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## **Testimony**

**New York State Office of Indigent Legal Services  
Hearings on Eligibility of Prospective Public Defense Clients  
Hall of Justice  
99 Exchange Blvd. Courtroom #303  
Rochester, New York 14614  
August 6, 2015**

My name is Velma Hullum and I am honored to provide comments on the Eligibility for Assignment of Counsel. I have worked with disadvantaged populations for over thirty years and currently serve on the NYS Defender Association, Client Advisory Board. I have seen first hand how those with lawyers vs. those without counsel fair within our justice system. This is especially true in small, rural counties across New York State. Just attend one of our rural county court sessions and see first hand how legal representation is rendered. In many cases, the client is forced to return several times because they cannot afford counsel and will take a plea because they do not have the ability to continue returning to court. Spend a day at the Albion Correctional Facility and you can get a sense of how vital counsel is to mothers, daughters, and sisters who are now serving time away from their families. There have been many instances when the client meet their counsel for the first time when they are standing before the judge. The Office of Indigent Legal Services should establish just, fair and comprehensive statewide standards for determining whether a person seeking public defense representation is financially eligible, so that does not happen. However, key principles must be included to ensure just and fair statewide eligibility standards because a person's constitutional and statutory right are at stake; eligibility criteria and procedures must ensure that no one is wrongly denied counsel.

- The constitutional and statutory right to counsel should not be undermined in eligibility determinations for any matter, whether felony, misdemeanor, violation, specified matter in family court, or other.
- The criteria for determining eligibility should clearly state that people are eligible for constitutionally mandated representation if they are financially unable to obtain qualified counsel. Qualified counsel is key when you are economically disadvantaged because many times clients have few options.
- Any doubt concerning a prospective client's eligibility should be resolved in favor of eligibility of the client.
- Counsel should be assigned upon the initial request and should not be delayed while questions about eligibility are being resolved or while efforts are required to convert assets to funds available to hire counsel.
- No single criteria, including income, should be used to presumptively establish ineligibility. For those not presumed eligible, all factors affecting whether paying for counsel will create a substantial hardship must be considered (details below).

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- The right to counsel being an individual right, income and assets of parents, spouses and other family members should not be considered. This is especially true in family who are already economically disadvantaged. Many clients have been shut out by family members and therefore cannot access income and assets.
- Procedures governing application for counsel and determination of eligibility must not chill the right to counsel, interfere with the attorney-client relationship, delay commencement of the tasks of competent representation, violate principles of confidentiality, or allow consideration of improper factors (details below).
- Mechanisms for promptly reviewing any denial of counsel should be established and be made known to those found ineligible. Procedures for obtaining review of any denial of counsel shall include:
  - A requirement that denial of eligibility should be in writing and should include the basis for the denial in detail.
  - A fair and timely process for seeking review of a denial of eligibility.
  - Provision of written notice of the appeal process, including any required form, to any person denied counsel. The review process should ensure prompt resolution, preferably the same day but no later than two business days thereafter. If an eligibility denial is upheld, any explanation of the denial should be confidential and made part of a sealed record that shall be available to the person denied counsel.
- Confidentiality of information provided when seeking provision of counsel should be maintained to protect privacy, constitutional and statutory rights, and the client-attorney relationship. Again, this is vital in small, rural counties where confidentiality has a very different meaning.

#### **Details on Fairly Establishing Financial Eligibility Criteria**

Building on these principles, the following factors should be included in the statewide eligibility criteria.

- There should be a presumption of eligibility due to “substantial hardship” for all those who:
  - receive public assistance;
  - live in public housing;
  - have income that is 250% of the Federal Poverty Guidelines or less;
  - are in a correctional facility or in correctional custody pending pre-trial proceedings;
  - are in a mental health facility; or
  - are an unemancipated minor under the age of 21.
- Prospective clients' assessment of their financial ability to obtain competent representation should be given substantial weight.
- The following financial assets should not be considered available for use in obtaining counsel:
  - Income and assets necessary to meet the reasonable and sustainable living expenses of the prospective client and any children, spouse, or other dependents, and to maintain financial stability;

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- Child support, including money for any child whose education costs the prospective client is paying in whole or in part; and
- Bond posted by another person shall not be considered, and the ability to post bond should not be a sufficient basis to deny eligibility.
- Neither of the following should be the sole basis for denying eligibility:
  - Ownership of an automobile; and
  - Ownership of a primary residence.
- Income and assets beyond those needed for reasonable and sustainable living expenses, including cash and bank accounts, should be considered available for obtaining counsel, taking into account the amount and effect of any penalty or fee for converting assets to cash.
- Debts and other reasonable financial obligations of the prospective client and dependents shall be weighed against income and assets in determining whether counsel could be obtained without financial hardship including future financial instability.
- Non-liquid assets that have monetary value and marketability and can be quickly converted to cash can be considered available unless converting such assets to cash would create substantial hardship for the prospective client or his or her dependents. These include:
  - real estate other than a residence occupied by the prospective client or dependents;
  - additional automobiles other than those necessary to maintain employment, school enrollment, or medical treatment of the prospective client or dependents; and luxury items.
- The actual cost of retaining a private attorney in the relevant jurisdiction shall be considered. A retainable fee of \$5000 to \$10,000 is almost impossible feat for most indigent clients.
- The caseload or workload of public defense lawyers or providers and/or the amount of money spent on public defense should not be considered when making eligibility determinations, and surrogate procedures, which indirectly permit this, should not be allowed. A prime example of this is when the public defender is unable to hire an investigator because he/she is told it cost too much.

#### **Details on Establishing Just Procedures for Determining Financial Eligibility**

Building on these principles, the following concepts should be applied in creating procedures.

- Confusing or overly stringent procedures that could discourage eligible clients from applying or completing the application process must be avoided.
- Failure to supply specific financial documentation should not be the sole ground for denying, or a ground for delaying representation.
- There should not be harsh punishment or consequences for minor errors.
- Potential clients should not be required to attest under penalty of perjury to the truth of information provided.
- The criteria and procedures for determining eligibility should be made publicly available by the courts and all public defense programs. Copies should be provided to anyone who requests them and provided

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to all persons whose request for counsel is denied. They should be posted on the websites of the ILS, the courts, and public defense providers.

- Financial eligibility criteria and procedures should be written in a manner and language that prospective clients can understand.
- A notice should be posted wherever people may request assignment of counsel informing them of their constitutional right to counsel, the existence of written procedures and criteria, a website and an office where a copy of the procedures and criteria can be obtained.

### **Courts Ultimately Determine Eligibility with Delegation to Public Defense Providers**

The courts have the ultimate authority to determine eligibility; the standards cannot limit a court's inherent power and fundamental duty to provide counsel.

However, initial eligibility determination is best delegated to a public defense provider, in a way that:

- furthers establishment of a trusting attorney-client relationship;
- minimizes conflicts of interest as to determination of eligibility for multiple clients;
- prohibits consideration of public defense workloads and/or program budgets in the eligibility determination, and
- adheres to the statewide criteria and procedures established by the Indigent Legal Services Office.

Further:

- County attorneys, prosecuting attorneys, probation employees and any other adversaries of public defense clients should have no role in determining the eligibility of prospective clients.

### **Maintain Record-Keeping**

Ensuring adherence to the statewide criteria and procedures, as well as analysis of eligibility issues and trends, requires data. Therefore,

- Records should be kept of the:
  - number of prospective clients found eligible and found ineligible;
  - specific reasons for any denials; and
  - number of requests for review of denials and the results of any such review.
- These records should be provided to the Office of Indigent Legal Services annually and at any other such time the Office requires.
- Data should be summarized and.
- Based on the outcomes of the data, recommendations should be made to ensure that

In closing, I recommend that data collected from across the state should be summarized and distributed throughout the judicial system. In addition, recommendations should be made to counties who fail to meet the comprehensive standards along with corrective actions that will ensure the standards are being met. It is finally apparent to our leaders that it is time to overhaul the criminal justice system, these standards can provide a stroke to support a fair and equal system.