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NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES

ELIGIBILITY FOR ASSIGNMENT OF COUNSEL

4TH JUDICIAL DISTRICT

PUBLIC HEARING

ESSEX COUNTY COURTHOUSE

ELIZABETHTOWN, NEW YORK

AUGUST 26, 2015

11:02 AM

COPY

1 PANEL MEMBERS:

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Indigent Legal Services

3 WILLIAM LEAH: Director, New York State Office of Indigent
4 Legal Services

5 PATRICIA WARTH: Chief *Hurrell-Harring* Implementation
Attorney

6 JOANNE MACRI: Director, Regional Initiatives at the New
7 York State Office of Indigent Legal
Services

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1 MR. DUNNE: Good morning. I know
2 everybody here in Essex County likes to start
3 on time, so I'm sorry. I apologize for being
4 two minutes late, but here we go.

5 Good morning, my name is John Dunne. I'm
6 one of the board members of the Office of
7 Indigent Legal Services, and it's my privilege
8 to participate with you and my fellow panelists
9 in this public hearing this morning. Thank you
10 for joining us at this public hearing to
11 discuss eligibility for assignment of counsel.

12 As we all know, over 50 years ago the
13 United States Supreme Court announced in Gideon
14 against Wainwright that any person who is too
15 poor to hire a lawyer must be provided with
16 counsel during a criminal court proceeding.
17 Moreover, New York, as would be expected, was a
18 pioneer among the states in providing a
19 statutory right to counsel for litigants in the
20 range of court proceedings.

21 But New York State, as well as many other
22 states, continues to struggle with its
23 obligation of providing adequate support to

1 ensure access to the courts for those who are
2 unable to afford to pay for an attorney on an
3 equal basis with those who can afford private
4 counsel. We are pleased to report that
5 measures, which will be informed by your
6 testimony here today, are being taken to begin
7 addressing many of these unresolved issues.

8 As many of you know, a settlement
9 agreement was approved in March of this year,
10 in Hurrell-Harring against the State of New
11 York, in which the state acknowledged
12 responsibility for ensuring quality mandated
13 representation. The New York State Office of
14 Indigent Legal Services has been vested with
15 the authority to fully implement the terms of
16 this historic settlement agreement. Thus, the
17 purpose of this public hearing is to solicit
18 your views, your opinions and comments on the
19 criteria that should be used in the process
20 that should be implemented in determining
21 eligibility.

22 We are also interested in hearing about
23 any expected advantages or disadvantages that

1 you see in developing uniform and comprehensive
2 guidelines as well as any recommendations you
3 have concerning the review or appeal of
4 eligibility determinations. We also welcome
5 any information you wish to share with us
6 regarding the related social and/or economic
7 impact you foresee these standards to have on
8 your communities.

9 Before we begin, I want to wish to extend
10 my thanks to our distinguished panel members
11 and our guests for taking time out of your busy
12 schedules to be with us here today and to share
13 your expertise, insight and recommendations
14 with us. I also want to extend a special
15 thanks to the Office of Court Administration
16 for their having made these splendid facilities
17 so available to us this morning.

18 We welcome each of you, and we'd like to
19 introduce you to each of our distinguished
20 members of the panel.

21 To my immediate right is William Leahy,
22 who is the director of the New York State
23 Office of Indigent Legal Services, who

1 undertook this initial assignment with great
2 distinction. And it's great to have you with
3 us again, Bill.

4 MR. LEAHY: Thank you, John.

5 MR. DUNNE: To my left is a new recruit
6 from our distinguished staff, Patricia Warth,
7 who is the chief of the Hurrell-Harring
8 implementation attorney, and she has
9 strengthened an already strong office that we
10 have.

11 And to my far right is Joanne Macri, the
12 director of Regional Initiatives at the office
13 of legal services.

14 And on my far left -- I don't know
15 whether that's politically, philosophically or
16 what -- but Angela Olivia Burton is the
17 director of quality enhancement for parent
18 representation at the New York State Office of
19 Indigent Legal Services.

20 And sitting quietly in the gallery is a
21 new member of our team, Lisa Robertson, who
22 will be joining us next week to determine and
23 work with us on eligibility standards for

1 Hurrell-Harring compliance.

2 And without further ado, if we have
3 nothing from our distinguished executive
4 director, it should arrange for our first
5 witness.

6 MR. LEAHY: We should arrange for our
7 first witness.

8 MR. DUNNE: Ms. Senora --

9 MS. BOLARINWA: Yes.

10 MR. DUNNE: -- Bolarinwa is joining us by
11 telephone from the Taconic Correctional
12 Facility.

13 Good morning.

14 MS. BOLARINWA: Good morning. This is
15 Senora Bolarinwa.

16 MS. MACRI: And if you could speak up,
17 Senora, for us. Just remember, we're in a
18 large court room. Want everybody to hear you.

19 MS. BOLARINWA: Okay. Good morning.
20 This is, Senora Bolarinwa, and I say hello to
21 the court, again.

22 MS. MACRI: Great. Terrific. Can you
23 hear us okay?

1 MS. BOLARINWA: Yes.

2 MS. MACRI: Great. Okay. Speak up and
3 feel free to present.

4 MS. BOLARINWA: So I can present now?

5 MS. MACRI: Yes.

6 MS. BOLARINWA: Okay. I'd just like to
7 say I am grateful for this opportunity and I
8 honor all my forebears that constructed the
9 Constitution and those that paved the way --

10 (Off-the-record discussion.)

11 MS. BOLARINWA: -- for our time.

12 MS. MACRI: She can't hear.

13 MS. BOLARINWA: Today I'm talking about
14 the problem of unmet legal needs --.

15 MS. MACRI: Senora, I'm going to stop you
16 for a second. If you could speak up real loud.
17 We want to make sure we can hear you okay.
18 Sorry, about that.

19 MS. BOLARINWA: Okay.

20 MS. MACRI: There we go. That's good.

21 MS. BOLARINWA: The problem is there's an
22 unmet legal need for those who are indigent.
23 The solution lies in the Gideon holding --

1 Gideon versus Wainwright, and the Constitution
2 of the United States Sixth Amendment, so
3 there's no denial that everyone is guaranteed
4 legal representation when facing a felony. And
5 Wainwright -- Gideon versus Wainwright
6 reiterated that. Now the Hurrell-Harring
7 lawsuit has tried to resurrect the failing of
8 Gideon.

9 Often we think it's the attorney
10 situation, but when an inmate or someone facing
11 a felony puts in for an attorney, that motion
12 goes to a judge. So the lack of or the limited
13 legal services is determined by the judge. So
14 that prompts me to go to the shifting of
15 America's consciousness.

16 I wonder, is our consciousness ready to
17 see all people worthy of legal representation
18 despite lack of funds, because one does not
19 have money does not mean that they do not have
20 a guarantee not to lose life, liberty and
21 pursuit of property.

22 And the next point is, can New York State
23 judges, which is also an attorney, prosecutors,

1 who prompt reasons not to, or attorney
2 generals, all lawyers ask themselves if they
3 view indigent individuals facing felonies or
4 facing civil rights actions or federal habeas
5 corpus positions -- petitions, are we worthy of
6 having full legal counseling?

7 The next point is Indigent Legal
8 Services, in any endeavor, in inchoate, it is
9 so incomplete in the chasm in which it exists.
10 America is five percent of the world's
11 population, but it has over 25, if not 35,
12 percent of the world incarcerated individuals.
13 So that is the definition of mass incarceration
14 versus regular incarceration. Once we not want
15 mass incarceration, every judge will follow
16 motions and grant legal services to people,
17 whether they're indigent or the working poor or
18 not.

19 The statistics on preparation, I just
20 want the statistics why legal representation is
21 so needed. Statistics on preparation in
22 homicide cases by appointed lawyers who do not
23 get paid the full fund include the following in

1 New York State City, and it's worse in upstate
2 counties and bar.

3 Interviewing and counseling: No time
4 spent in 75 percent homicide cases.

5 Next, discovery: No time spent on
6 discovery in 92 percent of homicide cases.

7 Investigation: No time spent in
8 72.8 percent of homicide cases.

9 In addition, those statistics being the
10 facts, if a judge does not give an order
11 granting legal representation, those statistics
12 are hyperbolically exacerbated beyond those
13 numbers. So the question today is how, do we
14 form the criterion on who gets legal services,
15 who are excluded?

16 Most of the prison population is people
17 that are poor. So that would be a means to
18 reinstate Gideon, because the Gideon holding
19 that was decided the year I was born, 1966, has
20 been a broken promise in the last 30 years.

21 I am honored and most grateful for this
22 opportunity, because Gideon held that it was
23 before a state -- before a state can imprison

1 an indigent person as a felon, due process
2 requires that the state provide her or him with
3 the guiding hand of counsel at every step of
4 the proceeding against that person. It's not
5 being done if people who lack funds don't get
6 that opportunity. And that has to be done in
7 every stage of the proceeding, arraignment,
8 investigatory, discovery stages, pretrial,
9 trial, sentencing and -- for example, at my
10 sentencing I had two lawyers and a law student.
11 They then discovered that the one expert was
12 not qualified. Had discovery been done
13 pretrial, it would have been a different
14 outcome.

15 In addition, the Sixth Amendment that was
16 added in 1791 states the following: In all
17 criminal prosecutions, the accused shall enjoy
18 the right to a speedy trial, blaize blaize, but
19 most importantly on bar here, to have a
20 compulsory process for obtaining witnesses and
21 to have the assistance of counsel for his or
22 her defense.

23 These laws expressly guarantee counsel

1 for all, not just indigent or non-indigent, in
2 civil and in criminal cases. And it states in
3 the Sixth and Fourteenth Amendment that counsel
4 is guaranteed. Legal representation that is
5 denied violates the Constitution and it is
6 counter -- it's -- it's contrary to the holding
7 in Wainwright.

8 So now we have Indigent Legal Services
9 that wants to promulgate and then make up
10 different ramifications on how to make the
11 criteria, who gets it, who does not. I just
12 ask that the consciousness sees the indigent
13 not as marginalized and worthy of the same if
14 one was able to pay out of their pocket.

15 When an attorney asked my father if he
16 had \$150,000 I would not go to prison, I know
17 my father died of a broken heart. My father
18 was the working class, chaplain for DOCCS,
19 pastor, but he did not have liquidity of funds.
20 He did not have fast funds, where he lived and
21 then his funds. So the criteria has to be
22 solely lack of funds to pay. No other
23 criterion.

1 And I'll just show you the outcome of
2 unmet legal needs. Okay. Limited scope of
3 legal representation. For example, if one does
4 not discover that an expert witness or a
5 prosecutor is a fraud, 20 years later or at
6 least 18 years later, that person may discover
7 the person was a fraud. And to lose life,
8 liberty and pursuit of property is an atrocity,
9 and that's a crime.

10 On the federal Hague petition, I was
11 granted a remand in my current 1983 for legal
12 malpractice and medical malpractice of not
13 doing what the Constitution required, we are
14 not given orders for assigned counsel. So the
15 real question is will ILS honor Gideon versus
16 Wainwright holdings, will honor Hurrell and
17 Harring holdings, the settlement, and honor the
18 Constitution?

19 But they can only do what the judge's
20 order states or it does not state. If a judge
21 does not give an order for indigent litigants
22 to get attorneys, it's just paper shuffling.
23 And the crime against humanity is lack of legal

1 services when there's issues that are
2 meritorious and freedom is denied, and the
3 fact -- we just prompt the question, will one
4 see the other as self?

5 MR. LEAHY: Ms. Bolarinwa, this is Bill
6 Leahy. I -- can you hear me all right?

7 MS. BOLARINWA: Yes, I can.

8 MR. LEAHY: Okay. Sorry to interrupt,
9 but I wanted to put a question to you, if I --

10 MS. BOLARINWA: Yes.

11 MR. LEAHY: -- may, and that is that one
12 of the problems that we've been hearing a lot
13 about in our -- in the testimony we've received
14 is the delay between the time that a person
15 asks for counsel and the determination is made
16 as to whether he or she is eligible and the
17 consequences during that time of not really
18 having a lawyer at a critical stage in the
19 early days of a case for investigation purposes
20 and all the rest of the work that a lawyer
21 needs to start doing. Do you have any comment
22 about that problem and -- and --?

23 MS. BOLARINWA: Right. At the onset, if

1 I had representation at interrogation, it would
2 be known that the confession was already
3 pretyped, and it took years for me to remember
4 that. In addition to that, if a lawyer was
5 assigned to me earlier--

6 (The lights went out)

7 (Off-the-record discussion)

8 MR. LEAHY: You were telling us, Senora,
9 about your experience of not having
10 representation during your interrogation. And
11 if you could just pick up on that and maybe let
12 us know at the outset how long after your
13 arrest was that, you know, did that
14 interrogation take place?

15 MS. BOLARINWA: That was -- the time
16 frame, I don't remember, but it was not
17 immediate. So there was a space in time, like
18 a week --

19 MR. LEAHY: Okay.

20 MS. BOLARINWA: -- if not at least eight
21 days.

22 MR. LEAHY: And if you could continue
23 your testimony --

1 MS. BOLARINWA: Yes.

2 MR. LEAHY: -- about the impact of not
3 having a lawyer present.

4 MS. BOLARINWA: The impact of not having
5 a lawyer present in that and the fact that the
6 lawyer, you see, that the lawyer kept changing.
7 So the change of the guard with the county, one
8 lawyer didn't pass onto the next lawyer what
9 was going on. And had I had a continuum legal
10 representation, the lawyer would have known
11 that the one expert that the DA had used the
12 wrong date of incidents in his report, not
13 once, but twice.

14 In addition, he fabricated his
15 credentials. So one attorney circled the
16 credentials on the report, because I see the
17 handwriting. So they picked it up. But by the
18 time the next attorney picked up the case, that
19 got swept under the rug or it was not noted.
20 So right there, these are two pivotable points
21 that early investigation would have found out
22 that the expert did not have the three board
23 certifications that he alleged.

1 In addition, the report he submitted into
2 evidence had a date before the crime ever
3 occurred, not once, but twice. That in itself
4 would have not allowed the judge to sentence or
5 the jury to convict on a void document from an
6 unreliable, unqualified expert.

7 And it's not my story, it is the story.
8 I hear all the time the same story. If they
9 only investigate that XYZ did not occur, this
10 would not have happened.

11 MR. LEAHY: Thank you.

12 MS. BOLARINWA: You're welcome.

13 MS. WARTH: I just have one question.
14 This is Patricia Warth. And I take it, from
15 your narrative, in your story about your
16 situation -- which I very much appreciate your
17 sharing with us -- that one of the things that
18 you're trying to suggest to us is that our
19 standards should capture ability to pay, and
20 that ability to pay includes ability to pay for
21 an adequate defense. And that may vary from
22 case to case in that there are some cases, like
23 yours, for example, that are very complicated

1 and could be very, you know, a defense -- a
2 competent defense could be quite costly and
3 that's something we should take into account.

4 Am I correct that that's what you're --
5 you're urging us to consider?

6 MS. BOLARINWA: I'm urging ILS to
7 consider holding attorneys up to the ADA
8 standard of adequate investigatory.

9 My case may seem complicated, but seven
10 doctors stated XYZ. And the seventh -- I mean,
11 and the DA's one doctor said contrary to
12 18 plus years of medical records and counters
13 seven doctors with fabricated credentials, all
14 my attorneys -- all of them -- had to do was
15 present board certification verification. Just
16 verify his board certification that he lied
17 about.

18 And then 13 years later, when the expert
19 recanted those fabricated credentials, all the
20 federal Hague judge had to do is honor my
21 motion for assigned attorney. All the civil
22 rights 1983 judge had to do was honor my
23 numerous motions for assigned attorney, because

1 they see. It appears complicated, but it's
2 simple. Verify that the expert committed
3 medical malpractice, lying about his
4 credentials.

5 How can 18 and a half years of medical
6 records and seven doctors who treated me be
7 debunked by one doctor who lied? Not that he
8 lied saying that they weren't correct, not the
9 results, but his process.

10 My attorney was required to make sure the
11 abuse of process, the malicious abuse of
12 process, the medical malpractice did not occur.
13 Where some doctor who was sued in the Roman
14 (phonetic spelling) versus Smith case who
15 represents reprehensible acts, that lying about
16 his credentials just to lawfully confine Robert
17 Roman (phonetic spelling) reoccurred with
18 Senora, myself.

19 So it seems complicated, but it's very
20 simple. At the onset, investigate the DA's
21 witnesses. And it cannot happen when there is
22 limited representation.

23 MR. DUNNE: Angela? Joanne?

1 MS. MACRI: I'm fine. Thank you.

2 MR. LEAHY: Just briefly, if I may. Did
3 you raise that issue under a 440 application or
4 a 1983 or anything else?

5 MS. BOLARINWA: Yes, sir. I raised it on
6 a 440-10 twice. And it's amazing, the same
7 attorney that was my trial attorney is now
8 Judge Peter Lynch who is a supreme court judge
9 in Albany County, the same court where I'm
10 sentenced.

11 So when I did the 440-10 motion for newly
12 discovered evidence that the expert presented
13 his fabricated credentials, that this judge
14 sent my 440 to the probation -- not the
15 probation, but the public defendant's office,
16 because attached there too was a felony
17 complaint against the doctor. I even reported
18 it to the Office of Professional Medical
19 Conduct.

20 So it is clearly an oversight, that
21 indigents get less due process. I even showed
22 in the 440, that brings up the recanted
23 fabricated credentials, that the DA, assistant

1 DA was moonlighting, practicing in private
2 practice against the New York Bar Association
3 standards, against the APA standards? In
4 addition, he was running for DA office,
5 campaigning, and was brought to court for
6 corruption of election process. And you cannot
7 do election process while you're an ADA,
8 assistant DA. So it's not that there's no
9 merit to the indigent clients' cases, it's just
10 that we're not held worthy of due process
11 guaranteed to us.

12 MR. DUNNE: Well, we're here to try to
13 change that, and I'm grateful to you for having
14 the courage to step forward --

15 MS. BOLARINWA: Yes.

16 MR. DUNNE: -- speak with us in such
17 clear terms and focus our attention on a very
18 important part, not only a representation by
19 counsel, but pretrial investigation.

20 MS. BOLARINWA: Yes.

21 MR. DUNNE: We will keep you informed of
22 our progress --

23 MS. BOLARINWA: Thank you.

1 MR. DUNNE: -- and I just hope God will
2 bless you as you face a very, very difficult
3 future.

4 Thank you so much.

5 MS. BOLARINWA: I thank you so much.

6 MR. DUNNE: Be well.

7 MS. BOLARINWA: Thank you.

8 MS. MACRI: Senora, we're just going to
9 put you on mute so you get a chance to listen
10 to the rest of the proceeding too. Feel free
11 to hang up when you like and I'll just make
12 sure to hang up the phone on this end.

13 MS. BOLARINWA: This is -- will I be able
14 to receive literature or a transcript?

15 MS. MACRI: Yes, we could try to arrange
16 that for you once we receive one.

17 MS. BOLARINWA: Okay. And I just want to
18 say good-bye to everyone and to give my love to
19 my family.

20 MS. MACRI: I think they're smiling, and
21 I think they hear you. Thank you very much.

22 MS. BOLARINWA: And they'll be here on
23 the 29th. God bless.

1 MS. MACRI: Take care.

2 MS. BOLARINWA: Alrighty.

3 MS. MACRI: I'm going to put you on mute.

4 MS. BOLARINWA: Okay.

5 MR. DUNNE: I almost think we should all
6 take a breather after that one, but I know your
7 time is very important and we're anxious to
8 hear from others who have been willing to step
9 forward.

10 Mr. Gerard Wallace is the director of the
11 New York State Kinship Navigator office, and he
12 is also a professor at the University of
13 Albany, School of Social Welfare. Welcome you.

14 MR. WALLACE: Thank you very much.

15 MR. DUNNE: Thank you, Professor.

16 MR. WALLACE: Let's hope the lights stay
17 on. Let me just get my papers here for a
18 second. Thank you.

19 MS. MACRI: Take your time.

20 MR. WALLACE: Distinguished panel, I
21 appreciate very much the chance to bring to
22 your attention kinship care. As Your Honor was
23 speaking, I'm the director of the New York

1 State Kinship Navigator and public service
2 professor at the university, but I'm going to
3 give you a little caveat on my talk here today.

4 I've been interested in kinship care
5 since for about 18 years. I went to law school
6 at the ripe age of 44. I got a fellowship at
7 Albany Law, which they gave me in grandparents
8 raising grandchildren, and --

9 MS. MACRI: Sorry.

10 MR. WALLACE: -- I've dedicated my entire
11 legal career for the past almost 20 years to
12 that topic.

13 For many years I was director of the
14 Grandparent Caregiver Law Center at Hunter
15 College. I've ran the National Grandparent
16 Advocacy Group. And for eight years, here at
17 New York State Kinship Navigator, which is an
18 OCFS funded program. Very established, and we
19 covered the entire state.

20 I'm going to be talking about kinship
21 care, and it really breaks up into two issues.
22 One is -- or two parts. One is to identify
23 this population to you and to profile them and

1 their special challenges and circumstances, and
2 then to talk about Article 6 which is custody
3 or guardianship in the Family Court Act and how
4 they are able to or not avail themselves of
5 assistance of counsel or proceedings under that
6 Article 6.

7 Okay. So profiling them, I would got off
8 to Tammeka, who's not here.

9 MS. MACRI: Okay.

10 MR. WALLACE: Okay. I got off of her,
11 yesterday, testimony --

12 MS. MACRI: Okay.

13 MR. WALLACE: -- which I think she's been
14 able to distribute to you.

15 MR. LEAHY: Show you what I have.

16 MR. WALLACE: Okay. And I'm --

17 MS. MACRI: Each of our -- our panel
18 members have a copy of your testimony --

19 MR. WALLACE: All right. Well, you might
20 have --

21 MS. MACRI: -- and if --

22 MR. WALLACE: -- if you read it as you
23 were trying to go to sleep last night, then I

1 helped you out. So it --

2 MR. DUNNE: It was thoroughly effective.

3 MR. WALLACE: Thank you. I try my best.

4 Okay.

5 I'm going to run through it, but just
6 topically, looking at the headers and
7 commenting on it, that, rather than trying to
8 repeat it. And I've already mentioned my role
9 in this. I'd like to mention a little bit more
10 about the Kinship Navigator.

11 As a state-wide program, we have over
12 11,000 caregivers in our database. I, myself,
13 have listened to countless caregivers, back to
14 '99, so I base my testimony on my own
15 experience, the experience of the Navigator,
16 the fact that for three years we've had a --
17 one of seven national demonstration grants in
18 this area and have been able to hire the Center
19 for Human Services Research out of University
20 of Albany to do survey work on this population
21 as well as chairing the Kincare Coalition and
22 their legal subcommittee on legal assistance to
23 these families.

1 These families face daunting obstacles.
2 If you looked at some of the charts that I gave
3 you, it's pretty apparent. But just to review,
4 what is the number one condition they have?
5 The number one condition they have is that they
6 are not in foster care. This is the elemental
7 thing that must be known.

8 We're talking about 153,000 to 250,000
9 children. There are some charts in here that
10 I'll mention a little bit later on, but the
11 numbers vary because the census data doesn't
12 really have good, accurate representation of
13 the families. Any case use of the number
14 153,000 children, the fact is that less than
15 5000 of those children are in approved foster
16 homes. A few other thousand may be in
17 certified foster homes. We don't know how
18 many. But bottom line is 95 percent of the
19 children living with relatives in New York
20 State are not in foster care. It's private
21 care.

22 Now these families in private care do not
23 get the resources of foster children. That's

1 apparent; correct? All right. So let's talk a
2 little bit more about them.

3 If you look on page 4, we have reasons
4 for kinship care. We had a cohort of 303
5 families in our demonstration project focused
6 on mothers because, frankly, the fathers are
7 often absent, and the reasons here are
8 therefore about mothers, so don't think we
9 haven't considered dads. And if you look at
10 the percentages, folks could have multiple of
11 these issues, but look at the ones at the
12 bottom.

13 The large numbers are mental health
14 issues of the parent and the mothers involved
15 in the child protective services. So if you
16 review these, you're going to see that the
17 causes for private kinship care are very
18 similar to the causes for foster care, the
19 population of kin that went into that
20 populate -- enter and get the benefits of
21 foster parenthood. At the very bottom of the
22 page, you can see that 86 percent of this
23 cohort -- when we looked at the child welfare

1 records available at the county and state level
2 in a blind test and we're able to reference
3 them -- 86 percent of these children had Child
4 Protective Services investigations.

5 So the theme here is that the kinship
6 population is, in many ways, an informal child
7 welfare population, but they have to avail
8 themselves of Article 6. You know where I'm
9 going on that. Okay? And so that's one fact.

10 Going over to the next page, what about
11 their poverty levels? National statistics are
12 about 40 percent or 200 percent of poverty.
13 But in our cohort, if you look at the upper
14 right of the -- of the pie chart, 19 percent
15 and 70 percent of these families were below
16 19,000. That means 40 percent of these
17 families, 39 to 40 percent, are at the poverty
18 level. This is upstate counties. These
19 counties are Broome, Tioga, Orange, Ulster and
20 Dutchess Counties. That was the part of our
21 demonstration project.

22 So the two facts that I've given you so
23 far are similarly situated in causality to the

1 foster care population and disproportionate in
2 poverty rates.

3 Going on to the Center for Disease
4 Control page, this is just a laundry list of
5 some of the conditions of these families. And
6 in sum and substance, we have heightened levels
7 of domestic violence that these children come
8 out of, witnessing what I just said about the
9 mothers, incarceration, abandonment, you know,
10 drug and alcohol abuse. Children come to
11 kinship care to live with their relatives for
12 bad reasons universally. It's always a bad
13 reason. And in sum and substance, the
14 fundamental bad reason is they lost their
15 parents. I've listened to caregivers for all
16 these years, and I'm telling you that you --
17 you stay with this population because you
18 become such an admirer of them. We're talking
19 about caregivers who take on incredible tasks
20 at incredible disadvantages and do the job.

21 There is our national studies showing
22 that children in kinship care have as good, if
23 not better, outcomes than children in foster

1 care. One of the old saws against kinship care
2 was the fruit doesn't fall from the tree. If
3 grandma screwed up with mom, that's why grandma
4 is in this position today.

5 If you look into your own communities,
6 I'm sure you will know people in these
7 situations and you will know that's not true.
8 Statistically it's not true. Statistically
9 it's been proven in the child welfare
10 community, and the OCFS commissioner is coming
11 next Wednesday to a celebration of kinship care
12 month as one of our keynote speakers in Albany.
13 The child welfare community knows that this is
14 their only large-scale resource available to
15 them to help children. Witness not many of
16 them are in foster care. It's really an
17 alternative system.

18 So far, is that -- got any question on
19 that, because I really want that to be
20 absolutely clear, please?

21 MS. BURTON: Hi, Gerry, its good to see
22 you.

23 MR. WALLACE: Hi, Angela. Yeah.

1 MS. BURTON: I just wanted to -- if you
2 could just clarify for the panel and for the
3 audience your understanding of and, you know,
4 the point that you're making at this point is
5 that those relatives are not statutorily
6 granted, explicitly, right to assigned counsel.

7 MR. WALLACE: That's correct.

8 MS. BURTON: And in your understanding,
9 what is the reason for this oversight at this
10 point in time?

11 MR. WALLACE: Population has really not
12 been discovered by many systems. We have
13 struggled to get meetings with court
14 administration for year. Finally, the Holy
15 Grail, we got a meeting last March with Chief
16 Administrative Judge Prudenti. Going along
17 nicely there, and then the judge left. So I
18 feel like I've got to start all over again.

19 It took many years for OCFS to become and
20 acknowledge that the informal population really
21 was something they should pay attention to.
22 Just last year they finally agreed to collect
23 statistics on certified foster homes. We

1 didn't even know how many there were.

2 The court administration does not collect
3 statistics on third-party custody or
4 guardianship. We don't know how many are done
5 during the year. It's been an uphill struggle
6 with temporary assistance.

7 I've been doing this for a long time and
8 I'd have to say that in 2002 and 2003, when
9 advocates really got off the table, we were
10 talking to folks who were -- after a whole
11 lecture would say to me, aren't we talking
12 about foster care? And it just -- you know, it
13 takes a while to sink in the issue. And that's
14 why I hope I'm not belaboring it, but driving
15 it home, what the population is; okay?

16 MS. BURTON: Yeah. I have another
17 follow-up question. In your experience under
18 Article 26 -- Family Court Act 262 --

19 MR. WALLACE: Yeah.

20 MS. BURTON: -- there's a sort of
21 catchall provision that the judge can assign
22 counsel even --

23 MR. WALLACE: Constitutional.

1 MS. BURTON: -- if the person is not --

2 MR. WALLACE: Yeah.

3 MS. BURTON: -- explicitly identified as
4 one of those people who are entitled.

5 In your experience, has that been used --

6 MR. WALLACE: Yes.

7 MS. BURTON: -- to avail this population
8 of assigned counsel?

9 MR. WALLACE: In the run up to speaking
10 today, I was able to reach a few judges and ask
11 them, and over the years, others have told me
12 and I've heard of anecdotally, there are judges
13 who will assign counsel. Now we have to look
14 at the distinct party situation and what the
15 proceedings are about, but the bigger picture
16 is what I usually hear and what we have heard
17 countless times of: I didn't get counsel. Mom
18 is going to get counsel. It's in the statute,
19 in custody or guardianship. And I didn't get
20 counsel. I'm at great disadvantage. These
21 children are suffering. I'm witnessing, I'm
22 trying to give you some facts on the social
23 situations.

1 Notice that the number two category in
2 that chart was mental illness on the part of
3 the mother. So there is a lot of family
4 dynamics here that are really, really
5 difficult, where parent -- grandparents and
6 aunts and uncles step in, and they're trying to
7 stabilize a child, and they're dealing with
8 parents who are on margin and the parents have
9 a right to counsel, and they're at a
10 disadvantage in trying to establish --

11 MS. BURTON: Yeah.

12 MR. WALLACE: -- a court ordered custody
13 of guardianship. Good enough? Okay. You want
14 more?

15 MS. BURTON: Yeah. So it is the case
16 that some judges --

17 MR. WALLACE: One judge said to me --

18 MS. BURTON: -- are already
19 recognizing --

20 MR. WALLACE: Yes.

21 MS. BURTON: -- that this is a population
22 that should, in certain cases, have counsel?

23 MR. WALLACE: I can think of two judges

1 by name right now: Judge Klein in Orange
2 County, who I spoke to last week about this,
3 and Judge -- now I'm not going to say the name
4 right -- Hanuszczyk out of Onondaga. He's a
5 wonderful man. I've been on programs with him.
6 Both of them will say yes, but it's a little
7 fuzzy on the legal justification, you know.

8 MS. BURTON: Thank you.

9 MR. WALLACE: And Judge Klein was very
10 specific about it, said I will give counsel to
11 a caregiver if they've had the child for a long
12 period of time. I won't do it in a direct
13 custody 1017 case, yes. Yeah.

14 MR. LEAHY: So Professor, if I could
15 just --

16 MR. WALLACE: Yeah.

17 MR. LEAHY: -- try to focus here, because
18 we -- we, you know, we have a mandate under the
19 settlement to --

20 MR. WALLACE: Uh-huh.

21 MR. LEAHY: -- set criteria and standards
22 for eligibility --

23 MR. WALLACE: Yes.

1 MR. LEAHY: -- not necessarily a mandate
2 to address the contours of the right to counsel
3 itself.

4 MR. WALLACE: Yeah.

5 MR. LEAHY: I just want to see if I'm --
6 exactly what we're hearing from you. Is it
7 that you want us to say that the legislature
8 should amend the statute to broaden the right
9 or is it that you want us to tell OCA that the
10 judges should exercise existing discretion to
11 appoint? Either one is technically beyond our
12 mandate but --

13 MR. WALLACE: Yeah.

14 MR. LEAHY: -- but --.

15 MR. WALLACE: Well, yeah. I am listening
16 that you have a mandate, but you are -- you're
17 the ears of this.

18 MR. LEAHY: Yes.

19 MR. WALLACE: And if I'm bringing to you
20 an egregious situation in which the well-being
21 of children is not being considered, I'm
22 hopeful that, you know, you --

23 MR. LEAHY: Preaching to the choir there.

1 I just want to hear specifically what it is
2 you're asking us. What message you're asking
3 us to transmit.

4 MR. WALLACE: I'd say it's both. In
5 talking to the chief judge then, we felt that
6 since some judges already are proceeding kind
7 of ad hoc on this, that there could be an
8 advisory in OCA to say that it's permissible
9 and maybe even recommended.

10 On the other hand, what I've offered to
11 you in the two recommendations are amendments
12 to the statute which I'm going to be pursuing
13 legislatively, which I've been doing in other
14 avenues for many years. However, I understand,
15 you know, everything is very specific, but
16 where else am I'm going to go talk?

17 MR. LEAHY: I applaud your coming here
18 and giving the message. I'm just trying to
19 get --

20 MR. WALLACE: Yes.

21 MR. LEAHY: -- get us to focus we need if
22 we're going to be of any practical assistance
23 to you.

1 MR. WALLACE: I feel that I'm -- my job
2 is to set the problem and then the pursuit of
3 the solution is really you know what you can do
4 and you can -- you know where you can go with
5 it.

6 MR. LEAHY: Thank you.

7 MR. WALLACE: All right. So I'll wind
8 up. I will go to the specifics of Article 6;
9 okay? I think it's pretty understandable the
10 compelling needs of this population.

11 Incidentally, there is one chart in here
12 by county. If you look at the fifth column, it
13 tells you the number of caregivers in the
14 county. And if you go to last -- the second to
15 the last column, the number who don't have
16 foster care or any public assistance, and you
17 can see in New York State we are talking about,
18 possibly -- in the second to the last column --
19 195,000 families who are out there on their
20 own. Right? A lot of folks. And they go into
21 family court. They go into family court
22 because they're looking for stability for
23 children.

1 Moving on to part two. When I got to the
2 two recommendations, which are in your summary,
3 I mention petitioning caregivers, just mention
4 that Judge Klein does this. It does seem
5 feasible legally to assign counsel on a
6 case-by-case basis under 262, but the lack of
7 uniformity and the fact that many judges don't
8 consider it, means that depending on the luck
9 of the draw, you may or may not get counsel.
10 And that's kind of brutal, you know.

11 The New York State bar's report on family
12 court three years ago had recommendation 20, a
13 complaint about the lack of uniformity in the
14 application of the opportunity to become a
15 foster parent for kinship care. They did not
16 address the opportunity for counsel, but the
17 lack of uniformity, because the issue has
18 underrepresented it by policy makers and
19 stakeholders is -- is, you know, touches a
20 number of different issues that are critical to
21 the well-being of this population. So if
22 anything, that's one of the factors here, some
23 way to make it uniform.

1 The petitioning caregivers are subject to
2 stat -- a case law and a statute. The case law
3 is Bennett V Jeffreys. If you're a family law
4 practitioner this -- they call it a Bennett
5 hearing. Everyone knows about Bennett v
6 Jeffreys, the 1976 court of appeals case,
7 establishing that if -- you must have an
8 extraordinary circumstance that you show prima
9 facie in your petition to get to a hearing, and
10 the hearing is on whether those circumstances
11 can be proven before you can get to the best
12 interest of a child.

13 So to get through that initial threshold
14 test is a barrier for caregivers to having the
15 best interest of children adjudicated. Clearly
16 you want to protect the parents' rights, but
17 clearly getting to the child's best interest is
18 an important procedural factor. You won't get
19 there if you can't show extraordinary
20 circumstances. Bennett said if you have a
21 child for an extended period of time, that
22 should be an extraordinary circumstance. I've
23 never had a caregiver not ask me how long. And

1 we don't know how long.

2 Now there is a statute, DRL 72, which
3 says for grandparents two years is a sufficient
4 period of time. But DRL 72 is now under attack
5 in the Fourth Department. It's going before
6 the court of appeals on a possible
7 constitutional violation of parental rights.
8 We don't know where it's going to go.

9 What I'm saying is, all this is very
10 influx and it calls for the need and for the
11 representation to try and navigate through
12 proving an extraordinary circumstances to get
13 the children. Even more basic than that,
14 judges will tell me they get really tired of
15 having to reject pro se petitions because the
16 petitions fail to show, on their face,
17 extraordinary circumstance. It would be nice
18 if there was some kind of opportunity to get
19 the professional help necessary to move this
20 along so that the reality of what's going on
21 with a child is before the court rather than
22 some artificial hurdle. Yeah.

23 The second thing that I want to mention

1 is that 262 does say that respondents in
2 custody proceedings get an attorney assigned to
3 them. And incidentally, 10 -- Article 10-C, on
4 destitute children, says that could be a
5 caregiver or a petitioning caregiver or a
6 responding caregiver. But 10-C is a specific
7 statute with its own guidelines that are
8 cross-referenced in 262. But the general one,
9 which is -- I think it's part of paragraph
10 A(iii), says that the respondent in a custody
11 proceeding can get assigned counsel.

12 Now why I mention that is it leaves out
13 guardianship proceedings. The Family Court Act
14 has jurisdiction over guardianship of the
15 person, and I gave you, in my testimony here,
16 some of the compelling reasons why, at times,
17 caregivers need to be guardians rather than
18 custodians.

19 The practice has been in New York to give
20 them custody. Judges will have their own kind
21 of ad hoc standards. Oh, if it's a --
22 grandparent, I'll go for guardianship.
23 Otherwise, I want them to do custody. Or if

1 the parents can't be found, I'll go for
2 guardianship. But they're ad hoc. There's no
3 universal rule. And the judges oftentimes are
4 not knowledgeable of the difference,
5 distinction between the two. I've been on
6 panels with judges, and we argue about it all
7 the time, what's the difference between custody
8 and guardianship? It's pretty obscure. But
9 there are really important elements that
10 distinguish the two.

11 So my feeling is, if we're going to cover
12 Part 3 under respondent custodians, we should
13 certainly include Part 4. And the one example
14 I'll mention and then conclude, is under the
15 Social Service Law there is -- in 2010 we
16 enacted the Kinship Guardianship Assistance
17 Program. Now close to 40 states have this kind
18 of program.

19 What is it? It's for a kin who is a
20 foster parent to leave foster care and become a
21 guardian and continue to get the foster
22 payment. It gets them out of the system, but
23 they continue to get payment. The report goes

1 to the governor of a year on it. We don't know
2 how many there are, but I'd say there's
3 probably about 1,000 of these a year right now.
4 But once that -- and in the statute it says the
5 kin get \$2000 for representation to become
6 guardians, but once they become guardians,
7 since the parents' rights are not terminated,
8 there is still the opportunity for the parent
9 to bring them back into court and challenge
10 their guardianship. In those situations, they
11 don't have representation because they are not
12 part 4, guardianship, under 262. All right.

13 So that's it. I can go on about kinship
14 care forever, but I hope I've kind of
15 identified a population that I think, in some
16 way or another, it really is compelling and
17 that you'll see that you want them to manage
18 this.

19 MR. DUNNE: You have given us some very
20 valuable insights.

21 Angela, did you want to follow up on
22 anything?

23 MS. BURTON: No, I think -- I appreciate

1 your bringing this to the attention of the
2 panel, although again, as Director Leahy said,
3 it's not exactly on point with the topics that
4 we're addressing in this settlement. I think
5 it's definitely related and appreciate that
6 it's been --.

7 MR. WALLACE: The settlement is one
8 thing, but your office is another --

9 MS. BURTON: Yeah.

10 MR. WALLACE: Thank you very much.

11 MR. LEAHY: We're very glad to hear what
12 you're thinking.

13 MR. DUNNE: Thank you.

14 We may be running a little behind
15 schedule. I hope you'll be patient and bear
16 with us.

17 Peter J. Herne is the chief judge of the
18 St. Regis Mohawk Tribal Court.

19 And Peter, we're privileged to have you
20 with us this morning. Thank you.

21 I've had some experience with the tribal
22 courts. When I was at the justice department,
23 I was charged with enforcing civil rights of

1 all citizens including those Native Americans,
2 and it's -- I appreciate your coming and being
3 with us and giving us your insights.

4 CHIEF JUDGE HERNE: Thank you very much.
5 I'd like to thank the committee and thank all
6 the other speakers for taking the time to give
7 us this opportunity to address the issue and
8 how it affects our reservation residents in
9 particular.

10 Our testimony, we point out a lot of
11 things that go directly to that. Hopefully,
12 after we finish today, if you have any further
13 questions. Obviously you -- it would require
14 some general knowledge of federal Indian law to
15 understand what I'm trying to present in here
16 today.

17 The land issue alone for our community
18 members and the people that live there can have
19 a pretty big effect on many legal proceedings
20 including the idea of are you eligible or not
21 eligible to get legal counsel. And so that's
22 one of our concerns going forward, as what kind
23 of determinations are going to be made

1 affecting our reservation residents and are you
2 going to consider that resource, or the person
3 who has to make the decision whether to assign
4 counsel going to consider that as a resource or
5 not.

6 As you're familiar, if you're with the
7 justice department, a lot of our lands are
8 inalienable. It has to be held by a tribal
9 member. So how do you consider that it has no
10 real effective market value other than on the
11 reservation itself?

12 And so obviously, one of the bigger
13 issues that I'd like to discuss as well -- and
14 this is not only unique to us, but probably the
15 entire North Country, or I should say the end
16 of the state country -- because up north, for
17 us, a lot of families, it's been an
18 economically depressed area for some time. You
19 see a lot of extended families living together,
20 especially in our community. You have more
21 than just the standard nuclear family residing
22 in one household. So if you're going to have
23 an application that's asking what are the

1 income and assets of the household, you really
2 need to break that out a little better, in our
3 view. I think the other thing is when you look
4 at assets like a car or something within that
5 household that's an extended family living
6 there, that's also a concern.

7 One of the things we would like to
8 advocate, and we don't know if the committee
9 has done it yet, but we would like you to look
10 at, perhaps, some of the federal rules for
11 determining financial eligibility. I think the
12 cite for that is 18 USC, subsection 4109.

13 For that, they have the fed -- my staff
14 was able to acquire and provide to me the
15 federal standards, have a more unique
16 viewpoint, and I'm hoping it's one that gets
17 considered by this committee.

18 It's not only looking at the individual's
19 ability to pay, but you also look at the
20 household as an entire unit. So when you're
21 making that determination, whether the
22 individual has ability to pay, you look at
23 what's actually going to happen if you require

1 the individual in the household to acquire
2 their own legal counsel. And so the standard
3 to actually provide the cost of providing
4 offender his or her dependents with the
5 necessities of life. So you have to look at
6 the necessities within that household that
7 these potential offenders are coming out of
8 when making the determination whether they're
9 assigned counsel or not.

10 So the 250 percent poverty level is a
11 nice idea, but what does the entire household
12 look like? What are the entire -- you know, if
13 you're going to take out that offender -- I
14 mean, this is one of my knocks on the criminal
15 justice system now. Too often, we are so quick
16 to put an offender in jail without realizing
17 the effect we're having on that entire
18 household. You might be throwing the
19 breadwinner in jail. You might -- he might
20 only have a part-time job, you know. We have
21 many instances where you see people lost a job
22 because they were thrown in jail.

23 MR. DUNNE: Excuse me a moment. Could I

1 stop you there, Judge, and just --

2 CHIEF JUDGE HERNE: Yes.

3 MR. DUNNE: -- and just see -- see if can
4 pin this down a little bit?

5 When you're talking about viewing the
6 household as a unit, it's making me think about
7 the components of the settlement that say that
8 in assessing eligibility it's not just a
9 question of what, you know, the -- let's say --
10 a father of a two-parent family. And it's not
11 just the father's income, but it is the
12 necessary costs of providing for the entire
13 family, spouse dependents --

14 CHIEF JUDGE HERNE: Yes.

15 MR. DUNNE: -- including, you know, food,
16 the necessities of life including
17 transportation to jobs that he or other family
18 members may have. So it's not like you can say
19 well, you know, you have a car and you should
20 sell it and hire a lawyer. Is that the kind of
21 thing you're thinking about when you're -- when
22 you refer to the need to look at the household
23 as a unit?

1 CHIEF JUDGE HERNE: Yeah, but I --
2 particularly true in the North Country. I
3 mean, in the North Country -- well, when
4 February hits, we're talking -- like this year,
5 we had 30 below 0 for probably 10 to 12 days.
6 I mean, if it wasn't for that person to be able
7 to stay within that unit, what would happen to
8 that entire unit? We're talking, perhaps, mom,
9 dad an uncle, a grandparent, all in that same
10 household. You take out one small -- even it
11 might seem minuscule -- source of income, what
12 is the effect on that entire household? All of
13 a sudden now the power bill goes without
14 getting paid, and then by the time summer rolls
15 around the power is going to get cut off.

16 MS. MACRI: And Judge, I'm sorry. I want
17 to thank you for taking the time out to express
18 your views on this because I think this is a
19 really important topic for us to consider.

20 One of the things that we have been
21 having discussions about in the previous
22 hearings is this idea of when we're looking at
23 determining eligibility whether the income of

1 spouses or grandparents or -- should be
2 considered in that analysis of what -- you
3 know, if there is a baseline of what the
4 poverty guideline minimum should be, for
5 example. And I want to make sure I understand
6 this idea that you're putting forth, is perhaps
7 we not necessarily look at what the other
8 income is as a contributing factor, but
9 obviously look at how that one individual
10 impacts those other individuals in that
11 family --

12 CHIEF JUDGE HERNE: Yes. And that would
13 probably be the better view, especially for the
14 entire North Country here.

15 I mean, our community is not unique in
16 the economic conditions of what our families
17 are facing. I mean, we can see it just outside
18 our borders within Franklin County. That's one
19 of the poorest counties in the state. So your
20 work on whatever standard you -- because this
21 is where our people are being forced to go,
22 like I put in my testimony. It's not like we
23 have a choice to say whether we want to go to

1 Bombay Town Court for criminal matters. We're
2 getting forced into that. So whatever standard
3 you implement is going to affect us and our
4 community members.

5 MS. MACRI: Can I ask, based on if you've
6 had any experience with this particular issue,
7 do you know whether, generally speaking, the
8 income of, for example, parents are being
9 considered when, let's say, a minor and --
10 well, somebody under the age of 21 who may be
11 living at home is being arrested, do you know
12 whether, anecdotally, whether parents' income
13 is being considered in that instance?

14 CHIEF JUDGE HERNE: I can only -- my past
15 experience myself -- because I originally
16 started in criminal defense work, then I became
17 an ADA and then I became tribal judge -- during
18 those years I did not see that, where they --
19 parents' income was considered for -- because
20 if you have the JD that's coming into a
21 criminal court, there are -- they could be
22 16 rears old, and a lot of times assigned
23 counsel would generally be following that.

1 Other than -- otherwise they try to go out and
2 retain counsel, mom and dad.

3 MS. MACRI: Thank you.

4 CHIEF JUDGE HERNE: So obviously our
5 concerns with the reservation, the reality we
6 live in is also something we're hoping that the
7 commission can make some type of a provision
8 for. I mean, we have a deep concern there.

9 We explained in our testimony how this
10 can play out even on bail matters, which is an
11 initial matter that the reservation residents
12 face. Right now, from our own studies, what we
13 were able to develop, it does not appear
14 commercial bonds, commercial bails, is an
15 avenue that's ever going to be acquired by a
16 reservation resident. The bond companies,
17 they're staying away because it's a sovereign
18 nation. It can't enforce their contracts
19 there. We can't post the real property to make
20 a commercial bond.

21 So our community -- everybody that's come
22 into contact with that system is facing a
23 cash-based criminal justice system, and that

1 clearly should not be fair -- should not be
2 existing in today's day and age, especially
3 when we look at the other CPL provisions that
4 do permit other forms of release, other forms
5 of bail. It just seems to be the standard
6 practice here, it's trumping everything else.

7 To finally be able to get a lawyer there
8 that understands these issues would be a
9 critical plus. It would be a step in the right
10 direction for a lot of our reservation
11 residents.

12 In our testimony too, we also were able
13 to acquire arraignment statutes all across the
14 state with those communities most near our
15 reservations. And you'll see that our
16 reservation is one of the ones where our
17 members are coming into the highest number, are
18 coming into contact with the state criminal
19 justice system, us and Seneca through Salamanca
20 city, so we definitely -- you know, we have a
21 concern when we hear statewide forum and our
22 concerns are not being addressed. I mean, it
23 has an effect on us and our members.

1 Any questions?

2 MR. DUNNE: Any questions for him?

3 MS. WARTH: I just want a quick follow
4 up. In previous hearings we've heard people
5 talk about ensuring that whatever criteria and
6 standards that we adopt are such that a person
7 isn't forced to be de-stabilized in order to
8 pay for counsel. And I think what you're
9 saying is we shouldn't just look at
10 de-stabilizing the person, de-stabilizing his
11 or her dependents and understanding that
12 dependents needs to be defined broadly. It's
13 not just children, immediate family members,
14 but anybody who is in the household who that
15 person is caring for.

16 CHIEF JUDGE HERNE: Yeah, without a
17 doubt. Especially they -- not only our
18 community, but that would apply to the entire
19 North Country. I mean, the counties that
20 surround us are quite core. So you go taking
21 out one source of income, it has a huge effect
22 that should be considered when you're making
23 the determination whether to assign counsel or

1 not.

2 MS. WARTH: Thank you.

3 MS. MACRI: Can I ask one more question,
4 Judge? In terms of your experience and the
5 criteria that is looked at when -- when an
6 individual is asking for an attorney, is there
7 anything unusual that sticks out in your mind
8 of what you've been told by, perhaps, other
9 members of your community about things that are
10 asked about when there is a determination of
11 whether an attorney should be assigned?
12 Anything unusual, whether it's -- for
13 example -- consideration of social benefits
14 like TANF or Social Security or any other
15 benefits that stand out?

16 CHIEF JUDGE HERNE: I think it's -- for
17 the reservation side, it's quite unique because
18 our members, we have what they call a two row
19 wampum, where the two societies are not going
20 to interact, where you beat -- you can both
21 travel in the same row, but you're mutually
22 exclusive with one another. And so a lot of
23 times the forms will ask for financial

1 information, some of our members do not file
2 financial information with the state or the
3 federal government.

4 We have a substantial portion that live
5 in what you would consider Canada, but we
6 consider Akwesasne one community and that
7 causes problems as well. We've had judges who
8 want to order somebody that they must stay on
9 the state side even though we have a right to
10 travel back and forth across the border. And
11 so we run into those unique issues and that
12 does cause a problem, some friction, because
13 they might not have the financial information.

14 Recently at the -- the tribal court we
15 were able to start, through the federal
16 programs, a child support unit. And during
17 that process -- obviously with child support,
18 Medicaid and welfare, reimbursement is a big
19 issue in that realm -- we asked how many people
20 would actually, in our community, from our ZIP
21 code, receive TANF. We were surprised to learn
22 the most they could find in one month was four.

23 So there's a lot of self-survival going

1 on there. And so how you ask the question --
2 what resources you have to obtain a lawyer --
3 is going to be crucial, and that's why we're
4 concerned with any kind of statewide form that
5 might be developed.

6 I think the only thing I would like to
7 add is obviously that that first line of
8 questioning is so important, but also the
9 appeals. It's difficult to understand how
10 you're going to handle an appeal with somebody
11 who doesn't have an attorney who can't afford
12 an attorney. So we'd really like to kind of
13 see where your proposals are in the appeal
14 process. And especially if somebody from our
15 community steps aboard with the unique issues I
16 just identified, how is that appeal process
17 going to kick in for them with -- we admit it
18 requires a, you know, good amount of
19 specialized legal knowledge to understand
20 reservation life.

21 MR. LEAHY: I don't have a further
22 question, except I just wanted to make one
23 comment. I see -- I -- and you brought your

1 team with you and you --

2 CHIEF JUDGE HERNE: Yeah.

3 MR. LEAHY: -- put them -- put them in
4 here and I wanted to thank all of you --

5 CHIEF JUDGE HERNE: Yeah.

6 MR. LEAHY: -- your team for coming down
7 and helping us. And this is something I'd just
8 like to see if we could follow up with you on
9 outside the context --

10 CHIEF JUDGE HERNE: Yes.

11 MR. LEAHY: -- of this hearing.

12 I'm very intrigued by your reference to
13 the robust tribal consultation policies --

14 CHIEF JUDGE HERNE: Yeah.

15 MR. LEAHY: -- that some states have.
16 New York does not have. Some of your testimony
17 has certainly helped us understand, I think,
18 why that is an important point to you. I don't
19 want to have other speakers wait while we
20 discuss --

21 CHIEF JUDGE HERNE: Yes.

22 MR. LEAHY: -- that, but I'd love to be
23 able to follow up with you, if we could.

1 CHIEF JUDGE HERNE: Sure. I can.
2 I'll -- need any contact information, we'll
3 then -- we'll try to give you -- I think we
4 have e-mail. We've been exchanging e-mails --
5 MR. LEAHY: I think we have it, yes.
6 Thank you very much, and we'll give you --
7 CHIEF JUDGE HERNE: So we'll be more
8 forward -- more willing to --
9 MR. LEAHY: Great.
10 CHIEF JUDGE HERNE: -- meet with you,
11 so --
12 MR. LEAHY: If we don't follow up with
13 you, please, please knock on our door.
14 CHIEF JUDGE HERNE: Alrighty.
15 MR. LEAHY: Make contact.
16 MR. DUNNE: I thank you --
17 MR. LEAHY: Thank you very much.
18 MR. DUNNE: -- very much.
19 MR. LEAHY: Go ahead.
20 MR. DUNNE: Just one question, if I may,
21 please. Are there any other Native American
22 attorneys within your area?
23 CHIEF JUDGE HERNE: Yes. Well, we have a

1 small bar now that's growing. We probably have
2 about, I want to say, eight.

3 Give me a quick nod.

4 Well, we have some members who had
5 actually earned their law degrees and moved
6 away because of the job status, but we do have
7 a local -- in fact, there are -- we have four
8 native judges that are all enrolled members of
9 our tribe. I just happen to be the chief
10 judge.

11 MR. DUNNE: And other than admission to
12 the bar to the state of New York, are there
13 other requirements to be certified as a tribal
14 attorney?

15 CHIEF JUDGE HERNE: For a tribal
16 attorney, you just don't -- for the tribal
17 attorneys we take other bar association -- if
18 you're a member in another bar, we'll take you.
19 To become judge, you have to be a member of any
20 bar, but you also have to be an enrolled member
21 of the tribe.

22 MR. DUNNE: Thank you.

23 CHIEF JUDGE HERNE: All right.

1 MS. MACRI: I want to thank you.

2 CHIEF JUDGE HERNE: Any questions?

3 Thank you.

4 MR. DUNNE: We appreciate it very much.

5 MS. WARTH: Thank you, Judge.

6 MR. DUNNE: Mr. Peter Racette --

7 MR. RACETTE: Racette.

8 MR. DUNNE: -- who is the deputy director
9 of Legal Aid Society of Northeastern New York.

10 Thank you so much for your patience and
11 being with us this morning.

12 MR. RACETTE: Good afternoon. I'm Peter
13 Racette and I'm -- I am the deputy director of
14 the Legal Aid Society of Northeastern New York.

15 MR. DUNNE: Tell us a little about
16 yourself before you get to your current agenda
17 here.

18 MR. RACETTE: About my organization?

19 MR. DUNNE: No, about you.

20 MR. RACETTE: Well, I am an attorney.
21 I'm admitted to practice in New York and have
22 been for more than 25 years. I've spent my
23 career doing legal services for low income

1 people, civil arena, with basically an emphasis
2 on housing law and public benefits.

3 And as deputy director of the Legal Aid
4 Society, I'm responsible for the four regional
5 offices that we have: Plattsburgh, Canton,
6 Saratoga and Amsterdam. And we have -- it
7 changes depending on the week, but I think
8 there are about 22 or 23 attorneys in those
9 four offices. In addition, there's some
10 paralegal and support staff.

11 MR. DUNNE: Y'all have a great presence
12 in the capital region. Very -- very
13 aggressive. And they serve their clients very
14 well. That's why we're interested in your
15 background.

16 MR. RACETTE: Thank you. I -- we hope to
17 serve -- it is our ambition to serve our
18 clients as well as we can.

19 The Legal Aid Society is a not-for-profit
20 organization, and we provide free civil legal
21 services in civil matters. So we don't do
22 criminal law, we do -- we do civil matters. We
23 provide services in all 11 counties in the

1 fourth judicial district and in five of the
2 counties in the third judicial district.

3 We receive funding from more than 35
4 federal, state, local and private sources, but
5 two-thirds of our budget comes from three
6 sources: The federal Legal Services
7 Corporation, LSC; the New York State Interest
8 on Lawyer Account fund, IOLA; and the New York
9 State Office of Court Administration judicial
10 civil legal services. And each of those
11 funders have their own eligibility criteria for
12 our services.

13 So I'm here today really for two reasons.

14 First, the financial eligibility criteria
15 formulated by Indigent Legal Services will have
16 a profound effect on LASNNY's client community.
17 We consider the low income people in our
18 service area to be our client community and for
19 us to be a spokesman for that client community
20 in a general way, and we want to ensure that
21 the constitutional and statutory rights to
22 mandated representation in certain cases are
23 provided in a fair and evenhanded way and are

1 effective in implementing the right to counsel.

2 Second, I'm here because I have some
3 experience in running income eligibility
4 programs. I want to share that.

5 MS. BURTON: Thank you. Thank you very
6 much.

7 MR. RACETTE: Like I say, our -- each of
8 our funders have some form of eligibility
9 criteria that we have to administer. Our three
10 primary funders have three different standards.
11 Two of them are the -- the LSC regulations are
12 the ones that give us federal standards and
13 IOLA's are in state regulations. And so I just
14 want to share with you what I think works and
15 what doesn't work when you have income
16 eligibility standards.

17 As a general matter, I think there needs
18 to be uniform and comprehensive criteria for
19 determining eligibility for mandated
20 representation, and there should be some room
21 for local discretion to address issues such as
22 cost of living and, in particular, the upfront
23 cost of retaining legal services in any

1 particular community. Those are going to vary
2 from community to community, and they should be
3 considered.

4 I believe that the floor for eligibility
5 should be no lower than 200 percent poverty.
6 There should be discretion to increase that
7 eligibility based on factors like actual
8 availability of income, the cost of retaining
9 counsel, necessary family or household
10 expenses, and the cost of living in particular
11 localities.

12 We think there should be presumptive
13 eligibility for those people who are receiving
14 needs-based public benefits such as TANF,
15 Safety Net benefits, food stamps -- now called
16 supplemental nutritional assistance, and
17 Medicaid, supplemental security income through
18 the federal Social Security Administration.

19 Financial verification requirements
20 should -- for those who are not receiving
21 needs-based benefits -- should be reasonable
22 and not so onerous as to result in a denial of
23 services or difficulty or a delay in obtaining

1 counseling. And we believe that the asset
2 eligibility criteria must emphasize the actual
3 expeditious availability of the resource to
4 retain counsel.

5 MR. DUNNE: Help us on that to flesh that
6 out.

7 MR. RACETTE: Well, for example, if
8 people have equity in their home. It may take
9 them months to access that equity in that home,
10 if a lender will provide an equity loan. It's
11 not something that someone can be arraigned and
12 then go the next day and get a home equity
13 loan.

14 Same thing happens with vehicles. Some
15 people may have some equity in their vehicle.
16 The chance -- the ability of them accessing
17 that equity, even if it's a vehicle like a
18 four-wheeler or a snow machine, are not
19 necessarily available on demand.

20 And -- and what we do at LASNNY is the
21 liquidity of the resource, becomes something
22 that we consider in determining if it's
23 available for a counsel. And I would urge you

1 to -- to as well look at the liquidity of the
2 resources.

3 MR. DUNNE: Sounds like a bit of a
4 cumbersome process, looking at liquidity and
5 availability, and how -- how can you do that in
6 an expeditious way?

7 MR. RACETTE: Well, the first thing, and
8 one of the things that I would want them to
9 discuss, is that we don't look for verification
10 of the information unless we have reason to
11 doubt the veracity of it. Now that will happen
12 from some -- time to time. Somebody will tell
13 us they have no income, yet their rent is paid
14 or their mortgage is up to date. There -- you
15 know, there are some times when you receive
16 information that you have reason to question.
17 And our federal and state funders require us to
18 follow up if we have reason to doubt. But if
19 we don't have reason to doubt, then we assume
20 that it's correct.

21 It's really important that in qualifying
22 somebody for eligibility, for legal
23 representation that you do so in a way that

1 fosters the attorney-client relationship. If
2 your initial interaction with somebody is to
3 question the veracity of the information that
4 they're giving you, you are undermining the
5 attorney-client relationship. And so we accept
6 the information that we're given unless we have
7 reason to doubt.

8 It may turn out that we're not given
9 correct information. And if we subsequently
10 find that we did not receive correct financial
11 information, our funders require us to withdraw
12 from representation if we can do so consistent
13 with our professional obligations.

14 MS. BURTON: And on that last point,
15 would you say that that happens very often,
16 somewhat often, or not very often at all?

17 MR. RACETTE: Not very often are we
18 required to withdraw. What you will find is
19 that when you ask somebody how much they earn,
20 they give you an estimate. Particularly, low
21 income people do not receive the same amount of
22 money every two weeks deposited into their bank
23 account. You know, if you're an hourly worker,

1 you don't always work the same number of hours
2 every week. And so people give you an
3 estimate.

4 And sometimes we'll find in a benefits
5 case or in a, say, a matrimonial case where
6 there's mandatory financial disclosure, that
7 the -- when we get around to the disclosure,
8 the information that we get to -- that we
9 receive so that we can disclose as part of the
10 court process is slightly different from that
11 which we were told. But very seldom is it so
12 different that it affects eligibility.

13 MS. WARTH: And just, you know, following
14 up on that a little bit, you said at the
15 beginning that your population, you know, who
16 you really feel that you represent, are low
17 income people, and so I think you've observed a
18 lot of low income people who have had contact
19 with the criminal justice system. And in your
20 observations, are you seeing people trying to
21 game the system to get a free criminal defense
22 lawyer or is that something that's really not
23 happening too often?

1 MR. RACETTE: No, I -- I don't see people
2 gaming the system to get a free criminal
3 defense lawyer. And to be honest with you, I
4 don't see -- I do a lot of work and spent a
5 career working in public benefits. I didn't
6 see a lot of people gaming the system to get
7 public benefits.

8 MS. MACRI: And can I ask about your --
9 the 200 percent minimum, the floor that you
10 proposed? Is that something that works not
11 only for the federal grants that you're dealing
12 with but also with the state grants?

13 MR. RACETTE: Well, it's a little
14 complicated. The federal grant, the Legal
15 Services criteria is actually 125 percent of
16 poverty. And what we do is, we can go up to
17 200 percent of poverty and spend them down to
18 125 percent of poverty by using specified
19 monthly expenses. The thing is, it's a waste
20 of time.

21 Almost anybody who is below 200 percent
22 of poverty, if I ask them what their housing
23 costs are, I can qualify them to be at

1 125 percent of poverty. So it -- to me, it's a
2 waste of time to go to 125 percent of poverty.

3 I'm not necessarily saying that 200
4 percent of poverty should -- is the be all and
5 end all of the right to afford -- or the
6 ability to afford counsel, but certainly the
7 floor should be no lower than 200 percent. And
8 I have experience working with a floor lower
9 than that, and it just seems to me that it's a
10 waste of effort to do.

11 MR. LEAHY: I'd like to promulgate on one
12 aspect of the statement you made about you
13 don't demand verification unless you have a
14 reason to doubt the credibility of the
15 assertion with respect to eligibility. Is that
16 a procedure which is endorsed by all three of
17 your funders? I'm particularly interested in
18 the LSC.

19 MR. RACETTE: If -- that is the LSC
20 standard and it's in the regulations.

21 MR. LEAHY: Thank you.

22 MR. RACETTE: It's in the federal
23 regulation.

1 MR. LEAHY: Thank you.

2 MR. RACETTE: And I attached to my
3 testimony both the IOLA and the LSC regulation.
4 It's probably as good a bedtime reading as
5 you're going to get.

6 MS. MACRI: And I'm sort of asking a
7 follow up. So when you're doing a
8 determination in your office, do your attorneys
9 consider the income, let's say, of common-law
10 partners? I know we don't recognize common-law
11 relations, but partners that they might be
12 living with or parents, if they're younger
13 children, that kind of thing? Is that
14 something that's taken into consideration?

15 MR. RACETTE: What we do is we look at
16 legal lines of responsibility --

17 MS. MACRI: Okay.

18 MR. RACETTE: -- first and foremost, so
19 that -- we do include spousal income if
20 you're -- if somebody is living with their
21 spouse, we'll include spousal income. And if
22 somebody is living with their children, we
23 include the children in the household size.

1 Typically they would not have income.

2 We would not include the income of a
3 child in determining the parent's eligibility
4 because there is no legal responsibility
5 between the -- from the parent to the child
6 like there is from a child to the parent. So
7 what we focus on is legal responsibility.

8 And with that, I'd like to just -- I want
9 to make sure I don't miss saying this: The
10 issue came up earlier in this hearing about
11 minor children living with their own parents.
12 We would not include the parental
13 parent/grandparent's income in determining
14 eligibility in those circumstances because we
15 really don't see that the duty of the
16 grandparent to support the minor parent would
17 include the right to counsel, would include --
18 they're not required to retain counsel for
19 their minor children.

20 MS. MACRI: Okay. Thank you.

21 MS. BURTON: You'd mentioned earlier that
22 one of the other issues that you wanted to
23 address had to do with the appeal process.

1 Could you say a little bit about your thoughts
2 on that process?

3 MR. RACETTE: Well, LASNNY thinks there
4 ought to be the opportunity for an expeditious
5 appeal from a denial of eligibility. The
6 federal Legal Services Corporation regulations
7 have that in their -- it is -- for us, it is
8 more than simply financial eligibility for our
9 services, it's financial eligibility for our
10 services in addition to our determination not
11 to accept a case.

12 We might deny a case because it's outside
13 of our priorities. We might deny a case
14 because we think it lacks merit. There is an
15 appeal right, a fairly simplified expeditious
16 appeal right where someone who is denied
17 services can get a supervisory review of the
18 reasons for denying services, and it
19 requires -- and I do this frequently: It's --
20 because it's a supervisory review, it often
21 falls to my mandate, I'm required to call the
22 applicant for services and talk to them. I
23 don't base it just on what my staff tells me.

1 I don't base it just on what the case notes
2 tell me. The federal law requires that I
3 contact the applicant and get their -- and ask
4 them what their take is on the denial of
5 services.

6 And I'll also say there are times where
7 having done that, I find that people are
8 eligible for services where my staff might have
9 found they were not.

10 MR. DUNNE: It takes a lot of courage to
11 make that decision.

12 MR. RACETTE: It is one of the more
13 challenging aspects of my position, I grant
14 you.

15 MS. BURTON: And can I just ask about the
16 process? So if a person is denied, is that
17 relayed to them in writing or -- or --?

18 MR. RACETTE: Typically it's not relayed
19 to them in writing, the initial determination.
20 Somebody would be told when they call.

21 For -- you know, for example, somebody
22 calls our offices and is asking for services on
23 any civil case. The first questions that they

1 are asked are -- in addition to name, Social
2 Security number and address -- are what's your
3 source of income? If they have excess income
4 and they tell us they have excess income, they
5 would be told at that point you are not
6 eligible for our services.

7 MS. BURTON: All right.

8 MR. RACETTE: If somebody files a
9 grievance of that determination, then I would
10 inform them in writing of my decision.

11 MR. LEAHY: But when you do an
12 eligibility review of a denial, do you have any
13 paper that you're working with? Is there a
14 checklist? Is there this person is not
15 eligible because they earn six times the
16 poverty rate or --?

17 MR. RACETTE: I don't work with a
18 checklist, no. What I do is we -- we ask
19 people to put their grievance in writing. And
20 if they -- and we offer them assistance in
21 doing that writing.

22 MR. LEAHY: Okay.

23 MR. RACETTE: I mean, the client

1 population we work with, you can't presume
2 literacy. So we make sure that we offer them
3 the opportunity that our support staff will
4 assist them in writing up why it is they feel
5 that they're eligible despite being told that
6 they're not eligible. And I think that becomes
7 part of what the supervisor has to do when they
8 review, is they have to keep an open mind to
9 what is being said.

10 MR. LEAHY: Thank you.

11 MS. WARTH: I want to follow up on
12 something you asked or talked about earlier
13 when you said that often when you talk to low
14 income people about their weekly or monthly
15 income, you're asking them really about a
16 moving target because often these are
17 individuals who work hourly and so their income
18 changes from week to week and month to month.

19 When you ask people information about
20 their income, you're not asking -- or when you
21 do the eligibility process, I take it you're
22 not asking people to verify or provide
23 information as in sworn -- in a sworn manner?

1 MR. RACETTE: No. No, it's a -- we take
2 it orally. We put it into our case management
3 system and -- and we do not ask them to verify
4 that to -- we don't ask them to affirm that
5 information.

6 MS. WARTH: Right. Right. And -- and
7 I -- based on what you're saying, it sounds
8 like you -- you could see distinct
9 disadvantages to doing that?

10 MR. RACETTE: Absolutely. I -- you know,
11 part of the struggle of doing this work is
12 clients often treat legal aid like we're just
13 another bureaucracy like the department of
14 Social Services, Social Security
15 Administration. And they do that because the
16 first 20 questions we ask them are no different
17 than the first 20 questions --

18 MS. WARTH: I mean, I get what you're
19 saying. I guess --.

20 MR. RACETTE: -- any of those
21 bureaucracies are going to ask them. And, you
22 know, it is -- it's unavoidable, but you have
23 to bear it in mind. I -- you -- that that is

1 not the ideal way to start off an
2 attorney-client relationship.

3 I think there was one -- we talked about
4 the appeal, talked about minor parents.

5 MS. MACRI: We beat you to the punch
6 line.

7 MR. RACETTE: Yeah, you beat me to almost
8 all of the -- all of my punch lines. And we
9 talked about the liquidity of an asset.

10 I think that's all I had to say. And if
11 there's any questions, I'd be happy to
12 entertain them. Or if you have any follow-up
13 questions afterwards, you have my contact
14 information.

15 I just want to emphasize, this is -- this
16 is a subject of real importance to the Legal
17 Aid Society, and we really see this as a great,
18 great opportunity to -- to really effectuate
19 the right to counsel.

20 And so I thank you very much for taking
21 your time to come up here, and it's been a
22 pleasure talking to you.

23 MS. WARTH: Do you have --

1 MR. DUNNE: Anyone --

2 MS. WARTH: Yes.

3 MR. DUNNE: Take your time.

4 MS. WARTH: I -- again, because you have
5 access to so many of the, you know, the clients
6 who have contacts with the criminal justice
7 system, I'm just curious as to what your
8 observations are, if you have any, about your
9 sense of why people are not being given the
10 rights to assigned counsel in criminal cases in
11 situations that you perceive as perhaps unfair?

12 MR. RACETTE: I actually don't have a
13 great deal of experience with the criminal
14 justice system because we only do civil work,
15 so the -- .

16 MS. WARTH: Right.

17 MR. RACETTE: I don't. Where I would
18 have a little more is when people in family
19 court or in matrimonial cases are denied
20 assigned counsel. And I think that goes to my
21 first point, which is that I -- there is just a
22 need for uniform standard. That you can take
23 into account local differences, but there --

1 there needs to be some uniform eligibility
2 standards that are fair across the board and
3 are not really just based on local custom and
4 local practice.

5 MS. WARTH: Right.

6 MR. RACETTE: Because I -- another
7 individual talked about how people get a --
8 people get assigned counsel in one court, and
9 with the very same issue in the court next
10 door, they don't get it. And there really does
11 need to be the uniformity of those standards.

12 Thank you.

13 MS. WARTH: Thank you.

14 MR. DUNNE: Just -- thank you to you. As
15 a member of the advisory board for your
16 organization, I'm very proud that you are a
17 member of our staff, and I congratulate you on
18 your lifetime commitment to this very, very
19 important work.

20 MR. RACETTE: Thank you.

21 MR. DUNNE: Stay well.

22 MS. WARTH: Thank you.

23 MR. DUNNE: We have a -- an additional

1 member who would like to address us today,
2 Ms. Molly Hann, who is the assistant public
3 defender here in Essex County.

4 Good morning, Ms. Hann.

5 MS. HANN: Good morning. Thank you.

6 Brandon Boutelle, our chief defender, is
7 part of JAG, and so he is in Connecticut this
8 week on an assignment with them. Bill Tansey,
9 our deputy public defender, is on vacation, so
10 you have me.

11 MS. MACRI: We are pleased you're here.

12 MS. HANN: Thank you. And we're pleased
13 to be a part of this.

14 I've been an attorney in the public
15 defender's office here for just over two years
16 now, and it's -- Kellie King, our confidential
17 secretary, is here this morning. She's been in
18 the office for almost 12 years, and this has
19 been an issue that constantly recycles and
20 resurfaces in our office, dealing with the
21 applications, dealing with challenges to our
22 application process by judges, courts and
23 district attorneys as well as perceptions by

1 the public. And so it's great to be heard on
2 this issue, and we're hopeful that there will
3 be some positive changes.

4 I think a lot of what Peter Racette just
5 said is very similar to our experience in the
6 process in dealing with our clients. Our
7 office is criminal defense only right now.
8 There's consideration that we might be getting
9 family court cases in the near future, but at
10 this point we're purely criminal defense.

11 I guess I'll just talk through how the
12 process works, and feel free to stop me if you
13 have any questions. And this is mostly dealing
14 with the justice court system at the town and
15 village court level, although it's very similar
16 at the county court level as well.

17 When clients are arraigned, right now it
18 happens with or without counsel. And whether
19 we're there or not, the judge will ask if the
20 defendant wants an attorney, if they're going
21 to hire someone, if they already have someone.
22 If they are considering our services, the judge
23 will give them an application, stop the

1 arraignment at that point and adjourn the case
2 so they can fill out the application and get it
3 to our office for review.

4 In some cases the judges will assign us
5 on the spot at that first appearance,
6 particularly with felony cases. And in that
7 case, the judge will usually scan a -- or
8 excuse me, fax us the OCA TB-1 form.

9 Typically when we receive the TB-1 form,
10 although the judge has assigned us at that
11 point, we still have the applicant fill out the
12 application so we can go through a screening
13 process and so we can get additional
14 information about our client. I do have a copy
15 of our application with me today, if you'd like
16 it. It's several pages long.

17 We get information about the client's --
18 potential client's employment, about their bank
19 accounts or any liquid assets that they might
20 have, physical property owned, real estate,
21 vehicles, any other assets. We get information
22 about the members of their household, their
23 age, whether or not they're employed, whether

1 or not they have an income. If so, the amount
2 of that income.

3 We then get more detailed information
4 about the applicant's income, whether they're
5 on public assistance, receiving child support,
6 alimony, any other financial gifts, any other
7 sources of income. We ask for information
8 about expenses, including insurance, loans,
9 child support, alimony, daycare, rent,
10 utilities, food, medication, health care and
11 other. We give them an opportunity to describe
12 any hardship circumstance that relates to their
13 financial ability or inability to obtain
14 counsel or that they feel should be considered
15 in addition to the information provided on the
16 application.

17 Most of the time, not all that
18 information is provided to us. Kellie is
19 usually the screener of most of the
20 applications. She'll often follow up with a
21 phone call to try to get more information, to
22 ask clients for documentation.

23 I think, you know, just like Peter, it's

1 just kind of a gut reaction that, you know,
2 maybe somebody filled out that their income is
3 this, but we're like, well, it doesn't really
4 quite add up. If you add up all their
5 expenses, it doesn't work. Or if the
6 application is blank and yet they're, you know,
7 living by themselves. How do you afford to
8 live, you know? Without disclosing the illegal
9 activity, if that's the case, how is it that
10 you are actually paying your rent or paying the
11 mortgage?

12 We do have a part-time investigator in
13 our office as well. And although it's not
14 really in his job description to be
15 investigating information for applications, if
16 we need to, we'll have him do that
17 investigative work.

18 A lot of times Facebook is -- provides us
19 with a lot of that information. You know,
20 people will post anything and everything about
21 their lives on Facebook, so we might see a lot
22 of, you know, where they're employed, family
23 members, vehicles, property and things like

1 that just by taking a look at their Facebook
2 account.

3 We also -- so then we take into account
4 the federal poverty guideline as a starting
5 point. We look at the ability to hire private
6 counsel. If we knew, too, if someone is, you
7 know, a little bit over income as far as the
8 numbers go, we'll take that into consideration.

9 Certainly it's our position that we can't
10 make someone sell their assets, you know, or to
11 take out a loan to get the equity out of a
12 house or a vehicle. Somebody could be property
13 rich and cash poor, then, you know, might have
14 a million-dollar property on Lake Champlain or
15 one of the other lakes. But if they don't have
16 any liquid assets, then they would qualify for
17 our services. And those are the cases where we
18 do tend to get push back and challenged, you
19 know, from the district attorney's office and
20 from the judges sometimes. Sometimes just, you
21 know, kind of -- members of the public as well.
22 They go, well, that person qualified for
23 assigned counsel.

1 MR. DUNNE: Let me interrupt you. When
2 you say sometimes you're pressed by the
3 district attorney, what pull does that man or
4 woman have and what basis would there be a
5 challenge?

6 MS. HANN: I would say, in speaking for
7 our office, that our belief would be that they
8 don't have any role in that. They don't have
9 any say in that process.

10 MR. DUNNE: Hear, hear.

11 MS. HANN: However, I think, you know, as
12 taxpayers of Essex County, you know, as
13 residents and taxpayers of Essex County and as
14 of the state of New York, you know, it may
15 simply be the interest in that wait a second,
16 I'm a taxpayer, why am I paying for this person
17 to have an attorney? You know, do they really
18 qualify to be receiving an attorney free of
19 charge? That's, you know, money coming from my
20 taxes.

21 But no, we don't believe that they should
22 have any say in that process, that they should
23 have any right to know the information that's

1 coming to us in those applications.

2 MR. DUNNE: Okay.

3 MS. HANN: I know last time this was a
4 big issue, in the last year or so. We talked
5 to a public defender's office from another
6 county. I don't remember which one it was, but
7 I was excited to hear that they keep their
8 applications confidential, and they usually
9 check a box on a form that says that this
10 person is qualified, we've reviewed the
11 application, and then they shred the
12 application.

13 MS. MACRI: Molly, can I ask you, in
14 follow up to Mr. Dunne's question, the idea
15 here of the DA raising this issue, have you had
16 any personal experiences in your office where
17 the DA has raised the issue and then it has
18 then been raised by the judge who is now asking
19 for verification? Or have you seen the DA's
20 office demanding verification of financial
21 eligibility in the way of requesting
22 documentation, that kind of thing?

23 MS. HANN: We have. And we have

1 suggested that they file a FOIL request with
2 the county attorney's office, and that usually
3 stops it in its tracks.

4 Where it comes up as less, an example I
5 gave about having a million-dollar house on the
6 lake and not having any liquid assets, but more
7 so, someone who's, you know, employed before
8 their charges and either gets incarcerated as a
9 result of those charges or doesn't get
10 incarcerated, but, you know, their job either
11 terminates them or suspends them without pay at
12 the point that they get charged or at the point
13 they're incarcerated. And so while they may
14 have had a, you know, even an 80-, 90,000,
15 \$100,000 a year income before those charges,
16 their ability to continue to make that income
17 stops as soon as they receive those charges.

18 And so that seems to be where we get the
19 challenges, you know. Hey, I know so-and-so is
20 working at, you know, International Paper mill
21 in Ticonderoga, and people that work there make
22 a lot of money, but they qualified for your
23 services. And then also -- I mean, it's --

1 also comes down to that we don't just look at
2 the income. That there's so many other factors
3 that go into it.

4 MS. MACRI: Do you have your forms, or
5 your application, do they require any
6 certification under penalty of perjury by the
7 individual who is being screened for
8 eligibility?

9 MS. HANN: We do, and we -- you know, we
10 ask them to make that affirmation. Some people
11 don't even get -- that's in the last page at
12 the very bottom of the application. Some
13 people don't always make it that far.

14 Yes?

15 MS. BURTON: Molly -- and this is maybe
16 putting you on the spot a little bit, but I
17 just wondered, in preparing for the -- your
18 testimony today and kind of reviewing your
19 policies and procedures that you've so
20 articulately explained to us today, is there
21 anything that comes to mind for you or for
22 anyone in your office who's gone through that
23 process that you might change as a result of

1 having gone through that process?

2 MS. HANN: Well, I mean, we have looked
3 at and talked about revising our application.
4 As I said, I think our application right now,
5 it's three and a half pages. Quite often most
6 of the blanks are not filled in, and I don't
7 know that it's -- it's not necessarily that --
8 I don't think -- because that information
9 doesn't exist. But once people get past the
10 first page, they seem to lose interest in
11 filling it out or maybe they just assume that
12 when they fill in some of the numbers, we'll be
13 able to put the picture together with the rest
14 of those numbers.

15 So we certainly have -- we've talked
16 about that, we've looked at other applications
17 from other counties, but we haven't yet revised
18 it. I think we also kind of want to see what
19 comes out of your work.

20 MS. BURTON: Okay.

21 MS. MACRI: And can we ask -- oh, I'm
22 sorry, but --

23 MR. DUNNE: All right. Go ahead.

1 MS. MACRI: -- I apologize.

2 Can we ask about that, the federal
3 poverty guideline that you make reference to as
4 a starting point, what's the percentage that
5 your office is implementing? Do you know
6 offhand?

7 MS. HANN: I don't know.

8 Kellie, do you?

9 MS. KING: 125.

10 MS. HANN: 125 percent.

11 MS. KING: It might be less.

12 MR. LEAHY: It strikes me that you're a
13 small office, and I know you -- we know your
14 reputation, very hard working and you're
15 dedicated to your work -- that this eligibility
16 process, it seems to me, poses quite a burden
17 on your staff in terms of the time and the
18 follow-up and the need to be careful so that
19 you don't receive public criticism.

20 MS. HANN: Absolutely. We spend quite a
21 bit of time on the application process, and it
22 certainly, you know, at times, brings quite a
23 bit of stress to us, especially when we're

1 under scrutiny and being questioned about the
2 financial qualifications of the clients that
3 we're representing that -- so we'd all prefer
4 to just do the work of defending our clients.

5 MR. LEAHY: So my question is, if we were
6 to establish this presumptive eligibility in a
7 way that encompasses, you know, some
8 percentage -- let's say 200 percent just for
9 discussion purposes -- of the -- just on the
10 income level, if we say that any public
11 benefits or preliminary detention, prefiled
12 detention presumptively qualifies a person, if
13 we say that you only do further investigation
14 if you have some reason similar to an analog to
15 that, the legal aid, to doubt the veracity of
16 the person's, let's say, entitlement to public
17 defenders --

18 MS. HANN: Right.

19 MR. DUNNE: -- so would that carve out a
20 significant number of cases such that it would
21 reduce the burden upon your office?

22 MS. HANN: I think that would probably be
23 helpful in reducing the burden by raising that

1 percentage. I think that would capture --

2 MS. KING: Yeah. (Nodding.)

3 MS. HANN: -- probably a --

4 MR. DUNNE: She's -- Kellie --

5 MS. HANN: -- way --

6 MR. DUNNE: -- nodding on the record.

7 MS. HANN: Kellie is nodding and saying
8 yes.

9 MS. MACRI: We'll make sure your nodding
10 is on the record.

11 MS. HANN: No, I was looking at Kellie
12 because she is the -- you know, when I get the
13 application in court, I say I'm not reviewing
14 this, I'm just going to make sure that you've
15 got your contact info in here and then I'm
16 going to take it back to the office and give it
17 to Kellie. She's the mastermind behind those.

18 But yes, I think that would significantly
19 ease the burden for us to say okay, you know,
20 the threshold is higher because probably, you
21 know, that's where we're actually saying that
22 you're eligible at this point anyway, and to
23 make it much easier to, you know, really just

1 check those boxes. Great. All right, let's
2 start doing the work that we need to be doing.

3 MS. WARTH: Just out of curiosity, Molly,
4 do you have a sense -- or does Kellie have a
5 sense -- of how many -- what percentage of
6 people who do apply for assigned counsel
7 through your office, how many actually are
8 assigned counsel?

9 MS. HANN: I think it's about 90 percent.
10 I think -- you know, we probably deny about
11 10 percent for over income on the whole.

12 MS. WARTH: And for those -- so that's a
13 significant majority of people who apply are
14 deemed eligible?

15 MS. HANN: Yes.

16 MS. WARTH: And for the 10 percent who
17 are denied, do -- is there an opportunity for
18 them to appeal that denial, either formally or
19 informally?

20 MS. HANN: Yes, absolutely. It's not as
21 formal as the process that Mr. Racette
22 described. But when we deny someone, we send
23 the applicant a letter and we let them know

1 that they've been denied and we advise them
2 that they can appeal as to the court, the
3 judge, where their charges are pending, and the
4 judge can then assign us. And so they may go
5 to the judge.

6 And we also, if they call and ask us
7 about it, we'll say, well, the judge might want
8 to know, you know, how much private attorneys
9 have said they would charge you to represent
10 you in this case and whether or not you can
11 afford that. So we'll often suggest get a
12 couple quotes from private attorneys so then
13 when you go before the judge you can say, you
14 know, I was denied by the public defender's
15 office, the private attorney says it will cost
16 me this, and I still cannot afford that.

17 And we don't find -- you know, I don't
18 think that there are people that are
19 fraudulently, fraudulently obtaining our
20 services, or attempting to. The people who can
21 afford attorneys, we never -- you know --

22 MS. WARTH: Right.

23 MS. HANN: -- we never see them. And

1 most of the time when people appeal to the
2 judge, you know, the judges want people to be
3 represented by lawyers --

4 MS. WARTH: Right.

5 MS. HANN: -- so they often assign us.

6 MS. WARTH: Okay. So -- so that's -- I
7 have two follow-up questions to that then.

8 So it sounds like you're saying that if
9 people do exercise that right to appeal to the
10 judge, often the judge does assign your office?

11 MS. HANN: Yes.

12 MS. WARTH: Okay. And, you know, one of
13 the other constituencies who would be concerned
14 about too many people being assigned counsel is
15 the private bar.

16 MS. HANN: Uh-huh.

17 MS. WARTH: Do you ever get complaints
18 from private lawyers that you're taking away
19 work from them?

20 MS. HANN: I don't think so. I'm looking
21 to Kellie again, but I don't --

22 MS. KING: Yeah, we don't even have
23 enough for our conflicts --

1 MS. HANN: Yeah.

2 MS. KING: -- lawyers, so, you know --

3 MS. HANN: Right. We -- yeah, we have a
4 hard time. I mean, there are probably two to
5 three attorneys that are in --

6 MS. KING: Yeah. We --

7 MS. HANN: -- Essex County right now --
8 well, actually, one is Warren County, northern
9 Warren --

10 MS. KING: Yeah.

11 MS. HANN: -- County. Try to who
12 regularly take the conflicts at the local and
13 even the county court level, so doesn't seem to
14 be that the private attorneys are knocking on
15 our door wondering why we're stealing all their
16 clients.

17 MS. WARTH: Thank you.

18 MS. MACRI: I don't mean to fire
19 questions at you.

20 MS. HANN: That's okay.

21 MS. MACRI: But in terms of -- again,
22 asking the same question I've asked before
23 about parental income, spousal income -- do

1 those particular incomes come into play when
2 you're screening, for example, somebody over
3 the age of 16, between 17 and 21? Or if it's
4 an individual who is married, do you consider
5 the spousal income when you're trying to
6 determine eligibility as a factor of whether
7 there's a basis to deny that person?

8 MS. HANN: As for applicants 21 and
9 under, we never consider parental or
10 grandparent or, you know, custodial income
11 because they are our client, that minor is our
12 client. And so just because their parents
13 might be a millionaire with several houses
14 throughout the country or the world or, you
15 know, have the ability to hire private counsel,
16 if the parents choose not to pay for their
17 child's mistakes and want them to learn a
18 lesson, if -- we only look at that child's
19 ability.

20 And then as for spousal situations, I
21 think it's a little more case specific.
22 Certainly if we've got a case where it's
23 domestic violence related charges, we

1 definitely do not look at the other spouse's
2 income because that's -- you know, two spouses
3 up against each other.

4 I don't know across the board. I mean,
5 we -- we are looking for income about everyone
6 in the household, so we do take it into
7 account, but then I think there's also, at that
8 point, questions about what -- who handles the
9 expenses and, you know, how do you share those
10 expenses.

11 MR. DUNNE: Any other questions that you
12 may have?

13 MS. MACRI: Thank you.

14 MR. DUNNE: And that is -- Well, it's
15 extremely valuable. I'm glad to see that your
16 two years of service have not worn you down. I
17 don't mean to make light of it.

18 MS. HANN: No.

19 MR. DUNNE: It's wonderful work you're
20 doing.

21 Tell me, Ms. Hann, what are the real
22 stress factors among the providers like
23 yourself?

1 MS. HANN: Aside from --?

2 MR. DUNNE: What makes it tough to go to
3 work in the morning?

4 MS. HANN: I really enjoy my job, and I
5 think, you know, sometimes there are difficult
6 clients. I think -- you know, people say, you
7 know, how can you do your job? I can't believe
8 you defend these people.

9 And the best clients to work with are the
10 ones that are honest and upfront and open, and
11 they could -- you know, they say I'm guilty of
12 everything, I did all of it. But they're being
13 honest right off the bat and we're able to
14 establish a working relationship right away and
15 open lines of communication.

16 Probably the most difficult clients to
17 work with are the ones that don't seem to be
18 telling the truth, even to their own attorney.
19 So that makes it very difficult to, you know,
20 to establish a rapport and move forward from
21 there.

22 We're fortunate. At this point, we have
23 four attorneys in our office and we open about

1 1000 cases a year. So in the two years that
2 I've been there, we went from three attorneys
3 to four, and it seems like adding that fourth
4 position has really helped with the workload in
5 dividing the labor.

6 So this week, while there's just myself
7 and Josh Ackerman in the office as far as
8 attorneys go, we're not overly stressed
9 covering the entire county between the two of
10 us.

11 MR. DUNNE: Do I assume correctly that
12 some of your clients have been remanded to the
13 county jail pending trial?

14 MS. HANN: Yes.

15 MR. DUNNE: What problems do you have
16 with regard to access to your clients?

17 MS. HANN: Access to the clients that are
18 at the jail?

19 MR. DUNNE: Yes.

20 MS. HANN: We don't really have any
21 difficulty with accessing our clients at the
22 jail. I mean, it's 7 miles away in Lewis. We
23 are able to show up at the door of the jail

1 during business hours to visit them and, you
2 know, if it's not the scheduled lunchtime, from
3 11 to 1, we're able to meet with our clients.

4 And if there isn't a room available -- we
5 usually meet with them in a conference room
6 within the booking area of the jail. And if
7 there's not a room available there, there's the
8 main visitation room, and so they'll usually
9 use that room for us, or even the library.

10 So we do have quite a bit of access to
11 the clients. They're able to call our office
12 for free from the jail, so, you know, some
13 clients call every hour on the hour, when we
14 have no new information for them. But I would
15 say we don't have any difficulties with access.

16 I mean, we have, you know, I guess
17 another issue has to do with bail and remand,
18 and some judges who seem to have a practice of
19 remanding and said, you know, for an aggravated
20 unlicensed operator, a third-degree charge --
21 sending people -- or setting bail at \$1000,
22 which often means remand for the majority of
23 clients, so we have those difficulties. And

1 perhaps that's a different forum, if you're
2 talking about that.

3 MR. DUNNE: And your comfort level with
4 regard to privacy in meeting with your clients
5 in the county jail?

6 MS. HANN: I feel comfortable. I mean,
7 the rooms that we're in are usually closed
8 rooms. No recording device in there. There's
9 a -- you know, there's a window. So there's no
10 corrections officer or a deputy that's in the
11 room with us. They walk the hall to see what's
12 going on, and they give us a panic button
13 should, you know, we feel unsafe and we need to
14 trigger an alarm. But I've -- as far as
15 meeting with clients in the jail -- I'm looking
16 at Josh from my office who's here too -- but
17 I -- I haven't -- I feel like it's
18 confidential.

19 I think it's more of an issue when we're
20 meeting with these clients in the hold -- well,
21 there's a holding cell here for county court,
22 and we do have a private space within that
23 holding cell. But at the local justice court

1 level, a deputy needs to be in the room with us
2 with that client, and so that's where it does
3 become difficult.

4 MS. MACRI: Can I ask one more follow up?
5 I -- I don't --

6 MS. HANN: No. No, that's -- I'm here
7 that's fine.

8 MS. MACRI: -- I don't mean --.

9 With respect to resources, so have -- do
10 you have resources available in terms of access
11 to interpreters, translators, if you're dealing
12 with an eligibility issue or you're screening
13 them for eligibility? How do you deal with
14 someone, for example, who might not speak
15 English or does -- is not comfortable with
16 English as a primary language.

17 MS. HANN: I think so far the experience,
18 in the two years I've been there, is that the
19 judges tend to assign those -- us to those
20 cases right off the bat, but, you know, we
21 certainly don't have a fluent Spanish speaker
22 in our office.

23 I mean, as you know from dealing me

1 within the last year, we had a client from
2 Honduras who required an interpreter. We could
3 talk about the weather and things like that,
4 but when it got to the details of his case, we
5 couldn't communicate with each other. And it
6 was quite a bit of legwork finding an
7 interpreter. And even at that -- for that
8 case, we had a lot of pushback and confuse --
9 not pushback, but confusion from the justice
10 court about who was responsible for getting the
11 translator for courts and who was responsible
12 for paying for it.

13 Once we did finally figure that out, the
14 court was very amenable to having someone
15 there. And got in there, it was very helpful.
16 But we certainly don't have someone at the
17 ready that could come, you know, right away to
18 determine eligibility, or to help us, you know,
19 communicate to determine eligibility.

20 MS. MACRI: So in follow up, Molly, the
21 form that -- I -- I -- from what I understood,
22 the form of eligibility is given to the
23 individuals to begin to fill out.

1 MS. HANN: Yes.

2 MS. MACRI: Is that form provided just in
3 English?

4 MS. HANN: Yes.

5 MS. BURTON: I have one -- one last --

6 MR. DUNNE: Angela?

7 MS. BURTON: -- for you.

8 Molly, I'm just wondering whether or not
9 in determining -- you mentioned earlier that
10 you guys use the 125. Is there any
11 consideration taken into account with respect
12 to the seriousness of the charge, of the
13 charges with respect to some malleability --

14 MS. HANN: Yes, absolutely.

15 MS. BURTON: -- around that?

16 MS. HANN: I mean, I think we feel -- I
17 think the entire staff in my office feels that
18 most of us would probably qualify for our own
19 services should we be charged with a higher
20 level felony. Just -- you know, certainly
21 don't have the liquid assets to hire an -- a
22 private attorney to pay to represent us in a
23 felony.

1 But absolutely. I mean, someone who
2 might be able to defend against a violation
3 with, you know, a minimal amount of liquid
4 assets and being closer to the 125 percent
5 figure certainly wouldn't be able to defend
6 against a felony charge. Yes.

7 MS. WARTH: Oh, so we take it then that
8 you're using the 125 as a floor, but not as a
9 ceiling?

10 MS. HANN: It's not a ceiling --

11 MS. WARTH: All right.

12 MS. HANN: -- by any means. It's just a
13 starting point so that, you know --

14 MS. WARTH: The conversation?

15 MS. HANN: -- we have some idea that --
16 yeah. You know, Kellie will often -- Kellie
17 and I sit on either side of the wall from each
18 other. So if it's one of my cases, she'll say,
19 oh, so-and-so, you know, they're just over.
20 They make, you know, \$50 a week over, you know.
21 What do you want to do? And we'll usually
22 accept them.

23 MS. WARTH: It's easy. Thank you.

1 MS. HANN: You're welcome.

2 MR. DUNNE: Any further questions?

3 MS. MACRI: No.

4 MR. DUNNE: Once again, thank you so much
5 for your dedication and for the --

6 MS. HANN: You're welcome.

7 MR. DUNNE: -- sharing your insights
8 today.

9 MS. HANN: You're welcome.

10 Would you like a copy of earning
11 application form?

12 MR. DUNNE: We would.

13 MS. HANN: I will get that for accounting
14 and certainly you have my contact information
15 as well as our office's if you want any
16 additional information. Thank you.

17 MS. MACRI: Thank you.

18 MS. WARTH: Thank you, Molly, for coming
19 out.

20 MS. BURTON: Thank you. And thank you,
21 Kellie.

22 MR. DUNNE: All right. Anybody else here
23 who would like to speak?

1 MS. MACRI: I know we've got some -- yes,
2 come on up.

3 MR. DUNNE: Well, good.

4 MS. FLORES: Good afternoon. My name is
5 Marcy Flores, F-L-O-R-E-S. I'm a Warren County
6 public defender. I didn't get to sign up in
7 advance because I had court this morning, so I
8 came here right after court.

9 MS. MACRI: Thank you for coming this
10 morning.

11 MS. FLORES: So thank you.

12 MS. MACRI: We really appreciate it.

13 MS. FLORES: You've asked in the past
14 about people's background. I'll give a
15 30-second bio.

16 I worked in Suffolk County District
17 Attorney's office for 11 years, and left as a
18 deputy bureau chief. I then moved to Warren
19 County, and I was in the Warren County District
20 Attorney's Office as a coordinating assistant
21 district attorney.

22 Then I did two years of private practice,
23 and my law partner, who was the former DA who

1 I'd worked for, we created the public
2 defender's office in 2004 in Warren County, and
3 now I am the public defender. I started as the
4 first assistant. So I've been doing
5 prosecution and defense for over 32 years, so I
6 have a little bit of background in terms of
7 this.

8 I am very supportive of indigent people
9 services, trying to come up with a standard
10 that we could use. It is very important.

11 Mrs. LaFountain is here from our office,
12 and she is the assigned counsel office. She is
13 the office. She runs it. And for us, it's a
14 wonderful thing.

15 When you're talking about Essex County
16 and they say that they review their
17 applications, we don't see them. I get, from
18 Mrs. LaFountain, the name, address, phone
19 number, is the person a US citizen and their
20 marital status. That's all I find out. And,
21 of course, a copy of the charge. So all their
22 qualifications that they submit, I don't see.
23 There's a great deal of confidentiality.

1 Someone asked a question about district
2 attorney's office and do they ever ask for
3 applications. I know that they have in our
4 county. And Mrs. LaFountain is very strong in
5 defending the clients' rights and tells the
6 DA's office they can't see those applications.
7 So that's a very important thing. The
8 applications are confidential, and they need to
9 be confidential.

10 In the terms of discretion,
11 Mrs. LaFountain does not have discretion. She
12 has to file -- follow the rules that have been
13 promulgated, and she follows them to the T.
14 Having some discretion, I think would be a
15 great deal of help, if that is possible.

16 Situations that I see, as a practical
17 matter, that makes things difficult. I am in
18 court and there's a young gentleman under the
19 age of 21 who lives here and there, doesn't
20 live with his parents, and he wants to fill out
21 an application. Well, first, to get him down
22 there to get an -- fill out an application is
23 an act of God. And then when he gets there, he

1 doesn't have his tax returns, he doesn't have
2 documentation, he doesn't have a photo ID.

3 Mrs. LaFountain has to do what is
4 required, and she does a great job of it. But
5 the client then becomes very frustrated. He
6 comes back to court the next week -- because
7 usually courts put them on each week -- saying
8 why haven't you completed the application? And
9 he goes through, I don't have this, I don't
10 have that, I don't have an ID, you know.

11 And I understand Mrs. LaFountain needs it
12 because that's the requirements. We go back
13 and forth with this for probably about a month,
14 and then eventually the judge may assign us
15 from the bench or maybe at that point the kid
16 just takes a plea to the charge because he is
17 frustrated with the system.

18 So there definitely needs to be changes.
19 I think it's a practical matter.

20 The other issue we have is when children
21 live with their parents and the parents don't
22 want to fill out applications or do anything
23 for them. I have had that come up numerous

1 times. Again, the child comes back and forth
2 to court. But they live in the household with
3 a parent and therefore, you have to look at the
4 household income for the family. And again,
5 that becomes a problem. Often, I get assigned
6 on those.

7 Now each court -- each county is very
8 different how they do things. I am assigned
9 it -- the -- in a local court. If the judge
10 feels he may be putting that person into jail
11 at the arraignment, he will say, Mrs. Flores,
12 I'd like you to handle this matter.

13 Fine. I am assigned from the bench. I
14 discuss with the client the qualifications that
15 I need to know in terms of setting -- asking a
16 bail application. I don't ask them all the
17 detail questions that Mrs. LaFountain would
18 need to do because that isn't what I need to
19 do. I need to focus on their qualifications.

20 And I'm assigned for the purpose of
21 arraignment. If they are remanded to the jail
22 or can't make bail, I am still on that case in
23 the local court. If they make bail, my file is

1 closed and Mrs. LaFountain receives a copy of
2 the order that I was assigned for the purpose
3 of arraignment.

4 Now in the county court, it's a different
5 matter. We only have one county court judge,
6 and I get every county is different how they
7 handle things. I am -- I am not assigned for
8 the purpose of arraignment, but I'm there to
9 assist the person at arraignment. So not an
10 official assignment, but I'm there to assist
11 them.

12 So I make the bail application on the
13 person's behalf, I hand them the application --
14 whether they're going into the jail or not --
15 and then tell them, you know, that they need to
16 follow the instructions. And I also give them
17 the instruction sheet from the assigned counsel
18 office. So each court handles things a little
19 differently.

20 I know you've been doing this all
21 morning, so I don't want to go over too much.

22 I feel that there's not a uniformity in
23 the assignment of counsel for arraignment

1 and -- and the standards that are used.
2 Discretion would be a huge thing. I really
3 can't stress that enough. It would just be so
4 wonderful.

5 Defense bar issues. I'm just trying to
6 cut -- hit some of the issues that I heard you
7 mention. In our county, there are certain
8 members of the defense bar who regularly
9 question why someone is assigned, and I don't
10 say why they're assigned because I've been
11 assigned. That's it. I have my assignment
12 sheet. That's it. And I'm assigned until I'm
13 not assigned by the judge.

14 So the defense bar does question things,
15 whether rightly or wrongly. Maybe they know
16 something about a client's background that I
17 don't know, what isn't answered on one of the
18 questions in the application. So there has
19 been times when the defense bar is upset about
20 it.

21 The other things some of the defense bars
22 tells me is the judge needs to remember to tell
23 the client they can hire their own attorney.

1 And sometimes some judges don't say that to
2 them and the defense bar takes umbrage against
3 it because it is something -- you're taking
4 their bread and butter.

5 The reality of my clients -- my clients
6 can't afford to hire another attorney. They
7 are assigned and they're entitled to an
8 attorney to represent them vigorously, and we
9 do that in our office. And I'm very grateful
10 that we do not have to review the applications
11 because of the time frame and the time
12 constraints.

13 Mrs. LaFountain works nonstop. She is
14 now, pursuant to the OILS grant, which we do
15 appreciate --

16 (Off-the-record discussion.)

17 MS. FLORES: Indigent Legal Services. I
18 call it OILS. They call it I-L-S. We always
19 called it something different from the
20 beginning, so I apologize.

21 MR. DUNNE: We try to make your job one
22 letter easier.

23 MS. FLORES: Which is good.

1 But in terms of the grant money that you
2 gave, she has somebody part-time to help her
3 with doing things. The grant money that you
4 have given us, we have gotten another secretary
5 to manage all the grants and other secretarial
6 duties. And starting in September, God
7 willing, we will be hiring another attorney as
8 a result of GLIS, out of the grant for case
9 reduction and attorneys' arraignments.

10 And so we're in the process of setting up
11 meetings with our two biggest courts and the --
12 all the players, the DA, the police
13 departments, various ones -- to set up our
14 schedule when those arraignments are going to
15 be, because you cannot afford to give us enough
16 grant money so they have somebody available
17 24/7. We wish you could. But again, we
18 understand that.

19 So the agency here is so important. And
20 the work that you're doing, we really respect
21 and we really appreciate it and encourage you
22 to continue doing so because it helps all the
23 clients.

1 Now do you have questions for me?

2 MS. WARTH: I do.

3 MS. FLORES: Okay.

4 MS. WARTH: You mentioned that the
5 assigned counsel panel administrator who
6 reviews that, who screens for eligibility,
7 follows promulgated rules.

8 MS. FLORES: Uh-huh.

9 MS. WARTH: Who promulgated those rules?

10 MS. FLORES: You would have to ask

11 Ms. LaFountain that --

12 MS. WARTH: Okay.

13 MS. FLORES: -- because I don't -- I
14 won't see them so it's all good.

15 The one thing I can add, though, is
16 sometimes in some courts judges will assign
17 from the bench and -- when they think someone
18 is going to qualify and maybe they don't
19 qualify.

20 So again, some of the judges in the
21 smaller local courts know their population and
22 their town well to know who they think would
23 qualify versus others that feel that the case

1 may be very complicated, and they'll assign
2 right away. And some just want them to do the
3 exact letter as required and don't want to get
4 involved in the assignments.

5 MS. WARTH: But in your own practice, in
6 your own experience, you don't feel that people
7 are being assigned your office, the service of
8 your offices who really don't need it?

9 MS. FLORES: No, I feel that 99.99
10 percent of the people definitely qualify. And
11 maybe it's 100 percent, but I always want to
12 just allow room for error.

13 MS. WARTH: Allow room for -- because
14 you're a good lawyer and you have to do that.

15 MS. BURTON: Ms. Flores, you mentioned a
16 case, you were talking about a young man who
17 eventually pled to a charge because of his
18 inability to provide the documentation that was
19 required -- or that you understand is required,
20 because I understand that you don't deal with
21 that.

22 MS. FLORES: Yeah.

23 MS. BURTON: Could you say a little bit

1 more about your -- any recommendation that you
2 might have for us that would flow from your
3 understanding that -- of that problem?

4 MS. FLORES: Right. I feel that his
5 problem -- I wasn't his attorney, but I feel
6 that his problem was he couldn't get the
7 documentation necessary. And if you're living
8 transient, you don't keep your -- if your
9 choice is taking food from the last place you
10 were living at or taking your tax returns,
11 they're taking the food. I understand that.

12 So I think the discretionary piece that
13 we don't have would be very helpful. There has
14 to be some give and take in this society to
15 allow someone to qualify. When you see they
16 don't have a place to live and they don't have
17 any income or they're, you know, eating from a
18 soup kitchen, I think those characteristics and
19 factors need to be taken into effect when
20 you're making the analysis of someone is going
21 to be qualified or not. In my heart, I believe
22 that person would be qualified.

23 MS. MACRI: And thank you. I know you

1 had court this morning --

2 MS. FLORES: Yeah.

3 MS. MACRI: -- so we appreciate that
4 you --

5 MS. FLORES: You're very welcome.

6 MS. MACRI: -- made the time to be here
7 on such short notice especially.

8 Let me ask you this: So and from what I
9 was hearing earlier in your presentation, would
10 you feel comfortable with this presumption that
11 there would be an attorney assigned, at
12 minimum, at arraignment? For arraignment
13 purposes only, despite whatever eligibility
14 determination is subsequently made, that
15 that -- would you feel that that would be a
16 fair kind of premise of, you know, guideline
17 that we would possibly consider?

18 MS. FLORES: I definitely think it should
19 be considered, and I think it should occur.
20 The reason being, arraignment is a critical
21 stage and it is very important for a client to
22 have an attorney at that time to advocate on
23 their behalf, explain some of what's going on,

1 because not all -- not every client has been in
2 the criminal justice system before and it's a
3 new experience and it's overwhelming, and I
4 think it's very important for a client to have
5 an attorney at arraignment.

6 And again, we appreciate the grant.

7 MR. DUNNE: Let me ask you, Ms. Flores,
8 please, and of course, we're wrestling with
9 this issue of guaranteeing an attorney at
10 arraignment: Can you discreetly characterize
11 the attitude of the JPs and the reigning
12 magistrates with regard to this requirement?

13 MS. FLORES: I think depending on the
14 type of case it is. The more serious case,
15 you're going to -- the court is going to want
16 you to be there. If it's a small case, they
17 may not be as concerned about it. If it's an
18 AUO third, which is operating with revoked or
19 suspended license, which is a vehicle and
20 traffic unclassified misdemeanor, that is
21 viewed very differently than someone charged
22 with a drug sale. So I think that also makes a
23 difference how the courts look at it.

1 Does that answer your question?

2 MR. DUNNE: Yes, I asked --

3 MS. FLORES: Okay.

4 MR. DUNNE: -- your experience.

5 MS. FLORES: Okay.

6 MR. DUNNE: Well, our gratitude to you.

7 MS. FLORES: You're welcome.

8 MR. DUNNE: You've got a very exciting
9 county you work in.

10 MS. FLORES: It is very exciting. It is.

11 MS. MACRI: Thank you very much. Thank
12 you for letting us be --

13 MR. DUNNE: Thank you.

14 MS. FLORES: Thank you.

15 MS. MACRI: -- included.

16 MS. FLORES: Thank you very much.

17 MR. SOUCIA: And I apologize for my
18 attire. I kind of just threw clothes on and
19 drove this morning.

20 MS. MACRI: Thank you for being here. We
21 really appreciate this.

22 MR. DUNNE: Now what were you saying,
23 please?

1 MR. SOUCIA: My name is Thomas G. Soucia,
2 S-O-U-C-I-A. I'm Franklin County public
3 defender.

4 The concerns I have -- my colleagues
5 already addressed a number of issues -- is
6 whatever the standard you set, the standard we
7 have at the moment is probably too low. And we
8 deal with over a thousand cases a year, which
9 includes family court, county court and local
10 justice courts, and, plus, we do parole appeals
11 and a number of other things. If it goes up,
12 we don't have the staffing to maintain what
13 we're doing, so it becomes an issue with how
14 we're going to pay for this.

15 Ms. Dyer, who's our assigned counsel
16 coordinator, sat down and did some
17 calculations. Based on the 250 percent
18 standard of poverty line, we're looking at 40
19 to 60 percent increase in cases. It's natural
20 for a lot of people, they won't apply. They
21 feel they're going to be rejected. So it
22 becomes more of an issue that they'll look --
23 and unfortunately there's a lot of individuals

1 that don't have counsel that go to court -- be
2 it family court or justice court or even county
3 court, where they don't have counsel available
4 to them -- and that puts them at a distinct
5 disadvantage. I'm now talking about kinship
6 guardianship that was talked about earlier.
7 Grandparents going in, not having counsel and
8 having petitions thrown out. It happens all
9 the time.

10 The standard for a lawyer or a nonlawyer
11 is the same in our courts. So if you go in and
12 you need to set a standard, which is a --
13 difficult for an attorney to establish, when
14 you have a nonlawyer doing it, it's an
15 impossibility.

16 So our system at this -- from my
17 perspective, is broke. It's been broke for
18 years. It's not fair. It's not fair to
19 someone sitting in prison, not fair for someone
20 that doesn't have their children.

21 But the problem is there's only so much
22 of people to go around. We don't have the
23 staffing to do much more than what we have.

1 And my concern is that if we set a standard of
2 eligibility, we have to have something
3 available to make sure that we have the
4 staffing to accomplish that. And at the
5 moment, that's --.

6 MR. LEAHY: Tom, you touch upon a very
7 interesting and important component of the
8 Hurrell-Harring settlement, and it is this:
9 That whereas with the case loads and the
10 quality improvements and the counsel at
11 arraignment the agreement calls upon our office
12 to implement a plan and it pledges the state to
13 fund those improvements. With respect to the
14 counsel eligibility for counsel question, it
15 directs us to set an appropriate standard and
16 an appropriate process, which, as you say, will
17 have -- may have, may well have an inflationary
18 effect upon the number of people who are
19 eligible and it does not have the pledge of the
20 state to come in and fund the increase. So
21 that's a difficulty, which your testimony
22 highlights for us, and I appreciate that.

23 This is related to another fact, which is

1 that five counties are covered under the
2 components of the lawsuit where the state does
3 pledge to fulfill its responsibility and
4 acknowledges its responsibility to be the
5 funding source for the improvements, and the
6 rest of the counties, such as Franklin, which
7 have no such guarantee. Then, of course, that
8 leads into -- I don't know. Were you in
9 Saratoga at the public defender convening in
10 July? The Saratoga meeting, the NYSDA meeting?

11 MR. SOUCIA: I was down there for the
12 conference, but I probably wasn't there for the
13 meeting between --.

14 MR. LEAHY: Sunday meeting.

15 MR. SOUCIA: The Sunday meeting.

16 MR. LEAHY: Because we talked about this,
17 and it ties into the pending legislation that
18 would have the state take over the
19 responsibility over a period of years for the
20 funding that is now provided through the
21 counties and would extend the benefits of the
22 Hurrell-Harring settlement state wide.

23 So that's -- I mention this only because

1 I want you to understand that we're well aware
2 of the deficiencies. And we're well aware of
3 the risks that by doing the right thing with
4 respect to eligibility -- if we could figure
5 out what that is -- we could unintentionally
6 inflate the unfunded state mandate that has
7 bedeviled your county and all other counties
8 over the past 50 years.

9 So movement and activity on all fronts --
10 both our implementation of the settlement,
11 advocacy for equal treatment of all localities
12 and all clients who are represented by
13 providers in those localities -- are all
14 interrelated, they're all essential. And we
15 need to all work together to see that happy day
16 come.

17 MR. SOUCIA: The concern, typically, for
18 any small county in Franklin, population wise,
19 a small county, area wise, is that it's the
20 money. It's always the money. Even today, me
21 being here was an issue regarding money. Two
22 other individuals were supposed to be here. At
23 the last moment, they weren't available. So

1 they didn't want to fund three of us coming
2 down on a trip, unless we carpooled or did
3 something else.

4 But there's always these considerations
5 that are going forth. It's idiotic that we
6 have two different systems for five counties
7 and for the rest of the state except for New
8 York City. I mean, we're putting a burden on
9 local taxpayers to make the difference. We
10 have a system that needs to be fixed, okay, and
11 we have to have a universal standard. It's --
12 someone in New York City should expect the same
13 quality of service as someone in Franklin
14 County. It shouldn't be any different. We
15 should have basic -- but we don't even have an
16 investigator.

17 We're on a contract basis. We have to
18 make decisions on whether or not we have a
19 paralegal or whether or not we're going to do
20 this case or we're going to get the funding to
21 do cases or not. Typically we have to beg for
22 money from -- either from the county or from
23 the judge, and it's not unusual for people to

1 say no.

2 So we make hard decisions every day,
3 okay. And it's difficult for you to make the
4 decision regarding eligibility because it's
5 going to have an enormous impact upon all of
6 us.

7 MS. BURTON: Tom, could I ask? And I
8 don't think you've mentioned a specific
9 guideline amount that you use --

10 MR. SOUCIA: It's -- it's --

11 MS. BURTON: -- so I'm assuming maybe
12 it's 125. Is that --

13 MR. SOUCIA: It's 133.

14 MS. BURTON: 133. Well, that's
15 interesting. I don't think we've heard that
16 number.

17 MR. SOUCIA: I think it's 133, but if --
18 that's my memory of it, it's --

19 MS. BURTON: Yeah.

20 MR. SOUCIA: -- 133.

21 MS. BURTON: Yeah.

22 MS. WARTH: Is that a ceiling or a floor?

23 MR. SOUCIA: It's kind of more like a

1 somewhat of a ceiling. There is some fudge
2 room in there. Not as much fudge room as my
3 colleagues have mentioned. Franklin County is
4 a very poor county. If we go to 250, like I
5 said, we would have 60 more percent cases than
6 what we have.

7 MS. BURTON: And so that leads to my
8 question, which you've basically answered, but
9 I just wanted to make it more explicit, that
10 currently -- and maybe you agree with this and
11 maybe you don't -- but my implicit in that
12 seems to be that currently there are at least
13 40 to 60 percent of the people who appear in
14 court who appear without assigned counsel or
15 maybe appear without counsel at all who might
16 otherwise have a -- have been eligible for
17 counsel. So there's a bunch of people who
18 appeared in court without counsel only because
19 of the very low financial eligibility
20 standards?

21 MR. SOUCIA: That's the assessment we
22 have. There's a number of people that are not
23 being adequately represented. It's a grave

1 concern. The courts are conscious of that.
2 They will assign, on occasion, someone. They
3 also will lecture the petitioner or respondent
4 or the defendant on why don't you have counsel?
5 Okay. Did you apply? Why didn't you apply?
6 If you did apply, what was the result? So
7 you've made a choice consciously to represent
8 yourself, that will -- it's heard routinely.
9 People are making conscious choices, usually.

10 If it's a decision between buying milk,
11 they'll buy milk. Lawyers are luxury items,
12 for the most part. And unless you're either --
13 and typically people will give up their
14 children before they would spend so much money
15 on a lawyer. So they're making these hard
16 choices about the fact that my child is in
17 foster care or what do I do? I mean, and
18 people even make choices between children.
19 Okay.

20 So it's an ongoing issue that we need to
21 address. We need more attorneys. Franklin
22 County doesn't have enough attorneys, okay.

23 When we start conflicting cases out,

1 we're scrambling for looking for qualified
2 attorneys to represent people that have
3 felonies. Or we're scrambling for finding
4 qualified attorneys to do family court.
5 There's just not enough attorneys in Franklin
6 County, which is -- in our state of and the
7 rest of the world, universe, there's more than
8 enough attorneys.

9 So it's a struggle. And it's -- it wears
10 people down and people leave. We have enormous
11 staff turnover. People don't stay more than a
12 couple years because they burn out, so --.

13 MS. MACRI: Tom, can I ask? In your
14 county, who's responsible for doing the -- I
15 mean, we understand that the judge has the
16 primary -- I don't want to say, the authority,
17 but now who actually does the screening of
18 eligibility?

19 MR. SOUCIA: We have assigned counsel
20 coordinator. She supervises bringing in an
21 attorney. She makes the decisions regarding
22 eligibility.

23 We have a relatively simple form. It's

1 only about two pages long. Probably, the
2 reason, because people can't get past a page or
3 two.

4 We will -- people sometimes don't have
5 the documentation they have. They're looking
6 for four -- four paystubs, if they have them.
7 Routinely we had the same thing where people
8 don't know -- no identification. So there's a
9 lot of -- a lot of times people are assigned
10 based on the fact, well, I know John Smith,
11 I've known John Smith since he was this high.
12 So it's a, I know who he is, I know he doesn't
13 have a job. We just do a notarized statement
14 that he has no employment.

15 MS. MACRI: So that's what I wanted to
16 ask you about, is the documentation
17 requirement. Is it fair to say that in your
18 county failure to provide the requested
19 documentation will result in a likely denial
20 unless there's some other type of documentation
21 that can supplement the application?

22 MR. SOUCIA: Yes. And it's one way of
23 eliminating cases, is because people do not

1 provide proper documentation.

2 When I look at -- because we have a
3 monthly assessment or a monthly report that
4 comes out, routinely it's because people fail
5 to provide income documentation is why they're
6 denied. So there is a number of people that
7 are not receiving assistance because they just
8 don't -- either they don't want to or they
9 can't or whatever reason they don't provide
10 documentation.

11 MS. MACRI: So in follow up to that, do
12 you -- does your county have any presumption of
13 assignment? For example, if somebody -- I know
14 that you have some correctional facilities in
15 your neighborhood. Do you have presumption
16 where if somebody is in a correctional facility
17 that they're automatically assigned or do they
18 also have to go through that eligibility
19 determination process?

20 MR. SOUCIA: We do parole appeals
21 routinely. Part of their parole appeal process
22 is that they fill out a form saying they have
23 no income. No one verifies it other than it's

1 sworn to. It's not unusual for someone being
2 in jail. They're automatically qualified based
3 on the fact they're in jail. So that's --.

4 MS. MACRI: How about -- how about from
5 public benefits? Is that the same --?

6 MR. SOUCIA: Public benefits, they
7 usually have to show some type, an indication
8 of public benefits. Either they get something
9 from Social Services, or if they're on an SSI,
10 they have to have some type of documentation.
11 If they don't have documentation, then they end
12 up -- it's not unusual for someone to say well,
13 I don't have it. And then that's -- then we --
14 they do a notarized statement.

15 But it's -- when they send the paperwork
16 in and they don't have the proper
17 documentation, then it's denied based on the
18 face. And even though that part of the thing
19 is that that's sent back saying why it was
20 denied, this is what you need to do -- because
21 that's what Jill does, she's -- there's a
22 little checklist saying you didn't have this,
23 you didn't have that, send it back. It's

1 extremely frustrating for the courts and for
2 those individuals because of the fact
3 everything is delayed. And then, of course,
4 they have to go through the process again.

5 And then sometimes courts will assign
6 this because of the fact that they know John
7 Smith doesn't have any money. Or sometimes the
8 person actually gathers the documentation that
9 they need. But sometimes people just -- then
10 they go in and they represent themselves and
11 the case gets dismissed.

12 MS. BURTON: Can I ask a follow --

13 MS. MACRI: Tom --

14 MS. BURTON: -- oh, I'm sorry, Joanne.

15 MS. MACRI: Just one last question --

16 MR. SOUCIA: There's family court.

17 MS. MACRI: -- from me.

18 MS. BURTON: Yeah.

19 MS. MACRI: Can I ask --

20 MS. BURTON: Go ahead, Joanne.

21 MS. MACRI: -- can I ask real quickly
22 about the parental income and the, you know,
23 for spousal income? If there is somebody who's

1 between 17 -- I know you've heard that question
2 asked before -- do you -- does your county
3 consider parental income if it's somebody
4 arrested between 17 and 21, do you know?

5 MR. SOUCIA: Well, it depends on the
6 situation. If it's just to say there that they
7 don't -- the parental income won't be looked at
8 if the person is not living at home. If
9 it's -- if they are living at home, then it
10 will be looked at. They will look at spousal
11 income. So those are a number of factors, so
12 that typically we'll knock someone out because
13 of the fact there's too much income.

14 And in Franklin County, you will find
15 people will rather have a public defender than
16 pay for someone. Bar being that it's so small
17 that there's not really an issue of us taking
18 cases away from people.

19 Occasionally -- I had a case last night
20 that they took away from me, and I'm going,
21 okay, that's a great deal. Why didn't you just
22 stay with us? You would have got the same
23 deal.

1 But the fact is that people expect
2 results, and they also -- there's always a
3 perception a private attorney is a real
4 attorney, therefore we'll get better results.

5 MS. BURTON: Tom, I'm sorry to bombard
6 you with questions. But I wanted to -- since
7 your office does also represent clients in
8 family court cases, and just sort of following
9 up on the presumption question, I'm wondering
10 whether, particularly in Article 10, child
11 abuse, neglect, termination of parental rights
12 cases, is there any sort of a presumption that
13 those respondents would be automatically
14 entitled to counsel or do they also need to go
15 through the same eligibility -- financial
16 eligibility process with the potential that if
17 they don't complete the application or provide
18 the documentation that they would end up not
19 being represented in an Article 10 proceeding?

20 MR. SOUCIA: Well, it does occasionally
21 happen that people on Article 10s don't fill
22 out the paperwork or there isn't a requirement
23 that they do fill it out.

1 Ms. Dyer is pretty quick to go up to
2 court to make sure paperwork is filled out and
3 the process is done as quickly as possible. A
4 lot of times people wait till the last moment.
5 I mean, we have a number of cases where we get
6 custody cases where literally the trial is the
7 next day and then we get the assignment. So we
8 had one this week even. I mean, literally it
9 was -- today is -- it was Thursday. It -- get
10 the assignment on Tuesday.

11 MS. BURTON: Uh-huh.

12 MR. SOUCIA: Now we asked for an
13 adjournment, and it was granted. There's no
14 way that you can prep in that short of a period
15 of time. It's not realistic to expect it.

16 And sometimes you don't get adjournments.
17 Because we've had cases where the thing is,
18 well, you've had all this time to prepare, to
19 get an attorney, and you've waited till the
20 last moment, then you basically are stuck with
21 what you got.

22 MS. BURTON: Uh-huh.

23 MR. SOUCIA: So a lot of the -- what we

1 do is like we're trying to -- like we're kind
2 of like miracle workers, kind of thing, we do
3 the best with what the time. We ask for
4 adjournments.

5 There's a lot of pressure to get these
6 things through the system, okay? There's
7 standards and goals. There's all this stuff
8 about the fact that we were interested in
9 processing cases, okay, and the courts were
10 interested in processing cases. That means
11 that they want -- they expect things to be
12 done.

13 There's not enough time in the day to do
14 everything, so there's big pressure, also, to
15 settle cases. And when you have a system
16 that's been in place for over 30 years, if you
17 look at who's sitting on the bench or who's in
18 the, you know, law guardian in the last 30
19 years, their philosophy is, we can settle this,
20 we know best. We've been doing it for 30
21 years. And then that's the way to go. And
22 then unfortunately, when you have clients that
23 say well, I don't agree with that and I want a

1 trial.

2 But sometimes that's basically it. You
3 know, doing trial sometimes is held against
4 you. It's held against you if you do a
5 criminal trial. You should have settled that
6 case. What's wrong with you?

7 Okay, so you -- there's a real enormous
8 pressure on winning, okay, because if you don't
9 win, if it's a criminal trial, your client is
10 going to go to prison for a long time.

11 So eligibility and time frames, all these
12 different things, in having the staff
13 available, it's extremely important. So we
14 don't want people sitting in prison and we
15 don't want families to lose -- losing their
16 children, and we want the best people available
17 to represent them.

18 And dedication of the people that
19 typically are doing this job -- be it Molly or
20 someone else -- the reality is is that it takes
21 a toll on that person, okay. We're not as
22 young as we used to be. So it becomes a
23 question of how we can do this and do it in a

1 manner that's going to represent our clients
2 best and make sure that the services are
3 available to people that need it, and also make
4 sure that there's something left to us the end
5 of the day.

6 MS. BURTON: Thank you, Tom.

7 MR. DUNNE: Mr. Soucia, I thank you for
8 your very sensitive and realistic portrayal of
9 what you are facing on a daily basis in
10 providing justice.

11 Could you answer a couple of questions?

12 First of all --

13 MR. SOUCIA: Sure.

14 MR. DUNNE: -- your -- the staff of the
15 public defender office here in Franklin County?

16 MR. SOUCIA: Right. Sure. There's three
17 attorneys including myself. We have two
18 paralegals. One is based on the grant that we
19 received. We have one secretary, and we have a
20 clerk typist which was also provided based on
21 the grant that we received.

22 MR. DUNNE: And --

23 MR. SOUCIA: That's just the one office.

1 There's another office. The conflict office
2 has, at the moment, two attorneys and a legal
3 secretary. It's supposed to be staffed by
4 three attorneys, and there's some debate about
5 what they're going to do with that.

6 MR. DUNNE: Uh-huh. And do you know how
7 many lawyers are there at the bar in Franklin
8 County? Ballpark figure?

9 MR. SOUCIA: Ballpark figure? Somewhere
10 between 50 and 100, I would think, and probably
11 somewhere around 80.

12 MR. DUNNE: Do you have any sense of how
13 many of them were signed up for the 18-B
14 program?

15 MR. SOUCIA: Not --

16 MR. DUNNE: Pardon me?

17 MR. SOUCIA: Not many.

18 MR. DUNNE: All right.

19 MR. SOUCIA: I think there's only like 18
20 or so.

21 MR. DUNNE: And --

22 MR. SOUCIA: There's only like three or
23 four attorneys that are qualified to do

1 felonies.

2 MR. DUNNE: Uh-huh. And also, how many
3 state prisons are located in Franklin County?

4 MR. SOUCIA: We have three. There is
5 Upstate, there's Franklin, and there's Bare
6 Hill. Used to have Gabriels, but they closed
7 that down.

8 MR. DUNNE: You have any sense of how
9 many inmates are in -- collectively in there?

10 MR. SOUCIA: There's probably over
11 10,000. Our population, it's somewhat based on
12 that. We only have 50,000 people in the
13 county. And I would suspect that based on
14 that, that would probably be my guesstimate,
15 would be about 10,000 in both -- all three
16 prisons.

17 MR. DUNNE: That many.

18 MR. SOUCIA: Upstate is basically -- any
19 of those facilities. You look at Franklin, you
20 look at Bare Hill, you look at Upstate.
21 Typically it's where you send people that you
22 don't want anywhere else in the state, and
23 that's the purpose of why Franklin wanted those

1 prisons in the first place. It's a big boom
2 for our economy. I mean, almost -- I would --
3 all of us have relatives that work at these
4 correctional facilities. I mean, I have --
5 well, I have one brother, one nephew. I had
6 two brothers that worked at the facilities.
7 They were -- you know typically they -- that's
8 their income.

9 And it's -- the normal way people from
10 the city or for other urban areas that are
11 shipped up, and we have buses that come up
12 every weekend. And we have -- get local -- we
13 have a lot of prison contraband cases.

14 MR. DUNNE: A lot of what?

15 MR. SOUCIA: Prison contraband cases.

16 MR. DUNNE: Wow. That's somewhat away
17 from our kin, but thank you. It's -- well, I'm
18 just a city boy. I don't --.

19 MR. SOUCIA: I'm just a country attorney.
20 It's I just help people all the time, sir.

21 MR. DUNNE: Pardon?

22 MR. SOUCIA: I'm a country attorney. I'm
23 just a simple country attorney.

1 MR. DUNNE: They're the best. Well,
2 thank you. You're very generous with your
3 time. Appreciate your insights.

4 MR. SOUCIA: Thank you for allowing me to
5 speak even though I didn't say I was going to.
6 I felt I had an obligation to my county to
7 mention the fact that we're concerned about the
8 costs. I'm not so much concerned about the
9 costs. I'm more concerned about how I'm going
10 to clone myself. So whatever you come up with,
11 we'll do what we have to do. Our motto is that
12 we can do anything, even the impossible.

13 MR. DUNNE: Good.

14 MS. BURTON: We appreciate you.

15 MR. DUNNE: Thank you very much.

16 MS. BURTON: Thank you.

17 MR. SOUCIA: Thank you.

18 MR. DUNNE: Thank you.

19 Anybody else would like to speak?

20 MS. LaFOUNTAIN: Hello. Joy LaFountain,
21 Warren County assigned counsel.

22 Hi, Bill. How are you?

23 MR. LEAHY: Okay. How are you?

1 MR. DUNNE: Give me your name again,
2 please.

3 MS. LaFOUNTAIN: Joy LaFountain.

4 MR. DUNNE: Thank you.

5 MS. LaFOUNTAIN: You're welcome.

6 Where would you like me to start? Marcy
7 kind of hit a lot.

8 MS. MACRI: Yeah, if you could just tell
9 us a little bit about just generally, you know,
10 what your criteria is in terms of eligibility
11 for --

12 MS. LaFOUNTAIN: Well, originally,
13 assigned counsel office was established in
14 1964. That woman held the position 18, 20
15 years. And then there was another women who
16 was there 7 years, and now there's me, 11
17 years. So everything that -- the rules Marcy
18 discussed about being promulgated, it's just
19 the following events that was laid down by
20 prior supervisors, board of supervisors,
21 criminal justice committee.

22 There's a lot of pushback from board of
23 supervisors, as you all know, about money being

1 spent. Regardless if you tell them it's a
2 mandated office, they need to be explained that
3 every year, usually every six months, that it's
4 a mandated office regardless. I'm constantly
5 battling with them over money. You can't touch
6 this. You have to pay these vendors, you have
7 to provide the service. It's just the way they
8 operate. They're always looking to cut
9 somebody's toes off to give somebody a leg up.

10 MS. MACRI: Can I ask a direct response
11 to that issue?

12 MS. LaFOUNTAIN: Sure.

13 MS. MACRI: Do your board of supervisors,
14 or other county officials, actually ask you to
15 sit down and talk about or are they educated
16 about the screening process that is undertaken
17 for eligibility?

18 MS. LaFOUNTAIN: I have begged them, and
19 I'm not good at begging. It's not in my
20 nature. I've also tried to ram it down their
21 throats, and that doesn't work either.

22 One supervisor, who is now the chairman
23 of the board, was in my office for two hours

1 one day about four years ago, when he was just
2 a supervisor. And he was shocked, not only at
3 the volume, but at what you actually have to go
4 through to get straight answers out of people
5 to get the information.

6 You know, you're 46 years old and you
7 live with your mom. You don't have a driver's
8 license, you don't have a Social Security card.
9 I mean, you know, that's a little crazy.

10 And he was impressed. He couldn't
11 believe the process itself takes -- you know,
12 it's a timely thing if people don't -- don't
13 want to provide the information. You know, I
14 have to at least verify where they live. I
15 have to verify if they have income. If they
16 have expenses, I need to see that as well.

17 You know, I'm not trying to cut people's
18 nose off despite their face, but they have to
19 have some basic information. If they tell me
20 they're homeless, where did you stay last? Did
21 you stay with an aunt or a cousin, an uncle,
22 you know, your friend? Were you at the soup
23 kitchen? You know, I've -- there's a lot of

1 license for me to get -- to let these people
2 get into the system, but some people are just
3 completely resistant.

4 MS. MACRI: Do you have any -- in your
5 process, do you have any presumptive guidelines
6 that you follow? For example, you know, this
7 is going to result in automatic assignment?

8 MS. LaFOUNTAIN: Yeah, he's incarcerated.
9 Incarcerated individuals are automatically
10 assigned.

11 MS. MACRI: Incarcerated by way of just
12 prisons or incarcerated in terms of not being
13 able to post bail? Is there a difference?

14 MS. LaFOUNTAIN: Bail is not an issue.
15 If they're incarcerated, period, it's automatic
16 assignment.

17 MS. MACRI: How about mental health
18 institution housing or --

19 MS. LaFOUNTAIN: I make --

20 MS. MACRI: -- soup kitchen, whether in
21 shelters?

22 MS. LaFOUNTAIN: -- well, I make a point
23 of contacting those places myself to see that

1 they're actually a resident there. Or I make
2 sure that proper authorizations are signed so
3 that I can speak to a counselor so I can get a
4 handle on what the situation is for that person
5 so that I can honestly assess them and say, you
6 know, they've got nothing and don't have access
7 to anything, they've got to be -- they've got
8 to be pushed through.

9 MS. MACRI: What about the documentation
10 requirement? Is it something that your county
11 mandates that you collect for them or that you
12 have to give it to someone at the end of the
13 day or --?

14 MS. LaFOUNTAIN: They don't have any
15 rules whatsoever, our county. They have no
16 interest in the office, so you're kind of left
17 holding the bag, both in -- one in each hand.

18 You know, I follow the basic guidelines
19 that I see from my predecessors. I completely
20 revamped the application, which is now two
21 pages. Covers most of the basic information
22 that the Essex County counterpart showed you,
23 and it's also available online. They have a

1 punch list now that they're provided when they
2 come.

3 Most of my people are trained because
4 they're all repeaters. I mean, I have
5 generations of people that come back to my
6 window on a regular basis.

7 So, you know, if Fred's uncle comes in
8 and I said, you know, where is Fred? He says,
9 well, he's not -- he's not living with so and
10 so. And I said here, give this to Fred. Tell
11 Fred he needs to come in and see me or he needs
12 to call me so we can get him squared away.
13 Fred doesn't want to participate. Fred doesn't
14 want to provide. I know where Fred is. Come
15 on, Fred, just give me a call. I'll hook you
16 up. But I can't do it for you if you don't
17 want to at least help yourself a little bit.
18 There's got to be initiative on the part of the
19 applicant.

20 MS. BURTON: Joy, can I just ask you --

21 MS. LaFOUNTAIN: Sure.

22 MS. BURTON: -- your similar -- my
23 particular interest is in family court --

1 MS. LaFOUNTAIN: Uh-huh.

2 MS. BURTON: -- and I'm wondering if in
3 your county you see people ending up
4 representing themselves or are going through
5 their cases without counsel --

6 MS. LaFOUNTAIN: Very rarely.

7 MS. BURTON: -- in -- in any family court
8 proceedings or --?

9 MS. LaFOUNTAIN: In any family court
10 proceeding, very rarely.

11 MS. BURTON: Uh-huh.

12 MS. LaFOUNTAIN: Very rarely. Our judges
13 are quick to assign from the bench and
14 there's -- in particular judge is Judge Breen,
15 who's been out sick for quite a while. But
16 he's -- he's really on top of people's income,
17 their life. He knows a lot about them. He
18 knows immediately if they qualify or not, and
19 he's -- doesn't hesitate to assign.

20 MS. BURTON: So in many cases in family
21 court, you don't -- the screening is done by
22 the judge and then assigned; is that correct?

23 MS. LaFOUNTAIN: He doesn't screen

1 anything. He does it --

2 MS. BURTON: He just bring -- well, I --
3 I don't mean -- screening -- screening in the
4 broad since the --

5 MS. LaFOUNTAIN: Yes.

6 MS. BURTON: -- of coming to a
7 determination --

8 MS. LaFOUNTAIN: Yes.

9 MS. BURTON: -- that this person --

10 MS. LaFOUNTAIN: That's correct.

11 MS. BURTON: -- is or is not eligible?

12 MS. LaFOUNTAIN: I mean, because it --
13 like I said, a lot of these people are -- have
14 been in the system so long he knows all their
15 families. He knows all the children, the
16 grandchildren. It's just -- you know, they all
17 get lumped together and you -- you end up
18 knowing everyone.

19 But most all of -- I would say
20 99.9 percent of my applicants for family court
21 are always compliant. They have everything
22 they need. That they're usually in and out.
23 They know within hours whether or not they've

1 qualified.

2 MR. LEAHY: So you're describing a
3 system -- I'm sorry to interrupt -- but you're
4 describing a system which is fast, it's
5 efficient --

6 MS. LaFOUNTAIN: Yeah.

7 MR. LEAHY: -- it has an umbrella that
8 covers almost all the people who apply --

9 MS. LaFOUNTAIN: Correct.

10 MR. LEAHY: -- for counsel. It sounds
11 like a magical solution.

12 MS. LaFOUNTAIN: I created it. Want to
13 hire me?

14 MR. LEAHY: Yeah.

15 MS. LaFOUNTAIN: Always looking to get
16 out from under the supervisors.

17 MS. MACRI: That system though, how much
18 time is devoted to this particular process?

19 MS. LaFOUNTAIN: Let's see. Of late, my
20 numbers daily -- because I see people for three
21 hours, then it takes me the rest of the day to
22 go through the paperwork -- so average numbers,
23 I'd see a week, has been 10 people. But I have

1 done up to 36 people in three hours. So I can
2 rock and roll it when it needs to get done.

3 It's people know what they need to do,
4 you know. So they know the process, they
5 have -- they are given the information swiftly,
6 they can access the information online. And I
7 tell everybody to apply regardless of whether
8 they think they -- they're going to qualify. I
9 said apply. The only way you're going to know
10 for sure is come in, talk to me. We could look
11 at your paperwork. We'll get you squared away.

12 MR. LEAHY: Last weekend I had a hearing
13 in Binghamton, we received -- and we hadn't
14 been aware of this -- a third department set
15 the eligibility guidelines from 1977. They
16 were printed out by a typewriter, of course --

17 MS. LaFOUNTAIN: Right.

18 MR. LEAHY: -- and they were pretty good.
19 I don't know that we've comprehensively studied
20 them yet, but they were proposed to us as a
21 very good guide. And they looked to us as
22 though they were a pretty good guide.

23 Are you familiar with them?

1 MS. LaFOUNTAIN: I would love to see
2 them. I got ancient history with my file
3 drawers. And I've kept it all just in the
4 event somebody may need to see something like
5 that. I don't know if there is anything, I
6 don't have the time to go through it. But I
7 kept it all.

8 MS. MACRI: Can I ask what you estimate
9 to be the denial rate in your office, based on
10 other documentation, failure to provide
11 documentation?

12 MS. LaFOUNTAIN: Well, usually it's not
13 failure to provide documentation. Usually it's
14 failure to even attempt to comply. Yeah, a lot
15 of people, that's, you know, that's none of
16 your business. Yeah. Oh, okay. I can't help
17 you if you don't let me help you, you know?

18 I'd say the rate, it can't be more than
19 8 percent denial.

20 MS. MACRI: Do you -- when it's denied,
21 do you advise them on how to appeal that
22 denial?

23 MS. LaFOUNTAIN: Well, I tell them if

1 they're short by 2- or \$300, I said maybe
2 you've got expenses that you forgot. I go over
3 the entire list for them again. Let's look at
4 this. And I mention every possible expense I
5 can think of that they may have forgotten that
6 they even paid cash for out of their pocket or
7 that maybe somebody kicked in to help them pay.
8 I said just bring me a receipt. If somebody
9 paid that for you, bring me the receipt. I
10 give them every opportunity to do it. But
11 there is no formal process in place. I have no
12 backup. It's just me.

13 MS. MACRI: So can I ask -- and this is
14 sort of a tough question -- but do you find
15 yourself, though, exercising some discretion in
16 those cases --

17 MS. LaFOUNTAIN: Absolutely.

18 MS. MACRI: -- so if someone, let's say,
19 doesn't find that receipt? I mean, because
20 these are guidelines, from what I understand,
21 that that your predecessors have promulgated
22 and you've --

23 MS. LaFOUNTAIN: Correct.

1 MS. MACRI: -- revamped?

2 MS. LaFOUNTAIN: Yeah.

3 MS. MACRI: So this is based on your
4 discretion?

5 MS. LaFOUNTAIN: Right. Absolutely. And
6 it has a lot of leeway for people. I mean, if
7 you're within \$200, I know there's something
8 you've forgotten, you know. If you're within
9 \$4000, now there is a problem. That's a big
10 problem.

11 And I give those people the same
12 opportunity. I said is there something we've
13 forgotten? And I'll go over it with them
14 repeatedly to help them try and get to where
15 they need to be.

16 MS. MACRI: Oh, can I ask in a scenario?
17 Let's take the \$200 example for instance. So
18 someone says I have looked and looked and
19 looked, and I can't find anything.

20 MS. LaFOUNTAIN: Here is -- here is the
21 way it goes: First timer, mostly family court,
22 this is -- these are the ones that get really
23 close. I say, this time you're good to go.

1 Next time, keep the receipts if you have to
2 come back. Everybody gets --

3 MS. MACRI: What about --

4 MS. LaFOUNTAIN: -- a pass.

5 MS. MACRI: -- what about criminal
6 matters?

7 MS. LaFOUNTAIN: Criminal matters,
8 usually there's not a lot of income information
9 to worry about, you know. I'd say half of them
10 are incarcerated. They're always provided with
11 arraignment coverage.

12 When they're released, the correction
13 officers tell them you need to reapply. You
14 need to go straight -- or they give them an
15 application. Go straight over and see her.
16 She'll get you hooked up and let you know what
17 you need to bring in.

18 Most people -- I'd say, 70 percent -- are
19 very compliant when it comes to the criminal.
20 But then there are those that don't want to
21 provide. It's none of your business. You
22 know, it's you don't need to know where I'm
23 staying. I don't have to have an ID. You

1 know, sometimes they won't even sign their
2 applications. I'm surprised they bring them in
3 a lot of times.

4 MS. MACRI: So in those criminal matters,
5 I just want to focus on them for a moment.

6 MS. LaFOUNTAIN: Sure.

7 MS. MACRI: Sometimes there's a time
8 limits issue --

9 MS. LaFOUNTAIN: Absolutely.

10 MS. MACRI: -- that goes on in criminal
11 matters where certain things need to be done --

12 MS. LaFOUNTAIN: Right.

13 MS. MACRI: -- fairly expeditiously to
14 protect those -- that individual's rights --

15 MS. LaFOUNTAIN: Correct.

16 MS. MACRI: -- in the matter. How do you
17 address that?

18 MS. LaFOUNTAIN: I call a judge. I said
19 you're the man with the power, you know. I
20 mean, you know, this guy doesn't want to
21 provide the information. I have no idea what
22 his status is, but I know you've got 48 hours,
23 so he's all yours.

1 MS. MACRI: Okay.

2 MS. LaFOUNTAIN: Yeah. I'm not hesitant
3 about calling the judge and telling him people
4 don't want to comply, it's your call, you know.

5 MS. MACRI: That's fair enough.

6 MS. LaFOUNTAIN: I'm not going to stop
7 him from being -- being represented. I know
8 how crucial it is.

9 MS. MACRI: Thank you.

10 MS. WARTH: Do you know what judges
11 you should -- I mean, do you have a sense of
12 any follow up of what happens in those
13 circumstances, whether judges assign or don't?

14 MS. LaFOUNTAIN: There's only a couple of
15 judges that bother to call me back, because
16 they're judges and I'm just a layperson, so --.

17 MS. WARTH: I know how that goes.

18 MS. LaFOUNTAIN: There is --

19 MS. WARTH: That's true with defense
20 attorneys too.

21 MS. LaFOUNTAIN: I'm very close with all
22 the local court staff. Their clerks and their
23 confidential secretaries all will call me up,

1 e-mail me or send me an order.

2 MS. WARTH: Okay.

3 MS. LaFOUNTAIN: Yeah, 9 out of 10 times
4 I request an order just so I have coverage from
5 the guys upstairs.

6 MS. MACRI: Can I ask one other followup?

7 MS. LaFOUNTAIN: Sure.

8 MS. MACRI: Are you somewhat in any way
9 driven by -- I know you had started off talking
10 to us about some of the pressures of the county
11 and -- and budget issues that I know all
12 counties face. Are you in any way driven by
13 those pressures when you have to determine what
14 that eligibility screening should look like?

15 MS. LaFOUNTAIN: Absolutely not. I push
16 back harder upstairs than they expect. You
17 know, everybody has the right to it. I tell
18 everybody that, you know. And I'll get you
19 there, but you got to help me get you there,
20 you know. That's part of the problem, the road
21 blocks or the people themselves don't want to
22 be active in seeking their own defense. So
23 I -- I try to push them to it.

1 MR. DUNNE: Well, thank you so much for
2 enlightening us --

3 MS. LaFOUNTAIN: You're welcome.

4 MR. DUNNE: -- from the front lines --

5 MS. LaFOUNTAIN: Yeah, that's --

6 MR. DUNNE: -- or maybe it's the
7 trenches.

8 MS. LaFOUNTAIN: It is both. Kind of
9 both.

10 MR. DUNNE: All right. You're a
11 strong --

12 MS. LaFOUNTAIN: Sometimes I'm digging
13 the trench, sometimes I'm holding off --

14 MR. DUNNE: Well, thank you.
15 Any other --

16 MS. LaFOUNTAIN: You're welcome.

17 MR. DUNNE: -- further questions?

18 MS. LaFOUNTAIN: And you have my contact
19 information and website if you need to see any
20 further information?

21 MS. MACRI: We appreciate you're coming
22 on such short notice.

23 MS. LaFOUNTAIN: Thank you. Now I get to

1 have lunch.

2 MR. DUNNE: If there are no further
3 members of the public who would like to
4 testify, we declare this hearing closed.

5 MS. MACRI: Thank you. Thanks everyone.

6 (The hearing concluded)

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1 STATE OF NEW YORK)

2 COUNTY OF ST. LAWRENCE)

3 I, Mary Elizabeth Burnham, a Notary Public in the
4 state of New York, do hereby certify that the foregoing
5 public hearing was taken before me, that the foregoing
6 typewritten transcription of the hearing, consisting of
7 pages number 3 to 172, inclusive, was produced to the
8 best of my ability of said public hearing.

9 IN WITNESS WHEREOF, I have hereunto subscribed my
10 name, this the 6th day of October 2015.

11 

Mary E. Burnham, Notary Public

12 State of New York

13 County of St. Lawrence

14 My commission expires: 6/15/19

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