

**PUTNAM COUNTY
LEGAL AID SOCIETY, INC.**

Board of Directors

Elizabeth Hudak, Esq.
President

Stephen Abels, Esq.
Bonnie Feinzig, Esq.
Joseph J. Fonseca, Esq.
Daniel M. Miller, Esq.
Peter Reynolds, Esq.
Edward Schaffer, Esq.
Kathleen M. Valletta, Esq.

**47 Gleneida Avenue
Carmel, New York 10512
Telephone (845) 225-8466
Facsimile (845) 225-0517
E-mail:
LEGALPCAID@Verizon.net
(NOT for service of legal process)**

Staff Attorneys

Patrick J. Brophy, Esq.
Chief Attorney

Brian E. Carlin, Esq.
Kristin M. Finan, Esq.
Christopher X. Maher, Esq.
Keith R. Murphy, Esq.
Steven K. Patterson, Esq.
Nancy Rothenberg, Esq.
David J. Squirrell, Esq.

August 26, 2015

SENT VIA MAIL AND EMAIL publichearings@ils.ny.gov

New York State Office of Indigent Legal Services
80 S. Swan Street, 29th Floor
Albany, New York 12210
Attn.: Ms. Tammeka Freeman
Executive Assistant

RE: Public Hearings on Eligibility for Assignment of Counsel

Dear Ms. Freeman:

In accordance with the Notice forwarded by your offices in connection with the above referenced matter, pursuant to the settlement agreement reached in the matter of *Hurrell-Harring et al v. State of New York*, the following criteria is respectfully submitted for consideration in determining whether an individual is eligible for mandated representation:

Appropriate Standard

Financial inability to obtain counsel must be determined on a case-by-case basis in the context of, among other things, the crimes charged, the services required, and the cost of private representation. Standards for eligibility should begin with the recognition that any individual determination of eligibility must be based on whether a person is unable to afford counsel in the respective jurisdiction.

Although eligibility determinations must be based upon an individualized determination of a person's ability to afford counsel, the promulgated guidelines should provide financial standards within which a person would be considered "presumptively eligible" for mandated representation. Criteria establishing levels of "presumptive eligibility" should include, without limitation:

- the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged or complexity of the family court or appellate court case; and
- New York State specific indices of poverty for each jurisdiction, such as “The New York State Poverty Report” issued by the New York State Community Action Association, as well as “The Self Sufficiency Standard for New York State 2010” prepared for the New York State Self Sufficiency Standard Steering Committee.

It is respectfully submitted that a single presumptive eligibility standard (e.g., 350% of the federal poverty guidelines), irrespective of the jurisdiction or type of case, would likely be either over-inclusive or under-inclusive in many jurisdictions throughout the State.

Eligibility Determinations

All information provided by the individual(s) seeking mandated representation must be considered confidential and not shared with the opposing party, and must be in accordance with statutory mandate, *to wit*: County Law Article 18-B.

It is respectfully submitted that screening for eligibility should be performed by the primary provider of mandated representation. A judge, at arraignment, can make an initial eligibility determination and, thereafter, refer the matter to the primary provider of mandated representation for further review, analysis and determination, all in furtherance of the intents and purposes of County Law Sec. 722-d. Notably, where an individual is deemed ineligible by the provider of mandated representation, the applicant should have the right to appeal such determination to the Judge before whom that case is pending.

Spousal and Parental Income Consideration

Where applicant(s) under age 21 years are seeking the appointment of counsel or other services, the assets, income, and expenses of his/her parent(s) or person(s) legally responsible for his/her support should be considered and be made part of the determination regarding eligibility for mandated representation.

With respect to spousal assets, the assets (including assets jointly owned with the applicant), income and expenses of the spouse of an applicant should be included in determining his/her eligibility for counsel except where, due to martial estrangement or other extenuating circumstances, it is unlikely that the respective spousal information of income and assets would be available. The expenses of a spouse should be considered as though they were expenses of the applicant only if the income and assets of such spouse are considered.

It is patently clear that the Sixth Amendment right to counsel is personal and, therefore, assignment of counsel cannot be denied if the parent(s) or person(s) legally responsible for support refuse to contribute towards the cost of counsel. Admittedly, this is a difficult balance; notwithstanding, it is respectfully submitted that both the constitutional right to counsel and the standards/guidelines hereinafter applied require the provision of counsel shall not be delayed while the person’s eligibility for mandated representation is determined or verified.

State Funding for Indigent Legal Services

Finally, it is important to note that the State must assume financial responsibility for any additional resources required by a provider of mandated representation to comply with promulgated standards set forth hereinafter. Adopting statewide standards may well result in increased caseloads to providers of mandated

representation. It is important to emphasize that the State should provide additional (indeed, the entirety) funding to cover the costs to counties that will result from having defender systems function pursuant to legally established eligibility standards. A system that expands eligibility as well as provides expanded indigent defense services that are uniform throughout the State must be accompanied with provisions to ensure that the increase in caseloads does not become an “unfunded mandate” especially in light of any additional requirements to counties resulting from the instant *Hurrell-Harring et al v. State of New York* settlement agreement.

Thanking you in advance for your consideration of the foregoing, I remain

Respectfully yours,

Patrick J. Brophy

Patrick J. Brophy, Esq.
Chief Attorney

cc: MaryEllen Odell/County Executive
Bruce Walker/Deputy County Executive
Jennifer S. Bumgarner/County Attorney
William J. Carlin, Jr./Commissioner of Finance
Adam Levy/District Attorney
Sandra M. Fusco/Sr. Deputy County Attorney