

*Hurrell-Harring, et al. vs.
The State of New York*

*PUBLIC HEARING
July 30, 2015*



METSCHL
AND ASSOCIATES

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1 Office of Indigent Legal Services
2 Public Hearing for the 8th Judicial District.

3 _____
4 Hurrell-Harring et al.

5
6 -vs-

7
8 The State of New York

9 _____
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11 Public Hearing in the above-captioned matter,
12 held in the Ceremonial Courtroom, Old County
13 Hall, 92 Franklin Street, Buffalo, New York, on
14 Thursday, July 30, 2015 at 11:08 A.M. before
15 BARBARA BUYERS, CSR, RPR, Notary Public.

16
17

18 PANEL MEMBERS:

19
20 HONORABLE SHEILA DiTULLIO,
21 Board Member of the New York State Office of
22 Indigent Legal Services.

23 VINCENT E. DOYLE III, ESQ.,
24 Board Member of the New York State Office of
25 Indigent Legal Services.

1 MATTHEW ALPERN,
2 Director of Quality Enhancement for Criminal
3 Defense at the New York State Office of Indigent
4 Legal Services.

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

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11
12 JUDGE DiTULLIO: If everyone's ready, we
13 can start.

14 Good morning, everyone. Welcome to
15 Buffalo and our Ceremonial Courtroom. I'm
16 Judge DiTullio, Sheila DiTullio. I know most
17 of you in here. I'm a County Court judge. I
18 handle criminal matters on a daily basis.
19 Nice to see you, Bob. I'm also the
20 supervising judge for the criminal courts for
21 the 8th Judicial District. I'd like to thank
22 all of you for joining us here today to
23 discuss the eligibility for assignment of
24 counsel.

25 Let me read you this little script, and
then I'll be a little bit more informal and
more personal. But for the record, over
fifty years ago, the Supreme Court announced
in Gideon versus Wainwright that any person
who is too poor to hire a lawyer must be

1 provided with counsel during a criminal
2 proceeding.

3 Moreover, New York was a pioneer among
4 the states in providing a statutory right to
5 counsel for litigants in a range of Family
6 Court proceedings, and as early as 1975, the
7 New York State Legislature noted because of
8 the possible infringements of fundamental
9 interests and rights, including the loss of a
10 child's society and the possibility of
11 criminal charges, litigants have a
12 constitutional right to counsel in certain
13 Family Court proceedings.

14 But as many of us know, despite the
15 acknowledgment of these principles, New York
16 State, as well as many other states, continue
17 to struggle with this obligation to providing
18 adequate support to ensure access to the
19 courts for those unable to afford to pay for
20 an attorney on an equal basis with those who
21 can afford private counsel.

22 I think all of you know, there was a
23 settlement agreement on March 11th of 2015 in
24 the landmark case Hurrell-Harring, in which
25 the state acknowledged responsibility for

1 ensuring quality mandated representation.
2 The New York State Office of Indigent Legal
3 Services -- I'm a board member as well as
4 many people here -- have been vested with the
5 authority to fully implement the terms of
6 this historic settlement agreement.

7 As part of that agreement, the Indigent
8 Legal Services board must develop and issue
9 recommendations that will be distributed
10 statewide to guide courts in counties located
11 outside of New York City in determining
12 whether a person is unable to afford counsel
13 and therefore, eligible for mandated
14 representation in criminal court proceedings.

15 The purpose of this public hearing is to
16 solicit your views, opinions and comments on
17 the criteria that should be used and the
18 process or method that should be implemented
19 in determining eligibility.

20 Before we begin, let me just say on a
21 personal note, I've been a member of the
22 Indigent Legal Services board for
23 approximately five years; one of the few
24 boards that I remain on because it's a
25 worthwhile board. I'm very passionate about

1 this issue, as everyone is in this room. The
2 poor, the indigent, should have quality
3 representation. That is an issue across the
4 state and across the country. We had our
5 director, Bill Leahy of the ILS board and
6 shared by our chief judge -- and how nice to
7 have the chief judge take this on as his
8 number one issue as chief judge -- that there
9 has to be equal representation for the
10 indigent and the poor.

11 Our panelists here, a distinguished
12 group. We have Vince Doyle to my right.
13 Vince is well known in the legal community.
14 He's a board member of ILS, he's a current
15 partner with Connors & Vilaro and the past
16 president of the New York State Bar
17 Association where Vince focused on efforts to
18 improve the quality and availability of legal
19 services, particularly to vulnerable persons
20 such as veterans, immigrants and poor people,
21 and led the bar association in its efforts to
22 increase its own diversity as well as that of
23 the legal profession as a whole.

24 Vince has done so many things for the
25 legal community. I'm going to keep it short,

1 it's a pleasure to have Vince here, and he
2 can make comments and certainly answer any of
3 your questions.

4 We have to my left Joanne Macri, and
5 Joanne is just a wonderful member of ILS.
6 She's the Director of Regional Initiatives at
7 the New York State office. If you don't know
8 Joanne, she works 24/7. She was e-mailing me
9 last night at eleven-thirty P.M. on the
10 agenda for today as she drove in from Albany.
11 She's a breath of fresh air for the board,
12 she's intelligent, she's smart and she's
13 passionate. She currently oversees the
14 implementation of a statewide network of six
15 Regional Immigration Assistance Centers on
16 behalf of the New York State Office of
17 Indigent Legal Services.

18 Prior to joining ILS, she was the
19 director of the Criminal Defense Immigration
20 Project and the Immigrant Defense Project of
21 the New York State Defenders Association.
22 And she taught for several years as an
23 adjunct professor on immigration law at U.B.
24 law school. So thank you, Joanne, for being
25 here.

1 And then we have to Vince Doyle's right,
2 Matthew Alpern?

3 MR. ALPERN: Yes.

4 JUDGE DiTULLIO: And so nice to have
5 Matthew here. I rarely see you here in
6 Buffalo, used to seeing you in New York. So
7 Matthew, welcome.

8 Matthew -- Mr. Alpern has dedicated his
9 legal career to providing high quality legal
10 representation to indigent persons accused of
11 criminal offenses. He has served in the
12 Public Defender Service for the District of
13 Columbia for over ten years as a deputy chief
14 of the trial division and senior litigation
15 attorney. He has also served as the deputy
16 capital defender with the New York State
17 Capitol Defender's Office between 1999 and
18 2005. So ILS is really fortunate to have
19 Matt Alpern. And again, welcome.

20 With that, we'll begin with our speakers?

21 MS. MACRI: Yes.

22 JUDGE DiTULLIO: And our first speaker is
23 Mr. Mark Williams, public defender, public
24 defender of Cattaraugus County and a great
25 fly fisher.

1 MR. WILLIAMS: Oh, no, you have to teach
2 me. I didn't say I was good. That's what
3 I've been waiting for, Judge.

4 Well, good morning. Certainly my
5 privilege and honor to be here to talk about
6 eligibility standards for prospective clients
7 of the public defender's office, at least in
8 Cattaraugus County.

9 I have been the Public Defender of
10 Cattaraugus County since January 1st of 2003.
11 Prior to that, I have some experience that I
12 think is relevant to this issue. I served as
13 the town judge of the town of Hinsdale from
14 1987 through 1995 and I left that position to
15 run for the county legislature in Cattaraugus
16 County, and I served on the county
17 legislature from 1996 until 2002; most of
18 that time as the majority leader of the
19 county legislature.

20 I want to talk briefly about the system
21 in Cattaraugus County before mid 2003 for
22 determining eligibility. As a town judge
23 from 1986 -- or, 1987, there was an assigned
24 counsel system, there was not a public
25 defender's office at the time. And

1 eligibility was determined by each of the
2 various judges, and I can tell you there are
3 about fifty judges in Cattaraugus County.
4 The number has gone down with some
5 consolidations in the last few years, but
6 each judge would make the determination of
7 whether or not somebody needed to be sent to
8 the assigned counsel system for an attorney,
9 and then each judge would also make the
10 actual assignment from the bench, from a list
11 that was provided by the program.

12 There was no uniformity of who was
13 getting an attorney; questions, of course,
14 that we were advised we should ask ranged
15 from do you own a car, do you own real
16 estate, do you have any money in the bank,
17 what do your parents do if it was a younger
18 person who still resided at home, can your
19 parents hire you an attorney.

20 Certainly no set guidelines.

21 In mid 2003, after taking office on the
22 1st of that year, I'm glad to see that Gary
23 Horton is here, because NYSDA directed me to
24 Gary as a mentor in establishing an office
25 from scratch. So by mid 2003 he started

1 taking cases in Cattaraugus County and
2 knowing the magistrates in Cattaraugus
3 County, I was able to go to them and with a
4 little bit of arm twisting, get them to agree
5 that the system as it was wasn't really
6 working, and so they agreed with -- my
7 proposition to them was, let the public
8 defender determine the eligibility or decide
9 if a person is eligible and if we decide
10 someone is not, then and under only that
11 circumstance could they tell us no, you
12 decided wrongly in determining that someone
13 wasn't eligible and they could direct us to
14 provide an attorney to represent that person.

15 The reason why I bring that up is because
16 since 2003, there have been issues on the
17 other side of judges saying to me you decided
18 this person is eligible and I don't think
19 they are so, you know, you can't represent
20 them in my court. And we've been very
21 successful in convincing them that, you know,
22 we're representing them and, you know, you
23 need to worry about other issues in the case,
24 not that issue of eligibility.

25 And the reason why I took that approach

1 is number one, Gary Horton suggested that if
2 I could do that, it would make a lot of sense
3 for our system. My own experience of being a
4 town judge and seeing a defendant in my court
5 that I was sending them to the assigned
6 counsel system and that same person being a
7 defendant in another court not getting
8 counsel in that court. But Olean -- well,
9 next to Olean and the town of Allegany, St.
10 Bonaventure University and the judge at the
11 time in the village of Allegany was of the
12 opinion that anyone who attended St.
13 Bonaventure University, whether they were on
14 financial aid, scholarship, no matter what
15 the circumstances were, they were not going
16 to get assigned counsel; that they should
17 contact their parents and have their parents
18 hire them an attorney.

19 Number one, that's not the case for a
20 whole lot of people that are involved in the
21 higher education system having the ability to
22 do that. The campus is actually located in
23 the town of Allegany; in an Allegany town
24 that wasn't the case. So depending upon
25 where the individual was alleged to have

1 committed a crime determined whether or not
2 they were going to get an assigned counsel.
3 And so that was the most glaring example that
4 I saw at the time of, you know, depends on
5 what court you're in front of whether or not
6 you're getting an attorney.

7 So we -- and I also have another relevant
8 thing that I'd done. I've spent over twelve
9 years on the board of directors of Southern
10 Tier Legal Services Corporation, and so I was
11 very familiar with the Legal Services
12 Corporation's eligibility guidelines for LSC
13 programs. So we quickly brought in the LSC
14 standards. The first year we started at 125%
15 of the poverty guidelines and that clearly
16 was not an appropriate place to start. So
17 our program has been using 150% of the LSC
18 guidelines as our starting point. If someone
19 falls below the 150%, they are given an
20 attorney without any further questions.

21 If, however, someone is above that, then
22 we start asking other questions. Have you
23 been in a position where, I don't want to say
24 poor, but when I hear a judge asking and we
25 still have a few courts where judges want to

1 try to make that initial determination when
2 they're having somebody in front of them,
3 particularly the city courts, they will start
4 to ask them, do you have a car; well, what
5 year is your car.

6 We've tried to convince the judges that,
7 Judge, it doesn't matter if they have a car
8 or not because in Cattaraugus County there is
9 no real public transportation. So a car is a
10 essential for them to have in order to get to
11 their work, in order to get to their medical
12 appointments, in order to get to the grocery
13 store to buy food, in order to get to the
14 drugstore, anything that they want to go
15 (sic), they have to have that vehicle.

16 So we've convinced them, or tried to
17 convince them, to come off of that. The
18 other issue was always bail. We've tried to
19 convince the courts that whether or not a
20 person can post bail -- and in most cases the
21 bail is being posted by friends or family
22 members -- that that, again, is not a real
23 indicator of whether or not the person has
24 the ability to retain their own attorney.

25 I've been asked by the Cattaraugus County

1 Legislature many times in the last thirteen
2 years to explain New York State's guidelines,
3 and at one point the county legislature
4 wanted to adopt their own standards, I was
5 able to point case law to them saying
6 counties that have tried to do that have been
7 soundly rejected in that area, but when you
8 try to talk to them about the fact that New
9 York State law says a person is eligible for
10 counsel if they're indigent or otherwise
11 financially unable to afford counsel, retain
12 counsel, they want me to go into great detail
13 with that information about, well, how do you
14 make that decision. So we do have a
15 financial questionnaire. The questionnaire
16 looks at what their income is, the sources of
17 their income, their expenses, what those
18 expenses are for.

19 The bottom line in Cattaraugus County is
20 about 85% of the people that are referred to
21 my office for criminal court cases and about
22 75% for Family Court cases, we are making a
23 determination that they're eligible for
24 services. In numbers, last year we had about
25 4500 individuals referred for cases and some

1 of those people were -- probably 150 to 200
2 probably had multiple cases in the office;
3 might be a little higher than that, but 85%
4 are qualifying under the standards, the
5 approach that we're taking.

6 During the time that I've been doing
7 this, we've had county legislators, for the
8 most part, including a county legislator
9 that's a landlord, he owns a few trailer
10 parks and has some other properties, he has
11 brought to our attention, you know, this
12 person doesn't qualify. We've investigated;
13 I now have two investigators, thanks to a
14 grant from ILS on the second investigator,
15 but if I were to put my investigator on to
16 all 4500 of those people that are filling out
17 financial forms, we wouldn't get any other
18 work done, we wouldn't be able to -- in fact,
19 we couldn't even investigate 4500 people, I
20 don't believe.

21 Now, we will do little spot checks
22 through some tools that we have, little --
23 check out registrations of vehicles if
24 somebody's driving, seems to be inappropriate
25 or just not a vehicle you'd expect, we'll

1 look at things and we'll ask you to explain
2 things. But for the most part, I can think
3 of three cases where we found that there was
4 perhaps outright fraud. We sat down with
5 that individual, we did refer them to the
6 district attorney for prosecution because I
7 don't believe that's our job to do that, but
8 we did sit down with those people and we
9 ultimately entered into agreements with them
10 to pay Cattaraugus County some money for the
11 cost of their legal services that they
12 received.

13 My concerns about going forward with any
14 standards that are developed, in many ways
15 they mirror the talking points that NYSDA has
16 developed for me to consider. I am concerned
17 about creating a new agency to make
18 determinations. I think that it would slow
19 down representation in a time when we're
20 trying to enter into cases at the first
21 appearance in court and even at times before
22 that first appearance in court. It's become
23 a bit of a controversy in Cattaraugus County.
24 Right now we have three cases that are
25 pending that people have contacted us when

1 the police have first told them they want to
2 talk to them about something, they come to
3 see us and we qualify them and we've taken
4 those people on as clients. We're getting a
5 lot of questions from the district attorney,
6 including some pretty nasty letters saying
7 these people aren't eligible, you have no
8 business being involved in the case that
9 early.

10 And the only reason I make that point is
11 because those folks are qualifying
12 financially under our standards. If they had
13 to go to another agency at that point, most
14 likely they wouldn't do that; they would
15 probably just say oh, this is a long, lengthy
16 process, I'm going to go to the police and,
17 you know, the fact maybe 25% of the
18 confessions are false if they were to
19 confess, who knows if it's true or not, or
20 giving incriminating statements or, since
21 they're not taping anything in Cattaraugus
22 County, the police saying they're giving
23 incriminating statements.

24 So my concern is if we create a new
25 agency to make the determination, it's going

1 to put another layer between the attorney and
2 their client and I think it's going to cause
3 more problems. Certainly don't want to see
4 probation or Social Services making the
5 determinations. While it's not an
6 adversarial relationship necessarily with
7 probation all of the time, certainly when
8 there's violations of probation alleged when
9 they're not doing adequate jobs on their
10 presentencing investigations, not making the
11 right determination that we believe they
12 should make on a pretrial release, I don't
13 think probation has any place in the system.

14 Social Services is the same; we're
15 battling heads against Social Services all the
16 time, from the Child Protective Unit, welfare
17 fraud cases are the same in Cattaraugus
18 County as they are in a lot of other rural
19 counties, I just don't think they're the
20 agency to do it. And mainly because of
21 timeliness but also it's going to raise those
22 conflict of interest questions.

23 I'm concerned about juvenile cases,
24 making determinations there. A lot of our
25 cases involve sixteen, seventeen and even

1 eighteen year olds, the complainants or the
2 alleged victims are the parents of those
3 children. If I had a dollar for every time I
4 heard a parent say, let him sit in jail for a
5 few days, or let her sit in jail for a few
6 days, I'd probably be a rich man and I
7 wouldn't have any need to be a public
8 defender in Cattaraugus County, I could
9 retire. But we're getting push through from
10 the political side of the county that we
11 should be making those parents pay. Well,
12 what parent who's the complainant wants to go
13 out and hire an attorney or pay for the cost
14 of an attorney, even if they can, for their
15 child? So that is a grave concern; how are
16 we going to make the determination in those
17 cases involving children, especially if the
18 parent who has the resources is the
19 complainant?

20 In Cattaraugus County, we've had an issue
21 about the confidentiality of information
22 that's provided for qualification. I was
23 subpoenaed, issued a subpoena duces tecum to
24 bring records regarding determination of
25 eligibility for a father in a Family Court

1 proceeding for failure to pay child support.
2 We actually had a conflict and weren't able
3 to take that case, made the determination
4 that he was eligible, sent the individual to
5 Southern Tier Legal Services for
6 representation and then about six months
7 later I was subpoenaed to bring his financial
8 information.

9 I resisted that subpoena, Southern Tier
10 was actually at one point thinking, they
11 thought oh, if there was any problem, give
12 it. In my mind, even though I felt I had a
13 client -- a conflict, that information was
14 still taken in the context of an
15 attorney/client relationship and it was
16 confidential and I did not feel that I had
17 any right to turn that information over.

18 That issue was never resolved because the
19 individual left the state. We actually tried
20 to figure out a way to appeal the decision
21 that I had to turn it over to the Appellate
22 Division. It kind of languished and then the
23 Social Services attorney tried to raise it
24 again. We were able to convince the Family
25 Court judge at that point that it was moot

1 because the individual wasn't even appearing
2 in court and was out of state.

3 But that, you know, raises the issue of,
4 in a county-run system, a county employee,
5 who am I to confer legal advice in that
6 situation? The Social Services attorney is
7 actually an assistant county attorney, and
8 the county attorney is supposedly my
9 attorney, but I think we need to make it
10 clear that any standards that are developed
11 that that information concerning eligibility
12 is confidential, it's part of the
13 attorney/client confidence and cannot be
14 revealed under any circumstances.

15 We did quickly, and Stephanie Batcheller
16 is here from NYSDA, Stephanie helped us
17 realize quickly that we needed to stop having
18 an affidavit, so my office no longer uses an
19 affidavit, we no longer have any swearing or
20 attesting to the truthfulness of that
21 information. And we no longer retain that
22 information. After we make that
23 determination, we mark it in the file
24 electronically the person qualifies in the
25 opinion of whatever attorney is making that

1 determination, and then that form is
2 shredded. So that way we won't have it if
3 they try to get that information.

4 And again, I want to make the point that
5 whatever standards -- and I don't know
6 exactly how you're going to be able to make a
7 recommendation with New York State's current
8 law being so vague about indigency. We can
9 all quickly set some standard for indigency,
10 but that next issue of "or otherwise
11 financially unable to afford an attorney",
12 you know, you can't look again at real
13 property ownership. It's not an indication
14 of somebody being able to convert something
15 to cash, having a vehicle or the ability to
16 post bail.

17 What I would really like to see, and
18 again, I don't know, it's something we're
19 trying to do in Cattaraugus County using ILS
20 grant money, all of my attorneys have iPads
21 and iPhones, I'm trying to come up with an
22 app that will allow us to quickly go through
23 some questions and have the app, using
24 whatever kind of magic it can come up with in
25 the system, you know, say yes, this person

1 can be assigned an attorney, or me look
2 closer at some particular area or lastly, no,
3 they have to get their own attorney. But we
4 need to find a quick way to make that
5 determination and especially if we're looking
6 at early entry.

7 Having an attorney present with that
8 individual at the time of the arraignment is
9 so critical, and it's not happening in
10 probably 60% of the cases in Cattaraugus
11 County right now. We're trying, but there's
12 resistance from everywhere. People are
13 ending up at the Cattaraugus County jail that
14 don't belong there, and if that determination
15 can be made that they're eligible or deferred
16 and, you know, we have grant money for
17 counsel at first appearance and our grant
18 states right in the documents, that that
19 decision would be deferred, we would show up
20 and then qualify the person after we make
21 that appearance. And I don't believe there's
22 any problem with attorney/client privilege in
23 those situations, even if it's later
24 determined that we have a conflict, I
25 don't -- you know, the issue at that

1 appearance is whether or not the person needs
2 to be held in jail or released on bond or
3 released on their own recognizance.

4 So unless there's any questions, that's
5 really the points I wanted to make.

6 JUDGE DiTULLIO: Thank you, Mr. Williams.
7 Those are really important points, practical
8 points; the fact that there are people in
9 jail that maybe shouldn't be. Any questions?

10 MS. MACRI: Actually, I have a few, if
11 that's okay, Mark. So a couple things. So
12 you mentioned that the form you now use is
13 not one that has any type of execution under
14 penalty of perjury, right?

15 MR. WILLIAMS: Correct.

16 MS. MACRI: And your county has had no
17 objection with the fact that --

18 MR. WILLIAMS: They have paid no
19 attention to that.

20 MS. MACRI: And the other thing, one
21 of the things I was struggling with is the
22 idea that in your opinion, the information
23 that you get in determining eligibility of
24 counsel, is this information that can valuelly
25 be used in terms of providing representation

1 during arraignment? So the same kinds of
2 questions you might be asking, is that also
3 information you can use to support any kind
4 of, for example, bail argument, or --

5 MR. WILLIAMS: Absolutely. Knowing that
6 information quickly is going to assist us in
7 getting an idea of whether the person can't
8 pay any kind of bail. You know, it's always
9 amazing that a judge sets bail routinely, you
10 know this judge is always going to set bail
11 at \$1000 cash, \$2000 bond. And that amount
12 of money means nothing to this person but it
13 means everything to the next five people.
14 And so having that financial information be
15 able to help our view effectively for them is
16 critical.

17 MS. MACRI: And finally, just in terms
18 of following up on that process. We're
19 trying to figure out, I mean, what do you
20 recommend in terms of -- I might have heard
21 you and I want to clarify that, is the idea
22 of maybe creating a baseline at arraignment,
23 so that if you're assigned to the arraignment
24 and let's just say you're assigned solely for
25 the purpose of arraignment to determine

1 everyone to be per se eligible unless
2 otherwise provided information during the
3 arraignment and then thereafter maybe conduct
4 a secondary eligibility determination, or how
5 would that work?

6 MR. WILLIAMS: Well, if the person is
7 sent to the jail, they would see my -- my
8 investigator -- one of my two investigators
9 is at the Cattaraugus County jail five days a
10 week, first thing in the morning to see
11 anybody who is newly incarcerated and so that
12 would include people that have gone in the
13 night before who hopefully we have been there
14 for the first appearance and then to do a
15 more thorough discussion with that
16 individual. Unless we send them an e-mail
17 saying that we've qualified that person,
18 there's no need to ask any further questions
19 about qualifying.

20 MS. MACRI: And do you do it for the
21 entire county, even if it's a conflict case
22 or is it just for those cases that determined
23 that you may be assigned to that case?

24 MR. WILLIAMS: The entire county.

25 JUDGE DiTULLIO: Mark, as far as counsel

1 arraignment, have you made some efforts in
2 that area but unsuccessful?

3 MR. WILLIAMS: We have, Judge. The
4 pushback from the police departments, the
5 pushback from the local judges including the
6 city judges, you know, we're just constantly
7 amazed every day we look at that jail list of
8 who has gone in and we see that at four
9 o'clock on a Thursday afternoon someone was
10 arraigned from the City Court that's only a
11 three-minute walk from my office and I have
12 attorneys who are available and they don't
13 call.

14 JUDGE DiTULLIO: So you could be there.

15 MR. WILLIAMS: We could be there, yes.
16 It's very, very frustrating.

17 JUDGE DiTULLIO: Thank you.

18 MR. DOYLE: Mark, thanks for coming.
19 How many attorneys and how many staff?

20 MR. WILLIAMS: I have six assistants at
21 this time. Two are entirely funded by ILS
22 grants; one for counsel at first appearance
23 and one for the case load reduction. I have
24 two full-time investigators; one fully funded
25 from the counsel at first appearance grant.

1 I have two legal secretaries, I have one
2 full-time keyboard specialist -- I have to
3 make sure I get the titles right for the
4 county -- basically are receptionist and data
5 entry person into our case management system.
6 I have an account clerk/typist position which
7 is funded under three grants, one of our
8 normal operating grants from ILS and then the
9 other two grants, that person has become key
10 in keeping our financial issues straight with
11 all of the grant money that we have received.
12 And then I have -- well, there's fourteen
13 altogether, one part-time clerical position
14 also.

15 MR. DOYLE: And how many of these
16 people are involved in any way in the
17 eligibility determination process?

18 MR. WILLIAMS: The two legal secretaries,
19 I've delegated them to make the determination
20 and then the attorneys and the two
21 investigators. So what is that, eleven out
22 of fourteen would make that determination,
23 and I review all of those determinations,
24 particularly when they say a person doesn't
25 qualify.

1 MR. DOYLE: This may be a tough
2 question to answer, but in terms of the
3 overall time that your office spends, how
4 much is spent on the eligibility
5 determination process? Is it 10%, 20%?

6 MR. WILLIAMS: I would say probably about
7 five percent. We try to make a determination
8 as quickly as we can, Vince, and then move on
9 to the important issues.

10 MR. DOYLE: And those times when you
11 determine that someone is ineligible person,
12 so has the right to appeal that, so to speak,
13 to urge the judge, what generally happens, is
14 there sort of a default when that happens?

15 MR. WILLIAMS: We will send them a letter
16 telling them that we determined that they're
17 ineligible and why, and then we tell them
18 that they have the right to go to the judge.

19 I would say in a small handful of those
20 cases the person goes to the judge; most of
21 those cases they end up retaining their own
22 counsel. And we watch for that. If somebody
23 is then showing up without an attorney, we
24 look at the decision, but that happens very,
25 very few days.

1 MR. DOYLE: Thanks, Mark.

2 MR. WILLIAMS: Thank you.

3 JUDGE DiTULLIO: Thank you, Mr. Williams.

4 I think our next speaker is Mr. Gary
5 Horton, director of the Veteran Defense
6 Program of the New York State Defenders
7 Association and former public defender of
8 Genesee County. Thank you, Gary.

9 MR. HORTON: Thank you. I'm sorely
10 attempted to say what he said, but I guess I
11 should justify my appearance here.

12 I also want to thank Mark, although I
13 don't really think I was as much of a mentor
14 as he likes to make out. He, despite his
15 coming late to public defense, has the heart
16 and spirit of a public defender. What he's
17 accomplished is a great deal, and he's done
18 that entirely on his own merit.

19 As I was introduced, I'm currently
20 working for NYSDA in the Veterans Defense
21 Program, and I started there in March of last
22 year, 2014. Before that, however, I was
23 Genesee County Public Defender from 1991
24 through March of last year. Throughout that
25 period of time, all of the courts in the

1 county, including Genesee County Court and
2 Family Court, referred anyone who requested a
3 public defender to our office for financial
4 eligibility screening. And when I say public
5 defender, assigned counsel because we did
6 screening for cases that would later turn out
7 to be a conflict as well.

8 Now, that statement I just made is in
9 theory because we would, occasionally, find
10 that there might be a town judge here or
11 there who said to a person requesting
12 counsel, well, are you employed, and if the
13 answer was in the affirmative, they would say
14 well, you're not going to qualify. And when
15 we found those things out, which we normally
16 did after a very short period of time, if
17 nothing else because the person would
18 complain to us, we would deal with that with
19 the individual judge. I think that's
20 certainly less so in the recent probably four
21 or five years than earlier on.

22 As a whole, I think the town courts
23 are -- and the town court judges are doing a
24 much fairer job since OCA's action plan, they
25 are trained more thoroughly, they are taking

1 it more seriously, including the right to
2 counsel. So that's a good outcome.

3 In the office, we have a process for the
4 eligibility determinations. They were done
5 for the person on a face-to-face interview.
6 For the most part, they were done by my
7 confidential secretary but if she were off or
8 out to lunch, another secretary was also able
9 to do the financial qualification. We used
10 NYSDA's financial case system so at the same
11 time financial eligibility was determined,
12 the case was being opened on the system so
13 the attorney who was eventually assigned
14 would have the information immediately as to
15 what the charges were, what court and so on.

16 Our first level of determination was
17 first, anybody who was incarcerated unable to
18 make bail qualified, anybody on public
19 assistance qualified, and then at that point
20 we probably, I'm going to say fifteen years
21 ago, started using 125% of the guidelines as
22 our initial determiner, and we stayed with
23 that for most of the time I was public
24 defender. But that was only, again, an
25 initial determination. If the person were

1 under they presumptively qualified; if they
2 were over then we went onto further steps.
3 We utilized what we called our long form
4 application, which really wasn't an
5 application; it was a form that was made out
6 by the person for the most part while they
7 were being interviewed, at their in-person
8 interview, and it included assets,
9 liabilities, income and debts; all the
10 information so we could get a true picture
11 of, regardless of income, what the person's
12 expendable income was for retention of
13 counsel.

14 We would also look at the nature of the
15 case, both on -- as to the level of the
16 offense -- felony, misdemeanor, violation --
17 and the complexity of the issues regardless
18 of the level of the offense. I have been
19 known to file suppression motions and conduct
20 suppression hearings on violation possession
21 of marijuana charges. And, yeah, it was
22 clear there was an issue there, and it was --
23 if truly litigated at the expense of
24 representation, that's something we took into
25 consideration.

1 So anybody who was over the 125%,
2 normally, anybody as I said who was under
3 presumed to qualify, anybody who was over I
4 would make the final determination whether we
5 would represent them or not. There again
6 was, as Mark indicated, an appeal process if
7 we were turned down, and on occasion judges
8 would order us to represent people and if we
9 were ordered, we did that. Obviously we'd
10 look at the cost of counsel again in relation
11 to the type of -- whether this would be
12 extended litigation in a complex case in
13 trying to make those determinations.

14 We would always -- or I would always err
15 on the side of providing representation on a
16 close case, which is another reason why I
17 think it was very important that the
18 determination were made in our house rather
19 than by town judges or even -- even courts of
20 record where they didn't have the information
21 that we had as far as the total financial
22 picture, and the issues were being raised by
23 the client as far as what needed to be done
24 on the case.

25 When individuals were returned to us who

1 we we found not eligible, if the courts
2 ordered us to represent, usually it was a
3 722(d) order. We took no part in enforcing a
4 collection of those orders. If they were
5 going to be collected, that was up to the
6 county attorney.

7 So my concerns, both when I was public
8 defender and would continue to be concerns in
9 any system for determining eligibility is
10 first something that Mark indicated, parental
11 income for minors. Due to the political
12 climate in my county, I was always required
13 by county government to consider parental
14 income of dependent clients, which has always
15 bothered me. If a minor was disqualified on
16 the basis of parental income and the parents
17 retained an attorney, I think it puts the
18 retained attorney in a position of
19 conflicting loyalty; who you have the loyalty
20 to, whose determinations do they honor, the
21 client or the person paying the bill? And I
22 think that's particularly dangerous for the
23 child. And you need to remember we're
24 talking about juveniles. It has always
25 concerned me that there's no conformity

1 across the state on how eligibility is
2 determined and that if you step across the
3 county line you may qualify in one county and
4 not the other. That's just not right.

5 Confidentiality of financial information
6 was always an issue and during my last years
7 as public defender, I actually reached the
8 point where the person qualified, I signed a
9 piece of paper that went in the file that
10 said a full financial interview had been
11 conducted and that this person qualified or
12 did not, and we destroyed any financial
13 records they brought to us.

14 I should back up to the point, also, that
15 if it was being -- if a determination was
16 being made solely on the basis of income, we
17 always required some verification of that
18 income; pay stubs, if somebody was
19 self-employed, income tax returns, and if we
20 got to the second level, the long form, as we
21 called it, then we would require written
22 proof of regular debt payment, so on.

23 So confidentiality was always a concern,
24 in my county in particular it was a concern
25 in Family Court because at times the judge

1 would ask for that information concerning
2 cases that were in front of him or opposing
3 parties were trying to subpoena that
4 information. We always resisted that, we
5 always treated it as confidential but again,
6 I think doing that, any public defender is
7 out on a very long limb and I think it's an
8 issue that has to be dealt with in your
9 determinations.

10 Okay. Going forward with your -- your
11 considerations, I think it's absolutely
12 necessary that there be clear-cut standards
13 of eligibility which is necessary to provide
14 uniformity of expectations across the state,
15 an application across the state as well as to
16 provide insulation from political pressure to
17 local offices.

18 In order for standards to be effective,
19 they should be based on a directive that no
20 person who is financially unable to retain
21 counsel shall not be denied assignment of
22 counsel; that provide for discretion in the
23 eligibility of determination based on the
24 nature of the proceeding and/or the level of
25 the offense and the complexity of the issues.

1 They're not based on any third-party income
2 regardless of relationship, should not rely
3 on income as a single criteria, should not
4 disqualify anybody based on an asset without
5 determining the rest of their financial
6 situation, to protect the confidentiality of
7 financial information and to provide a review
8 mechanism. And again, a presumption that
9 counsel will be supplied.

10 Thank you.

11 JUDGE DiTULLIO: Thank you, Mr. Horton.
12 Any questions?

13 MR. DOYLE: No questions.

14 MR. ALPERN: In terms of the
15 eligibility determination and the conflict of
16 interest determination, which came first?

17 MR. HORTON: The eligibility.

18 MR. ALPERN: And at the time you were
19 determining the eligibility, was the office
20 assigned or that was --

21 MR. HORTON: We were -- I guess I
22 determined that we were assigned to do the
23 eligibility determination, and that was --
24 that was the first part. Then if the person
25 qualified, the secretary would then, as I

1 said, go onto the case management system and
2 enter information about the nature of the
3 charges, the court and so on. Conflicts were
4 always determined by myself or at times my
5 first assistant, Jerry Ader, who you are
6 going to hear from in a little bit. But if
7 we determined financial eligibility and there
8 did not appear to be any type of conflict,
9 then we would return the form to the assigned
10 court asking to be assigned as counsel. If
11 we felt there was a conflict but the person
12 was eligible, again, the form would say the
13 person is eligible, please assign -- based on
14 conflict, please assign assigned counsel, or
15 if they do qualify.

16 I don't know if that answers your
17 question.

18 MR. ALPERN: Yes.

19 MS. MACRI: Can I ask a couple of
20 questions, Gary? Thank you as well for
21 showing up.

22 I wanted to ask about the letter of
23 appeal -- or the letter of denial. I think
24 you made reference you would often issue a
25 letter.

1 MR. HORTON: Our denials were done in
2 person.

3 MS. MACRI: In person, okay. When
4 you -- when you did them in person, did you
5 actually provide the reason for the denial or
6 just basically say we don't think you
7 qualify?

8 MR. HORTON: No. We would say it was
9 based on your income or expendable income.

10 MS. MACRI: And then would you explain
11 the process of what they needed to do to be
12 reconsidered or was it something that was
13 done by the individual when they showed up in
14 court?

15 MR. HORTON: Quite frankly, I'm not
16 sure on every occasion how that was done, but
17 they were clearly told they could, you know,
18 ask the judge for counsel if they thought we
19 were in error.

20 MS. MACRI: And the 722 order I want
21 to take you back to. You had indicated that
22 once in a while individuals might come back
23 to your office but they'd come back with a
24 722(d) order.

25 In your experience, did you see

1 enforcement by the county attorneys on that
2 722 order?

3 MR. HORTON: If the clients didn't pay
4 voluntarily, nobody was out enforcing.

5 It does raise another issue I meant to
6 mention, if I can just pick up on. Another
7 thing I had to fend off several times during
8 the period of time I was public defender was
9 the suggestion from county legislature,
10 county manager of some type of user fees, and
11 I think the standard should be very clear
12 there should be no -- if somebody is
13 financially unable to retain counsel, there
14 should be no fee for anything; not for the
15 representation, not for financial
16 determinations. We were asked at one point,
17 could we have a user fee for the application.

18 MR. ALPERN: One other follow-up to the
19 initial questions I was asking.

20 Prior to doing the eligibility
21 determination, were any representations made
22 to the clients as to the confidentiality of
23 those communications?

24 MR. HORTON: Yes. Is it stated right
25 on the form that they signed it was

1 confidential.

2 I should also state, because it came up
3 in Mark's testimony. Initially we were
4 asking people to -- the information that we
5 were given at the in-person interview was put
6 on a sheet and they were asked to sign, but
7 we stopped doing that, so that that was not
8 an issue.

9 MR. DOYLE: Gary, I asked Mark to just
10 give me a very rough estimate on the amount
11 of time his office spends on these. I think
12 he said five percent. Was your experience
13 similar in your office?

14 MR. HORTON: It's difficult for me to
15 put it into a percentage, but I will tell you
16 that it was basically a full-time situation
17 for one of the secretaries at least three
18 days a week.

19 MR. DOYLE: The sense I got from
20 Mark's testimony, and I'll ask you directly
21 is, whatever time it takes something that it
22 seemed like Mark would prefer that -- that he
23 continue to do, that his office continue to
24 do rather than having any outside entity or
25 the court do it entirely. Would you feel the

1 same way?

2 MR. HORTON: I would feel the same way.

3 MR. DOYLE: Okay.

4 MS. MACRI: I have one more last
5 question. In terms of, you mentioned that
6 you sometimes would sign the form, is that
7 correct?

8 MR. HORTON: Yes.

9 MS. MACRI: Would you do it under
10 penalty of perjury?

11 MR. HORTON: Yes.

12 MS. MACRI: Okay. Thank you.

13 JUDGE DiTULLIO: Thank you for your time,
14 Gary.

15 MR. HORTON: Thank you.

16 JUDGE DiTULLIO: The next speaker is
17 Mr. Jerry Ader, the Public Defender of
18 Genesee County.

19 MR. ADER: Thank you, Judge. I'm in
20 the unenviable position of having to speak
21 about how the office runs after I took over
22 from Gary when he departed last year when the
23 county couldn't find anyone else to take the
24 position.

25 But just as a background, I've worked for

1 Norman when I got out of school, back in '89
2 and assistant staff attorney and assistant
3 public defender in roughly 1990 when we took
4 over that office -- that position for Wyoming
5 County and Genesee County in 2004 as public
6 defender. So I was not an administrator and
7 I was always thanking God that I was never an
8 administrator, until last year.

9 So eligibility requirements I just took
10 every case that was assigned to me and I
11 never had a question, I just did it. So as
12 of last year I took over for Gary, we made
13 some changes and I guess I might be one of
14 those attorneys that's gone out on a limb as
15 a public defender and I've gone back to
16 having the clients sign forms under penalty
17 of perjury. If it becomes a problem I will
18 deal with it. I've had one issue so far
19 that's come up with a town attorney wanting
20 to get the financial paperwork for their
21 eligibility determination and raised a FOIL
22 issue. I told him it was confidential, never
23 heard again from him.

24 So at that point, that's the way it
25 stands in our office.

1 MR. DOYLE: Jerry, I don't mean -- why
2 does the town attorney want that information?

3 MR. ADER: We were assigned to the
4 client in a Supreme Court case involving a
5 contempt for violation of some zoning
6 ordinances in the town of Darien. And the
7 court had made a judgment and issued certain
8 civil damages that the former client was to
9 pay. And at some point apparently when the
10 client was paying, the county attorney wanted
11 me to find out exactly where her resources
12 were to determine eligibility.

13 In that case, sort of unusual, in that
14 case a Supreme Court judge, acting Supreme
15 Court judge basically determined eligibility
16 and assigned us.

17 Anyway, getting back to the way things
18 have changed and the way they're staying the
19 same. When I became a public defender, one
20 of the things I tried to do and I'm still
21 doing is trying to talk with other public
22 defenders, assigned counsel, NYSDA as to how
23 it's done, because apparently it's done so
24 many different ways in so many different
25 places.

1 Until I went to a department meeting a
2 couple weeks ago here in Buffalo and heard
3 from some of the people who are here today
4 and also Mark, I didn't realize that other
5 counties were using more than 125%. It was
6 just me, it was ever since I started in
7 Wyoming County 125%, if it changed I never
8 knew. When I was with Gary it was 125% under
9 the federal poverty guidelines, if you're
10 under that you're qualified. And then I
11 found out that some places use 150, some
12 people use 200%. I was amazed that it was
13 just so different in so many different
14 places. But the procedure, going back to
15 Genesee County, hasn't changed much except we
16 tried to streamline since so much time was
17 taken up in eligibility determinations. Gary
18 had his office manager, confidential
19 secretary having in-office determinations
20 without any kind of an application, but a
21 financial affidavit became just a financial
22 statement.

23 It took quite a lot of time. They might
24 have gotten into things that probably didn't
25 need to be determined for financial

1 eligibility, that probably took up a lot of
2 time. So one of the first things I did was I
3 made up an application that included
4 financial information from an affidavit as
5 far as income, expenses; if they were under
6 twenty-one, the parents' information. And I
7 made it available either in the office, at
8 all the courts, town courts and also made it
9 available online. So -- and I made sure that
10 all the magistrates and the town courts knew
11 if they made an initial determination, this
12 is how people could get the application
13 going, get it to us either by fax, e-mail,
14 drop it off in person, mail it, to make it as
15 fast as possible so we could make a
16 determination.

17 It has worked, as far as I know, so far.
18 The courts appreciate being able to get that
19 done more quickly than it was done in the
20 past because some people would just blow off
21 appointments in the office, they figured
22 they'd have to come in, they'd come in just
23 before court and it didn't work as well as
24 it's working now. But going back to, I might
25 have asked this question to Gary. Almost all

1 the courts -- well, I would say all the
2 courts in our county make an initial
3 determination by asking a couple questions;
4 not confidential, just are you working
5 generally is the question. Are you working,
6 can you afford an attorney, no. Okay, I'll
7 assign a public defender. It's basically a
8 preliminary assignment without going into
9 in-depth. And they're sent to our office for
10 us to make a determination. That hasn't
11 changed.

12 The public defender then makes that
13 initial determination after the judge makes
14 the preliminary finding. Then we make the
15 decision after they fill out the information.
16 It's pretty much based on the same things as
17 Gary said as far as income, there's a
18 presumption under the 125%. We do consider
19 the parents' income. If the parents do not
20 want to contribute, then we reassess if we'll
21 take the case and let the county do it.

22 We make the initial determination after
23 the judge sends the people over to our office
24 and if there's a conflict, then we send the
25 paperwork over to the assigned counsel's

1 office in our county. We notify the court
2 that there's a conflict, they're eligible and
3 we notify the court and that's the end of it.
4 The assigned counsel doesn't do any
5 determinations as to eligibility.

6 Two points; one is 722(d)s and Family
7 Court. This past year I've had issues with
8 our Family Court judge who believes that --
9 who believed that he could make a decision
10 from the bench from talking to initially the
11 respondents as to whether or not somebody is
12 eligible and whether there's a conflict. And
13 they have judges put down on their assignment
14 sheets person's not eligible and they won't
15 assign them. Or they will put down on the
16 assignment sheet, sent to our office, he's
17 eligible, assign so and so outside of our
18 office, assigned counsel because the judge
19 sees a conflict. Or a person says well, I
20 had so and so, assistant PD a couple years
21 ago, so the judge assigns.

22 I've had discussions with the judge to
23 let him know that he's probably not in the
24 best position to know whether somebody's
25 eligible because they can't go into the

1 details that they can go in court, even
2 though the judge thinks he can because it's
3 just open court and he asks a whole bunch of
4 questions and two, there's just no way that
5 he knows at this day, at this point in time,
6 whether there's a conflict of interest,
7 whether we have a closed case, an open case.
8 But asking simple questions doesn't work.
9 And cases have been assigned out that
10 shouldn't have been assigned out, that we
11 hear back from the county why is their
12 assigned counsel's case load going up for
13 Family Court. Well, because the judge
14 assigned cases that he didn't have to, that
15 we could have represented with no problem.
16 So that, I think I've got under control at
17 this point, I think the judge understands,
18 let us make the decision, send people over.

19 The other was 722(d)s that was mentioned
20 before. Even before I took over the office,
21 it was always an issue with how do we
22 determine 722(d)s; every court wants somebody
23 who is not eligible to be eligible under some
24 basis, partial payment, so we had, in the
25 past before I took over, if they were turned

1 back -- turned down and told to contact the
2 court, the court would say, take them under
3 722, figure out how much. We would have the
4 person come back, we would make a
5 determination, very subjective determination
6 as to amount that they should pay. The court
7 would then be informed, they would have to
8 have the defendant there saying do you want
9 to make this payment arrangement, and if you
10 don't, can you hire any counsel. If you do,
11 I'm gonna sign this order. And in the past
12 those orders were done on routine basis for
13 all courts and turned out that the county did
14 nothing to collect them, so in effect we were
15 taking people that we determined were not
16 eligible, the county never got any money so
17 we just increased our case load.

18 The county now is trying to -- and I sort
19 of stopped that policy. Some of the judges
20 still want to try to do something; if they
21 want to, we do. The county thinks they have
22 some better plan to enforce that, the judges
23 think they have some sort of plan to enforce
24 that. I have really strong concerns as to
25 whether or not that creates problems in court

1 when you're there representing them and the
2 judge wants them to make their payment. And
3 if they haven't made their payment, well,
4 let's take an adjournment until you make your
5 payment. That's an issue that you definitely
6 see coming up.

7 The other issue is with the 722(d)s.
8 Even if the county got money, it didn't come
9 back to the public defender's office; if went
10 into the general treasury, and the county
11 appreciated that, and the county wants us to
12 try to continue it if they could collect and
13 keep the money themselves. So we end up
14 taking more cases and not getting funds for
15 it. I have no problem in taking more cases
16 as long as we have the money to do it and the
17 attorneys to do it.

18 Speaking of attorneys, we have in the
19 office, we have six attorneys, including
20 myself; two handle Family Court and four
21 others handle criminal court. We have two
22 case managers, thanks to a grant from ILS, an
23 investigator, thanks to a grant from ILS. My
24 office manager determines all the
25 applications for eligibility and if there is

1 close calls, then she brings them to me. A
2 letter does go out, I know it was asked what
3 the letters say and I was trying to think
4 exactly what they do say. They do tell the
5 defense or the prospective clients that there
6 is appeal is your right, it could go to the
7 judge, but if you have any questions contact
8 me.

9 I had somebody in my office yesterday
10 questioning me. I tell them that if the
11 court insists, requires that we represent
12 you, we will. I do suggest that they, for
13 the sake of private bar, rather than just
14 taking somebody, that they at least contact
15 three attorneys in the private bar; let us
16 know who you contacted and whether or not you
17 can make any kind of arrangements with the
18 private bar for your case. And if not come
19 back and let us know and then we'll review
20 it, and if necessary we'll have to let the
21 court know and if the court wants us to
22 represent them, we'll represent them, and it
23 will probably be on some type of sliding
24 scale. Again, sliding scale, very
25 subjective, but if they want to do that's

1 what we'll do.

2 There are issues with regards to
3 confidentiality in the application that was
4 discussed before. I'm not quite sure if the
5 application does say the information is
6 confidential. I consider it confidential so
7 it never leaves our office. I think one of
8 the questions that was asked of Gary and I
9 think Mark, was the -- whether some other
10 office should determine eligibility. I don't
11 think there's an office out there that could
12 make the assessment knowing what you need to
13 know for somebody to be able to retain
14 counsel, how serious is the charge. How
15 somebody who is not an attorney could know
16 how serious a charge is. There's just no way
17 another county agency would be able to or
18 want to take on that task.

19 I think the eligibility determination has
20 to be made as quickly as possible and, as
21 Gary said, that hasn't changed in our office.
22 If somebody's in jail, we represent them. If
23 our case manager says the person is bailed
24 out or we get them released, then they're
25 going to have to qualify because they

1 probably will be able to get back to work.
2 Well, if they're bailed out, we get them
3 released and let them know they have to fill
4 out the application and then it will
5 determine if we will represent. So we'll let
6 the court know we'll represent you initially
7 but that may change and we'll let the court
8 know.

9 But other than that -- oh, one last
10 thing, and I'm sure Norm is going to bring it
11 up because Norm always brings up everything I
12 forget, and he had mentioned it, and it's so
13 true. Coming up with standards, I totally
14 agree there has to be some standards because
15 the way it's done now, every county does it
16 differently; assigned counsel is doing it one
17 way, public defender is doing it another way.
18 I used to do Erie County assigned cases and
19 the attorney was assigned, had the defendant
20 client fill out the application and make that
21 determination right then and there.

22 So every county did it differently, but
23 in coming up with standards, there are
24 differences in regions and counties. Wyoming
25 County, Genesee County, a little poorer,

1 standard of living might be a little
2 different in Westchester County, so
3 determining who is poor and who is not poor I
4 think is gonna have to be -- somehow
5 accommodate the different areas of the state.

6 But other than that, I think I've covered
7 it.

8 JUDGE DiTULLIO: Thank you, Jerry.

9 MS. MACRI: I have a question, Jerry.
10 And thank you for taking the time to be here
11 today.

12 In terms of going back to the idea of
13 trying to figure out this representing on a
14 sliding scale, all right? So let's say
15 you've got somebody who is brought back to
16 the office and you decide okay, they might be
17 eligible or not eligible but they can't
18 retain a private attorney, they have shown
19 you they can't. How do you feel about the
20 idea that the sliding scale would be just
21 based on the statutory rate that's provided
22 to assigned counsel? Is that something your
23 office has considered, do you think that's
24 too high, too low if you had to do a sliding
25 scale perspective?

1 MR. ADER: You mean have the attorney
2 keep track of hours spent on the case and
3 then submit a voucher? I have heard of other
4 counties that do that. I guess the problem
5 is being more fair rather than trying to come
6 up with some kind of figure like a private
7 counsel would do and say this is how much for
8 taking the case.

9 I don't think that's much of an issue
10 because we don't do a lot of 722(d)s but if
11 we had to, I think that that would probably
12 make sense because it would take away from
13 the requirement to make payments while you're
14 representing somebody and have the court
15 enforce making payments basically so they can
16 bill at the end of the case and have the
17 county deal with it. I don't have a problem
18 with it, I don't think it would require that
19 much work.

20 MS. MACRI: Thank you.

21 MR. DOYLE: Do your attorneys keep
22 track of the time?

23 MR. ADER: No. The only time I had
24 to keep track of my time as an attorney was
25 in Wyoming County when we dealt things for

1 the state, for reimbursement for representing
2 the state in a case, but otherwise, no.

3 JUDGE DiTULLIO: Jerry, when you talk
4 about there has to be standards, I think we
5 all agree, but there's differences in
6 regional offices. We had Niagara Falls City
7 Court Public Defender Dave Farrugia, and city
8 court's one building and ILS was able to get
9 a part-time public defender to handle
10 arraignments in that building. A little
11 easier than a rural county where the courts
12 are spread out.

13 So what are you thinking, maybe you,
14 maybe Mark, kind of an on-call public
15 defender in various regions, maybe a central
16 court?

17 MR. ADER: Well, the last committee I
18 did report, this was brought up back when
19 Judge Lippman I think brought up first --
20 counsel's first appearance a couple years
21 ago, and we brought it up at a CJAC meeting
22 in our county, Criminal Justice Advisory
23 Committee, and I thought the best idea,
24 probably would require some changes in
25 statute and CPL, was having a central court.

1 In our county you have a City Court, full
2 time City Court judge, part time City Court
3 judge. They do arraignments twenty-four
4 hours -- 24/7. If you can transfer cases to
5 a city court because the CPL allows it, why
6 can't you have the cases arraigned in a city
7 court for the local courts, easier for the
8 sheriff's department, State Police,
9 convenient, one place, bring everyone there,
10 the jail's across the street if they have to
11 be remanded or taken there, there's no
12 holding areas in most of the local town
13 courts, so it would make sense.

14 There was some pushback because one of
15 the judges attends CJAC meetings as the head
16 of the magistrates association, smart guy but
17 he said he would think that -- he would
18 imagine that there's some town judges who
19 would be not in favor, and it's the whole
20 control thing, which is the whole problem
21 with the whole system, I think, is control,
22 nobody wants to give it up as far as local
23 courts. They were not going to be willing to
24 let the City Court judge determine how much
25 bail should be.

1 Makes no sense at all, but I guess that's
2 the reason you have two part-time judges in
3 some of the local courts, and there's no
4 sense in doing that. So yes, I think that
5 having one court do it for the whole county;
6 one, it makes it easier for the defense
7 attorney, plus you know the judge, and at
8 least their City Court judge is a lawyer. So
9 it makes a big difference when you're arguing
10 cases as far as bail to have one judge do it,
11 but it requires some changes in procedure and
12 legislation, but I think it makes the best
13 sense.

14 JUDGE DiTULLIO: Thank you. Thank you,
15 Jerry, thank you for your time.

16 Before I proceed with Mr. Convissar, I
17 want to take a five- or ten-minute break,
18 just to stretch a little bit. Thank you.

19 (A recess was then taken.)

20 JUDGE DiTULLIO: I think we're ready. If
21 everyone wants to be seated, we can continue
22 with our next speaker, Mr. Robert Convissar,
23 our fairly new director of the Assigned
24 Counsel Program.

25 MR. CONVISSAR: Thank you. Thank you for

1 giving me the opportunity to speak before you
2 at this public hearing. Although we know
3 each other, for the record, my name is Robert
4 Convissar, and since February of this year, I
5 am the chief defender and administrator of
6 the Assigned Counsel Program here in Erie
7 County.

8 We are operated by the Erie County Bar
9 Association Aid to Indigent Prisoners
10 Society, Inc. As a private criminal defense
11 attorney, I have been involved in the defense
12 of the indigent since 1988, working through
13 the Assigned Counsel Program and under the
14 federal Criminal Justice Act.

15 A majority of my case load throughout all
16 my years in a criminal practice including --
17 included working on behalf of the indigent.
18 I was proud to have received the Western
19 District CJA Trial Practitioner of the Year
20 Award in 2010. Every defendant that is
21 accused of crimes, even when they are heinous
22 in nature, remains cloaked with the
23 protections of the law, our constitution and
24 the bill of rights.

25 Quite frankly, you look at this group out

1 here and those others in this business,
2 there's a sense of honor and decency among
3 those in our business to protect the lowest,
4 poorest, weakest and most needy members of
5 our society who are accused of crimes against
6 the awesome and unrelenting power of the
7 state and its well-funded prosecutors.

8 The statutory criteria for determining
9 eligibility for the services of assigned
10 counsel is those who are financially unable
11 to attain counsel under the county law. It's
12 not just for those who are poor. While a
13 defendant who is destitute is clearly
14 eligible for such services, it's not
15 necessary in every case for a person to be
16 destitute. It's necessary to maintain a
17 degree of flexibility because the financial
18 ability to obtain counsel depends not only on
19 the financial condition of the defendant but
20 also on the nature, seriousness and
21 complexity of the charges, special financial
22 considerations and other intangibles.

23 For example, a person who is charged with
24 disorderly conduct who has limited income may
25 still be able to afford private counsel.

1 That same person with the same finances
2 charged with murder clearly could never do
3 so.

4 The Assigned Counsel Program here in Erie
5 County considers eligible in all cases
6 persons who can document current receipt of
7 public assistance, Medicaid, food stamps or
8 SSI benefits. In addition, the program
9 utilizes the federal income guideline from
10 the Legal Assistance Corporation at three
11 different levels. Those guidelines are based
12 on 125, 140 and 175% of the poverty level as
13 determined by the government. And they're
14 presented in a grid form which takes into
15 account the number of members in a person's
16 family.

17 The determination to utilize these
18 criteria was made by us following a survey of
19 defense attorneys in Erie County so as to
20 determine the general cost of obtaining
21 counsel in various types of cases and by
22 reviewing eligibility criteria for both
23 liquid and non liquid assets and income from
24 a number of public entitlement programs, such
25 as Medicaid, food stamps and others.

1 The highest percentage of 175 applies to
2 felonies and abuse and neglect proceedings in
3 Family Court or multiple misdemeanor charges
4 in multiple courts. Misdemeanors are at the
5 next level 140; violations are 125.

6 In all cases the individual's assets, as
7 well as their income, are considered.
8 Because it is our position that a person of
9 limited income who has liquid assets, such as
10 bank accounts which could -- and here's the
11 word -- realistically be used to obtain
12 counsel should be required to use those
13 assets rather than the assets of the county,
14 but only if those assets are substantial.
15 Non liquid assets such as the equity in a
16 residential family home up to \$40,000 are
17 allowed before requiring application for a
18 home equity loan. Car ownership is not
19 considered. The posting of bail is not
20 considered. Occasionally, persons with
21 income slightly higher than those guidelines
22 are considered eligible but only for those
23 matters which, in the judgment of the
24 administrator, are so serious or complex that
25 the client clearly would not be financially

1 able to obtain counsel or where there exists
2 significant financial hardships, unusually
3 large medical bills uncovered by insurance,
4 special hardships or where other special
5 circumstances exist such as the emancipation
6 of a child under twenty-one living away from
7 home and long-term nonsupport of the child by
8 an estranged parent. In situations where
9 spouses are cross-complainants or
10 cross-petitioners, the other's income is not
11 considered. It's the same for a trial where
12 the parent is a complainant.

13 Where it is a close call we opt to
14 provide an attorney. In other cases which
15 arguably are close, we have a program that we
16 call Project Capable. It is a voluntary
17 project by the attorneys who we have accepted
18 onto our panels to take a case to conclusion
19 for the price of \$300. In many misdemeanor
20 instances, they're able to provide Project
21 Capable counsel who will step up and accept
22 the representation. That is a voluntary
23 situation and not compelled by our office.

24 For children under twenty-one, minors, we
25 investigate the parents' income to qualify

1 them. However, if they refuse to contribute
2 to the defense or even to provide income, we
3 provide counsel and later seek to recover our
4 costs through action of the county. No child
5 is ever abandoned by the Assigned Counsel
6 Program.

7 In the past year, 2014, the Assigned
8 Counsel Program handled approximately 23,415
9 referrals from both criminal courts and
10 Family Court. We have over 365 attorneys on
11 our criminal panels and our Family Court
12 panels combined. In every case, the court
13 makes an initial eligibility determination at
14 the defendant's first appearance. Such an
15 inquiry, if done at all, typically consists
16 of a very quick, cursory examination
17 concerning the defendant's employment, how he
18 supports himself, et cetera. The court then
19 makes a referral to the program, 23,000. The
20 order of referral assigning counsel is in
21 every case signed by the judge.

22 In those cases in which a close question
23 exists regarding eligibility, the court, of
24 course, retains the final determination as to
25 eligibility. However, for the most part, the

1 vast, vast almost complete majority, it is
2 the administrator's decision that is final.
3 Our practice and procedure is to review every
4 single referral for eligibility on an
5 individual basis. We do this with a staff of
6 four hard-working individuals who interview
7 every referral who is not in custody,
8 personally at our offices or by telephone
9 call from the client to our office.

10 The individual is required to disclose
11 how he supports himself and the answers will
12 determine the type of documentation that's
13 required by us. Referrals who are in custody
14 are immediately assigned counsel who then
15 must complete a client's financial statement
16 and provide it to our office within two weeks
17 of assignment. Those statements are then
18 reviewed to assure eligibility.

19 It's been our experience that most people
20 who are in custody will generally always
21 qualify because they generally can't post the
22 bail that's set, whether it's unreasonable,
23 wouldn't expect it, but reasonable bail can't
24 be posted either.

25 We also obtain completed client financial

1 statements from the attorneys for all the
2 clients who are, in our initial assessment by
3 our three people at the window, are initially
4 determined eligible by that initial
5 interview. This is a detailed form
6 requesting a great deal of information
7 concerning the income and assets of the
8 client, the spouse and if a minor, the
9 parents. In the latter case, the parent is,
10 in every case, asked to sign the form.

11 The form is then sent by every attorney
12 on every case to our office where the
13 information is then compared with that given
14 directly to the program's staff in the
15 earlier initial interview. In cases where
16 discrepancies exist regarding the
17 individual's financial status, a follow-up is
18 done either by the program staff or by the
19 attorney at the direction of the program. We
20 trust, but we verify every single case.

21 Persons who claim to be on public
22 assistance or another of the programs which
23 result in automatic eligibility must produce
24 the benefit card, letter from the agency or
25 other similar proof if the interview is in

1 person. In other cases, the last four or so
2 pay stubs or unemployment receipts are
3 required. Other times we look for in
4 appropriate cases tax records, letters from
5 employers on employer letterhead saying the
6 person was fired or no longer has a job.
7 Bank statements, mortgage statements, letters
8 from disability officers or written
9 statements generally required to be notarized
10 from persons who claim to be supporting the
11 individual who shows no income.

12 If the person produces such documentation
13 is found to be eligible, the assignment is
14 made and continued to conclusion. If it is
15 necessary to make the assignment prior to the
16 time such documentation is produced, the
17 defendant is told that he must show that to
18 the attorney at their first meeting. We will
19 send the attorney, then, to find out whether
20 they qualify so that they are protected at
21 every court appearance. This information is
22 also conveyed to the attorney and the
23 defendant is clearly told that the assignment
24 is contingent on him or her producing the
25 requested documentation.

1 In any case, if and when assigned counsel
2 becomes aware that the defendant's
3 circumstances has changed or he is no longer
4 eligible for assigned counsel, we are
5 required to bring that attention to the
6 court -- bring that to the court's attention
7 where decisions are made and the attorney can
8 be relieved of the assignment.

9 We do this because we have 23,000 cases;
10 that's a lot of cases, it's a lot of money.
11 We spend over 67 -- \$6.7 million on
12 attorney's fees and we want to make sure that
13 the county is getting the bang for their
14 buck, that we are doing this for people who
15 clearly are in need in what I view to be a
16 liberal determination. We err on the side of
17 the defendant on close calls but we do check
18 to make sure; we don't simply say no, I'm not
19 working and then move on from representation.
20 That is, I don't believe, fair to the county
21 and fair to the system, and the requirements
22 for verification, we can do it, we do it on
23 every case, are not onerous for people who
24 are looking to have themselves protected by
25 attorneys provided by the county.

1 One final note. I do not believe that
2 there's anything inherently wrong with
3 uniform eligibility standards. Whatever the
4 standard is, though, it should be for the
5 program, each program, to apply rather than
6 any outside agency or anyone else as Mark
7 brought up. But it's important to note, to
8 the extent that tightening the standards
9 currently in use by our program and approved
10 by Erie County, less clients will be helped.
11 To the extent they loosen the standards,
12 allowing more to be eligible, our program
13 would need additional funding to cover the
14 additional expenses and attorneys' costs
15 which will certainly be incurred. I do not
16 believe that additional unfunded mandates to
17 Erie County will be appropriate and certainly
18 would not be consistent with the spirit of
19 the Hurrell-Harring decision.

20 So if we're going to open up or loosen,
21 for want of a better word, widen the net of
22 people we can provide help to, it's going to
23 have a significant economic factor that I put
24 to you folks to consider the funding for
25 that. Just can't make magic -- you know,

1 pass a magic wand over 125 to 175 and not
2 provide additional money or people.

3 You talked about district courts, that
4 would be a wonderful thing. Politically
5 impossible, I suppose, but the best way to do
6 that, if you're going to do that, is keep the
7 town courts, let them keep all the income
8 from the traffic tickets, just move the
9 criminal business where it ought to be, in a
10 centralized location.

11 If you have any questions, I'll be happy
12 to answer them for you.

13 JUDGE DiTULLIO: Thank you, Bob.

14 MR. ALPERN: Thank you for your
15 remarks.

16 MR. CONVISSAR: Sure.

17 MR. ALPERN: Of the 23,000 -- you had
18 23,000 referrals?

19 MR. CONVISSAR: Yes.

20 MR. ALPERN: How many of those
21 percentages are found not eligible?

22 MR. CONVISSAR: We're actually pretty
23 good. We find out, after all is said and
24 done, about seven percent, I think, is the
25 number that we find out or that we -- in the

1 reportings given to the state either are not
2 eligible or are determined to be able to
3 afford counsel. So it's not a large number.
4 In Erie County, the people we get are really
5 the destitute, the poor and those at the
6 lower end of the financial spectrum. There's
7 not a lot of people trying to fool us;
8 doesn't appear to be, but there's a
9 significant number.

10 MR. ALPERN: And of that seven percent,
11 do you know what basically -- which category
12 mostly they fall under? Do they fall under
13 the violation category or is it --

14 MR. CONVISSAR: No, I don't think they do.
15 I think it's -- I don't have that breakdown.
16 My sense of when I'm involved with these
17 decisions and stuff, is that they are -- they
18 are felonies -- about half and half, felonies
19 and misdemeanors and, you know, misdemeanor
20 defense, you can obtain counsel not at
21 outrageous costs here in Erie County with the
22 private bar. Felonies are another matter but
23 there are some people that try to slide them
24 past us.

25 MR. DOYLE: Bob, thanks for coming.

1 Picking up on, we were talking about the
2 private attorneys. Just so we have it in the
3 transcript, for felonies at least, you've
4 been a private practitioner up until about a
5 year ago, you were a private practitioner.

6 MR. CONVISSAR: Yes, sir.

7 MR. DOYLE: For a felony charge, an
8 attorney is normally going to quote a
9 retainer figure and want the money up-front
10 or the vast majority of the money up-front.

11 MR. CONVISSAR: Correct.

12 MR. DOYLE: So for example, a murder
13 case, the defendant can go in and the
14 attorney would require that before the
15 attorney would step into the courtroom, do
16 anything, that private attorney would want
17 tens of thousands of dollars.

18 MR. CONVISSAR: Tens of thousands of
19 dollars. Now, the economy is such that there
20 are people who try to undercut things, so you
21 can find somebody but you get what you pay
22 for. But in the tens of thousands; \$10,
23 \$20,000 not unrealistic. Federal court
24 you're talking \$25,000 to walk out of your
25 office door to go to court.

1 MR. DOYLE: And courts, especially
2 federal but even the state court, once an
3 attorney gets involved they're reluctant to
4 let that attorney leave because there are
5 money problems.

6 MR. CONVISSAR: That is correct, to the
7 chagrin of the starving attorney who took it
8 for five grand and then finds out he's got
9 three suppression hearings and a three-week
10 trial on a murder case, yes.

11 MR. DOYLE: But that's the type of
12 thing that needs to be taken into
13 consideration in these eligibility decisions;
14 the client may be able to afford \$25 a week
15 on a serious felony case, no attorney is
16 going to accept that.

17 MR. CONVISSAR: That's true. Even on
18 things less than murders, if you're
19 talking -- I mean, this is from my own
20 experience and generally from working around,
21 private criminal defense attorneys generally
22 try to figure out the time involved in a case
23 and multiply it by two hundred and fifty
24 bucks an hour. That's the bottom line
25 process I think is a general average. So if

1 you're talking a murder case and you've got a
2 hundred hours, you're looking at \$25,000. If
3 you, you know, got a little burglary case
4 that you might be able to get rid of as a D
5 felony, nonviolent, you might take \$2500.
6 But you still need to take five if the guy
7 has a record and history; it's a huge amount
8 of money to hire private attorneys and the
9 attorneys who work for me are private
10 attorneys, they have their own private
11 practice and so we're very familiar with the
12 numbers that are involved and quite frankly,
13 they're astronomical. If you ran a hearing
14 just on what lawyers try to get, you'll be
15 shocked at those numbers. Try to get, not
16 what they're getting. They're shocked at
17 what they get, but --

18 MR. DOYLE: And the other question is,
19 I know you have a lot of experience in
20 federal court, the CJA equivalent of
21 assignment of private attorneys there. We
22 also have a public defender in the --

23 MR. CONVISSAR: Yes.

24 MR. DOYLE: -- Western District and
25 many districts too.

1 MR. CONVISSAR: Yes.

2 MR. DOYLE: Do you know what the
3 process is in federal court in terms of who
4 makes an eligibility determination?

5 MR. CONVISSAR: Yes. It is solely by the
6 magistrate judge. There is a financial form,
7 there is an application handled, usually at
8 the initial arraignment. The form is
9 prepared through the offices of the probation
10 department interviewing the defendant, and it
11 provides significant information but not
12 terribly detailed information; bank accounts,
13 car ownership, homeownership and stuff like
14 that. The problem is tackled by a judge and
15 that is the final decision because in federal
16 court, the numbers to be able to afford an
17 attorney to defend your case against the
18 prosecutor who offers no reduced pleas, on
19 cases that take three or four years to come
20 to an end are astronomical.

21 There aren't many people in the state, in
22 Buffalo, in Erie County, who can afford the
23 \$25, \$50,000. So your regular worker-day
24 person, guy arrested off the street, just
25 about anybody with a middle class job, is

1 going to qualify. So they go through the
2 process and, you know, if the answer is I'm
3 earning a million bucks they're not going to
4 qualify. But if I'm earning \$70,000 and I've
5 got a house and a mortgage and a car and two
6 kids, the judge is going to give you an
7 assigned attorney.

8 MR. DOYLE: So in the federal system,
9 the people who do it, the magistrate is
10 entering probation, and probation is an arm
11 of the court in the federal system.

12 MR. CONVISSAR: Yes.

13 MR. DOYLE: So they're essentially
14 under the umbrella of the court system when
15 they're making a determination. Is that
16 something that you think would be possible in
17 the state system and --

18 MR. CONVISSAR: No, I don't think it would
19 be possible, but the first off we've had,
20 you've heard problems with each of the prior
21 people testifying that even when they're
22 changing things and most people agree there's
23 still resistance among many of the local town
24 attorneys. We have 58 jurisdictions we cover
25 here and we'll have differences in five

1 county courts. There's no real control, top
2 down influence to say you will do this. So I
3 don't believe that that can work. It works
4 in federal court because you have two or
5 three magistrates that handle all the
6 arraignments and they're not asked -- cut to
7 the chase, the bottom line, they're not
8 making close calls. Nobody can afford an
9 attorney in federal court and if they can,
10 they come in with you or me once in a while
11 when I get real lucky, or Terry or somebody
12 else, and that solves that issue and the rest
13 aren't close calls because you can't come up
14 with the money to hire an attorney in federal
15 court.

16 So it's not fair in comparison because
17 the skill set to do that, many, many of the
18 judges can have, even in the towns but the
19 actual application won't work because a town
20 attorney may counter with who posted the
21 bail, who did this, who did that, and may not
22 care that it's going to cost \$5,000 for a
23 felony, you posted, you know, a bond or you
24 posted cash, you can do it.

25 I think it has to stay with the programs.

1 We have the knowledge of the costs, we have
2 the knowledge of the amount of work that's
3 done, we have the knowledge of -- and the
4 time, we also have the time. I mean, as I
5 said, they're there but they don't have the
6 time to make in-depth inquiries and there's
7 no follow up. They can't follow up, so
8 you're in front of a judge and you tell the
9 judge, oh, I'm not working and therefore I'm
10 unemployed and therefore, okay, you get the
11 public defender, the judge doesn't follow up
12 and can never follow up. So making it the
13 judge's responsibility on the state side, I
14 don't think would work.

15 MR. DOYLE: Thanks, Bob.

16 MS. MACRI: Hi, Bob. Thank you for
17 coming in. And I just want to ask one quick
18 question.

19 MR. CONVISSAR: Sure.

20 MS. MACRI: In terms of the
21 documentation requirements that you referred
22 to earlier --

23 MR. CONVISSAR: Yes.

24 MS. MACRI: -- I know you mentioned
25 also that in some instances there might be a

1 requirement to get a notarized document or
2 other types of information.

3 MR. CONVISSAR: Yes.

4 MS. MACRI: Does that create any type
5 of delay for your office with respect to sort
6 of finalizing the assignment process, or is
7 it something that you continue to represent
8 while those documents are being collected?

9 MR. CONVISSAR: We do. Everybody in
10 custody has an attorney from the day we're
11 notified, which is the same day as the
12 arraignment. That assignment is going out,
13 we're doing it electronically now from the
14 courts. They e-mail us, we e-mail it to the
15 attorney. That person has an attorney,
16 felony, misdemeanor, that same day. So at
17 the next scheduled felony hearing date we
18 have an attorney there. Most of them have
19 the pleadings in advance because we're able
20 to get them as a scanned document. So we're
21 moving quickly, whether they're qualified or
22 not.

23 For those out of custody, it depends.
24 Return dates, generally, in City Court are
25 within a week. Return dates in the towns

1 give us two weeks, perhaps. Family Court
2 return dates are months. So we have the
3 luxury of trying to get that stuff, to the
4 extent we get it, and people generally come
5 back quickly with it because they want to
6 resolve their situation. We're encouraging
7 them. They're telling us, okay, you will
8 qualify if you show us this and we're
9 assuming they're not lying to us and on that
10 assumption, they will have it to show us,
11 they come in and show us everything. Whereas
12 someone who is not telling the truth to us,
13 then there's a little problem there and we
14 try to work things out. But even then, we'll
15 have an attorney for them who is expecting to
16 get it at the next court date and at least
17 they're represented there if the judge won't
18 allow an additional adjournment to finalize
19 the situation.

20 So there's generally no prejudice to
21 the -- to the client who doesn't complete the
22 eligibility inquiry.

23 MS. MACRI: I know I said one final
24 question, I promise this will be it.

25 In terms of, do you consider the

1 documentation you collect as confidential?

2 MR. CONVISSAR: Absolutely. We don't keep
3 it. We don't keep it. We just look at it.
4 If they're on Social Services, we don't make
5 a copy of the Social Services card, we don't
6 make a copy of anything. We have them sign a
7 financial statement. It used to be under
8 oath, and going back, someone wanted it once
9 and we decided no, that's not how we're going
10 to do that. We're not helping to hurt
11 anybody here.

12 If there's an issue, we know how to
13 handle an issue and we reserve the right to
14 do whatever we need to do, which would
15 include perhaps -- not that I would ever do
16 this -- but a referral to the district
17 attorney. But that statement is prepared
18 essentially by the attorney with the
19 defendant. We don't have him sit in our
20 office and fill that out. So it is, by
21 definition, an attorney/client work product,
22 and it stays in the file. We may hold it but
23 it goes -- because we need it to support our
24 audits and things of that nature, but we
25 consider that absolutely confidential as an

1 attorney work product and nobody is going to
2 see it until they take the handcuffs off.

3 MR. DOYLE: I'm sorry, you said it
4 stays in the file; does it stay in the
5 attorney's file?

6 MR. CONVISSAR: No, it stays in my file,
7 it stays with us. And the reason we do that
8 is because we take a follow-up because, you
9 know, people lie and sometimes the best thing
10 about lies is they can't remember the lies
11 that they tell. So they tell a lie at the
12 window -- and we don't get a lot of them,
13 small percent, not the vast majority, are all
14 telling the truth but some people are cheats,
15 and they will say something at the window, I
16 have two kids, I'm earning \$500, you know, a
17 month. On the financial statement they will
18 say they have four children earning \$400 a
19 month. Well, that's a red flag and we have a
20 woman who goes through those things and finds
21 those things out and then we, you know, don't
22 like that. We will contact the employer,
23 we'll demand work stubs, you know, we have
24 ways of investigating further, but that's on
25 the rare case. But our job, I view, is to

1 find people who cheat. And we've got a
2 limited amount of money here that we need to
3 spend on people who deserve it so that I
4 don't have to chisel on anybody's defense
5 because I can't cover a motion or a hearing
6 or another body that comes in the door. It's
7 just not fair to the entire system.

8 MR. ALPERN: Just one other question.

9 MR. CONVISSAR: Sure.

10 MR. ALPERN: Do you have any policies
11 in place regarding whether the attorney
12 that's initially assigned for a person who is
13 later determined to be not eligible, whether
14 that attorney can retain -- can be retained?

15 MR. CONVISSAR: Can be retained? Yeah; I
16 don't like that. They ask me, they'll Bob,
17 you know, I got along with the client, I know
18 he's not, I can do this. It's almost like
19 our Project Capable thing. If the attorney
20 wants to do it for X amount of dollars and I
21 don't care what the dollars are, I will let
22 them.

23 What I won't do is I won't do the
24 reverse, where in the rarest of instances,
25 Bob, I did this as a favor to my wife and the

1 guy paid me two fifty and he was supposed to
2 pay me a grand, can you assign me; I won't do
3 that. I won't do that.

4 JUDGE DiTULLIO: Bob, one final quick
5 question.

6 MR. CONVISSAR: Sure.

7 JUDGE DiTULLIO: Are you concerned about
8 the town courts -- the town courts as far as
9 competent arraignment, whether it be Orchard
10 Park or maybe Boston where they meet a couple
11 times a week?

12 MR. CONVISSAR: Well, we have a dual
13 structure, and a lot of this came from
14 funding from ILS, thank God for that. We
15 have the attorney of the day program and we
16 have the on-call attorneys. The attorney of
17 the day program is, we assign an attorney to
18 be in the -- we'll call them the -- well,
19 let's just call them the busiest of the
20 courts, but Cheektowaga, Amherst, Tonawanda,
21 city of Tonawanda, we have attorneys who are
22 there every time the court is in session.

23 JUDGE DiTULLIO: Right.

24 MR. CONVISSAR: And that works very, very
25 well. We have broken the County of Erie down

1 into four areas with multiple lower level --
2 lower, less busy courts, and we have what we
3 call on-call attorneys. So we have talked to
4 and trained a group of five or six attorneys
5 to cover various towns like West Seneca,
6 Lancaster, Clarence, Depew, you know, a
7 geographical area like that; five are in that
8 panel; two are on duty every week. Due to
9 funding by the ILS, we have given them
10 laptops and a phone so that there's a single
11 phone that has a single number so the judge
12 only has to learn one number, we don't want
13 to tax all our town judges. But they have a
14 number to call and that gets them an
15 attorney, and if there's an arraignment in
16 the middle of the night, they will go out
17 there.

18 And we've got it in two of the four
19 areas. We're trying to now work the
20 hinterlands, it's harder to find attorneys
21 willing to go to Farnham. I was there once,
22 it's by the water tower, I think, but it's
23 hard to do that, but we're getting people and
24 we will probably have the whole county
25 covered within the next couple of months.

1 JUDGE DiTULLIO: I'm glad you said that,
2 because I worked with Bob Lonski, your
3 predecessor, and we covered the larger towns
4 but we still weren't there in the smaller
5 rural areas.

6 MR. CONVISSAR: Right.

7 JUDGE DiTULLIO: And it sounds like you
8 and I, all of us can do this.

9 MR. CONVISSAR: There's no question we can
10 do this. We have a new deputy for the
11 criminal division that we have, Jamie
12 Auricchio, who is stepping up and doing well,
13 and he's charged with getting that together
14 for us, and he's already lining up bodies and
15 names and, you know, we ask a little bit for
16 these folks; if they get covered a minimal
17 stipend which we can cover under the grants,
18 but it works.

19 This is not a pitch for more money,
20 although if you want one, I can make one, but
21 it works. But they're also knowing they're
22 doing me a favor. Not that we give them an
23 extra assignment now and again, but they get
24 an extra assignment now and again, for
25 someone who is completely qualified, of

1 course, but we try to help those who help us
2 and work for the program and have loyalty
3 and, you know, we're loyal back. We make it
4 work, and that's one way of helping to make
5 that work.

6 JUDGE DiTULLIO: That's a good way to
7 look at it.

8 MR. CONVISSAR: That's what I think. I
9 know know, I'm from Brooklyn.

10 JUDGE DiTULLIO: Thank you, Bob. Thank
11 you very much. Next we have David Schopp,
12 the chief executive officer and executive
13 director of the Legal Aid Bureau of Buffalo.
14 Hello, David.

15 MR. SCHOPP: Good afternoon. I am, as
16 I was just introduced, the chief executive
17 director of the Legal Aid Bureau of Buffalo.
18 The Legal Aid Bureau of Buffalo is the
19 largest institutional provider in
20 representation to the poor in Western New
21 York. We've been around since 1912; annually
22 we handle over 20,000; 13,000, approximately
23 13,000 of those are cases that originated in
24 Buffalo City Court. Additionally, we have an
25 appeals and postconviction unit which

1 represents indigent criminal appellants on
2 appeals of convictions in Erie County,
3 Genesee County, Orleans County and
4 Cattaraugus County. So we currently are the
5 institutional appellate counsel for half of
6 the 8th Judicial District.

7 We fully support the recommendations of
8 the defender association and a number of
9 other not-for-profit defense organizations in
10 a number of areas. Initially, we believe
11 that eligible individuals under the age of
12 twenty-one should automatically be assigned
13 counsel if they are financially eligible,
14 regardless of parental resources. We believe
15 that the threshold eligibility percentage
16 that many offices use should be generally
17 increased and should be increased to a level
18 that is appropriate to the region in which
19 the office is located.

20 As Jerry Ader talked about, certainly
21 representation in New York City by private
22 counsel costs more than it does in Erie
23 County. We believe that not a single
24 factor -- there should be no single factor
25 that is used in denying assigned counsel to

1 individuals, and when in doubt we believe
2 that the provider of assigned counsel should
3 err on the side of representing people.

4 Because we are the -- a significant
5 portion of our work is appellate
6 representation, I thought I'd first talk
7 about eligibility for counsel at the
8 appellate level. Our office, because we
9 cover a four-county region, we believe that
10 we are obligated to help inmates generally,
11 but they're not always inmates, who contact
12 us to whom we are not assigned, to obtain
13 appellate counsel if they are entitled to do
14 so.

15 As such, we respond to all inquiries from
16 inmates and others who contact us about
17 appellate representation. We regularly
18 receive correspondence from inmates within
19 this area -- who are convicted within this
20 area, I should say, who are not assigned to
21 our office but believe that they are entitled
22 to and will be obtaining appellate counsel.

23 What is most often the problem in this
24 case is that although appellate counsel filed
25 a notice of appeal, they did not take the

1 additional -- he or she did not take the
2 additional step to do a poor-person
3 application to the Appellate Division and
4 have us assigned. And I can tell you
5 sometimes clients sit in custody for two or
6 three years before they contact us and seek
7 assignment of counsel. So clearly there's a
8 significant problem there.

9 And although I believe most attorneys who
10 regularly practice in the criminal courts in
11 this area realize that a motion for poor
12 persons -- poor person status is necessary to
13 trigger the person's assignment of counsel,
14 it's interesting that attorneys are not
15 required to do so by court rule, and the
16 court rule I'm speaking of is 22 NYCRR
17 1022(a), which is one of the rules of the
18 Appellate Division which deals with indigent
19 appeals. And if you read -- and I've set
20 forth in some written materials that I've
21 been provided the actual section of the
22 regulation, and I won't read that, but when
23 you look at it closely, although trial
24 counsel is required to advise clients of time
25 limits for appeals, how an appeal is

1 instituted, file a notice of appeal, the
2 right to -- and their right to appeal as a
3 poor person, there's no actual requirement
4 that they file the motion for purpose -- poor
5 person status.

6 So something we are suggesting and that
7 this committee consider is approaching the
8 Appellate Division regarding their rules. We
9 have found that really in a significant
10 number of cases as a result of this
11 regulatory gap, we exert a significant amount
12 of arguably unnecessary resources as far as
13 attorney time goes in assisting clients, you
14 know, future clients in obtaining counsel
15 either through, you know, filing of the poor
16 person status application or in very many
17 cases filing for the permission to file a
18 late notice of appeal.

19 So, you know, our first suggestion is
20 that this committee look into, you know,
21 initiating a discussion about amending
22 Section 22 NYCRR 1022(a) to include the
23 requirement that in addition to inform the
24 trial counsel (sic), in addition to informing
25 the client of his or her right to appeal,

1 that the time limits involved in that and
2 their right to the assignment of counsel,
3 that if they are, in fact, indigent, that
4 counsel -- that trial counsel, should be
5 required to also file the necessary motion
6 for assignment of counsel.

7 And I'm talking about assignment of
8 counsel at the Appellate Division. I was in
9 the appeals unit at the Legal Aid Bureau for
10 fifteen years before I had my present
11 position; I believe, and everyone in our unit
12 in our appeals division believes this, and I
13 think -- I think this is generally true that
14 the Appellate Division standards about
15 entitlement to eligibility for counsel are
16 relatively high; that I think certainly
17 appellate representation on appeal is a very
18 expensive undertaking in most all cases, and
19 I think an assertion that the defendant
20 posttrial, postplea, particularly an
21 incarcerated defendant, cannot afford counsel
22 is pretty clear.

23 However, no one really knows what the
24 Appellate Division standards are; they're not
25 publicized, they're not -- don't know; no one

1 talks about percentages of federal poverty
2 guidelines, nothing. And although we think
3 the threshold isn't really very high because
4 it's very rare that someone is denied
5 assignment of counsel, a concern that we have
6 is private counsel primarily but also
7 assigned counsel, when it comes to appellate
8 representation, might be applying their own
9 concept of what indigency is and informing
10 the defendant, you know, you probably can get
11 assigned counsel or you can't get assigned
12 counsel and if, in fact, private counsel
13 postconviction are informing clients well,
14 your income didn't exceed the 125%, you're
15 not going to be able to get an attorney at
16 the appellate level, that probably just isn't
17 true.

18 So a little bit of transparency from the
19 Appellate Division 4th Department -- and I
20 suspect this is true with the other three
21 departments -- about eligibility and who is
22 eligible for assignment of counsel for that
23 level I think could, you know, result in many
24 people who are convicted of crimes who are --
25 who believe that they are not entitled or

1 have been informed that they're not entitled
2 to assigned counsel, I think that just might
3 not be true, and I think that's something to
4 look into.

5 Now, I'll address our office's current
6 practices for determining eligibility in
7 Buffalo City Court and our ideas about how we
8 think it should be done, ideally.

9 Buffalo City Court is a very busy place.
10 As I said, we handle over 13,000 cases a year
11 there, there are arraignments every day of
12 the year, and the intake parts in which
13 arraignments take place are astoundingly
14 busy. We have a limited amount of time to
15 speak to our clients at that first
16 proceeding. The way it works is, the judge
17 will generally make an initial inquiry, can
18 you afford an attorney. If the defendant
19 says no, speak to the public defender.

20 We, like other people who have spoken
21 here, someone who is on public assistance,
22 SSI, Medicaid, et cetera, they're
23 automatically qualified. Generally when
24 someone says they're unemployed, they qualify
25 pending, you know, examination of other

1 financial factors.

2 When someone is employed, we use
3 initially, as a threshold, that 125% of the
4 federal poverty guidelines. This is
5 something that we have internally talked
6 about changing in our office. Our civil
7 division, which applies federal poverty
8 guidelines for eligibility, has a threshold,
9 a percentage of 200%. Virtually every civil
10 provider in the state utilizes 200% as the
11 threshold for consideration for financial
12 eligibility.

13 The reason we have not, as a matter of
14 internal policy, raised our threshold is
15 simply because we have extremely heavy case
16 loads in Buffalo City Court. Our attorneys
17 generally handle between 700 and 800 cases
18 apiece per year, and of course, this is
19 greatly in excess of the 400 which is
20 recommended by the ABA, and ILS's weighted
21 number of 367.

22 So we have not instituted a higher level
23 but we certainly think a higher level should
24 be instituted and as I said before, it should
25 be based on the region. But along with that,

1 as Bob Convissar has just said and others
2 have said, any increase in that percentage
3 rate that is going to result in an increase
4 in clients has to be met with a commensurate
5 increase in resources to be able to represent
6 those clients.

7 But anyway, at arraignment, you know, our
8 attorneys do charts; if someone says their --
9 tells us their income level, if they're below
10 the 125%, considering also the number of
11 dependents they have, we automatically take
12 the case. If they're above that and they
13 still cannot -- assert that they cannot
14 afford counsel, we make a brief inquiry as to
15 why and we also accept the case. And this is
16 all immediately before arraignment. The
17 arraignment proceeds, we receive the
18 paperwork.

19 Subsequent to arraignment, we do a
20 conflict check, we don't have the mechanism
21 to do a conflict check before arraignment.
22 We do a conflict check, of course, and we
23 also, at the initial interview of the client,
24 obtain more financial information. They
25 confirm the information they provided at

1 arraignment and, you know, we ask about
2 other -- liquids assets, et cetera, when it
3 is the case of someone over 125% who still
4 says they can't afford counsel.

5 It is extremely rare, even despite our
6 numbers, for us to find anyone who does not
7 convince us that they can't afford an
8 attorney. And again, something I think is
9 just generally true, I'm sure there are very
10 small number of people who try and get a free
11 attorney even though they could afford one,
12 but generally our experience is, and I think
13 the experience of most other offices, is that
14 people who can't afford an attorney seek out
15 private counsel.

16 I think -- we don't have the resources
17 staff wise or time wise to make some of these
18 extremely searching inquiries into resources
19 and asking for proof, et cetera, but we feel
20 that, you know, we do not see clients who
21 have tried to sneak in to get representation
22 from our office, even though we provide great
23 representation in Buffalo City Court and
24 maybe better than a few private attorneys,
25 the people who feel they can afford an

1 attorney go out and get one.

2 So the other factors, of course, that we
3 consider are their liquid assets, their
4 debt-to-income ratio, their, you know,
5 expenses for necessity of life, all of those
6 are factors that enter into our decision on
7 whether someone who is over that 125% should
8 continue to be represented by our office.
9 And in borderline cases, we really always are
10 there and retain the case.

11 A couple other matters that I wanted to
12 talk about; one is --

13 JUDGE DiTULLIO: David, I'm not cutting
14 you off. We have the courtroom until two,
15 and we have a couple other speakers.

16 MR. SCHOPP: Oh, okay. Let me say
17 something about, because I wanted to bring
18 the committee's attention to this.

19 The under twenty-one defendants, under
20 the age of twenty-one, I explained why
21 basically we accept representation in
22 virtually all of those cases where the parent
23 is unwilling to pay for the representation of
24 the client, but I think something very
25 interesting that this committee should

1 consider that in the case of juvenile
2 delinquency cases in Family Court, we have a
3 large attorneys-for-children division that
4 represents clients in juvenile delinquency
5 proceedings in Erie County Family Court. The
6 state funds us to represent those -- those
7 children up to the age of sixteen who -- who
8 we're assigned to, regardless of their
9 parental income. So there is already a
10 precedent for the state to consider
11 representation of children or persons under
12 the age of twenty-one on criminal matters.

13 With that, I -- there's a couple other
14 things I was going to mention, but I think
15 other speakers have addressed these so I'll
16 conclude just by saying we look forward to
17 this committee, you know, and ILS setting
18 standards that will address many of the
19 problems with the client eligibility in New
20 York State.

21 JUDGE DiTULLIO: Thank you, David.

22 MS. MACRI: Can I ask -- thank you,
23 David, for taking the time out to be with us
24 here today.

25 You mentioned, so this idea -- I

1 really -- I appreciate you bringing up the
2 appellate representation issue because that's
3 something we really haven't addressed in some
4 of the other prior hearings, so I appreciate
5 the fact that you brought some attention on
6 that issue.

7 So conceptually I'm thinking, and correct
8 me if I'm wrong, would it be the idea at the
9 time, we've heard that defenders are actually
10 filing notices of appeal on behalf of an
11 individual client who stresses an interest in
12 filling their position with conviction and
13 that at that same time they should also be
14 considering filing that in forma pauperis, a
15 poor person motion with that notice of appeal
16 or along that line.

17 Is that sort of what the recommendation
18 would be in that instance?

19 MR. SCHOPP: That is the
20 recommendation. And I know that Erie County
21 assigns counsel in that instance. I'm not
22 sure if it's statewide.

23 MR. DOYLE: David, I just want to make
24 sure. You were talking about the 125% figure
25 and you said, at least to some extent, the

1 decision to use that and not to move to a
2 more liberal, if you will, that that decision
3 is based in part on the case loads, the very,
4 very high case loads that you have.

5 MR. SCHOPP: Correct.

6 MR. DOYLE: So people who are above
7 that might be eligible under other standards,
8 if other standards were employed, they might
9 be determined to be eligible. That's just
10 interesting, that your case loads have
11 affected how you determine some of the
12 eligibility questions.

13 MR. SCHOPP: Right.

14 MS. MACRI: Can I bounce off that
15 idea? So theoretically, somebody in your
16 office could get an attorney to help them
17 with a housing matter but at the same time
18 would not be eligible for counsel in a
19 criminal proceeding; is that possible?

20 MR. SCHOPP: That is possible.

21 MR. DOYLE: Thanks, David.

22 JUDGE DiTULLIO: Thank you, David. Thank
23 you for your time. Our next speaker is
24 Norman Effman, public defender of the Wyoming
25 County Public Defender Office and director of

1 the Attica Legal Aid. Thank you, Norm, for
2 being here. Norm's been around for a long
3 time.

4 MR. EFFMAN: Thank you, Judge. Thank
5 you, everybody.

6 JUDGE DiTULLIO: Yes.

7 MR. EFFMAN: A little transparency
8 first. It's true that I was either in law
9 school or about to start when Gideon was
10 decided, but I did not argue it.

11 Also, prior transparency is we're
12 somewhat unique in the 8th Judicial District
13 in that the chief defenders in this district
14 have been meeting regularly probably for
15 seven or eight years and so we exchange
16 information and that's why you've heard what
17 I think is relatively consistent information
18 about how we handle our offices because we
19 talk about it. That is not true in other
20 districts, but it's certainly true here and
21 that's why, again, the consistent answers
22 that you've heard.

23 Another thing that might be taken into
24 consideration is that part of the problem
25 that we're facing with eligibility and people

1 trying to get assigned counsel where
2 otherwise in the past they might not have, is
3 probably your fault. Starting in 2004 when
4 Vincent Doyle I think was made a chairman of
5 the special committee to ensure quality
6 mandated representation as a result of the
7 Kaye Commission Report, which was a result of
8 the Spangenberg Report that's a result of the
9 summit held by Justice Bing Newton, we knew
10 we were in trouble and since that time we, as
11 a group, and the people sitting up here in
12 front of me, have all been involved in
13 increasing the quality of mandated
14 representation which, of course, results in
15 the public conception that that's happening
16 and the public conception that, and I'm going
17 to refer to Bob Convissar, if he's still
18 here, because he was present when Vince Doyle
19 ran his first house of delegates meeting at
20 the state bar and the issue came up on
21 assigned counsel.

22 There's less and less of a concept that
23 we've heard over the years of no, I didn't
24 have a lawyer, I had an assigned counsel or I
25 had a public defender. That concept was

1 mentioned at a house of delegates meeting
2 when we were reviewing the standards of
3 mandated representation, and somebody named
4 Convissar got up and, you know, he's somewhat
5 vocal from time to time, I wish I had a tape
6 to play it, and said something like, I am an
7 18-b provider and I am a real lawyer.

8 And that not only hung in the air for
9 about twenty-five minutes, but it really has
10 set the stage for I think a different
11 impression that the public has with respect
12 to the quality of representation now being
13 made available to them through the advent of
14 ILS and the monies flowing from the state to
15 increase the quality. So yes, more people
16 are seeking assignment of counsel because
17 more people believe that they get a real
18 lawyer by doing so. So that's part of what's
19 happening.

20 The other thing is, I think we do
21 ourselves a disservice by using the term
22 indigency with respect to eligibility, and
23 that's been pointed out especially by NYSDA
24 and I don't know if Jonathan Gradess has
25 already testified or submitted his written

1 material, but that's a real issue because if
2 you're dealing with the people that supply us
3 local money, the counties, they're looking at
4 indigency as a standard and that is a totally
5 different concept than what we have been
6 talking about this morning as far as the
7 ability to afford competent counsel based on
8 the serious nature of the case that you have
9 or lack thereof, and the place -- the venue
10 that you're seeking counsel and what liquid
11 assets you have available without destroying
12 your ability to provide necessities for
13 yourself and your family. That's a lot
14 different from indigency, and the two are not
15 only confusing but create a barrier for us to
16 try to justify what we do for our funding
17 sources, not ILS but with the counties.

18 Nobody's mentioned this particular
19 document, but it changed my mind. I grew up
20 at Buffalo Legal Aid --well, I haven't grown
21 up but I started my profession at Buffalo
22 Legal Aid, and I think at that time in City
23 Court they were not taking violations, had to
24 be a misdemeanor or better. They were
25 probably using 125 and when I moved out to

1 Wyoming County under circumstances not to be
2 discussed in this room, you know, I just
3 followed suit using the forms available
4 through the 18-b program in Erie County and
5 basically modeling what we did on what was
6 happening in Buffalo and in Erie County.

7 The thing that changed my mind about the
8 125, and I know it's mentioned in some of the
9 materials, but this document, the self
10 sufficiency standard of New York State, this
11 one is 2010, it's available online, and it is
12 an eye-opener. And around 2010, I think it
13 was the chiefs at NYSDA -- New York State
14 Defenders -- had had a presentation by the
15 people involved in creating the standard.
16 And if you have it available -- and I'm sure
17 that you do -- if you take a look at this,
18 not only does it contain the rationale for
19 dealing with assignment of counsel in a
20 different way than indigency, but it lists
21 all of the counties, every one of them, and
22 talks about the different standards of living
23 and what is required in each of those
24 counties. And that's why when I looked at
25 this -- and I think page 91/92 has a summary

1 of all 62 counties and what it costs to
2 provide the necessities of life, so families
3 at one, two, three level, you know, no matter
4 how many members. I looked at that and I
5 think Wyoming County was at about 232% of the
6 poverty lines -- guidelines, and so I was
7 conservative, I went to 200.

8 Jerry Ader had already left so I didn't
9 call him and tell him, okay? So we went to
10 200% and up until tomorrow or the day after,
11 we were faced with the lack of equitable
12 assignment protocol in Wyoming County because
13 our Assigned Counsel Program had remained at
14 125. So you talk about the difference
15 between civil and criminal in Erie County, at
16 least at Buffalo Legal Aid, we had that
17 across the board, and so when we would
18 conflict a case out, we don't have a conflict
19 defender, it goes right to the 18-b panel.
20 And obviously there were people who would
21 have been eligible and we determined
22 eligibility but not eligible under the lower
23 threshold standard being used by the Assigned
24 Counsel Program.

25 As this committee was formed and as the

1 issue developed after Hurrell-Harring, I
2 started to discuss this with the county
3 people, primarily with a person that most of
4 you know rather well, Judge Mohun, who is now
5 kind of our senior criminal court judge,
6 about the inequity of that and through his
7 impetus, we put together a meeting with
8 myself, the assigned counsel coordinator --
9 who happens to be the county attorney -- and
10 the chief executive of the legislature, and
11 we came up with a protocol which will
12 commence August 1st, and that is all
13 eligibility determinations will be made by my
14 office utilizing the 200% guideline as a
15 threshold, again. Presumption is 200% lower,
16 you're in. Other than that, we do what
17 everybody else has been doing and has talked
18 about this, and that is we plan the case, we
19 determine what reasonable attorney's fees
20 would be if they went private and we look at
21 all of the other factors including the
22 seriousness of the case and what it would
23 cost to mount a competent defense.

24 We are then going to maintain a
25 statistical analysis on a monthly basis and

1 again at the end of the year to see what, if
2 any, differences there are economically, and
3 again I echo what Bob Convissar and David
4 Schopp said, that we anticipate that if the
5 new guidelines come out across the board,
6 whatever happens, including the twenty-one
7 and under and the use of spousal income in
8 certain cases as either a determiner or not a
9 determiner, that we anticipate there will
10 clearly be an increase in case load, and that
11 cannot happen without an increase in state
12 support.

13 I would, at the very least, compare this
14 to the increase in assigned counsel rates in
15 '05 where it was acceptable to NYSAC and the
16 counties only because, at least in theory,
17 the state can make up the difference through
18 the indigent defense fund which is now, of
19 course, being run by ILS.

20 So without that type of guarantee, we're
21 all in trouble. And as some of you know, I
22 wear more than just the two hats referenced
23 in my introduction. I'm very much involved
24 in what we call the Doyle Effman Kossover
25 committee now because who can remember

1 mandated quality whatever, I'm very much
2 involved in NYSDA, I'm very much involved in
3 the new organization, the Chief Defenders
4 Association of New York, and I'm very much
5 involved from the beginning, I think it was
6 Judge Doyle who got me into it, but the New
7 York State Bar Association and the criminal
8 justice section specifically, and I'm also a
9 member of NYSACDL, which are more or less
10 more private attorneys than public attorneys
11 involved in criminal defense.

12 And any one of these organizations
13 statewide is discussing what you are doing
14 now and how to address these issues and we
15 are trying as best we can to be on the same
16 page to make recommendations that are
17 consistent among the defense community as to
18 what is applicable, what should be done and
19 how to do it. And I can tell you some of the
20 concerns I've heard without getting to what
21 everybody else is saying because I'm only
22 speaking for myself at this point.

23 Concerns; who will make the decision.
24 I've also reviewed the state bar criminal --
25 the Doyle Effman Kossover Committee report on

1 eligibility which started in 2005, and in
2 there we recommended that, we said the
3 judiciary has to make that decision and there
4 was no reference to the process that we
5 talked about.

6 In reality, of course the judiciary must
7 make the decision under the law with respect
8 to assignment and I interpret our own
9 standards to mean that it's okay if the court
10 says you need a lawyer, yes. And then we do
11 the initial determination, make a
12 recommendation to the court and then the
13 court assigns us, which has been the process
14 that most of the defendants you've heard have
15 talked about, and that's what we do as well.

16 But that is a concern because there was
17 some other chief defenders who loved the fact
18 that they don't have to spend the two days a
19 week that we've talked about, or the two and
20 a half days a week with one person
21 determining eligibility because the courts do
22 it. Rensselaer County is an example where
23 the providers there are told which are their
24 cases because the judiciary determines
25 eligibility. And the chief defender there

1 says I love it, I don't have to do anything,
2 I know what my case load is.

3 Who needs to make additional work and
4 decisions? Well, I think that it is our
5 responsibility, and we have much more
6 information available to us with respect to
7 what the requirements should be with respect
8 to eligibility, and I would agree with most
9 of the people who have spoken in the past and
10 presently saying it should be the primary
11 provider who makes the initial eligibility
12 determination and obviously the court must
13 approve that assignment and the court can, of
14 course, review that assignment.

15 The other issue of controversy is the
16 twenty-one and younger defendants. NYSDA's
17 position, which I tend -- which I agree with
18 and is also referenced in the state bar
19 standards, is that the constitutional right
20 to counsel is individual and we, therefore,
21 are obligated to provide attorneys when
22 required to the individual and it's not a
23 family process. But like every other
24 provider that has to deal with budgets and
25 legislatures and inquiries, we certainly do

1 look to the parental income in cases where
2 either/or both parents take that individual
3 as a dependent for income tax purposes.

4 When someone's incarcerated, we're there
5 and we continue to be there until that
6 decision is made. And that's true as far as
7 I know just about everyone that you've heard
8 from today, that we will remain on the case
9 from the beginning until the decision is made
10 so there's no delay in representation. But
11 we do attempt to see if the parents will pay
12 for it. If not, we carry on, and especially
13 if there's incarceration. If the individual
14 is not incarcerated, we have far more time to
15 require the documentation and some of the
16 conversations that might result in parental
17 retaining private counsel (sic), but again,
18 that's a luxury we can only afford if it's
19 not to the prejudice of the individual who is
20 seeking assignment.

21 I agree with everything David said about
22 appeals because we do our appeals in-house
23 and I get a lot of issues and letters from
24 inmates and, as you know, we get letters
25 throughout the state because of our Attica

1 Legal Aid component saying I don't have a
2 lawyer, my lawyer filed a notice of appeal.
3 That is a problem that must be addressed and
4 it must be addressed by the Appellate
5 Division, rules have to be established to
6 ensure that poor person applications are made
7 by trial counsel when appropriate.

8 So if we deal with standards -- and
9 again, I would refer to this document, the
10 self-sufficiency standard, as at least a
11 starting point to determine what is logical
12 throughout this state with respect to
13 appropriate guidelines which commence the
14 presumptiveness of eligibility.

15 Counsel, at first appearance, is kind of
16 a magic bullet with respect to early entry
17 and eligibility determinations. We have a
18 counsel-at-first-appearance grant, which has
19 been in effect for about a year and a half
20 now, there's no eligibility requirement, we
21 cover 24/7. We have two staff attorneys who
22 are responsible for the program, they go one
23 week on, one week off, and we have a list, I
24 think Bob Convissar mentioned it, it's a
25 similar program, we have a list of five or

1 six 18-b lawyers who are paid a little bit
2 more under our contract, I think they get
3 seventy-five an hour across the board rather
4 than the sixty and seventy-five split, to be
5 available after hours, and we talk to them
6 specifically about what we require with
7 respect to intake and they send the forms to
8 us so when we have counsel who is not
9 available on the regular number, that
10 attorney will then contact the Blist and
11 find someone, and they're divided
12 geographically, because Wyoming County is low
13 in population but big in area, we have about
14 600 square miles and those of you that live
15 around here know it snows a little bit more
16 than it might in the city, not so much more
17 than Elma but more than in the city.

18 So we have that and we've been very
19 successful on counsel at first appearance in
20 covering the majority of those and we've
21 gotten some positive feedback showing, among
22 other things, that the pretrial services in
23 Wyoming County that interview inmates
24 incarcerated in the local jail every morning
25 find that while there's the same number of

1 arrests, there's about 25 to 30% less intakes
2 because there's less people in the jail. We
3 think that's counsel at first appearance.

4 Another kind of data that we picked up
5 from the jail is that even though there's the
6 same number of arrests in the county for the
7 year we've been operating, the amount of bail
8 collected by the jail in that year was
9 \$75,000 less than it was the year before, and
10 we attribute that -- and the officials agree
11 with us -- that the bails are significantly
12 lower than they were before there were
13 lawyers at arraignments, and of course, we
14 begin the eligibility process immediately,
15 even before -- at the arraignment, and that's
16 done by the attorney who appears, whether
17 it's one of our staff attorneys or one of the
18 18-b lawyers that's being paid directly
19 through our ILS grant. They begin the
20 eligibility and conflict determinations at
21 initial intake. So all of that melds
22 together to the point that we have a really
23 good handle on what cases are coming in.

24 We also have an investigator through the
25 case load reduction grant that we got through

1 ILS and that means that we are now at the
2 jail on a regular basis, not once a week but
3 almost daily. And if not, we have an
4 arrangement with the jail that anyone in that
5 jail has a free call to us. As some of you
6 may know, the ability for incarcerated
7 individuals to make phone calls is extremely
8 limited and very expensive under the systems
9 even as modified within the state and the
10 jails. We have an absolute open line between
11 the jail and our office, which is right
12 across the parking lot, so access to those
13 individuals are easily accomplished.

14 We do a complete financial. I mean, we
15 modify the forms, we do not require
16 signatures under oath but we utilize the Erie
17 County assigned counsel forms to begin with;
18 we modify them a little bit. As a result of
19 information we received from these various
20 meetings I attend, especially in Family Court
21 matters, we do not maintain the financial
22 records in those forms, we substitute it with
23 an attorney's application or affidavit or the
24 staff person that reviewed the financials
25 showing their eligibility to avoid what is

1 more likely in Family Court than any other
2 place, and that is the attempt to gain the
3 financial for purposes of the adversarial
4 system that is applied in support/custody/
5 visitation.

6 We're not -- we do pretty much the same
7 thing in criminal, although for example, in
8 devising a new protocol, and since the
9 assigned counsel coordinator is also the
10 county attorney, we have determined that in a
11 conflict situation, number one, we will
12 forward all of the financial intake to the
13 assigned counsel coordinator so that he has
14 the documentation necessary so he can answer
15 to our legislative committees with respect to
16 the people who have been accepted by us.

17 Moreover, we deem it, obviously, a
18 conflict immediately if it's a support case
19 since the county attorney's office represents
20 the other side on support cases so we do not
21 do -- that's the one exception to our office
22 doing all eligibility, and that is a support
23 case because it's an inherent conflict
24 because the opponent is the county attorney's
25 office.

1 With that I realize, Judge, you have
2 other business to attend to, but in any
3 event, I'd be more than happy to answer any
4 questions.

5 MS. MACRI: Can I ask, you mentioned
6 as of August 1st you're going to be
7 implementing this 200% guideline rule.

8 MR. EFFMAN: Across the board.

9 MS. MACRI: Across the board. And so
10 you also mentioned, just to make sure I
11 understood this, you're going to be
12 collecting statistics on the impact of that
13 increase, is that correct?

14 MR. EFFMAN: That's correct.

15 MS. MACRI: Okay. Thank you.

16 MR. DOYLE: Norm, the last thing you
17 mentioned, in support cases, who does the
18 eligibility screening?

19 MR. EFFMAN: Assigned counsel.

20 MR. DOYLE: The administrator of whom
21 is the county attorney?

22 MR. EFFMAN: Yeah. When Judge Pigott
23 was PJ 4th Department before his almost
24 mandatory forced retirement coming up soon,
25 we had discussed this, and it's a phenomenon

1 that is not only something in Wyoming County
2 but apparently the counties got together too
3 back in the mid '60s to decide how to do this
4 stuff, so that's why some of the plans look
5 so similar.

6 And it is not unusual, I found out, for
7 the county attorney's office or the county
8 attorney himself or herself to be the
9 assigned counsel coordinator. It's an
10 inherent conflict, I believe, so did Judge
11 Pigott, but he was about to visit Eric Dadd
12 who was the assigned counsel coordinator at
13 the time, who sadly has passed away, but he
14 got called away so it never got resolved.

15 But I think in determining, for example,
16 who makes the eligibility determinations, it
17 might be something that ILS might want to
18 look at as far as potential conflicts in who
19 does the secondary and third level of
20 assignment of counsels. But yeah, there's no
21 question because if I go to a meeting, the
22 assigned counsel coordinator who is not a
23 criminal lawyer, not a defense lawyer or
24 prosecutor, is interested in one thing,
25 protecting the county tax level, period.

1 That's the paramount concern that he has and
2 in dealing with potential increased case
3 load, especially on 18-b where it's money
4 right out of the county -- if it's money out
5 of our office, well, we're a county
6 department so we have a budget and they can
7 control that.

8 But obviously, as you know, when you
9 increase the assigned counsel rates, there's
10 little or no control, it all depends on who's
11 eligible and how many hours are vouchered
12 for. So yeah, the great concern, as more
13 cases go to alternative providers rather than
14 county providers using the panel system, it's
15 going to cost more.

16 There's another factor that quickly I
17 want to mention. I am cognizant because I
18 wear so many hats including private attorney
19 that -- of the private bar and so is the
20 state bar association which, you know, the
21 significant numbers of which are in private
22 practice, not public practice. The position
23 of the state bar has always been to maintain
24 the involvement of the private bar in the
25 criminal justice system through the 18-b

1 panels, et cetera. But more than that, it is
2 a profession but you got to make a living.

3 There are a lot of lawyers out there that
4 survive on not the murder and the rape one
5 cases where the fees are in the \$20, \$25,000
6 plus category, but in the DWIs and the petit
7 larcenies and the 511s where the fees can be
8 in the \$700 to \$3,000 level. And we, as
9 eligibility determiners, must be completely
10 cognizant of that portion of the bar that
11 actually relies on this, and so as I think
12 Jerry might have indicated, we often, if we
13 find somebody on the fringe we'll say listen,
14 go out and get quotes from three attorneys,
15 and we know who the attorneys are in the
16 practice in our area and we know the basic
17 fees, we don't have to do a survey because
18 there's three of them. But besides that,
19 they come back and try to get three lawyers
20 and tell me who you went to and what kind of
21 fees they're looking for. And if you still
22 can't afford someone, we'll take another
23 look.

24 But I also learned some things here today
25 as well. I learned that, you know, I like to

1 think that we're really good at what we do,
2 but we're not, I mess up. I don't have -- we
3 used to send out letters with everyone we
4 found not eligible to the court so they knew
5 about it, and we had some information in
6 there about how to appeal, go to the judge.
7 I just called my office and said are we still
8 doing that, and the answer is no.

9 So I have to improve my practice as well.
10 I think it's important to provide those who
11 are not eligible -- and there are very few, I
12 think out of something like 700 cases, 15
13 were found not eligible by my office last
14 year, so a really small number but in any
15 event, I have to make sure they are advised
16 that it is the court that is the final
17 arbiter of that and they can go to the judge
18 and say I need a lawyer.

19 And there are judges in our jurisdiction
20 that will assign counsel when they're clearly
21 not eligible simply because most courts want
22 to have a lawyer on the scene as quickly as
23 possible.

24 JUDGE DiTULLIO: Thank you so much, Norm.
25 Thank you for your time. Judge Farrell, now

1 practicing attorney, did you want to make a
2 couple of comments?

3 MR. FARRELL: Yes, thank you. Thank
4 you, Your Honor. I'm appearing here in my
5 capacity both as having served twenty years
6 on the bench in Amherst but also as former
7 president of the New York State Magistrates
8 Association.

9 First off, I think my comments will be
10 brief, I think we have about eight and a
11 quarter minutes left. But I want to state
12 from the outset that the New York State
13 Magistrates thoroughly endorse the concept
14 and philosophy of Hurrell-Harring and what
15 Judge Lippman is trying to do.

16 One of the things that became a
17 recognition to me when I sat on the bench and
18 I served as state magistrate's president was
19 a clear perception of the amount of
20 diligence, time, effort, concern and real
21 ethical effort that was involved with the
22 town of court attorneys, 70% of which are
23 nonlawyers. So I take up their cause as
24 being able advocates of people who are in
25 their court and they do their job well.

1 I think that the issue that we have here,
2 because aside from a few other courts in the
3 state, by and large the burden of getting up
4 once or twice in the middle of the night
5 falls on the town and village court judges.
6 So as a result, the legislation, the
7 enactments, the requirements for, as we
8 endorsed and have counsel at first
9 appearance, and the eligibility
10 considerations have a strong bearing on the
11 efficacy of village courts.

12 I'm not really going to speak to
13 eligibility criteria because very honestly,
14 I'm a thorough supporter of Bob Convissar's
15 program because I believe the way that worked
16 not only in my court where, as my wife puts
17 it, I'm a spoiled brat and I had nineteen
18 clerks and everybody else running around
19 doing things for me, the bottom line is
20 having an attorney of the day and having an
21 attorney who can come out in emergencies,
22 whether or not as we do have at the holding
23 center for fifteen -- fifteen to eighteen
24 different prisoners at any one time. Still
25 and all that provides the representation

1 that's necessary and meets the need.

2 I think from the standpoint of the state
3 magistrates, the comments were made early on
4 this afternoon about the effect of the action
5 plan and the fact of providing additional
6 logistic support and also educational
7 support, the town court judges are not funded
8 by OCA so as a result, education became
9 something that was sponsored by the New York
10 State Magistrates Association or through OCA,
11 but funding for people to attend and all the
12 other considerations that made it difficult
13 came into play in that circumstance. I think
14 with the action plan, we begin to get much
15 more highly educated town and village court
16 judges, especially the nonlawyers who took it
17 and take it very seriously in what they're
18 doing.

19 I think we would advocate for a
20 semi-standardization in terms of eligibility
21 criteria bearing on the area, but I think the
22 agencies involved, such as Bob's and many of
23 the other gentlemen who have spoken this
24 morning, would be the most appropriate to
25 make that jurisdiction. I don't necessarily

1 feel comfortable that it's the primary
2 responsibility of the court to make a
3 pervasive controlling decision as to
4 someone's eligibility, someone else should
5 step into that capacity.

6 I think from the standpoint -- and I'll
7 cut to the chase on a couple of other points.
8 I think the mention was made by my colleague
9 of having a central court. That would be
10 fine if the majority of courts, especially in
11 rural counties where some don't even have a
12 City Court, had a 24/7, 365 coverage, but a
13 lot of them don't. And as a result,
14 considering some of our more rural counties,
15 northern counties, central counties, the
16 logistics of law enforcement transporting
17 clients or defendants to the court and the
18 logistics of having the town and village
19 court judges out there twice sometimes in the
20 middle of the night, I think it makes a
21 central court while ideally desirable,
22 practically probably unable to be put into
23 place.

24 So while we support that type of
25 approach, pending further legislation, and I

1 will opine maybe as sort of a side comment,
2 district courts have been extremely expensive
3 in Nassau and Suffolk County, they are really
4 cash quarters and as a result, there's been a
5 strong reluctance to try to do that let alone
6 taking away the jurisdiction from the
7 localities around the state.

8 Town and village courts are considered
9 the courts of the people, the courts of the
10 jurisdictions they're in, so without getting
11 into a discussion on a philosophical basis, I
12 believe I want to state our goals for what's
13 taking place here, but I think more
14 education, more allowance of the
15 organizations to make determinations of
16 eligibility and the operational capacity to
17 provide lawyers in the middle of the night
18 rather than having some person have to get up
19 at two in the morning and wait until five in
20 the morning at the courthouse until someone
21 shows up. We're lucky in that regard in Erie
22 County but in many places they are not.

23 So I'll confine my comments, Your Honor,
24 and if there are any questions I'll field.

25 MS. MACRI: Thank you so much for

1 taking the time to share these comments with
2 us and especially appreciating your
3 perspective from being on the bench for so
4 many years and determining what works best in
5 terms of who should be engaged in this
6 process of determining eligibility.

7 I'm going to ask real quickly, one of the
8 things we've been sort of thinking about is
9 arraignment and obviously the idea that in
10 some instances, arraignment might result in
11 attorneys being called out, a judge being
12 called out in the middle of the night to
13 appear in court, and this concept of when it
14 comes to arraignment, sort of having a
15 presumption of eligibility solely for
16 arraignment purposes to engage in that, you
17 know, immediacy of the proceeding and
18 therefore do a secondary eligibility
19 determination process after the arraignment
20 is over.

21 What's your thought, based on your
22 experience on the bench?

23 MR. FARRELL: Well, I listened to what
24 Mark Williams had to say and I'm sure Your
25 Honor will understand any level of the

1 judiciary, there's some folks who get with
2 the program and there's some who don't.

3 So as a result, my experience in going
4 around the state, you know, with the 1600
5 courts around the state and the 2200 town and
6 village court judges, most often the
7 presumption will be to opt for assignment of
8 assigned counsel because, as Norm said,
9 basically as a judge, especially the calendar
10 I had, you know, we had in Amherst of all
11 different types, 40,000 cases a year, I want
12 an attorney there. I don't want to be
13 waiting for a lot of folderol to make sure an
14 attorney is there, so I will opt to provide
15 for an attorney, and I'll say sorry for doing
16 it but I'm not asking for permission.

17 So the idea behind that, that really
18 espouses the view that I've seen at
19 conferences from the state magistrates and in
20 other contexts where they will opt for
21 eligibility. Now, to say that some folks
22 don't because they have their only personal
23 views, I can't really comment on that, and
24 again, I think that's a function of
25 education.

1 MS. MACRI: Thank you, Mark.

2 JUDGE DiTULLIO: David Farrugia, public
3 defender from Niagara County, anything you'd
4 like to say?

5 MR. FARRUGIA: Just briefly. Thank you.

6 Judge, this is like going to one of those
7 CLEs where you kind of think you know the
8 material and then you hear it and you --
9 again, I'm glad to hear that my colleagues
10 have some of the same problems, concerns and
11 issues that I have, and again, there's some
12 things I have to look at. We've always used
13 the 125% but again, that's always been just a
14 starting point. If they fall below, easy.
15 And again, the other thing is that most of
16 the determinations are very easy. It's only
17 a small percentage that you really have to
18 ask the deeper questions regarding their
19 liabilities and assets and that type of
20 thing. Most of the folks we represent are
21 getting some type of public assistance and
22 the inquiry stops there. But again, I have
23 really nothing to add, just to say that I'm
24 glad to hear that we all have the same
25 problems.

1 JUDGE DiTULLIO: Yeah. And they should
2 be talked about. And thank you, Dave, for
3 taking the time to come here.

4 MR. DOYLE: Real quick question. You
5 heard Dave Schopp talk about they used 125%
6 as well and he mentioned that the fear is
7 increasing that to 150 or 200, that that
8 would tax the ability of his office which is
9 already overloaded with cases.

10 Is that a concern of yours as well? Does
11 that inflate any role in setting that
12 eligibility standard?

13 MR. FARRUGIA: I can't say that it would
14 at this point. As I said before, it's only a
15 small percentage of folks that we really have
16 to go beyond the initial inquiry; are you on
17 public assistance, are you working. That
18 would only probably be maybe 10 or 15% of the
19 applicants. So I don't see it being a big
20 problem at this point, but again, who knows.

21 MR. DOYLE: But if you went to 200,
22 assumedly even for those 10 or 15%, you would
23 have more people than being represented by
24 your office?

25 MR. FARRUGIA: Yes, we would, definitely.

1 MR. DOYLE: Would that pose a problem
2 for you?

3 MR. FARRUGIA: I have kind of an unusual
4 office. The staff members are mostly part
5 time but I've got a lot of them, there's five
6 people that do Family Court, two that do
7 appeals and eighteen that do the criminal
8 court cases and twelve town courts, three
9 city courts and of course the county courts.

10 So a few more cases here or there I don't
11 think would be a huge problem.

12 MS. MACRI: Could I ask too, David?

13 MR. FARRUGIA: Sure.

14 MS. MACRI: I know that you have --
15 you're a teacher provider also to the
16 assigned counsel system. Do you do all of
17 the determination of eligibility, or --

18 MR. FARRUGIA: Yes. We do all of the
19 determinations and then if there's a
20 conflict, the case goes over there.
21 Conflicts does not do any of the screening.

22 MS. MACRI: Do you collect
23 documentation in your process in terms of
24 financial documentation?

25 MR. FARRUGIA: Sometimes we ask for pay

1 stubs or tax returns but again, that's the
2 exception rather than the rule.

3 MS. MACRI: And do you have them sign
4 any documents under penalty of perjury?

5 MR. FARRUGIA: We still do, but I'm going
6 to review that, after what I've heard today.

7 JUDGE DiTULLIO: David, as far as the
8 lawyer or counsel at arraignment in Niagara
9 Falls, is it working out okay?

10 MR. FARRUGIA: It's working out great,
11 and there's anecdotes that I could tell about
12 cases getting dismissed at arraignment or
13 bails being set at such a low amount that the
14 DAs have been protesting. Again, it's
15 working the way it's supposed to.

16 JUDGE DiTULLIO: Good, good. For
17 everyone here, we're so concerned about the
18 rural areas and counsel arraignment, and
19 we're listening to that and we have to figure
20 that out. But Niagara Falls City Court, one
21 of the busiest courts in Western New York, up
22 until recently didn't have counsel at
23 arraignment. But we were able to correct
24 that and, go Dave.

25 MR. FARRUGIA: Yes. Thank you very much.

1 Thanks for the help.

2 JUDGE DiTULLIO: Bob Elardo, would you
3 like to make some comments?

4 MR. ELARDO: Yes. Thank you, Judge.
5 With the exception of Judge Farrell, I'm a
6 little different than all of the other
7 speakers because I don't come from a program
8 that provides mandated services. I'm from
9 the Erie County Bar Association Volunteer
10 Lawyers Project, which provides free civil
11 legal services in non mandated cases. So our
12 clients are very similar.

13 I have a particular interest in the civil
14 side of mandated services and I have for a
15 long time, in that I've been involved in
16 bringing an Article 78 case in order to get
17 someone the right to assigned counsel that we
18 believed had that right. I've also written
19 an article that was published by Fordham Law
20 School about some assigned counsel issues and
21 so I have that history on the civil side and
22 also, looking forward, we will be the program
23 along with the subcontractor Legal Aid in
24 Rochester, that will be creating the
25 immigration resource center for this part of

1 the state to help advise and give technical
2 assistance to the public defenders and
3 assigned counsel on the immigration
4 implications, the criminal and Family Court
5 representation.

6 So I come from a little bit different
7 point of view and, you know, as David Schopp
8 mentioned, on the civil side we are moving
9 more and more towards 200% of the poverty
10 level as our -- as our threshold and in
11 particular with funding that Chief Judge
12 Lippman has secured through the judiciary
13 legal services funding, that's been the
14 standard.

15 And, you know, in the past and still with
16 some funding sources, 125% was the threshold,
17 but we could go up to 187% it was and then up
18 to 200% with certain factors, not quite as
19 involved as the public defenders and assigned
20 counsel programs do here, considered less
21 factors but frankly, we found that -- that
22 going just to the straight 200% level with
23 some of our funding sources, it didn't make
24 that much of a difference. There were some
25 people who became eligible who weren't

1 before, but a lot of them we were spending a
2 lot more time doing all of this extra work
3 trying to figure out if they were eligible
4 and, you know, they were becoming eligible
5 anyways.

6 So while I do empathize with the programs
7 who have said if we have more clients we need
8 more funding, I think they would have more
9 clients if you went to 200%, I think, you
10 know, it makes a lot of sense for a number of
11 reasons. Certainly we wouldn't want in our
12 state to have, you know, less access to
13 justice in mandated services than there is in
14 non mandated services.

15 So I have a couple other points that I
16 wanted to get to quickly. And that is what
17 should be included when you're looking at
18 mandated services in addition to criminal and
19 Family Court services because there's also
20 Surrogate's Court which has Section 407 of
21 the Surrogate's Court Procedure Act which
22 provides the right to assigned counsel in
23 issues that are very similar to those covered
24 by 261 and 262 of the Family Court Act, and
25 there's also a Judiciary Law 35(8) which

1 provides very similar right to counsel in
2 Supreme Court; but actually refers to if the
3 person would get it in Family Court.

4 And I would certainly hope that as you
5 look at your statewide standards -- which I
6 hope you will establish a threshold that no
7 program can go below, but then allow them the
8 flexibility to go above, certainly would hope
9 that you would include those courts as well
10 because we've seen very uneven application,
11 even in Erie County between the different
12 courts, and I think it's very confusing and
13 it's a waste of effort for all these
14 different courts to be creating their own
15 systems and it creates for some inequities.

16 Third, I've been very interested to hear
17 that there's an issue about who would
18 evaluate the person's eligibility. On the
19 civil side it's always the program and it
20 made me think about the fact that years ago,
21 whenever we wanted to -- one of our clients
22 to have in forma pauperis status to get
23 filing fees waived, we had to actually bring
24 a motion, serve the county attorney and the
25 other side, and many years ago, maybe fifteen

1 years ago the state bar worked with OCA to
2 help us to change that. And so now, if a
3 program is represented by a program (sic)
4 like legal aid or us on the civil side, we
5 just file a certification that the person
6 meets our eligibility criteria, they are
7 deemed eligible for in forma pauperis status
8 unless someone else brings a motion.

9 And the reason that that was so easy to
10 get through was that the experience statewide
11 is, you know, programs across the state were
12 filing these motions, the county attorneys
13 were spending time on it, the court was
14 wasting time on it and they were always
15 granted. There were -- there were so few
16 examples where they weren't granted and the
17 experience since that change is that nobody
18 brings a motion to challenge it.

19 So I think that the lesson is that the
20 programs on the civil or the criminal side,
21 you know, should be trusted to do their due
22 diligence to make sure the people are
23 eligible and that should be presumed, you
24 know, to be correct. I think it creates all
25 kinds of issues if outside parties are

1 talking to clients, getting confidential
2 information that might end up in the wrong
3 hands later.

4 That's all I wanted to say. I really
5 appreciate the opportunity to speak.

6 MS. MACRI: Bob, I want to thank you
7 for bringing this up, because I think that
8 that's one thing that we hesitate to go to,
9 is the idea that there are some really
10 important lessons that have been learned on
11 the civil side that might necessarily be able
12 to be translated to the mandated
13 representation side in criminal and Family
14 Court proceedings where mandated
15 representation in New York State is being
16 provided.

17 I think one of the things I wanted to ask
18 about is with respect to the threshold
19 discussion that we had. This concept of
20 200%, is it fair to say that 200% is
21 generally the accepted threshold across the
22 state when it comes to civil legal services
23 or are you saying that there's a lot of
24 variation even within the civil legal
25 services side?

1 MR. ELARDO: There is variation, and
2 some funding services, like the Legal
3 Services Corporation, still says it's 125%
4 but you can go up to 200% if you take into
5 account all these different factors. We have
6 one funding source which is the IRS actually
7 funds us to represent people with problems
8 against the IRS. That standard is 250% of
9 the poverty level.

10 So I think the fair way to characterize
11 it is it's increasingly moving towards 200%,
12 especially with state funding, which is
13 really the issue for -- I think for your
14 organization.

15 MS. MACRI: Thank you, Bob, and we
16 appreciate your article as well. Make sure
17 it's distributed to our office.

18 JUDGE DiTULLIO: So thank you, everyone.
19 I think we'll end the hearing. I'd like to
20 thank the panel members but more importantly,
21 all of you who came. Your expertise and your
22 insights were all listened to. David, thank
23 you for bringing in the appellate piece, we
24 sometimes forget that, and so thank you, we
25 appreciate that.

1 I'd like to thank Andrew Isenberg, he was
2 here, I feel bad that he left because he's
3 going to think that I didn't thank him, so if
4 anyone runs into Andrew, I want to thank
5 Andrew, district director for OCA, he let us
6 use this wonderful courtroom and we want to
7 thank Andrew. But this was really productive
8 and hopefully we can follow up on a lot of
9 what you discussed, what you said and what
10 you recommended.

11 Thank you all for being here. I can't
12 thank you enough.

13

14 **** (2:13 P.M.) ****

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1 STATE OF NEW YORK
2 COUNTY OF ERIE

3 I, Barbara Buyers, a Notary Public in and
4 for the State of New York, do hereby certify:

5 That the witness whose testimony appears
6 herein before was, before the commencement of
7 his deposition, duly sworn to testify the truth,
8 the whole truth and nothing but the truth; that
9 such testimony was taken pursuant to notice at
10 the time and place herein set forth; that said
11 testimony was taken down in shorthand by me and
12 thereafter under my supervision transcribed into
13 the English language, and I hereby certify the
14 foregoing testimony is a full, true and correct
15 transcription of the shorthand notes so taken.

16 I further certify that I am neither counsel
17 for nor related to any parties to said action,
18 nor in anywise interested in the outcome
19 thereof.

20 IN WITNESS WHEREOF, I have hereunto
21 subscribed my name this 7th day of August, 2015.

22
23
24
25


Notary Public
State of New York

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