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Testimony
Regarding
Income Eligibility
for 18-b Attorneys in Criminal
and Some Family Court Matters

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Good afternoon. My name is Susan Patnode and I am the Executive Director of the Rural Law Center of New York, Inc. The Rural Law Center is a statewide non-profit legal services organization devoted to addressing the systemic legal and economic issues that affect low-income New Yorkers who live in our state's 44 rural counties.

Rural New York is beautiful, diverse and expansive. Whether it be from the perspective of its agricultural productivity, its pristine rivers and lakes or a view from the Adirondacks, there is no question that rural New York adds value to the Empire state. However, beyond the scenery, rural New Yorkers face critical challenges in terms of access. The access issues include access to a stable economy, access to public transportation, access to safe, affordable housing, access to human services, and access to healthcare, and of course, access to broadband service. These access issues disproportionately affect rural low income New Yorkers, because where resources are scarce, service delivery is a challenge. The picture is not all glum. Several of these access issues are being addressed by creative, innovative initiatives that involve shared services and technology. However, one of the most serious access issues facing rural, low income New Yorkers is the need for access to a justice system where free or affordable legal services are available. That is particularly evident when a rural New Yorker of limited means faces a criminal charge or a serious family court matter, and he or she cannot access or afford legal representation

In the essential tenets of our legal system, we all have some guaranteed constitutional rights. Among the most important of these rights is the right to an attorney when one is charged with a crime. And, as important as that right is, it is reinforced by the right to a free attorney, if one cannot afford to hire counsel. My written testimony here is given from a rural perspective, and I would like to thank Chief Judge Jonathan Lippman and New York's Indigent Legal Services agency, for holding these important hearings to address eligibility criteria for assigned counsel. Under Judge Lippman's leadership and vision, entrenched legal access issues are being addressed, and so I was delighted to learn that there was to be a focus on access to indigent defense.

The right to a free or affordable attorney in a criminal matter seems straightforward. Unfortunately, this right is undermined in rural New York largely because cash strapped rural counties have the burden of paying for this legal representation, so there is a built in tension between a county's serious budget concerns and an individual's Constitutional right. Unfortunately, under our current system, cutting costs can also mean stripping a person of his or her Constitutional right to counsel, and the long term consequences of facing a criminal charge without an attorney can be substantial to the individual and to the community.

When considering the issue of income eligibility for assignment of an attorney in a criminal matter, geography, or place of residence, should not play a part in determining whether a person is eligible for an assigned attorney. Yet, that is the case in rural New York, where each county determines the eligibility guidelines for assigning counsel. Stated simply, to insure that rural New Yorkers have access to defense counsel or family court attorneys, there needs to be a restructuring of the eligibility criteria, with an eye towards uniformity, and the realization that the counties cannot be expected to solely bear the burden of paying for these constitutionally protected rights.

There are several specific rural issues that come into play when considering eligibility standards for indigent defense.

One of the major factors to be considered when developing fair eligibility standards for rural public defense is the state's unique Town and Village Court system. Most criminal matters in rural New York come before a locally elected town or village magistrate. The more serious crimes are heard in county court, but most cases are at least brought before a local town or village magistrate. These justices work hard for their communities for very little compensation and for many it is a second job. **There are approximately 2,000 Town and Village Court magistrates in New York, yet only about 10% of these justices are attorneys.** Contrast this with individuals who are charged with a crime in a city with a population of 20,000 or more. The judges in these "City Courts", presiding over the same range of crimes as the Town or Village magistrate, are required to be licensed attorneys. There is no such requirement for rural Town and Village justices. Consequently, if an individual is charged with a crime, and the matter is heard in a rural Town or Village court, chances are that there will not even be an attorney in the courtroom to safeguard the defendant's substantive and procedural rights. Not having attorney representation in these Town and Village courts can have severe negative implications.

For example, I am reminded of an 18 year old young man from a tiny town, who came to see me, after he had served 4 months in jail. His crime was walking through the woods with a friend when they came upon an old snowmobile. They sat on it and played with it, and someone called the police. As I remember, they were charged with possession of stolen property, and failure to report a crime. The younger boy's case was diverted to family court where he was assigned an attorney, and the matter was resolved with an ACD. The older boy was not given an attorney, nor was he told that he had a constitutional right to an attorney. His parents did not have a telephone and, since they lived outside of town, they did not learn that the boy was sent to jail. He was a senior in his last semester of high school when he was sent to jail, and was to be the first in his family to graduate from high school. Unfortunately, this incarceration affected his schooling and he quit school in the last semester.

Even though I was not representing him in this matter, I thought maybe I had heard the facts incorrectly, so I drove 30 miles to the town court where the boy had pleaded guilty. I asked to speak to the magistrate, and he invited me to talk with him privately. When I mentioned the boy's name the magistrate basically said, "That boy is from a family that causes trouble, so I wanted him to know I am tough, and I thought a few months in the county jail would deliver that message." I asked if he had told the boy of his right to an attorney and he said he told the boy if he wanted to bring in an attorney, then he'd "really be in for some trouble." So the boy pled to the charges. (A few years later, when the Rural Law Center was sponsoring a magistrate's training on Justice Court appeals, this same town justice told those of us at his table, "Let me tell you what I do in MY court about appeals. I just don't tell people they have a right to them." My point is that it is **always** important for the accused to have an attorney present.

Local Town and Village Courts generally meet once a week or sometimes twice a month. So if a person is charged with a crime, without funds for a private attorney, he is often remanded to the county jail, until he can make bail or come for the next court appearance. **Since the court may**

not be in session for a week or two, the defendant is likely to spend significant time incarcerated before the matter comes before the justice again. A friend of mine who practices criminal defense has been frustrated because often a defendant will spend more time in jail, waiting for a hearing, than he would if he served a full sentence. Of course the consequences of that incarceration are significant to the individual and to the county tax payer. Even if the charges are diminished or dropped, the defendant may lose his employment, fall behind in child support, or miss classes if he or she is enrolled in school. Additionally, the county must pick up the cost of the defendant's time in jail, which is likely to exceed the county's cost of paying for an assigned attorney.

Counties officials should not be faced with the choice of granting a person defense counsel, and keeping the county financially solvent. Of course counties must consider costs, especially in rural New York where a perpetually slow economy erodes at the county's tax base. **However, the county's cost of providing a constitutional right should not determine whether or not an individual can exercise that right.** It is unreasonable to assume that a rural county has the resources to pay for indigent defendant representation, and therefore these costs should be subsidized by the state.

Rural counties have uneven and sometimes very vague guidelines to determine whether a person qualifies for free counsel. There are 44 counties in New York State that are officially designated "rural". In preparing this testimony, I attempted to ascertain all 44 rural counties' criteria for income eligibility. That turned out to be a challenge. While it seems that each county should have a straightforward, easily understandable set of written criteria, this most basic information was generally not easy to obtain. In the counties that do provide the information, there was a significant range of income eligibility criteria.

For example, counties often state that they use the "Federal Poverty Guidelines." (FPG) to determine eligibility. However, most counties do not appear to have a chart available that shows what those guidelines are. Also, counties vary in how the FPG rate is applied. For example, one county states that it uses 185% of the FPG, which allows an individual earning about \$20,000 a year, to qualify for an attorney. However, in an adjacent rural county, the guidelines use 125% of the FPG that means an individual must earn less than about \$14,000 a year to be eligible for counsel. It defies logic that one could be accused of a crime in one place and be provided with counsel, as opposed to being 5 miles down the road, accused of the same crime, and not qualify for counsel.

Having some uniformity and easily accessible, understandable eligibility guidelines posted online, in the courts, at the Public Defender offices, as well as in the application form, would help defendants understand the eligibility criteria.

Beyond vague guidelines, some rural counties overtly discourage individuals from applying for an assigned attorney. Sometimes there are veiled threats of criminal prosecution if statements are found not to be true. For example one county's application form, just above the signature line, reads: "I further understand that any false statements herein may be a crime under the state of New York, punishable as a Class A Misdemeanor. (PL210.45)." That statement arguably has a chilling

effect of filling out the form, since the guidelines are not clear. When one is facing a criminal charge, the last thing he or she wants is to be told they might be committing a crime by applying for an attorney.

New York's rural counties also vary in what the criteria is and who makes the determination about qualifying for indigent defense. As mentioned above, many counties do not have published criteria for eligibility for an assigned attorney. In some counties, the applicant has a personal interview with the Public Defender. In other counties the justice presiding over the matter, makes the determination.

Making the eligibility determination to assign counsel is not limited to income, and a county plan may include looking at a person's other financial assets or liabilities, before granting counsel. It seems that if those assets are to be a factor in determine eligibility, then the liquidity of the asset should be considered, and what might be considered a liquid asset in some parts of New York, are not liquid in rural New York. I have heard numerous anecdotes where a person who qualifies for eligibility based on income guidelines, but perhaps owns an ATV or a share in a hunting camp, is denied counsel. This denial presumes that the defendant should be able to sell the asset and then afford an attorney. However, the liquidity of a remote hunting camp or selling an ATV, in a little town, is questionable at best, and while the property is for sale, the defendant must go forward, often in jail, without an attorney. **Many counties seem to emphasize questions about the income and assets of any person living in the defendant's household. The implication is that if someone lives in a defendant's dwelling, who has some assets or is employed, than that will negatively affect the defendant's ability to have an attorney assigned. It is my understanding that one's housemates are not financially responsible for one's criminal defense.**

If one is denied counsel, it is a critical problem for a low-income person to secure any affordable defense counsel. If the income eligibility guidelines are set low, or even if a person is employed, chances are he or she cannot afford the services of a private attorney to represent him. One of the reasons for this is that many rural attorneys do not like to trudge to remote Town and Village Courts, and if they are going to travel to them, it is likely to be costly. Also, in rural New York, the lack of public transportation, and the critical need for a personal automobile, coupled with the high cost of critical utilities, translates to most families having virtually no available money to pay for an attorney. In sum, looking at the rural employment income data and economic opportunity available in rural areas, it is clear that even if a person would not qualify under the county's income guidelines for assigned counsel, it is likely that he or she cannot afford to hire an attorney to represent him.

As mentioned previously, I empathize with rural county officials trying to balance a bare bones budget, so again I urge the state to create funds to permanently offset the high cost of indigent legal fees. I also have another suggestion to cut costs. **That suggestion would be to reduce the number of criminal arrests for non-violent activities. Diverting individuals away from the criminal system would save the county considerable tax-payer dollars.** On the other side of

that statement however is the reality of the number of upstate jobs that are created and sustained by criminal convictions. So, if in rural New York, we are going to consider jails, prisons, probation, police, and court costs as a credible basis for the upstate economy, then the least we can do is to provide the accused with an attorney, so he has some chance of either winning his case or having his charges and punishment reduced.

Respectfully submitted,

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