



Criteria and Procedures for Determining Assigned Counsel Eligibility

Blackletter with Commentary

April 4, 2016

CRITERIA AND PROCEDURES FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY: WITH COMMENTARY

The purpose of the criteria and procedures is to ensure equitable, efficient, and fair implementation of the statutory and constitutionally guaranteed right to counsel across New York State and to make the rights articulated in *Gideon* and *Witenski* a reality in New York.

ILS promulgates these criteria and procedures with the understanding that, while courts have the ultimate authority to determine if applicants are entitled to assigned counsel, courts need not be responsible for gathering information and screening applicants for eligibility. Other entities can be involved in gathering the required information from applicants, assessing this information, and then making a recommendation to the court as to applicants' eligibility for assigned counsel. It is critical, however, that these criteria and procedures govern recommendations that any entity involved in the screening process makes to courts, and that courts use these criteria and procedures to make the ultimate eligibility determinations.

To promote the implementation of these criteria and procedures, ILS has created an Application for Assignment of Counsel under County Law § 722-a. This form, with instructions, is included in Appendix D.

CRITERIA

- I. An applicant shall be eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for a competent defense, and the reasonable living expenses of the applicant and any dependents.**
 - A. Whether an applicant is eligible for assignment of counsel shall be determined in accordance with the criteria and procedures set forth below.**
 - B. Counsel shall be assigned unless the applicant is conclusively ineligible.**

Commentary:

For nearly four decades, New York courts have recognized that, under County Law § 722, financial inability to afford counsel is “not synonymous with destitution or a total absence of means.”¹ Indeed, as the American Bar Association explains, “[n]o state uses only ‘indigency’ as

¹ 1977 Memorandum written by Richard J. Comiskey, the then-Director of the Third Judicial Department, regarding, “Assignment of Attorneys to Represent Individuals who are Financially Unable to Obtain Counsel,” (hereinafter, “1977 Third Department Memo and Guidelines”), at 1, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>; see also *People v. King*, 41 Misc.3d 1237(A) (Bethlehem Justice Ct, Albany County 2013) (noting that it is a defendant's “financial inability to retain counsel and not indigency which governs the determination of eligibility for court-appointed representation”); New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center*, *supra*, at 3 (hereinafter, “1994

the basis for providing counsel. This test is rejected because it confuses the question of the right to be provided counsel with issues about eligibility for public welfare assistance and suggests a rigid standard for every defendant without regard to the cost of obtaining legal services for a particular case.”²

This Criterion recognizes that the right to assigned counsel includes not only having a qualified attorney, but also the resources necessary for a defense, which may include investigative services, experts, evidence testing, sentencing advocacy, and the costs associated with advising the person on and mitigating significant enmeshed consequences of a conviction.³

NYSDA report”) (noting that the constitutional right to assigned counsel applies to those unable to afford counsel, and stating that “New York’s parallel statutory authority implementing the constitutional right to appointed counsel likewise emphasizes that it is financial inability to retain counsel and not ‘indigency’ which governs the determination of eligibility for court-appointed representation.”); Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, Guideline 4, pp. 12-21, *supra*; see also *Commentary*, ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-7.1 (3d ed. 1992) (hereinafter, “1992 ABA Standards”) (“The fundamental test for determining eligibility for counsel should be whether persons are ‘financially unable to obtain adequate representation without substantial hardship’”); National Study Commission on Defense Services/NLADA Guidelines for Legal Defense Systems in the United States (1976) (hereinafter, “1976 NLADA Guidelines for Legal Defense Systems in the United States”), Section 1.5 (“Effective representation should be provided to anyone who is unable, without substantial hardship to himself or his dependents, to obtain such representation”). Notably, this standard for assignment of counsel is nearly identical to the federal standard. See United States Judicial Conference, *Guide to Judiciary Policy, Vol. 7-Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes*, Ch. 2, § 210.40.30(a) (hereinafter, “CJA Guidelines”).

² See 1992 ABA Standards, Standard 5-7.1, *supra*; see also National Association of Criminal Defense Lawyers, *Gideon at 50: A Three-Part Examination of Indigent Defense in America, Part 2 – Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel* (March 2014), at 9 (“[I]t should be noted that the term ‘indigent’ is itself a misnomer. While those defendants who are ‘too poor to hire a lawyer’ are typically referred to as ‘indigent,’ courts have never required that defendants be wholly without means before they are eligible for assigned counsel.”).

³ See 1977 Third Department Memo and Guidelines, *supra*, at 1 (“The key test for determining eligibility is whether or not the defendant, at the time need is determined, is financially unable to provide for the full payment of adequate counsel and all other necessary expenses of representation.”); see also County Law § 722 (dictating that “[e]ach plan [for representation under Article 18-B] shall also provide for investigative, expert and other services necessary for an adequate defense.”); 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5(b) (“The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.”) (Black Letter summary available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesvstems_1976.pdf); National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970), Section 1 Definitions (“‘expenses,’ when used with reference to representation under this Act, includes the expenses of investigation, other preparation, and trial”) (available at http://www.nlada.org/Defender/Defender_Standards/Model_Public_Defender_Act#4). During the public hearings, Hon. David Steinberg detailed this issue: “So I have a concern, these are the eligibility requirements that when you make – when the providers are making the decision, whoever is going to make the decision, about how that person, not only is going to afford counsel, but in some instances are going to have to afford an investigator, they’re going to have to afford a consultant, they’re going to have

A determination that an applicant is able to afford counsel should be made only after the funds needed to pay bond have been subtracted from any calculation of available resources.⁴ An applicant should not have to choose between paying the costs of bail and paying for the costs of a defense. *See* Criterion III.

Nor should applicants have to choose between retaining private counsel and providing basic life necessities for themselves and their dependents. Applicants should not have to risk having their lives de-stabilized (i.e., losing a home, a car needed for employment, and the ability to pay for food, clothing and utilities) to pay the costs of a defense. In this regard, this Criterion honors the mandate set forth in the *Hurrell-Harring* Settlement that the criteria and procedures used for assigned counsel eligibility require that “income needed to meet the reasonable living expenses of the applicant and any dependent minors within his or her immediate family, or dependent parent or spouse, . . . not be considered available for purposes of determining eligibility.”⁵

To fully honor an applicant’s right to assignment of counsel, counsel should be assigned unless the applicant is conclusively ineligible for assignment of counsel.⁶ This rule is consistent with the rules and procedures in other jurisdictions, including the federal government.⁷

to afford possibly a transcript, or even going to have to afford as basic hire someone to go out and serve process to get their witnesses into court to have that subpoena served. And so when we're talking about eligibility and what it's going to cost to hire a lawyer, let's not forget about the cost that cases need to be investigated.” Testimony of Hon. David Steinberg, Town Justice, Hyde Park, 9th Judicial District public hearing transcript, pp. 58-59, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>.

⁴*See, e.g.*, 1977 Third Department Memo and Guidelines, *supra*, at 3; 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5(a) (“Nor should the fact of whether or not the person has been released on bond . . . be considered.”); Revised Code of Washington § 10.101.010(2) (2011) (for purposes of determining eligibility for assigned counsel, defining “available funds” as “liquid assets and disposable net monthly income calculated after provision is made for bail obligations.”).

⁵ *See Hurrell-Harring* Settlement, *supra*, § VI (B)(5).

⁶ Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University’s Maurice A. Deane School of Law, dated August 12, 2015 (hereinafter “Nevins written submission”), p. 8 (“To the extent that a person is ‘on the bubble,’ or there is some conflicting information regarding a person’s eligibility that cannot be avoided, courts should assign counsel rather than risking a Sixth Amendment violation by failing to do so.”), available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>. *See also* 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5 (“The accused’s assessment of his own financial ability to obtain competent representation should be given substantial weight.”).

⁷ *See, e.g.*, CJA Guidelines, *supra*, Ch. 2, § 210.40.30(b) (“Any doubts as to a person’s eligibility should be resolved in the person’s favor; erroneous determinations of eligibility may be corrected at a later time.”). *See also* Brennan Center Guidelines, *supra*, at 20-21 (noting several jurisdictions instruct those who screen for assigned counsel eligibility to resolve close questions “in favor of eligibility.”).

II. To streamline the eligibility determination process, there shall be presumptions of eligibility. A presumption of eligibility is rebuttable only where there is compelling evidence that the applicant has the financial resources sufficient to pay for a qualified attorney and the other expenses necessary for a competent defense.

Commentary:

The use of presumptions of eligibility will obviate the need for a detailed, complex analysis, thereby making the eligibility determination process more efficient and less costly. As stated in the Brennan Center Guidelines: “In practice, it is not necessary to engage in a time-consuming eligibility assessment for each defendant, because there are shortcuts that jurisdictions can and should take.”⁸ ILS’ surveys and public hearings revealed that many jurisdictions are already using eligibility presumptions and that in most instances, an applicant will be deemed eligible based on one of their oft-used presumptions.⁹

The following presumptions of eligibility shall apply.

A. Applicants are presumptively eligible for assignment of counsel if their net income is at or below 250% of the Federal Poverty Guidelines.

Commentary:

Testimony both at the public hearings and in written submissions revealed that many counties are already relying on a multiple of the Federal Poverty Guidelines (“FPG”) as a method for determining financial eligibility for assignment of counsel.¹⁰ Yet, it was also apparent from the testimony that often there was not sufficient justification for the particular multiple used. One hearing participant stated that he realized that using a low multiple of the FPG was confusing “indigency” with “the ability to afford competent counsel” and in employing such a standard, “we do ourselves a disservice.”¹¹ He explained:

The thing that changed my mind about the 125 [% of the FPG] . . . this document, the self sufficiency standard of New York State, this one is 2010, it's available online, and it is an eye-opener. . . . [I]f you take a look at this, not

⁸ Brennan Center Guidelines, *supra* at 21. See New York State Defenders Association Statement on the Criteria and Procedures for Determining Eligibility in New York State (2015 NYSDA Statement), *supra*, at 4-5.

⁹ See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, A.

¹⁰ *Id.*, at § III, B.

¹¹ Testimony of Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th Judicial District public hearing transcript, p. 106, available at: <https://www.ils.ny.gov/content/eligibility-public-hearings>.

only does it contain the rationale for dealing with assignment of counsel in a different way than indigency, but it lists all of the counties, every one of them, and talks about the different standards of living and what is required in each of those counties. And that's why when I looked at this - - and I think page 91/92 has a summary of all 62 counties and what it costs to provide the necessities of life, so families at one, two, three level, you know, no matter how many members. I looked at that and I think Wyoming County was at about 232% of the poverty lines -- guidelines, and so I was conservative, I went to 200.¹²

Similarly, Merble Reagon, the Executive Director of the Women's Center for Education and Career Advancement, testified that the Self-Sufficiency Standard is a better reflection than the FPG of the income required to meet life's basic necessities in a specific locality without relying on financial public assistance.¹³ However, she also recognized that, "it doesn't make sense to think of our 62 counties having different eligibility criteria; it's just not practical in general. But doing the math that you just did and then doing the simulation to other counties, I think...that a multiple of the poverty measure could come closer than we are today in

¹² Testimony of Norman Effman, *id.* at 108-109; see <http://www.selfsufficiencystandard.org/docs/New-York-State2010.pdf>.

¹³ Testimony of Merble Reagon, Executive Director, Women's Center for Education and Career Advancement, 9th Judicial District public hearing transcript, pp. 68-69, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>, describing the Self-Sufficiency Standard and defining "reasonable living expenses" as "a family's basic needs: [h]ousing, childcare, food, transportation, healthcare, taxes, including income taxes, payroll taxes, and sales taxes, as well as a ten percent of miscellaneous expenses, which we add, which includes household products, telephone, clothing, shoes, and other household expenses. There is no recreation, there is no entertainment, there is no savings, and no debt repayment in this budget. In other words, we're talking about bare-bones budget, a no-frills budget with no extras." See, e.g., *Adkins v. E.I. DuPont de Nemours & Co.* 335 U.S. 331, 339-40 (1948) ("We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution."); see also CJA Guidelines, *supra*, Ch. 2, § 210.40.30(a)(1) ("A person is 'financially unable to obtain counsel' within the meaning of 18 U.S.C. § 3006A(b) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to . . . the cost of providing the person and his dependents with the necessities of life.").

terms of those eligibility criteria.”¹⁴ As a result, Ms. Reagon used the Self-Sufficiency Standard to support her recommendation of a multiple of 250% of the FPG.¹⁵

Like the above-referenced speakers, ILS used the Self-Sufficiency Standard as a guide¹⁶ to conclude that a multiple of 250% of the FPG best captures the income necessary to meet life’s basic necessities in New York.¹⁷

Accordingly, any person whose net income is at or below 250% of the FPG is presumptively eligible for counsel. “Net income” means an individual’s wages, interest, dividends or other earnings after deductions for state, federal and local taxes, social security taxes, Medicare taxes, any union dues, retirement contributions or other withholdings - in other words, “take home pay.” Gross income shall not be used as it is not an accurate measure of one’s ability to pay for the costs of private counsel and still provide oneself and any dependents with the “necessities of life.”¹⁸

¹⁴ Oral testimony of Merble Reagon, *supra*, at 73-74.

¹⁵ Oral testimony of Merble Reagon, *supra*, at 73-74. Notably this recommendation is more conservative than her written recommendation to use a 300% multiple of the FPG. *See* written submission of Merble Reagon, Executive Director, Women’s Center for Education and Career Advancement (available at <https://www.ils.ny.gov/content/eligibility-public-hearings>).

¹⁶ ILS explored the possibility of using solely the Self-Sufficiency Standard to establish income-based eligibility presumptions for each county. However, in addition to the concern about the impracticality of divergent standards from county to county, the Self-Sufficiency Standard is not updated annually. The last report was issued in 2010, meaning it cannot currently be used as a measure for presumptive income eligibility purposes.

¹⁷ To achieve this, ILS compared the 2010 Self-Sufficiency Standard Report to the 2010 Federal Poverty Guidelines and calculated the multiple of the FPG that most closely matched the Self-Sufficiency income data. *See* <http://www.selfsufficiencystandard.org/docs/New-York-State2010.pdf>; <http://aspe.hhs.gov/hhs-poverty-guidelines-remainder-2010>.

¹⁸ *See* CJA Guidelines, § 210.40.30(a)(1), *supra*. It is also important to note that, in some areas of civil legal services, where there is no right to counsel, eligibility determinations are based on multiples of up to 200% of the FPG. *See, e.g.*, written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, p. 2, available at: <https://www.ils.ny.gov/content/eligibility-public-hearings>, stating that LASNNY’s three major funders – LSC, IOLA and JCLS – use various multiples of the FPG, from a base of 125% up to 200%, when considering additional factors (depending on the funding stream) to dictate income eligibility. IOLA does not even have a 200% “cap” on consideration of income and household expenses, and it also requires providers to consider the actual cost of retaining private counsel in the matter. *Id.* Additionally, Mr. Racette noted that private “[r]etainers in felony cases or custody disputes are often many thousands of dollars and cannot be realistically afforded by many people even if their income is over 200% of poverty given routine household expenses.” *Id.* at 3. *See generally* Gross, John P., *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 Wash. & Lee L. Rev. 1173; *see also*, 1977 Third Department Memo and Guidelines, *supra*, p. 2 (“A person charged with a crime [or] otherwise entitled to assigned counsel, is eligible for assigned counsel when the value of his present *net* assets and his current *net* income are insufficient to enable him promptly to retain a qualified attorney,

B. Applicants who are incarcerated, detained, or who are confined to a mental health institution shall be presumed eligible for assignment of counsel.

Commentary:

During the public hearings, there was consensus amongst those who addressed the issue of presumptions that persons who are incarcerated, detained, or confined to a mental health institution should be presumed eligible for assignment of counsel, and in fact, many testified that in their jurisdiction, such persons are already presumed eligible.¹⁹ Having a presumption of eligibility for those who are incarcerated, detained, or confined to a mental health institution is also consistent with the practice in other jurisdictions.²⁰

C. Applicants who are currently receiving, or have recently been deemed eligible pending receipt of, need-based public assistance, including but not limited to Family Assistance (TANF), Safety Net Assistance (SNA), Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP), Medicaid, or

obtain release on bond and pay other expenses necessary to an adequate defense, while furnishing himself and his dependents with the necessities of life.”) (emphases added); Testimony of James T. Murphy, Legal Services of Central New York, 6th Judicial District public hearing transcript, pp. 52-53, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings> (“First of all, we talked about eligibility guidelines this morning and percentages of poverty. No one has said whether they’re looking at net income or gross income in those calculations. The Third Department got it right in ’78 it ought to be net.”).

¹⁹ See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, A.

²⁰ See Brennan Center Guidelines, *supra* at 22-23 (noting that states would save time and resources by establishing presumptions of eligibility for defendants who are incarcerated or confined to a mental health facility). Several states have established such presumptions of eligibility. See, e.g., Ohio Admin. Code, 120-1-03(B)(2), (3) (presumptions of eligibility for defendant confined to a mental health institution and for defendants confined to a state prison); Mass. Gen. Laws, Supreme Judicial Court Rule 3:10 (presumption of eligibility for persons in a mental health facility and persons in a correctional facility); Colorado Chief Justice Directive 04-04 (amended Nov. 2014) (dictating that defendants who are incarcerated are automatically eligible for appointment of counsel and need not complete the application); 2005 Washington Revised Code § 10.101.010(1)(b) (“‘Indigent’ means a person who, at any stage of a court proceeding, is . . . [i]nvoluntarily committed to a public mental health facility”); Nevada Supreme Court, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Jan. 4, 2008) (court rule establishing presumption of eligibility for defendants who are “currently serving a sentence in a correctional institution or [are] housed in a mental health facility”); Michigan Criminal Procedure 780.991, Sec. 11(3)(b) (presumption of assigned counsel eligibility for those “currently serving a sentence in a correctional institution or . . . [housed] in a mental health . . . facility”); Idaho Code § 19-854(2)(c) (same); Louisiana Rev. Stat. § 15.175(A)(1)(b) (same).

Public Housing assistance, shall be deemed presumptively eligible for assignment of counsel.

Commentary:

As with the foregoing presumption, ILS' research into current practices in New York revealed that many counties currently use presumptions of assigned counsel eligibility for applicants who receive need-based public assistance.²¹ Such applicants have already undergone a thorough and comprehensive assessment of their financial situation and have been deemed unable to pay for reasonable life expenses without assistance. Conducting another assessment of their finances would require a needless expenditure of resources.²² Moreover, common sense suggests that if a person needs government assistance to pay for basic life necessities, like food or housing, then the person lacks the resources needed to fund a competent defense. Finally, having a presumption of eligibility for applicants who are in receipt of need-based public assistance is consistent with that which is done in many other states.²³

D. Applicants who have, within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction shall be presumed eligible. Appellate courts shall assign appellate counsel to appellants who were deemed eligible for assigned counsel by their trial court.

²¹ See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, A.

²² The National Institute of Justice (NIJ) also recommends this presumption in its 1986 report because it will streamline the process. See NIJ, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (September 1986), at 69 (hereinafter, the "1986 NIJ Report") ("The presumptive test regarding public assistance should be applied in each case since it appears that a large number of criminal defendants fall into this category.").

²³ See Brennan Center Guidelines, *supra*, p. 22 ("Many jurisdictions already presume defendants to be eligible for free counsel when they receive certain need-based public benefits."); see also National Association of Criminal Defense Lawyers, *Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*, *supra*, at 15, 24-42 (noting that "some states find defendants who are already receiving certain needs-based federal benefits automatically eligible for assigned counsel" and identifying the following states as establishing automatic, or presumptions of, eligibility for defendants receiving certain types of public assistance: Alaska, Hawaii, Idaho, Massachusetts, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, Virginia, and Wisconsin). Other states that presume assigned counsel eligibility for applicants who receive public assistance include: Washington (2005 Washington Revised Code § 10.101.010(1)(a)); Florida (Fla. Stat. Ann. § 27.52(2)(a)); Nevada (Nevada Supreme Court, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Jan. 4, 2008) (court rule)); Michigan (Michigan Criminal Procedure 780.991, Sec. 11(3)(b)); Idaho (Idaho Code § 19-854(2)(b)); Louisiana (Louisiana Rev. Stat. § 15.175(A)(1)(b)).

Commentary:

During the public hearings, many participants told stories of applicants who had been assigned counsel in one jurisdiction, but denied counsel in another jurisdiction when facing similar charges.²⁴ Though these stories were conveyed to illuminate the need for statewide eligibility standards, they also highlight an opportunity to streamline the eligibility determination process through adoption of a common-sense presumption of eligibility for any applicant who has recently been deemed eligible for assignment of counsel in the same or another jurisdiction. For similar reasons, it also makes sense that appellate courts assign appellate counsel to applicants who were deemed eligible for assigned counsel by their trial court.²⁵

With regard to the information needed to verify these foregoing presumptions, documentation should not be required to verify that a person is incarcerated, detained, or confined to a mental health institution, since this is self-evident. Nor should documentation be required to verify that an applicant has, within the past six months, been deemed eligible for assignment of counsel in another case, since that information can easily be verified through the provider of representation or the court in the other case. For the presumption regarding the receipt of need-based public assistance, the production of a public benefits card or an award letter shall constitute sufficient verification.

III. Ability to post bond shall not be sufficient, standing alone, to deny eligibility for assignment of counsel.

Commentary:

The American Bar Association (ABA) has stated strongly and succinctly that “[c]ounsel should not be denied . . . because bond has been or can be posted.”²⁶ In the commentary accompanying this rule, the ABA explains that the “ability to post bond is rejected as a basis for denying counsel because it requires the accused to choose between receiving legal representation and the chance to be at liberty pending trial. Since a person’s freedom prior to trial often is essential to the preparation of an adequate defense, placing the defendant in this dilemma is arguably a denial of the effective assistance of counsel.”²⁷ Other professional standards agree that it is not a

²⁴ See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § I.

²⁵ See 2015 NYSDA Statement, *supra*, at 4 n. 11.

²⁶ ABA Standards for Criminal Justice: Providing Defense Services (1992 ABA Standards), *supra*, Standard 5-7.1.

²⁷ See also *U.S. v. Scharf*, 354 F.Supp. 450, 452 (E.D. Penn., 1973), *affd* 480 F.2d 919 (3d Cir 1973) (in appeal context, noting that it violates due process to force defendants into choosing between posting bail or putting forth a defense).

permissible practice to deny counsel to defendants based solely on the fact that they posted bail.²⁸

There are additional reasons to refrain from denying assignment of counsel solely because an applicant has posted bail. First, the bail could have been posted by someone other than the applicant, such as a friend, an employer, or a relative, and thus, does not reflect the applicant's financial ability to retain private counsel.²⁹ As fully discussed in Criterion IV, the right to counsel is a personal right, and the ability of a third party to post bail for the applicant should not be factored into an assessment of whether or not the applicant qualifies for assigned counsel.³⁰ Second, applicants might be able to post bail, but only because they know that the funds will be returned. Permanent relinquishment of these funds to retain counsel might not be possible without jeopardizing their ability to provide reasonable living expenses for themselves or their dependents. Third, if applicants are required to choose between eligibility for assignment of counsel or posting bond, they may choose the former, and as a result languish in jail at the county's expense, which is needlessly costly for taxpayers.³¹ Finally, this Criterion comports with the *Hurrell-Harring* Settlement, which provides that "ability to post bond shall not be consider[ed] sufficient, standing alone, to deny eligibility."³²

IV. The resources of a third party shall not be considered available to the applicant unless the third party expressly states a present intention to pay for counsel, the applicant gives informed consent to this arrangement, and the arrangement does not interfere with the representation of the applicant or jeopardize the confidentiality of the attorney-client relationship.

²⁸ See, e.g., 1976 NLADA Guidelines for Legal Defense Systems in the United States, Section 1.5(a) (stating that the fact that a person has been released on bond should not be considered); National Advisory Commission on Criminal Justice Standards and Goals: The Defense, Chapter 13, Standard 13.2(1) (1973) (hereinafter, "1973 NAC Standards") ("Counsel should not be denied to any person merely... because he has posted, or is capable of posting, bond.") (available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense); see also National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act*, Section 4(b) ("In determining whether a person is a needy person and the extent of his ability to pay, the court may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily disqualify him from being a needy person.").

²⁹ See, e.g., *U.S. v. Scharf*, *supra*, 354 F.Supp. at 452 (noting that courts "have generally agreed that the ability to post bail is not a proper criterion to consider..." because the "money could have come from persons who have no legal or moral obligation to the petitioner, such as friends and distant relatives...").

³⁰ See 1994 NYSDA report, *supra*, at 11, citing, *Hardy v. United States*, 375 U.S. 277, 289 n. 7 (1964) and *Fullan v. Commissioner of Corrections of State of N.Y.*, 891 F.2d 1007, 1011 (2d Cir. 1989).

³¹ See Brennan Center Guidelines, *supra*, p. 17.

³² See *Hurrell-Harring* Settlement, § VI (B)(3).

A. The resources of a spouse shall not be considered available to the applicant, subject to the above exception.

B. The resources of a parent shall not be considered as available to minor applicants, subject to the above exception.

Commentary:

The right to the assignment of counsel is an individual right that requires an individual eligibility assessment, and “[t]he accused’s assessment of his own financial ability to obtain competent representation should be given substantial weight.”³³

Fundamentally, the relationship between an attorney and his or her client is exclusive and premised on the concept that an attorney acts solely at the client’s request and advocates only on the client’s behalf.³⁴ An accused person must consult with his attorney to make crucial decisions at every stage of a criminal case. Each decision can have far-reaching consequences for the accused person, including the potential loss of liberty. As such, the right is wholly individual, “and the assignment of counsel should not be dependent on the income or assets of anyone other than the defendant.”³⁵

³³ NLADA Black Letter “Summary of Recommendations” – National Study Commission on Defense Services/NLADA Guidelines for Legal Defense Systems in the United States, Section 1.5 (available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf).

³⁴ See Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.2(a) (“Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify”); see also *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal”); see also *ABA Standards for Criminal Justice: Defense Function*, Standard 4-5.2(a) (1993) (discussing decision-making in the context of the attorney-client relationship).

³⁵ Written submission of the Chief Defenders Association of New York (CDANY), dated August 26, 2015, p. 2, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>; see also 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5(a) (stating that the “resources of a spouse, parent or other person” shall not be considered in determining assigned counsel eligibility); *ABA Standards for Criminal Justice: Providing Defense Services* (3rd ed.), Standard 5-7.1 (“Counsel should not be denied because . . . friends or relatives have resources to retain counsel. . . .”); 1973 NAC Standards, Standard 13.2(1), *supra* (“Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel.”) (available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense); 2015 NYSDA Statement, *supra*, p. 6, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings> (“Since the constitutional guarantee of counsel is a personal right, the income of parents and spouses should not be considered available to the defendant for the purpose of determining eligibility. There is no freestanding spousal obligation to pay for legal representation. Also, it is improper to take parental income into

Considering a third party's assets as part of assigned counsel eligibility determinations creates inherent danger of conflict and unconstitutional delay.³⁶ Denying eligibility for assignment of counsel based upon a third party's resources is tantamount to requiring this third party to pay for private counsel. Payment by a third party can compromise an attorney's ethical obligation under the New York State Rules of Professional Conduct.³⁷ Rule 1.8 requires attorneys not only to obtain "informed consent" from a client before accepting payment from a third party, but also to ensure that there will be "no interference with the lawyer's independent professional judgment or with the client-lawyer relationship" while maintaining "the client's confidential information."³⁸ Denying eligibility for assignment of counsel based on a third party's resources can also result in

account in determining whether to assign counsel to represent a minor in criminal court. A parent has no obligation to hire counsel to represent a minor child in criminal court and owes none to the government or the child" [internal footnotes omitted]); Written submission of David P. Miranda, President, New York State Bar Association (NYSBA), dated August 26, 2015, p. 2, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings> ("[I]n the case of a minor, an individual under the age of 21, the determination of eligibility should be based on that person's individual financial ability to retain counsel. The constitutional right to counsel is a personal right. . . . The income of a minor's parents should not be considered available to the defendant in a criminal proceeding for the purpose of determining eligibility. A parent is under no obligation to hire counsel to represent a minor child in a criminal proceeding.") (citing *Fullan v. Commissioner of Corrections of State of N.Y.*, 891 F.2d 1007, *cert denied* 496 U.S. 942 (1990) and *People v. Ulloa*, 1 A.D.3d 468 (2d Dept. 2003)); CJA Guidelines, *supra*, Ch. 2 § 210.40.50 (directing that the "initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement."); Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, dated August 12, 2015 ("Nevin's written submission"), *supra*, at 4 ("An individual must be assessed for eligibility on his own . . . without regard to the finances of other household members, family, or friends, unless such individuals indicate their willingness to pay in a timely way.").

³⁶ The potential delay that can flow from requiring consideration of third-party resources was illuminated in the 2005 testimony before the Kaye Commission. *See* Testimony of William Cuddy, Jail Ministry of Syracuse, Public Hearing Regarding the Commission on the Future of Criminal Indigent Defense Services, March 23, 2005, Transcript at 195-196, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings> (telling of a 19 year-old Hispanic teen who, after being arraigned on a petit larceny charge, spent three months in jail without a lawyer or a court appearance because his mother, who was not English-speaking, did not understand that she needed to make appointments to sign the assigned counsel eligibility application).

³⁷ *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.8(f) ("A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6.").

³⁸ *Id.*

an accused person not obtaining counsel at all if, after analysis, an attorney concludes that third-party payment cannot be accepted.

Additionally, requiring a third party to pay for an attorney can denigrate an accused person's interests or create an imbalanced relationship dynamic that influences the person on key decisions, or both. The obvious example is an accused person who wishes to go to trial but who is relying on a third party to pay the legal bills. This accused person might be pressured by that third party to avoid the increased costs of trial and may be induced to plead guilty notwithstanding the consequences. During ILS' public hearings, providers repeatedly cited cases involving accusations between two household members, e.g., domestic violence allegations, where it is potentially dangerous to assess the same household member's finances in order to determine the accused person's eligibility for counsel.³⁹ Clearly it is a conflict when a person who is a possible complainant, opposing party, or witness is required to pay the legal fees of an accused person.

As the New York State Defenders Association noted in its 1994 report, "[t]he personal nature of the right to court-appointed counsel is equally applicable to minor defendants as to their adult counterparts."⁴⁰ Yet, the surveys and public hearings revealed that many counties are currently considering parental income in the case of minors based on the analysis that parents have a legal responsibility to provide certain life necessities to a child.⁴¹ While it is true that generally, absent emancipation, parents have such a legal responsibility up to the age of 21,⁴² in a criminal case where current New York State law treats individuals who are 16 years and older as adults,⁴³ this responsibility does not extend to paying for defense counsel. Unlike in Family Court where the

³⁹ See, e.g., Nevins written submission, *supra*, p. 5 ("Indeed in domestic violence cases, this could mean asking the victim of the offense to be responsible for the defendant's fees."). Further, in the civil legal services arena, this danger of conflict is recognized in the Code of Federal Regulations ("C.F.R."), which dictates, "[n]otwithstanding any other provision of this part, or other provision of the recipient's financial eligibility policies, every recipient shall specify as part of its financial eligibility policies that in assessing the income or assets of an applicant who is a victim of domestic violence, the recipient shall consider only the assets and income of the applicant and members of the applicant's household other than those of the alleged perpetrator of the domestic violence and shall not include any assets held by the alleged perpetrator of the domestic violence, jointly held by the applicant with the alleged perpetrator of the domestic violence, or assets jointly held by any member of the applicant's household with the alleged perpetrator of the domestic violence." C.F.R. § 1611.3(e).

⁴⁰ New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State* ("1994 NYSDA report"), *supra*, p. 11 (citing N.Y. Penal Law § 30.00; N.Y. Crim. Proc. Law §§ 170.10, 180.10, 210.15).

⁴¹ See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, H. Though many counties consider third-party income, including parental income, during the eligibility determination process, as ILS' Study reveals, the vast majority of hearing participants who offered an opinion on this issue recommended against doing so.

⁴² See N.Y. Family Court Act §§ 413, 416.

⁴³ See P.L. § 30.00.

parents are often parties to the litigation, a criminal case is personal to the individual charged and no other party has the same vested interest, nor is there jurisdiction over any other party.⁴⁴ A minor who is accused of a crime faces the same consequences as an adult, including the loss of liberty. When a parent is required to pay irrespective of the minor's personal wishes, the representation of the minor runs the risk of being subordinated to the parent's will.⁴⁵ Consequently, the risks are the same as in any other third-party scenario if appointment of counsel for a minor is postponed or not achieved because of a need for parental income analysis.⁴⁶

⁴⁴ See *People v. Clemson*, 149 Misc. 2d 868 (Justice Ct, Wayne County 1991) (distinguishing between the line of family court cases holding parents responsible for minor's legal fees and finding the criminal court does not have jurisdiction to order the parents to pay a minor defendant's legal fees); see also *People v. Kearns*, 189 Misc. 2d 283 (Sup. Ct, Queens County 2001) (same). Though both *Clemson* and *Kearns* ultimately determined that the minor defendant's parental income should be considered, both courts focused on the personal nature of a minor defendant's right to counsel and the fact that there is no jurisdiction to force a non-charged parent to pay a minor defendant's legal fees. As a result, it is clear from the courts' analysis that any parental support obligations should not be litigated in criminal court at the expense of a minor defendant. As NYSDA noted on page 7 of its July 8, 2015 memo, entitled *Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability*, "[t]he issue of whether the payment of counsel fees on behalf of a minor constitutes a support obligation is in all accounts a question of fact dependent on the circumstances of the family and the parent-child relationship and cannot be cursorily resolved against a parent by a criminal court in the course of a determination of the minor accused's right to the assignment of counsel."

⁴⁵ In one of the public hearings, Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, testified that it was all too common in Monroe County and across the State to encounter parents who are unwilling to assist their child or want to use the criminal justice system to teach their child a lesson (see 7th Judicial District public hearing transcript, at 24-25, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>). Mr. Nowak also described parents who refused to return phone calls and refused to pay for their child's defense, thereby creating delays in appointment of counsel. Unfortunately, Mr. Nowak's experiences are not exceptional. ILS staff heard from other providers that these types of scenarios occur frequently. Mark Williams, Cattaraugus County Public Defender, testified: "If I had a dollar for every time I heard a parent say, let him sit in jail for a few days, or let her sit in jail for a few days, I'd probably be a rich man and I wouldn't have any need to be a public defender in Cattaraugus County, I could retire." (8th Judicial District public hearing transcript, p. 19, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>). And, in her testimony, Essex County Assistant Public Defender Molly Hann stated: "As for applicants 21 and under, we never consider parental or grandparent or, you know, custodial income because they are our client, that minor is our client. And so just because their parents might be a millionaire with several houses throughout the country or the world or, you know, have the ability to hire private counsel, if the parents choose not to pay for their child's mistakes and want them to learn a lesson, if – we only look at that child's ability." (4th Judicial District public hearing transcript, at 104, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>).

⁴⁶ The 1977 Third Department Memo and Guidelines, *supra*, allows for the consideration of parental income of minors (and other family income for all defendants), but cautions care, stating, at p. 3, "HOWEVER, THE SIXTH AMENDMENT RIGHT TO COUNSEL IS PERSONAL, THEREFORE, ASSIGNMENT OF COUNSEL CANNOT BE DENIED IF OTHER FAMILY MEMBERS REFUSE TO CONTRIBUTE TOWARD THE COST OF COUNSEL." (emphasis in original).

Should a third party state that he or she will help the accused person pay for counsel promptly, and the accused person agrees to accept such an offer,⁴⁷ that third party's income and resources can be considered an available resource for the purposes of the eligibility determination so long as it does not cause unwarranted delay in appointment of counsel.⁴⁸ However, absent such a statement, the analysis should focus solely on the accused person's individual ability to pay.⁴⁹

- V. Non-liquid assets shall not be considered unless such assets have demonstrable monetary value and are readily convertible to cash without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.**
 - A. Ownership of a vehicle shall not be considered where such vehicle is necessary for basic life activities.**
 - B. An applicant's primary residence shall not be considered unless the fair market value of the home is significant, there is substantial equity in the home, and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.**

Commentary:

It is well-recognized that non-liquid assets should not be considered in determining whether an applicant is eligible for assigned counsel⁵⁰ because such assets typically cannot be converted to

⁴⁷ See Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.8(f)(1), *supra*.

⁴⁸ Similarly, the CJA Guidelines § 210.40.50 require that “[t]he initial determination of eligibility should be made without regard to the financial ability of the person’s family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person’s spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.”

⁴⁹ Again we note that the *ABA Standards for Criminal Justice: Providing Defense Services* (“1992 ABA Standards”), *supra*, echo this point in Standard 5-7.1, stating that “[c]ounsel should not be denied . . . because friends or relatives have resources to retain counsel.”

⁵⁰ *People v. King*, 41 Misc.3d 1237(A)(Bethlehem Justice Ct, Albany County 2013) (“Only available liquid assets should be considered, and non-liquid assets, such as a home used as a primary residence, or an automobile necessary to sustain employment, and reasonable household furnishings should be excluded from the net asset inquiry.”); see also 2015 NYSDA Statement, *supra* at 5 (“Only non-liquid assets that have demonstrable monetary value and marketability or are otherwise convertible to cash may be considered, and only if converting such assets to cash would not create substantial hardship for the prospective client or persons dependent upon the prospective client.”); Nevins written submission, *supra*, at 5 (“If the question is whether a person can actually pay a lawyer for a matter as time-sensitive as a pending criminal case, the fact that she owns a home or a car that she needs to get to work may be patently irrelevant.”); Brennan Center Guidelines, *supra* at 15 (“However, just as jurisdictions should

cash quickly enough to retain private counsel. For instance, an asset may have value, but no substantial equity against which a loan can be secured. And even if the asset does have substantial equity, if it cannot be readily converted to cash, then the applicant does not have the present ability to retain counsel – a criterion for determining eligibility for appointed counsel.⁵¹

Ownership of a vehicle may not be considered if the vehicle is used for basic life necessities, such as employment, educational, or medical purposes.⁵² This requirement is in accord with the *Hurrell-Harring* Settlement.⁵³ Nor shall ownership in a home normally be considered if the home is the applicant’s primary residence. An applicant’s primary residence may be considered only if the fair market value of the home is significant, there is substantial equity in the home, (for example, the equity is more than 50% of the home’s fair market value), and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.⁵⁴

consider unavailable all revenue used for the basic expenses of daily living or to maintain employment, jurisdictions should consider unavailable all assets used for such purposes, such as a defendant’s primary residence, household furnishings, and clothing, and the car a defendant uses to get to work”); 1976 NLADA Guidelines, *supra*, Section 1.5(a) (“Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person’s home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility.”) (Black Letter “Summary of Recommendations,” available at www.nlada.org/DMS/Documents/998925963.238/blackletter.doc). Other states similarly provide that generally, non-liquid assets should not be considered in assigned counsel eligibility determinations. *See e.g.* Massachusetts Supreme Judicial Court Rule 3:10, Section 1(h) (equity in non-liquid assets can be considered only if such equity “is reasonably convertible to cash.”); Texas Access to Justice Foundation 2015 Financial Income Guidelines, Client Income Eligibility Standards (defining as liquid assets “[t]hose assets that can readily and promptly be converted to cash by the individual seeking assistance, prior to the time that the assistance is required.”).

⁵¹ *See* Brennan Center Guidelines, at 16 n. 63, *citing, inter alia, Barry v. Brower*, 864 F.2d 294, 299-300 (3d Cir. 1988) (“The Constitution requires states to meet a ‘present’ need for counsel. If by their nature an accused’s assets cannot be timely reduced to cash and cash is required, the ‘present’ financial inability to obtain counsel which defines indigence for Sixth Amendment purposes appears.”).

⁵² “Medical purposes” is defined broadly to include medical and behavioral health needs. Thus, for example, if a car is needed to transport a dependent child to behavioral health appointments (such as occupational therapy for an autistic child), ownership of the car shall not be considered in determining eligibility.

⁵³ *See Hurrell-Harring* Settlement, § VI(B)(6) (requiring that “ownership of an automobile should not be considered sufficient, standing alone, to deny eligibility where the automobile is necessary for the applicant to maintain his or her employment.”).

⁵⁴ A home’s fair market value is significant if, for example, it is three times the median listing prices of homes in the city or town in which the home is located. The median listing prices of homes in specific geographic areas can be found on commercial real estate websites.

VI. Any income from receipt of child support or need-based public assistance shall not be considered as available to applicants in determining eligibility for assignment of counsel.

Commentary:

By law, child support receipts are intended for the well-being of the child, not the parent.⁵⁵ Generally, the law precludes the consideration of need-based public assistance in making other assessments regarding government benefits, or in determining a person’s taxable income.⁵⁶ Thus, the receipt of child support and any income that is derived from a need-based source of public assistance, described in Criterion II, C, should not be considered income for purposes of assessing financial eligibility.

VII. Debts and other financial obligations, including the obligation to provide reasonable living expenses for the applicant and his or her dependents, shall be considered in determining eligibility for assignment of counsel.

Commentary:

Determining whether an applicant has the current available resources to pay for qualified counsel and the other expenses of representation requires consideration of the applicant’s liabilities as well as resources.⁵⁷ Such debts and financial obligations include the following: fixed household

⁵⁵ See Family Court Act § 413(1)(a), (b)(2) (“Child support shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties *for care, maintenance, and education of any unemancipated child* under the age of twenty-one years.”) (emphasis added).

⁵⁶ See, e.g., 7 U.S.C. § 2017(b) (with regard to SNAP benefits, providing as follows: “The value of benefits that may be provided under this chapter shall not be considered income or resources for any purpose under any Federal, State, or local laws. . . .”); accord 42 U.S.C. § 407(a) (Social Security and SSI benefits); New York Social Services Law § 97(3) (HEAP benefits). Under federal law, need-based public assistance is not considered income for tax purposes. See <https://www.irs.gov/publications/p525/index.html>.

⁵⁷ See 1977 Third Department Memo and Guidelines, *supra* at 5 (“Unusual, necessary, recurring expenses can make an otherwise ineligible individual eligible. [E.g., child care expenses, recurring medical expenses, alimony, or child support.]”); see also 1976 NLADA Guidelines, *supra*, Section 1.5 (“Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations.”); Brennan Center Guidelines, *supra*, p. 17 (“Before considering any liquid or illiquid assets, or even income, available to pay for private counsel, jurisdictions should subtract the value of any debt the individual owes.”). During ILS’ public hearings, several hearing participants identified the importance of considering financial obligations during the assigned counsel eligibility determination process. See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, E.

expenses, such as rent or mortgage, utility payments, and food; employment or educational-related expenses, such as child or dependent care, transportation, clothing, supplies, equipment or automobile insurance payments; child support paid to another; minimum monthly credit card payments; educational loan payments; health insurance payments; unreimbursed medical payments; and non-medical expenses associated with age or disability. Denying eligibility for assignment of counsel because of failure to consider these liabilities can have immediate adverse consequences, such as jeopardizing applicants' ability to pay reasonable living expenses and maintaining the stability of themselves and their dependents. It can also lead to serious long-term consequences, such as bankruptcy. Additionally, as set forth in the *Hurrell-Harring Settlement*, the income needed to meet the reasonable living expenses of the applicant and his or her dependents is a liability which must not be considered as available to the applicant in determining the applicant's financial eligibility for assignment of counsel.⁵⁸

VIII. Eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged.

Commentary:

In assessing an applicant's ability to retain private counsel, it is critical that the actual costs of representation for the particular charge and in the particular jurisdiction be considered.⁵⁹ As set forth in the *Hurrell-Harring Settlement*, "eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged."⁶⁰ This requires consideration of the following: the seriousness of the particular charge,

⁵⁸ See *Hurrell-Harring Settlement*, § VI(B)(5).

⁵⁹ See *People v. King*, *supra*, 41 Misc.3d 1237(A), *2 (Bethlehem Justice Ct, Albany County 2013) (noting that in making eligibility determinations, courts should give substantial consideration to, among other things, "the complexity of the case, and the cost of privately retained counsel in the jurisdiction where the representation will occur."); see also NLADA Guidelines for Legal Defense Systems in the United States ("1976 NLADA Guidelines"), *supra*, Section 1.5 ("If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation."); NIJ, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* ("1986 NIJ Report"), *supra* at 23, noting that "[o]btaining private defense counsel can be a costly proposition. Even defendants whose assets exceed their liabilities could experience hardships due to the cost of hiring an attorney." In this report, the NIJ examined studies done in both Massachusetts and Los Angeles, California, and reported that the Massachusetts study found that the cost of criminal private representation "varied not only by type of case (juvenile, misdemeanor, felony, or appeal), but also by the seriousness of the charges within each category; thus, both variables should be factored into the eligibility decision." *Id.* at 23-24. Following its analysis, Los Angeles decided to include, in its assessments for eligibility determinations, the question of "whether or not a competent private attorney would be interested in representing the defendant in his or her present economic circumstances." *Id.* at 24. As a result, NIJ ultimately recommends that "eligibility screeners . . . take into consideration in making indigency determinations the prevailing rates in their jurisdiction for retaining private counsel in different types of cases." *Id.* at 70.

⁶⁰ See *Hurrell-Harring Settlement*, § VI(B)(4).

the anticipated complexity of the given case, the need for other necessary expenses of representation (such as investigative and expert services), and the actual cost for retaining an attorney to represent the applicant in the particular jurisdiction. After all, an applicant with limited resources might be able to afford the cost of representation on a simple violation, but might be unable to pay the costs of a competent defense of a more complex case, especially when the cost of such other related services, such as case investigation and expert services, are factored in.

PROCEDURES

IX. These criteria and procedures shall be applied uniformly, consistently, and with transparency.

Commentary:

During ILS' public hearings, nearly every person who addressed this issue emphasized the need for uniform, written, comprehensive, yet easily understandable eligibility criteria and procedures.⁶¹ These sentiments mirror the *Hurrell-Harring* Settlement, which requires that "eligibility determinations shall be made pursuant to written criteria."⁶² Uniform criteria and procedures are necessary to ensure that individuals are not denied their right to assigned counsel because of the indiscriminate application and consideration of improper criteria, to enable predictability for counties and mandated providers in the forecasting of their future resources and budgetary needs,⁶³ to ensure that similarly-situated individuals are treated in a similar manner, and to guard against personal prejudices and implicit bias informing decisions about assigned counsel eligibility.⁶⁴ As set forth in the New York State Defenders Association's written submission:

The purpose of these criteria and procedures is to ensure equitable, efficient, and fair implementation across the state of the right to counsel as guaranteed by constitutional and statutory provisions. . . . These guidelines can eliminate the

⁶¹ See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § I.

⁶² See *Hurrell-Harring* Settlement, § VI(B)(1).

⁶³ See Brennan Center Guidelines, *supra*, at 6-7.

⁶⁴ See NLADA, *The Implementation and Impact of Indigent Defense Standards* (2003), p. 16, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf>. ("Standardized procedures for client eligibility screening serve the interest of uniformity and equality of treatment of defendants with limited resources. . . . The National Study Commission on Defense Services suggested that . . . unequal application of the Sixth Amendment constitutes a violation of both due process and equal protection.") (*citing* the 1976 National Study Commission on Defense Services/NLADA Guidelines for Legal Defense Systems in the United States, *supra*, *Commentary*, at 72-74).

substantial amount of idiosyncratic, divergent, and improper practices that are depriving individuals of their right to appointed counsel.⁶⁵

The promulgation and implementation of written criteria and procedures will diminish arbitrary eligibility determinations. If the same eligibility factors are applied by all involved in the eligibility determination process, regardless of their location, the chance that an accused person deemed eligible in one jurisdiction will be deemed ineligible in another similar jurisdiction under the same set of circumstances will be greatly reduced. The fair treatment of all applicants for assigned counsel can revive public trust in the criminal justice system.⁶⁶

Transparency means that potential applicants know how their application for assigned counsel will be processed and decided.⁶⁷ Thus, it is imperative that these eligibility determination criteria and procedures be widely disseminated – for example, posted in courthouses, in the offices of mandated providers, and on the websites of courts and mandated providers.

- X. Courts have the ultimate authority to determine eligibility, but may delegate the responsibility for screening and making an eligibility recommendation.**
 - A. Entities responsible for screening and making a recommendation should be independent and conflict-free.**
 - B. Where there is no entity that is independent and conflict-free, courts may delegate the screening responsibility to the provider of mandated representation.**

Commentary:

In New York State, courts have the ultimate authority for determining eligibility for assigned counsel.⁶⁸ Courts may, and often do, assign to other entities the responsibility of screening for eligibility and making a recommendation as to the applicant’s eligibility for assignment of

⁶⁵ New York State Defenders Association, Statement on the Criteria and Procedures for Determining Eligibility in New York State (“2015 NYSDA Statement”), *supra*, pp. 7, 8 (available at: <https://www.ils.ny.gov/content/eligibility-public-hearings>).

⁶⁶ Brennan Center Guidelines, *supra*, pp. 6-7.

⁶⁷ 2015 NYSDA Statement, *supra*, at 7 (“To ensure the broadest possible distribution of this critically important information, the standards should require that, in addition to being prominently displayed on posted signs and available in writing, court and public defense websites should include this information.”).

⁶⁸ See County Law § 722; Criminal Procedure Law (“CPL”) §§ 170.10(3)(c); 180.10(3)(c); *People v Rankin*, 46 Misc. 3d 791, 802-803 (County Ct, Monroe County 2014) (citing both case law and statutes to support the concept that, in New York State, “an indigent defendant’s eligibility determination rests with the court”) (citations omitted).

counsel.⁶⁹ Regardless of the entity to which these responsibilities are assigned, it is ideal that the eligibility screening process be conducted by an entity that is independent and free from political influence or financial pressures – a prerequisite to ensuring fair outcomes and protecting the rights of those unable to afford counsel. Having an independent screening entity ensures that eligibility determinations are not motivated by impermissible factors, such as pressure to minimize costs to the county or to manage caseloads. For that reason, in its 2008 Guidelines, the Brennan Center emphasizes the importance of ensuring that those involved in the eligibility screening process “be free of any conflict of interest or other ethics violation.”⁷⁰

Under New York’s county-based system, there currently is no entity involved in screening for assigned counsel eligibility that does not have a conflict of interest. All entities that screen – whether it is a provider of mandated representation or a third-party screening entity – are currently funded by the counties, and thus have an inherent incentive to control costs by diminishing the number of applicants deemed eligible. This reality emerged during the public hearings, during which several county providers acknowledged the pressure imposed upon them to apply rigid screening criteria so as to reduce the number of applicants deemed eligible for assigned counsel. As one provider stated, her county’s assigned counsel committee “bases our performance as an office on how low we can keep the 18-b line, which is just a horrible thing. It doesn’t take into account our representation of these clients who just desperately need our help. All that they care about is how much the county part is going to be at the end of the year, and we work very hard to try to keep that line low. . . . [U]nfortunately, the county considers it to be a bad thing if the assigned counsel line, which we have absolutely no control over, exceeds our budget for the year.”⁷¹ And in at least one other county, judges were reportedly asked by the provider to refrain from overriding the provider’s eligibility denials “because those overrides increased [the provider’s] caseloads.”⁷²

⁶⁹ *People v. King, supra* (noting that courts may delegate to another entity the responsibility for financial data collection). See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, A (ILS’ Study reveals that in most counties, the responsibility for screening and making a recommendation regarding assigned counsel eligibility is delegated to the provider of mandated representation).

⁷⁰ Brennan Center Guidelines, *supra*, p. 8.

⁷¹ See Testimony of Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th Judicial District public hearing transcript, at 85-86, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>; see also *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, A.

⁷² See Written submission of John A. Curr, III, Director of Western Regional Chapter, New York Civil Liberties Union, at 3, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>.

Other providers acknowledged that being involved in the eligibility determination process can create a potential for applicants to question the providers' loyalty.⁷³

On the other hand, the public hearings revealed compelling advantages of delegating the screening and initial recommendation responsibility to providers of mandated representation.⁷⁴ The following are some of the advantages identified:

- Because the providers are now regularly appearing at arraignments, when providers are responsible for eligibility determinations, a decision often can be made quickly, thereby facilitating the early entry of counsel and diminishing the possibility of gaps in representation.
- The provider is in the best position to maintain the confidentiality of information obtained during the eligibility determination process.⁷⁵ This is important because prosecuting attorneys or other entities have sought to obtain, and to use against applicants, financial information gathered during the eligibility screening.
- The information gathered during the eligibility determination process is the same information that defenders need to advocate for pre-trial release or bail applications. Having the provider responsible for screening is more respectful of the applicant because it reduces the number of people to whom the applicant must disclose the same personal information.
- Perhaps most importantly, the provider of mandated representation is the only entity that is professionally and ethically obligated to align its interests with those who are in need of public representation.⁷⁶

⁷³ See, e.g., Testimony of Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th Judicial District public hearing transcript, at 79-80, available at: <https://www.ils.ny.gov/content/eligibility-public-hearings>.

⁷⁴ See generally *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, A.

⁷⁵ The 1992 ABA Standards for Criminal Justice: Providing Defense Services (“1992 ABA Standards”) note, in the commentary to Standard 5-7.3, p. 96, that “[i]nformation given during the [assigned counsel eligibility] interview, if candid, may involve revelations as to the proceeds of criminal conduct. The attorney is most able to make judgments about the relationship of information given during the eligibility interview and evidence of guilt or innocence of the offense charged. . . . In addition, when the eligibility inquiry and determination are made by the [provider], the attorney-client privilege protects the information disclosed to the lawyer.”

⁷⁶ The 1992 ABA Standards (*supra*) recognize this concept in the commentary to Standard 5-7.3, p. 96, stating, as follows: “The lawyer for the accused, who has a continuing and personal interest in the client’s welfare, is likely to conduct eligibility interviews in a dignified manner.” Similarly, during his hearing testimony, Edward Nowak, who served as Monroe County Public Defender for thirty years and currently is President of the New York State Defenders Association, was asked about his strongly-held position that the providers of mandated representation should be charged with the responsibility of screening for

For that reason, ILS acknowledges that where there exists no screening entity that is independent and conflict-free, it makes sense for courts to delegate to the providers of mandated representation the responsibility for the initial eligibility determination screening and recommendation.⁷⁷ We further emphasize that law enforcement entities must not be involved in the eligibility determination process.⁷⁸

Finally, it bears emphasizing that the inherent existence of conflict elevates the importance of adherence to these eligibility criteria and procedures. Strict adherence will diminish the influence of outside pressures to control costs, thereby ensuring the integrity of the eligibility determination process.

- XI. The confidentiality of all information applicants provide during the eligibility determination process shall be preserved.**
 - A. The eligibility screening process, whether done by another entity or the court, shall be done in a confidential setting and not in open court.**
 - B. Any entity involved in screening shall not make any information disclosed by applicants available to the public or other entities (except the court).**

eligibility. He acknowledged the reality that everyone involved in a county-based system has some conflict, but then stated: “Then I would just ask, which entity in the entire State of New York . . . cares about the rights of th[e] defendant more than the defender? I submit to you, there are none. Everyone else has some type of a conflicting position and there is no one that looks out for the rights of a defendant who is charged with a crime more than the defense attorney. That is why they are the ones [who should screen for eligibility].” (7th Judicial District public hearing transcript, at 29).

⁷⁷ This is in accord with national standards. *See, e.g.*, 1976 NLADA Guidelines for Legal Defense Systems in the United States, Section 1.6 (“The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person.”); ABA Standards for Criminal Justice: Providing Defense Services (“1992 ABA Standards”), *supra*, Standard 5-7.3 (“Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency, or by the court.”).

⁷⁸ The federal system explicitly prohibits law enforcement from being involved in the assigned counsel eligibility screening process and from seeking information disclosed by the defendant during this process. *See* CJA Guidelines, § 210.40.20(e) (“Employees of law enforcement agencies or U.S. attorney offices should not participate in the completion of the [assigned counsel application form] or seek to obtain information from a person requesting the appointment of counsel.”). During one of the ILS public hearings, a speaker succinctly explained why it is inappropriate to have probation involved in the screening process, stating as follows: “I have to stress this; probation has no business doing screening. Probation is law enforcement, probation is part of the entity which is prosecuting the individual. . . . The police department has no business, probation [has] no business.” Testimony of Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th Judicial District public hearing transcript, at 101, available at: <https://www.ils.nv.gov/content/eligibility-public-hearings>.

C. Any documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.

Commentary:

Maintaining the confidentiality of information disclosed during the eligibility determination process is necessary to protect applicants' constitutional, statutory, and privacy rights.⁷⁹ If applicants believe that the information they disclose could be sought and used against them, "as in the case of domestic violence matters (where familial relationship is an element of the crime), tax offenses (where income may be a question of fact), or even drug possession cases (where ownership of a vehicle is at issue),"⁸⁰ they could be forced to choose between exercising their constitutional right to counsel and their right against self-incrimination - a choice no person should ever have to make.⁸¹ Nor should applicants have to choose between the right to privacy and the right to counsel.⁸² Indeed, fearing public disclosure, applicants might choose privacy over the assignment of counsel and withhold embarrassing information about household expenses, or, for an applicant who is being abused or controlled by her spouse, an honest explanation as to why she lacks access to assets she holds jointly with her spouse.⁸³

Additionally, "[s]hielding the information can improve the accuracy and efficiency of the screening process, and ensure that eligible people are provided with counsel."⁸⁴ When applicants know that their information will be kept confidential, they are more likely to be forthcoming, thereby facilitating an accurate eligibility determination.

⁷⁹ See New York State Bar Ass'n Revised Standards for Providing Mandated Representation, Standard C-4 (2015) ("Rules, regulations and procedures concerning the determination of initial eligibility and continuing eligibility for mandated representation shall be designed so as to protect the client's privacy and constitutional rights and to not interfere with the attorney's relationship with his or her client."); accord *United States v. Pavelko*, 992 F.2d 32, 34 (3rd Cir. 1993) (holding that, to protect the defendant's 5th Amendment rights, information a defendant discloses as part of the assigned counsel eligibility determination process cannot be used against the defendant on the issue of guilt).

⁸⁰ Nevins written submission, *supra*, at 6-7.

⁸¹ See Brennan Center Guidelines, *supra*, at 23; *United States v. Pavelko*, 992 F.2d 32, 34 (3rd Cir. 1993).

⁸² *Id.*

⁸³ Nevins written submission, *supra*, at 6 ("There is simply no reason that a person's personal financial information must be shared in front of a courtroom full of people. Such a public airing can lead people to exaggerate their earnings, for fear of embarrassment (but in derogation of the right to counsel and the accuracy of the information), and certainly means public disclosure of very personal information.").

⁸⁴ Brennan Center Guidelines, *supra*, p. 24.

For these reasons, entities involved in screening for eligibility shall take steps to ensure the confidentiality of information disclosed during the screening process,⁸⁵ a requirement of the *Hurrell-Harring* Settlement.⁸⁶ Generally, eligibility screening shall not be conducted in open court, but instead in a location that allows for a private conversation with the applicant. In limited situations where court facilities are such that the courtroom is the only location available to screen the applicant in a timely manner, the eligibility screening may be conducted during a court proceeding, but in a manner that preserves the confidentiality of the information disclosed (for example, at a bench conference). Applications and any other supporting information or documentation shall not be made available to the opposing counsel or to any other persons or entities for use in the case at issue or in other cases. Nor shall such information be made available to prosecutors or other governmental agencies for investigation of fraud relating to the application for assigned counsel.

Finally, while courts are not required to conduct *ex parte* proceedings to determine assigned counsel eligibility, any documentation submitted to a court for determination of eligibility shall be made as an *ex parte* submission and ordered sealed so as to guard against release to the public.⁸⁷

- XII. Counsel shall be assigned at the first court appearance or immediately following the request for counsel, whichever is earlier.**
- A. Eligibility determinations shall be done in a timely fashion so that assignment of counsel is not delayed.**
- B. Counsel shall be provisionally appointed for applicants whenever they are not able to obtain counsel prior to a proceeding which may result in their detention, or whenever there is an unavoidable delay in the eligibility determination.**

⁸⁵ See, e.g., ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-7.3, *supra* at 95 (“When the eligibility determination is not made by the court, confidentiality should be maintained, and the determinations should be subject to review by a court at the request of a person found to be ineligible.”); accord 1976 NLADA *Guidelines for Legal Defense Systems in the United States*, *supra*, Guideline 1.6 (“The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney-client relationship.”) (Black letter “Summary of Recommendations” available at http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#onesix).

⁸⁶ See *Hurrell-Harring* Settlement, § VI(B)(2) (providing that “confidentiality shall be maintained for all information submitted for purposes of assessing eligibility”).

⁸⁷ See *People v. King*, *supra*, 41 Misc.3d 1237(A), *3 (noting that, to maintain the confidentiality of the financial information the defendant provided, “the particulars of his finances are not being included in this Decision; the financial statement itself will be maintained in the court file, and is herein being ordered to be SEALED from public view.”).

Commentary:

The right to counsel, which attaches at arraignment if not sooner, and lasts until the disposition of the case, now clearly encompasses the right to counsel at first appearance in New York.⁸⁸ Often, the early stages of a criminal case are the most critical because it is then that, among other things, issues pertaining to the defendant's pre-trial liberty are determined, evidence is collected or lost, and legal rights are preserved. More than twenty years ago, the New York State Defenders Association emphasized the importance of immediate assignment of counsel, stating as follows:

The necessity for prompt and accurate judicial determinations of eligibility for appointed counsel cannot be over-emphasized. . . . Effective representation of the accused, which includes the constitutional right to present a defense, compels the appointment of counsel at the earliest possible stage of the proceedings. Indeed, all professional standards for the provision of defense services recommend that counsel be provided as soon as feasible after custody begins, and in fact contemplate intervention of counsel even before the defendant's first appearance before a judicial officer or the filing of formal charges.⁸⁹

It is critical that counsel be assigned not only at first appearance, but also sooner if a request for counsel is made.⁹⁰ Thus, for example, a determination as to a person's eligibility for assignment

⁸⁸ *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010) (holding that arraignment is a critical stage); *Massiah v. United States*, 377 U.S. 201 (1964) (Sixth Amendment right to counsel attached once adversarial proceedings have begun); *Rothgery v. Texas*, 554 U.S. 191 (2008) (the Sixth Amendment right to counsel attaches at the arraignment of the defendant); *Miranda v. Arizona*, 384 U.S. 436 (1966) (the Fifth Amendment right to counsel attaches when a person is subjected to custodial interrogation).

⁸⁹ New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State* (1994 NYSDA report), *supra*, at 4, citing *ABA Standards for Criminal Justice: Providing Defense Services*, 5-6.1 (1990); *National Advisory Commission on Criminal Justice Standards and Goals, Courts*, 13.1 and *Commentary* (1973); *National Study Commission on Defense Services*, 1.2-1.4 (1976); *National Legal Aid and Defender Association Standards for Defender Services*, II 2b, II 2e (1976); *NLADA Standards for the Administration of Assigned Counsel Systems*, 2.5 (1989). More recent standards have similarly stated that counsel must be assigned as soon as possible. See, e.g., ABA, *Ten Principles of a Public Defense Delivery System* (2002), Principle 3 ("Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel."); NYSBA 2015 *Revised Standards for Providing Mandated Representation* (hereinafter, "NYSBA 2015 Revised Standards"), Standard B-1 ("Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified."); New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* (2012), Standard 5 (county programs for mandated representation must "[p]rovide representation for every eligible person at the earliest possible time and begin advocating for every client without delay, including while client eligibility is being determined . . .").

⁹⁰ See ABA, *Ten Principles of a Public Defense Delivery System*, *supra*, Principle 3 (noting that eligibility should be determined and counsel assigned as soon as possible after a request for counsel is made);

of counsel should be made even prior to arraignment for a person who has been issued an appearance ticket and requests assignment of counsel prior to arraignment. Similarly, an eligibility determination should be made as soon as possible for a person who “reasonably believes that a process will commence that could result in a proceeding where representation is mandated.”⁹¹ Thus, persons who learn that they are being investigated by law enforcement for their possible involvement in a crime should be screened for assigned counsel eligibility upon request, and an eligibility determination should be made immediately.⁹²

When delay is unavoidable, counsel must be provisionally appointed until eligibility for assignment of counsel is determined. A majority of magistrates and providers who responded to ILS’ survey indicated that counsel is provisionally appointed pending a final decision regarding eligibility for assigned counsel. Still, a sizeable minority of magistrates and providers responded that there is no such process.⁹³ And during ILS’ public hearings, some witnesses spoke of a long

NYSBA 2015 Revised Standards, *supra*, Standard B-3; *see also id.*, Standard B-1 (“Effective representation should be available for every eligible person whenever counsel is requested during government investigation or when the individual is in custody.”); Sixth Amendment Center and The Pretrial Justice Institute, *Early Appointment of Counsel: The Law, Implementation, and Benefits* (2014), p. 8 (noting that assigning counsel to people who reasonably know that they are the subject of a criminal investigation would foster “quicker, less-costly, and more accurate” case outcomes).

⁹¹ NYSBA 2015 Revised Standards, Standard B-3 (“Counsel shall be available when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated.”); New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* (2012), Standard 5(a) (noting that counsel not only must be present at arraignment, but “earlier when an individual has invoked a constitutional or statutory right to counsel in an investigatory stage of a case . . .”).

⁹² In unique circumstances, it may be necessary for the provider of mandated services to assert the person’s right to counsel prior to a court order appointing counsel. This was the situation presented to the court in *People v. Rankin*, 46 Misc.3d 791 (County Ct, Monroe County 2014), in which the Monroe County Public Defender’s Office asserted the defendant’s right to counsel while he was being subjected to police custodial interrogation, and after an initial eligibility determination had been made. In holding that the police had unlawfully failed to cease interrogating the defendant after they had been notified by the Public Defender’s Office to do so, the Court acknowledged that the notification of the Public Defender’s Office preceded a court determination of assigned counsel eligibility. In so holding, the Court relied on well-established New York law regarding the indelible right to counsel and on professional standards regarding the early entry of counsel, and stated: “To be clear, this [C]ourt readily recognizes and in no way seeks to supplant the well settled existing law that the final determination of indigency is reserved for the judge. In reconciling that rule with the customary practice of submitting an order of appointment, the highly regarded standards for effective representation of indigent individuals promulgated by the ABA and NYSBA, and the immeasurable importance of safeguarding the constitutional right to counsel, *this [C]ourt holds that the Public Defender, following a preliminary eligibility determination for a witness, suspect, or defendant, must have unconstrained liberty to act swiftly in defense of his clients, no different than attorneys in the private sector.*” 46 Misc.3d at 811 (emphasis added).

⁹³ *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, G.

and needless delay in the assignment of counsel, during which defendants had no access to counsel.⁹⁴

Courts and entities involved in the screening process must ensure that persons are not constructively denied the right to counsel because of a needless delay in the eligibility determination process or because of failure to provisionally appoint counsel when delay is unavoidable.

XIII. The eligibility determination process shall not be unduly burdensome or onerous.

- A. Applicants shall not be required to attest under penalty of perjury to the truth of the information provided as part of the eligibility determination process.**
- B. Applicants shall not be denied assignment of counsel for minor or inadvertent errors in the information disclosed during the eligibility determination process.**
- C. Applicants shall not be required to produce unduly burdensome documentation to verify the financial information provided; nor shall they be denied assignment of counsel solely for the failure to produce documentation where they have demonstrated a good faith effort to produce requested documentation.**
- D. Applicants shall not be required to demonstrate that they were unable to retain private counsel to be deemed eligible for assignment of counsel.**

⁹⁴ See, e.g., Testimony of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th Judicial District public hearing transcript, at 92 (describing the long delays in the eligibility determination process in Nassau County, and stating that "[d]efendants in Nassau County district court are structurally denied access to counsel for months. . . . This must change."); Testimony of Jay Wilbur, Broome County Public Defender, 6th Judicial District public hearing transcript, pp. 35-38, available at: <https://www.ils.ny.gov/content/eligibility-public-hearings> (noting that in some cases, there can be a 2-3 week delay in the assignment of counsel); Testimony of Sabato Caponi, East End Bureau Chief, Legal Aid Society of Suffolk County, 10th Judicial District public hearing transcript, pp. 134-136, available at: <https://www.ils.ny.gov/content/eligibility-public-hearings> (noting that on Suffolk County's East End, counsel is often not assigned until after the defendant has appeared 5-6 times at court without a lawyer). The issue of delay in assignment of counsel was also highlighted during the public hearings that the Kaye Commission conducted in 2005. See e.g., Testimony of Vince Warren, American Civil Liberties Union, before the Kaye Commission, Feb. 11, 2005 transcript, at 378 ("And delays in the initiation of client contact are ubiquitous throughout the state").

Commentary:

It is important that the integrity of the eligibility determination process be maintained to ensure that counsel is being assigned to those who cannot afford the costs of a competent defense, and not to those who can.⁹⁵ Yet, the reality is that most people facing criminal charges who apply for publicly funded counsel are too poor to pay the costs of a competent defense.⁹⁶ “Therefore, the goal of a sensible screening process should be to screen in most defendants accurately and efficiently, while screening out the few individuals who are not qualified, all without spending too much money.”⁹⁷

Eligibility determination procedures should not be premised on the assumption that applicants will provide false or misleading information to be deemed eligible for assignment of counsel. This assumption is belied by research, which shows that the vast majority of applicants provide accurate information during the eligibility determination process. The few applicants who misstate their finances tend to overstate their resources, diminishing rather than enhancing their chances of being found eligible for assignment of counsel.⁹⁸ For that reason, it is not necessary to require applicants to affirm under penalty of perjury that the information they provide is accurate.⁹⁹ Doing so does not enhance the accuracy of the information provided, but instead

⁹⁵ See, e.g., Brennan Center Guidelines, *supra*, p. 1 (“Without fair standards for assessing eligibility, some people who truly cannot afford counsel without undue hardship are turned away. . . . On the other hand, some individuals receive counsel who should not. In these times of fiscal austerity, every dollar spent representing someone who can afford to pay for counsel robs resource-poor indigent defense systems of money that could be better spent representing people who are truly in need.”).

⁹⁶ See, e.g., Brennan Center Guidelines, *id.*, at 4. The information collected by ILS as a result of our surveys and eligibility determination hearings reveals that the vast majority of people who apply for assigned counsel are found to be eligible.

⁹⁷ *Id.*; see also 1992 ABA Standards: Providing Defense Services, *supra*, Standard 5-7.3 (recommending the use of a questionnaire “to determine the nature and extent of the financial resources available for obtaining representation,” and explaining in the accompanying *Commentary* (p. 97) that “[t]he use of a questionnaire facilitates rapid determinations of eligibility and, in the event that eligibility is denied, provides a record that can be reviewed by the trial court.”).

⁹⁸ See Elizabeth Neely & Alan Tompkins, *Evaluating Court Processes for Determining Indigency*, 43 *Court Review* 4, 9 (2007) (“These findings indicate that in a typical month, 5% of defendants provided inaccurate or false information to the court. Of those providing inaccurate information, however, only one person in 25 gave information that could have possibly increased their chances of receiving public defender services. In fact, the inaccurate information may have not even been such that it would have made a difference in eligibility. These findings are consistent with what several interviewees . . . told us: Defendants are as likely to lie to make themselves seem more financially secure than the facts would indicate.”).

⁹⁹ Many states and counties do not require assigned counsel applicants to submit sworn applications. See Lynn Langton and Donald Farole, Jr., *Bureau of Justice Statistics Special Report: State Public Defender Programs, 2007* (2010), p. 6 (finding that one-third of states with statewide assigned counsel eligibility criteria do not require sworn applications for assigned counsel); Farole and Langton, *Bureau of Justice Statistics Special Report: County-based and Local Public Defender Offices, 2007* (2010), p. 5 (finding

chills the exercise of applicants' right to assigned counsel. Nor should applicants be penalized for minor or inadvertent errors in reporting their financial resources. As was stated during ILS' public hearings: "If defendants fear prosecution based on unintentional or minor errors, they may opt to forego the screening and fail to avail themselves of their right to counsel."¹⁰⁰ In the end, "[o]rverzealous enforcement is unlikely to result in significant cost savings for jurisdictions."¹⁰¹

Similarly, applicants should not be required to provide voluminous or hard-to-obtain documentation to verify the financial information they disclose, as doing so also has a chilling effect on the exercise of the right to assignment of counsel.¹⁰² Processes that are needlessly burdensome and time-consuming increase the administrative costs of the eligibility determination process and delay the appointment of counsel, but do not result in significant cost-savings to the county or state. For that reason, in a 1986 report, the National Institute of Justice advised that the financial information disclosed during the eligibility determination process be verified only when there is missing information or legitimate grounds to believe that the applicant has provided inaccurate information.¹⁰³ Of course, as is stated in the Commentary to Procedure XV, when the assignment of counsel is based on intentional misrepresentation, the court has the inherent authority to re-visit the assigned counsel eligibility determination.

that about 40% of county-based or local public defender offices do not require sworn applications for assigned counsel).

¹⁰⁰ Nevins written submission, *supra* at 7-8; see 2015 NYSDA *Statement on the Criteria and Procedures for Determining Eligibility in New York State*, ("2015 NYSDA Statement"), *supra*, at 10; Brennan Center Guidelines, *supra*, at 19-20 ("Nor should jurisdictions impose harsh punishment on defendants for unintentional or minor errors in describing their income and assets."). The problems that stem from needlessly burdensome documentation requirements and requiring applicants to swear or attest to the information disclosed were discussed during ILS' public hearings. See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, §§ II, C, D.

¹⁰¹ Brennan Center Guidelines, *supra*, at 20.

¹⁰² Brennan Center Guidelines, *supra*, at 19 ("Jurisdictions should avoid imposing requirements that discourage qualified individuals from exercising their right to counsel."). The requirements imposed on applicants during the eligibility determination process should never be used to reduce the number of defendants who apply for assigned counsel. See 2015 NYSDA Statement, *supra*, pp. 9-10 ("Lengthy and onerous eligibility practices, which in other contexts derive their ability for 'governmental savings' by discouraging applicants seeking services, are wholly inappropriate in the context of the right to counsel as they can delay appointment and therefore interfere with prompt investigation, early witness location, and crime scene preservation.") (internal footnote omitted).

¹⁰³ National Institute of Justice (NIJ), *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures*, *supra*, at 27 (September 1986) ("In general, it would seem to be wasteful of scarce resources and unnecessarily dilatory to verify all defendants' information in every case. However, screeners should be trained to watch for unusual or missing information....").

Finally, eligibility for assignment of counsel should not be contingent upon applicants having to provide evidence that they have repeatedly sought and failed to retain counsel because of their limited financial resources.¹⁰⁴

XIV. The determination that applicants are ineligible for assignment of counsel shall be in writing and shall explain the reasons for the ineligibility determination. Applicants shall be provided an opportunity to request reconsideration of this determination or appeal it, or both.

A. Screening entities shall promptly inform applicants of their eligibility recommendation. If their recommendation is that the applicant be denied assignment of counsel, they shall provide the reason for the denial in writing along with written notice that the applicant can ask the screening entity to reconsider or can appeal to the court, or both.

B. If a court determines that an applicant is ineligible for assignment of counsel, the court shall inform the applicant of this decision in writing with an explanation as to the reason for the denial. The court shall also entertain an applicant's request to reconsider a decision that the applicant is ineligible for assignment of counsel.

Commentary:

Written notice and explanation of a denial of assignment of counsel, as well as the right to ask that a denial be reconsidered or appealed, are fundamental to the fairness and transparency of the eligibility determination process. Written denials ensure clear communication and provide a record of all ineligibility determinations and the reasons for these determinations. Written decisions may also enhance an applicant's acceptance of the denial, particularly where it is clear that the denial is consistent with these criteria and procedures. Reconsideration and appeal processes provide a mechanism by which to review eligibility denials to ensure that such denial is consistent with these criteria and procedures.

By reconsideration, we mean an informal process by which an applicant can ask a screening entity to reconsider a recommendation that assignment of counsel be denied. This can be done in writing or orally, in person or by telephone. This reconsideration process is accessible to applicants because it is not needlessly formal. It offers applicants an opportunity to provide the screening entity with more information, including a better explanation of their financial situation or better documentation. During the ILS public hearings, many providers involved in screening for eligibility testified that they often reconsider eligibility recommendations if asked to do so, and it is not unusual for them to change their minds about recommending that an applicant be deemed ineligible for assignment of counsel. However, while providers are willing to reconsider, not all providers are notifying applicants in writing that they will reconsider denial recommendations; nor are all providers regularly informing applicants in writing of the reasons they are recommending that assigned counsel be denied.

¹⁰⁴ See Brennan Center Guidelines, *supra*, at 19.

Similarly, providers involved in eligibility determination screenings told us that applicants often appeal such recommendations to the court, and that it is not unusual for trial courts to disagree with what the provider has recommended. However, as with reconsiderations, not all providers are regularly notifying applicants that they can appeal a screening entity's recommendation to the court.¹⁰⁵

Accordingly, any entity involved in screening for assigned counsel eligibility shall provide applicants with written notice of a determination to recommend that eligibility be denied. The notice shall contain reasons for the recommendation. A Sample Notice of Eligibility Recommendation is included in Appendix E. Entities involved in screening shall also notify the applicant that she or he has the right to request that the screening entity reconsider the denial recommendation, or to appeal the denial recommendation to the court. Applicants shall be told that they can do both – ask for reconsideration, and if still denied, then appeal to the court – or they can appeal directly to the court without first asking the screening entity to reconsider. This notice shall use language that is easy to understand, and shall be provided in the applicant's primary language. A Sample Notice of Right to Seek Review is included in Appendix F. Reconsideration requests and appeals shall be resolved in a timely fashion (no more than 48 hours) to guard against delay in the assignment of counsel. If delay in resolving the request for reconsideration or appeal is unavoidable, counsel shall be appointed provisionally in accordance with Procedure XII, B.

A decision by a court that an applicant is not eligible for assignment of counsel shall also be provided to the applicant in writing with an explanation as to the reason for the denial. As previously stated, written decisions ensure clear communication; they are also likely to enhance the applicant's acceptance of the denial, thereby diminishing the likelihood that the applicant will seek to challenge the denial.¹⁰⁶ This written decision shall also be in the applicant's primary language. Sample Notice of Judge's Ineligibility Decision is included in Appendix G.

Currently, there is no mechanism by which an applicant may seek to immediately appeal a judge's decision denying eligibility for assignment of counsel.¹⁰⁷ National standards, however, state that a process for appealing a judicial denial of eligibility for assignment of counsel should be made available.¹⁰⁸ Accordingly, ILS urges that consideration be given to enacting regulations

¹⁰⁵ For an overview of current practices amongst providers, see *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, F.

¹⁰⁶ Oral decisions do not have similar benefits because they do not provide an applicant the same opportunity to review the decision and discern if it accords with these criteria and procedures.

¹⁰⁷ If convicted, the person can raise the issue of the judge's denial of assignment of counsel on an appeal of the underlying conviction.

¹⁰⁸ See 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Guideline 1.6 (“A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal.”) (Black Letter “Summary of Recommendations,” available at www.nlada.org/DMS/Documents/998925963.238/blackletter.doc). See also *Determining Eligibility for*

or legislation that would authorize an administrative appeal process or an interlocutory appeal of a judge's decision denying eligibility for assignment of counsel.

XV. A determination of eligibility for assignment of counsel shall not be re-examined absent a substantial change of circumstances such that the defendant can pay for a qualified attorney and the expenses necessary for a competent defense.

A. County Law § 722-d shall be used only after an assignment of counsel has been made, only if prompted by defense counsel, and only after a finding of a substantial change in the defendant's financial circumstances.

B. Counsel shall not be assigned contingent upon a requirement that the defendant make partial payments to the provider of mandated representation or to the county.

Commentary:

As stated in the commentary to Procedure XIII, it is important to maintain the integrity of the eligibility determination process to ensure that counsel is being assigned to those who cannot afford the costs of a competent defense, and not to those who can. Thus, there may be times when a change in the financial circumstances of the person receiving mandated representation warrants a re-examination of the continued assignment of counsel. However, the eligibility determination should be re-examined only when there is concrete evidence that the financial circumstances of the person receiving mandated representation have substantially changed such that the person is now able to afford the costs of qualified counsel and the expenses necessary for a competent defense.

New York County Law § 722-d sets forth a very limited process for the re-examination of eligibility for assignment of counsel. County Law § 722-d applies only after a person has been deemed eligible for assigned counsel, and not as part of the initial appointment process. Once counsel is appointed, if a mandated provider learns that the person is “financially able to obtain counsel or make partial payments for representation,” the mandated provider may report this fact to the court,¹⁰⁹ and the court may then terminate the assignment of counsel or authorize partial

Appointed Counsel in New York State (“1994 NYSDA report”), *supra*, p. 19 (“Provision of an appellate review process conducted by the judiciary is consistent with the inherent responsibility of the courts to insure proper appointment of counsel.”); Vt. Stat. Ann. § 5236(c) (providing that a trial court’s determination that a defendant is not financially eligible for assignment of counsel may be appealed to a single justice of Vermont’s Supreme Court).

¹⁰⁹ The use of the word “may” in County Law § 722-d, instead of the mandatory “shall” is intentional and is compatible with defense counsel’s ethical responsibility to maintain the confidences of their clients. Specifically, the New York State Rules of Professional Conduct prohibit attorneys from revealing their clients’ “confidential information”, which includes a client’s financial information, unless the client consents or some other exception exists under the Rules. *See* 22 NYCRR 1200.0; Rule 1.6(a)(1), (2) and (b).

payment to the mandated provider. The court can do so only after conducting a detailed inquiry into the person's financial situation to determine if he or she can pay all or part of the costs of representation.¹¹⁰ Only after a finding that the person is able to afford counsel may the court terminate the assignment or order reimbursement to the mandated provider.

Notably, under County Law § 722-d, the authority to order partial payment exists only after a person has been determined eligible for assigned counsel and only after the assigned attorney notifies the court that a defendant may be able to pay for counsel. The law does not authorize courts to *sua sponte* terminate the assignment of counsel or order defendants to make partial payments for their representation.¹¹¹ Moreover, County Law § 722-d does not authorize courts to assign counsel contingent upon the defendant paying the partial costs of representation.¹¹² Thus, counsel should not be assigned simultaneously with the issuance of an order under County Law § 722-d requiring the defendant to partially pay the costs of representation.¹¹³

Nevertheless, County Law § 722-d does not constrain judges from acting upon learning that an applicant has intentionally misrepresented his or her financial situation to obtain free counsel. When the assignment of counsel is based on intentional misrepresentation, the court has the inherent authority to re-visit the assigned counsel eligibility determination.

XVI. Procedure regarding data maintenance

A. Data shall be maintained regarding the:

- i) number of applicants who apply for assignment of counsel;**
- ii) number of applicants found eligible;**
- iii) number of applicants found ineligible and the reasons for the ineligibility determination;**

¹¹⁰ See *People v. Lincoln*, 158 A.D.2d 545 (2nd Dept. 1990) (reversing the defendant's conviction where the trial court had relieved the assigned counsel without conducting a detailed inquiry into the defendant's income, financial obligations, and "other relevant economic information.").

¹¹¹ *Matter of Legal Aid Society of Nassau County, NY v. Samenga*, 39 A.D.2d 912 (2nd Dept. 1972) (holding that once a defendant has been assigned counsel, "that assignment could be terminated for reasons of nonindigency at the instance of counsel only."); *People v. Lincoln*, *supra*, 158 A.D.2d 545 (citing *Samenga*, *id.*). See Op. Atty. Gen. [Inf.] 1989-44 (a court may not impose additional community service on an indigent defendant to repay county for cost of legal services); Op. Atty. Gen. [Inf.] 1985-78 (county cannot implement repayment plan on initially indigent person who becomes solvent after termination of action).

¹¹² See, e.g., Op. Atty. Gen. [Inf.] 1963-171 (a county cannot condition representation by public defender upon promise to reimburse county). During ILS' public hearings, participants identified several problems and issues that, in their experience, have resulted from issuing County Law § 722-d orders at the time of assignment of counsel. See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, H.

¹¹³ 2015 NYSDA Statement, *supra*, at 9 ("Nothing in 722-d authorizes a court to prospectively order a partial payment of assigned counsel fees during the initial eligibility determination process.").

- iv) number of reconsiderations and appeals requested;**
- v) results of these reconsiderations and appeals;**
- vi) number of reports made pursuant to County Law § 722-d regarding the assignment of counsel; and**
- vii) number of orders issued for partial payment or termination of the assignment of counsel under County Law § 722-d.**

B. To ensure the confidentiality of information submitted during the eligibility determination process, the data shall be made available in aggregate form only, meaning that no individual applicant can be identified in the data itself.

Commentary:

As stated in the commentary to Procedure IX, adherence to these criteria and procedures will ensure equitable, efficient, and fair implementation of the right to counsel across New York, and will enhance public trust in the integrity of the eligibility screening process. But no standards, criteria, or procedures are self-executing. It will be critical to ensure not only that these criteria and procedures are widely disseminated and made available, but also that their implementation is monitored. Therefore, courts and screening entities must maintain relevant data regarding the eligibility determination process. Pursuant to Executive Law § 832(3)(b), this data shall be made available to ILS upon request. Importantly, to ensure the confidentiality of all information applicants disclose, the data maintained shall be de-identified, meaning all information that could identify a particular applicant shall be redacted. Additionally, all submissions of data to ILS pursuant to the Executive Law need only be in aggregated form, further guaranteeing against disclosure of private or individually identifiable information.

ILS recognizes that the responsibility to collect this data may impose a burden upon some courts and screening entities. The existence and extent of this burden may vary from county to county, depending on existing systems, infrastructure, and resources. ILS will work with the Office of Court Administration, courts, indigent defense providers, and other screening entities in support of their efforts to collect the data required by this procedure.