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# Criteria and Procedures for Determining Assigned Counsel Eligibility

## Report on Implementation in the *Hurrell-Harring* Counties

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April 4, 2019

Submitted by the New York State Office of Indigent Legal Services in accordance with  
Section VI(C) of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement

**NEW YORK STATE  
OFFICE OF INDIGENT LEGAL SERVICES**

**Criteria and Procedures for Determining Assigned Counsel Eligibility:**

**A Report on Implementation in the *Hurrell-Harring* Counties**

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## I. INTRODUCTION

Section VI (C) of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement (“*Hurrell-Harring* Settlement” or “Settlement”) requires the New York State Office of Indigent Legal Services (“ILS”) to submit annual reports assessing the criteria and procedures being used in the five Settlement counties to determine whether a criminal defendant is financially eligible for an assignment of counsel. Specifically, ILS is required in each annual report to analyze (1) the criteria and procedures that are currently being used to determine whether a person is eligible; (2) who is making these determinations; (3) whether and to what extent decisions that applicants are ineligible are being reconsidered and/or appealed; and (4) whether and to what extent the criteria and procedures being used differ from the criteria and procedures set forth in the *Criteria and Procedures for Determining Assigned Counsel Eligibility* (“Eligibility Standards” or “Criteria and Procedures”), which ILS issued in April 2016.

Pursuant to the terms of the Settlement, on April 4, 2017 and April 4, 2018, ILS issued its first two annual reports on eligibility, entitled, *Criteria and Procedures for Determining Assigned Counsel Eligibility: Report on Implementation in the Hurrell-Harring Counties*. In each report, we discussed for each of the five counties the criteria and procedures used prior to implementation of the Eligibility Standards, the steps taken to implement the Eligibility Standards, an assessment of compliance with the Eligibility Standards since implementation, and the barriers and ongoing challenges to implementation.

ILS submits this third annual report to discuss the ongoing implementation of the Eligibility Standards in the five Settlement counties since the issuance of the April 2018 report. For this report, unlike the two previous reports, there is no need to discuss steps taken to implement the Eligibility Standards because all five Settlement counties have now been implementing the Eligibility Standards since 2016. Thus, this report focuses primarily on whether the providers’ current criteria and procedures for determining assigned counsel eligibility are consistent with the ILS Eligibility Standards. Additionally, the report includes a brief analysis of the data for calendar year 2018 collected from each county. Finally, the conclusion focuses on recently-garnered information from the providers as to whether the Criteria and Procedures are achieving the goal of fairly and efficiently discerning between those defendants who can afford to retain counsel and those who cannot.

The report is based on information gleaned from the on-going conversations between ILS staff and the providers in each county, our review of the data each provider sent to ILS, the court observations we made in certain courts over the past year, and the structured interviews we conducted of providers and their staff members who are involved in the eligibility determination process.

Below is a summary of the court observations and structured provider interviews that were conducted between April 2018 and March 2019:

### ***Court Observations***

Between April 2018 and March 2019, ILS observed several court sessions in all five counties, including the following:

Onondaga County: Centralized Arraignment Part (CAP), P.M. sessions; Syracuse City Ct. (CAP, A.M. Session); Van Buren Town Court

Ontario County: County Jail (Pre-CAP Weekend Arraignment); CAP A.M. and P.M. Sessions; County Ct. (Judges Doran and Reed); Hopewell Town Ct.; Geneva Town Ct.; Victor Town Ct.; Canandaigua City Ct.; Drug Treatment Ct.

Schuyler County: Watkins Glen Village Ct.; County Ct.; Catharine Town Ct.; Montour Village Ct.; Hector Town Ct.

Suffolk County: District Court (Parts D-11, D-43, D-45, D-46, D-51, D-52, D-53, D-54, D-55, DV1, FP1); Riverhead Town Justice Ct.; Southampton Town Justice Ct.; Westhampton Beach Village Ct.; Riverview Town Justice Ct.; East Hampton Town Justice Ct.; Southold Town Justice Ct.

Washington County: Centralized Arraignment Part (CAP); County Ct.; Kingsbury Town Ct.; Fort Edward Town Ct.; Whitehall Town Ct.

### ***Structured Interviews***

Between August 2018 and March 2019, ILS staff conducted structured interviews of the administrators and support staff of providers involved in determining assigned counsel eligibility, as follows:

Onondaga ACP: ACP Executive Director Kathleen M. Dougherty; Eligibility Specialist Ishmael Hawkins

Ontario PD: Public Defender Leanne Lapp

Schuyler/Tompkins Regional ACP: ACP Program Coordinator Julia P. Hughes; Administrative Assistant Patricia Halstead

Schuyler PD: Public Defender Wesley A. Roe

Suffolk ACP: Administrator Daniel A. Russo; Deputy Administrator Stephanie McCall; SAP Screener Andrew McCall

Suffolk LAS: Chief Legal Operating Officer Sab Caponi

Washington ACP: Administrator Marie DeCarlo-Drost; Supervising Attorney Thomas N. Cioffi

## II. IMPLEMENTATION OF THE ELIGIBILITY CRITERIA AND PROCEDURES IN THE *HURRELL-HARRING* COUNTIES

### Onondaga County

#### A. Current process for deciding assigned counsel eligibility

The primary provider of mandated representation in Onondaga County is the Onondaga County Bar Association's Assigned Counsel Program (ACP), which is responsible for screening defendants and making assigned counsel eligibility recommendations. There are four different processes for assessing assigned counsel eligibility in Onondaga County depending on whether the defendant is arraigned (i) in one of the Town and Village Courts; (ii) in Syracuse City Court as an in-custody arraignment; (iii) in Syracuse City Court as an out-of-custody, or appearance ticket, arraignment; or (iv) in the Centralized Arraignment Part (CAP).

For arraignments done in the **Town and Village Courts**, an ACP attorney is available to represent every defendant at arraignment. The arraigning attorney retains the case as the provisionally assigned attorney, unless the defendant has a private attorney or has another assigned attorney on a pending case. The provisionally assigned attorney then obtains from the defendant the information needed to complete the ACP's assigned counsel application form and submits the completed application to the ACP for review.

For the **in-custody arraignments in Syracuse City Court**,<sup>1</sup> the ACP assigns two or three attorneys, depending on the day of the week, to represent these defendants at arraignment. Starting at 8:00 a.m. each morning, the arraignment attorneys meet with the defendants at the jail before they are transported to court. The attorneys interview the defendants and collect information from them to complete the assigned counsel application form. Once the case is called, the attorney informs the judge whether it appears that the defendant qualifies for counsel, and if so, at the conclusion of the arraignment, the judge provisionally assigns an attorney (usually someone other than the arraignment attorney) to represent the defendant. The arraignment attorney then delivers the assigned counsel application form to the ACP for review.

The procedure is different for the **out-of-custody arraignments in Syracuse City Court**. The ACP assigns an office clerk to sit at a desk just outside the entrance to Part 4 (the arraignment Part in City Court). Starting at 9:00 a.m., the clerk announces to all persons who approach the courtroom to stop and see her if they wish to have an attorney assigned to their case. The arraignment attorney also makes the announcement inside the courtroom before the start of the court session. The office clerk then assists defendants in completing the application form to ensure that the form is filled out accurately. She then passes each completed form to the arraigning attorney, who reviews it and informs the judge whether the defendant appears to qualify for an assignment of counsel. The judge will provisionally assign an attorney to

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<sup>1</sup> This is also considered the morning portion of the County's Centralized Arraignment Program (CAP), which means that people arrested after-hours throughout Onondaga County and detained prior to arraignment are arraigned in this session, not just individuals arrested in the City of Syracuse. Notably, as of March 4, 2019, a CAP Clerk attends the City Court morning arraignments to assist the judge with recommendations for attorney assignments and scheduling the next court dates.

represent the defendants deemed eligible. The arraigning attorney then submits the completed application form to the ACP for its review.

Defendants who are arraigned in the **Centralized Arraignment Part** are all in custody. The ACP generally assigns two attorneys to cover arraignments in this Part. Starting at 4:00 p.m. each day, the attorneys meet with an ACP office clerk at the Public Safety Building next door to the jail. The clerk gives the attorneys i-Pads, which they bring to the jail to interview the defendants to be arraigned, and collect information to complete the application form. The defendants are then transported to the Public Safety Building, where the attorney represents them at arraignment. Unless the case is disposed of at arraignment, the judge provisionally assigns an attorney. The arraignment attorneys then submit the completed applications to the ACP electronically.

\* \* \* \* \*

Every provisionally assigned attorney is notified by the court, the ACP, or both, of the assignment. In City Court, following each arraignment session, the arraigning attorney returns the charging documents to the court clerk. The court clerk takes the documents to the City Court Clerk's office and places them in the assigned attorney's document bin. Upon receiving notification of the assignment, the attorney goes to Room 130 and retrieves the documents. The documents are also scanned in by the ACP receptionist and emailed to the assigned attorneys. In CAP, the charging documents are electronically transmitted to the ACP and the provisionally assigned attorney. The "hard copies" of the charging documents from CAP are maintained at the Public Safety Building, and the assigned attorneys can retrieve copies of the charging documents there, as well. In the Town and Village courts, the assigned attorney maintains the documents.

Upon receiving the application forms from the attorneys, the ACP staff immediately scan the forms, enter the scanned forms in an electronic folder, and enter the data from them into their case management system. An ACP eligibility specialist then reviews every application to ascertain whether the applicant qualifies for assigned counsel, or whether additional information should be requested of the defendant before a final determination of eligibility is made. The ACP then either (i) informs the assigned attorney that the defendant is eligible for assigned counsel and that the attorney should continue on the case; (ii) sends the attorney a "pending" notice identifying missing information, thus making it incumbent upon the attorney to obtain and provide the missing information,<sup>2</sup> or (iii) sends the attorney an "ineligible" notice stating that the defendant is not eligible for assigned counsel and the attorney must submit to the court a motion to withdraw as counsel. In the latter cases, the attorney must also provide an ineligible notice to the defendant as well as a written notice provided by the ACP (i.e., the "Notice of Right to Seek Review") of the right to request reconsideration or to appeal the denial, or do both. If the court denies the motion to withdraw, the attorney is ordered to continue to represent the defendant

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<sup>2</sup> According to Kathy Dougherty and Ishmael Hawkins, in most instances, this "missing" information is basic, necessary information, such as the defendant's name. Thus, inadvertent attorney error means that the ACP may have to notify the attorney of the need for complete information.

(a/k/a, a “judge-ordered” assignment). If the motion is granted, the defendant is instructed to retain counsel.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The ACP thoroughly assesses each application to ensure that applicants who need counsel are assigned counsel.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	Staff estimates that approximately 90% of the eligibility decisions made in 2018 were based on an eligibility presumption.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	The ACP asks about a defendant’s release status, but for reasons unrelated to eligibility.
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	Though the ACP asks about non-liquid assets, very few applicants have any that would impact the outcome of an application for assigned counsel.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	If an applicant lists an expense which, to the screener, appears questionable, the screener will confer with Ms. Dougherty.
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	In assessing the actual cost of retaining counsel locally, Ms. Dougherty relies on her personal knowledge and that of her attorney staff.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	The ACP screens for assigned counsel eligibility. The Eligibility Standards have dismantled previous barriers to applying for counsel; thus, the number of times judges have had to intervene and deem someone eligible has significantly declined.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Judges no longer ask defendants detailed questions about their financial circumstances in open court, and the ACP has implemented protocols to protect the confidentiality of the information applicants disclose.

<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	Eligibility determinations are generally made within 1-2 days of the ACP's receipt of the application; 3 days if there is missing information or the application was delivered on a Friday. Where appropriate, the ACP assigns counsel provisionally for individuals seeking counsel pre-charge.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The ACP asks for verification only when there is missing information or reason to believe that applicants may have under-reported their financial resources.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	No applicant is deemed ineligible until the ACP office staff has reviewed the application.
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The ACP notice of ineligibility no longer prompts judges to issue partial payment orders at the time of assigning counsel, and no judge has so ordered since implementation of the C&P.

### C. Data

Procedure XVI requires the collection, maintenance, and reporting of data pertaining to the assigned counsel eligibility process. For calendar year 2018, the ACP sent ILS four quarterly reports for the aggregate period of January 1, 2018 – December 31, 2018. The report revealed that a total of 17,584 defendants applied for assigned counsel, 95 applications of which are “pending” while the ACP obtains additional information. This means 17,489 applications were processed in calendar year 2018. Of these:

- 17,323 applicants were deemed eligible by the ACP.
- 46 applicants were deemed eligible by a judge.
  - 3 were reversals of the ACP's ineligibility determination.
  - 35 involved instances in which there was no application. This could be because the judge *sua sponte* assigned counsel or because the panel attorney bypassed the application process and asked the judge to assign counsel.
  - 8 were instances in which no reason was given or for other reasons (i.e., defendant not cooperative).
- 120 applicants were deemed ineligible.

This data, when compared to the data reported in the April 2017 and April 2018 reports, clearly show that the ACP continues to make fewer ineligibility recommendations that are subsequently overturned by a judge, and thus judges are involved in eligibility determinations far less frequently than before implementation of the Eligibility Standards.



As we reported in 2017, the ACP's ineligibility rate for the last two months of 2016, soon after implementation began, was 15.1% in November 2016 and 17% in December 2016. In 2017, the ineligibility rate had dropped to 7.42%. For calendar year 2018, the ACP's ineligibility rate is slightly less than 1%.

#### **D. Additional Information**

The ACP has made great strides in ensuring that defendants who need counsel are assigned counsel. Prior to implementation of the Eligibility Standards, the ACP had a needlessly burdensome application process that required the provisionally assigned panel attorney to obtain a variety of verifying documents from the client. The ACP would deem many clients ineligible simply for failing to complete the application process. To protect the defendants' right to assigned counsel, judges frequently intervened to assign counsel. Indeed, according to the former ACP Administrator Renee Captor, 40% of the ACP caseload were defendants who were assigned counsel by the judge.

Since implementation, the ACP has experienced a steadily declining rate of ineligibility, i.e., 15%-17% in the last two months of 2016; 7.42% in 2017 and less than 1% in 2018. Accordingly, judges seldom need to get involved in assigning counsel. Ms. Dougherty reports that judges appreciate not having to be involved in this decision-making process knowing that the ACP is using a fair and efficient process.

Additionally, prior to the installation of the new ACP leadership, the ACP refused to assign counsel unless a person had been arraigned on an accusatory instrument. Now, consistent with Procedure XII of the Eligibility Standards, and in accordance with its commitment to being more responsive to existing and potential clients, the ACP has established a protocol to ensure that eligible people who need representation have it, even if they have not been arraigned -- a period of time in which the guidance of counsel may prove to be critical.

For example, recently, a man walked into the Onondaga ACP office and explained that the police had been to his house the previous night and told him they were investigating him for an alleged first degree robbery. He said that the police advised him to "turn himself in because they had a warrant for his arrest." The man sought advice from the ACP on whether he should turn himself in. The ACP recognized that he needed the advice and guidance of counsel, assessed his financial eligibility for assignment of counsel, and upon determining that he did not have the financial resources to retain counsel, assigned him counsel. The ACP also located and assigned an attorney to take the case who was able and willing to talk to the gentleman right away.

In the 2018 report, we noted that one challenge the ACP faced was its inability to ensure that defendants whom the ACP deemed ineligible for counsel were being given the written notice of their right to request reconsideration or appeal. Since that report, we have discussed this issue with Ms. Dougherty, and she is confident that the panel attorneys are providing each ineligible applicant with a copy of the requisite notice because the ACP receives requests for reconsideration from defendants they have deemed ineligible. Still, ACP staff consistently remind panel attorneys of this requirement.

## Ontario County

Since its creation in 2010, the Ontario County Public Defender Office, headed by Leanne Lapp<sup>3</sup>, has been responsible for screening and making recommendations about assigned counsel eligibility in criminal cases in Ontario County Court, Geneva and Canandaigua City Courts, and the County's 17 Town and Village courts.

### **A. Current process for deciding assigned counsel eligibility**

As set forth in ILS' 2017 report about the progress of Settlement implementation,<sup>4</sup> the Ontario County Public Defender Office (PD Office) has programs in place to represent all defendants at arraignment. Time permitting, defense counsel appearing at arraignments screen defendants for assigned counsel eligibility and notify the judge if the defendant is eligible, thereby enabling the judge to assign counsel at that point. If they are unable to do so, counsel instructs the defendants to contact the PD Office so they can be interviewed and screened, either by phone or in person, for assigned counsel eligibility. Defendants who are already being represented by the PD Office on another case unrelated to the charge for which they are being arraigned are automatically assigned counsel on the new case.

On May 1, 2018, Ontario County implemented a Centralized Arraignment Plan (CAP). There are two sessions – morning and evening. As explained below, CAP implementation has facilitated quick assigned counsel eligibility determinations.

To ascertain whether there were any missed arraignments, staff from the PD Office check the jail logs 6 days weekly, and, if there are any such defendants, staff visit with and interview them that day. Ms. Lapp has described this process as an effective safety net. The interview conducted by staff is designed not only to determine eligibility for assigned counsel, but also to ascertain if there is a need to immediately calendar the case, for example, to argue that the defendant should be released. And, in the rare instances in which defendants are arraigned without counsel and not detained, judges will typically inform the defendants to contact the PD Office to apply for assigned counsel.

The Ontario PD Office uses the application for assignment of counsel to collect the defendants' financial information, not only to determine eligibility for assigned counsel, but also for bail arguments and plea negotiations. Ms. Lapp reports that the form, which she considers to be an intake form, is also used to elicit as much information as possible about defendants, including their criminal history, medical and mental health history, place of birth, and family. As such, the intake form is considered a privileged document with confidential client information, and therefore is not disclosed to any entity outside the PD Office.

Office staff make decisions regarding eligibility soon after receiving the applications, most often on the day of receipt, unless the application raises issues requiring consultation with Ms. Lapp. If staff determine that an applicant is ineligible for assigned counsel, or if there is a close call, Ms. Lapp will review for further assessment of whether the applicant can, in fact, afford to pay

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<sup>3</sup> Ms. Lapp assumed her role as Public Defender in 2012.

<sup>4</sup> See *Implementing the Hurrell-Harring v. The State of New York Settlement: 2017 Update*.

for counsel. If deemed ineligible, those applicants are immediately sent written notification of the ineligibility determination and of their right to ask the provider to reconsider, appeal to the judge, or do both. In 2018, one applicant who was deemed ineligible requested reconsideration. Ms. Lapp reported that she reversed the ineligibility decision and assigned counsel.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	Ms. Lapp reviews close calls and ineligibility determinations to ensure compliance.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	Ms. Lapp estimates that in 2018, 95% of the eligibility decisions were based on one of the presumptions.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	Though the intake form elicits information about parental income, the PD Office does not use this information in its eligibility assessments.
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The intake form elicits information about need-based public benefits to determine presumptive eligibility.
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	The PD Office considers hardship factors, such as the cost to the applicant of providing care for an ill relative, that the applicant is collecting Workers Compensation benefits, or that the applicant is receiving chemotherapy because of a cancer diagnosis.
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	In assessing the actual cost of retainers, Ms. Lapp relies on information she receives from applicants who have obtained quotes from private attorneys.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	Ms. Lapp reports that courts accept the recommendations of the PD Office.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	The PD Office treats information it receives during the intake interview as privileged and confidential; and staff take steps to protect the clients' confidentiality.

<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	Eligibility decisions are made soon after the applications are received, most often within 24 hours. The office screens and assigns counsel at the pre-charge stage of a case, when requested.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The PD Office requires verifying documentation only when necessary, such as when the financial information disclosed does not make sense, or when applicants are self-employed and their net income cannot be easily discerned.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	No determination of ineligibility is made until Ms. Lapp has personally reviewed the application.
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The PD Office no longer recommends to courts that counsel be assigned contingent upon a County Law § 722-d order authorizing defendants to make partial payments for the costs of their representation.

### **C. Data**

In compliance with the data collection requirements set forth in Procedure XVI of the Criteria and Procedures, the Public Defender Office was diligent in sending us timely reports for the four quarters of 2018. Our review of the data reveals that, in calendar year 2018:

- The office received 2,847 applications for assigned counsel.
- Of those, 2,803 were deemed eligible for counsel.
- 44 applicants were found to be ineligible.
- 1 applicant requested reconsideration and was ultimately deemed eligible.

This is an ineligibility determination rate of about 1.5%. The PD Office also reports that during calendar year 2018, there were no orders issued pursuant to County Law § 722 for payment of assigned counsel fees.

### **D. Additional Information**

Implementation of the Centralized Arraignment Program has facilitated the Eligibility Standards. Prior to each CAP session, the PD Office is notified of those defendants being detained for arraignment. PD Office investigators and attorneys interview those defendants and, among other things, obtain the information needed to complete the PD Office’s Intake/Eligibility form. As a result, the arraignment attorney can inform the judge at arraignment if the client is eligible for assignment of counsel.

Finally, the PD Office has protocols for ensuring that individuals who request counsel pre-charge are screened and assigned counsel. As Ms. Lapp once noted, “*Ideally, due to early entry, charges are not filed or at least statements are not made.*” ILS observed an example of this

practice at the recent arraignment of a defendant who had contacted the PD Office several weeks earlier, after he learned that he was being investigated by the police. The PD Office had found him eligible for an assignment of counsel and notified the police that they were representing him to ensure that his rights were protected while he was being investigated and prior to formal charges being brought.

## Schuyler County

Until 2016, the Schuyler County Public Defender Office (PD Office), headed by Wesley A. Roe, conducted all the financial screening for assigned counsel eligibility in criminal cases in the County Court and the 11 Town and Village Courts (“justice courts”). As we reported in the April 2017 Eligibility Report, as part of its initiative to improve the quality of public criminal defense, in April 2016, the County terminated its Conflict Defender contract and, through an Inter-Municipality Cooperative Agreement (“IMA”) with Tompkins County, contracted for a regional Assigned Counsel Program (“ACP”) to be administered by the Tompkins County Assigned Counsel Program. The regional ACP handles only those cases in which the Public Defender Office is conflicted or otherwise disqualified from representing a defendant, and pursuant to the terms of the cooperative agreement, it screens for assigned counsel eligibility in known conflict cases. The PD Office screens for eligibility in non-conflict cases.

### **A. Current process for deciding assigned counsel eligibility**

#### *i) The Schuyler County Public Defender Office*

To ensure the rights of defendants to assigned counsel, Mr. Roe has instituted several avenues by which a defendant in need of assigned counsel can apply. PD Office attorneys bring the assigned counsel applications to arraignments. The judge, the defense attorney, or both inform defendants of their right to have counsel assigned if they cannot afford to retain one. Time permitting, the attorney assists each defendant in completing the application, which the attorney then brings back to the office for processing. “It is always better when we assist them with the application,” Mr. Roe recently told ILS. If time does not allow, the attorney tells the defendant how to complete and submit the application. The PD Office attorneys continue to represent these defendants provisionally until an eligibility determination is made. Defendants in custody are presumed eligible for counsel, but the PD Office staff have them fill out the application so that the Office can collect from them relevant information and data.<sup>5</sup> The PD Office has contracted with the Tompkins County Office of Opportunities, Alternatives and Resources (O.A.R.), to have, among other things, an O.A.R. staffer meet with defendants at the jail and assist them in filling out the assigned counsel application. If there is a defendant who was not represented at arraignment, the O.A.R. staffer will meet with that person immediately and assist the person in completing the assigned counsel application.

Additionally, some defendants with appearance tickets who have not yet had their first court appearance, come to the PD Office and apply for assigned counsel. Office staff provide an

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<sup>5</sup> The assigned counsel application is used not just for eligibility purposes, but also to collect relevant personal information from defendants. Thus, it is important that defendants deemed presumptively eligible complete it.

application to everyone who asks for it, though some individuals change their minds about applying. A staff member also assists any defendant who requests assistance with the form. If no staff member is in the office when defendants come to the office, defendants can find copies of the application on the bulletin board outside the office. The application form can also be located on the PD Office’s website, or, upon request, mailed or emailed to the defendant. Completed applications can then be faxed, emailed, mailed, or personally delivered to the office. Once received, staff review them and determine eligibility within three days, sometimes sooner, depending on the day of the week that the office receives the application.

The PD Office deemed only one applicant ineligible for assigned counsel in 2018. According to Mr. Roe, consistent with its notification process, this applicant was notified, in writing, of the ineligible decision, and the reason for it, and was also provided with written notice of his or her rights to request reconsideration or to appeal.

ii) *The Tompkins/Schuyler Regional ACP*

Pursuant to the Inter-Municipality Cooperative Agreement mentioned above, once the Schuyler County Public Defender determines that his office is conflicted on a case, he immediately refers the case to the Tompkins/Schuyler Regional ACP, which then becomes responsible for screening and making a recommendation on assigned counsel eligibility. Under the IMA, the ACP uses the same assigned counsel application as is used by the Schuyler Public Defender Office, and conducts its screening of the conflict cases in accordance with the ILS Eligibility Standards.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The PD Office and ACP staff use forms that ensure that the applicants’ debts, financial obligations, income and assets are considered in the eligibility assessment.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The PD Office and ACP staff estimate that between 85%-95% of applications are decided based on a presumption.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	The PD Office and ACP report that generally, applicants do not have sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application.

<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The application asks about need-based public assistance, but only to decide presumptive eligibility.
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	Schuyler County judges and magistrates have consistently followed the eligibility recommendations of the PD Office and the ACP, and have not intervened into their determination processes.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Defendants are not required to disclose their financial information in open court and both providers take steps to maintain the confidentiality of the information they receive.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	Both the PD Office and the ACP decide eligibility applications promptly, usually within 3 days of receiving them, if not sooner. Additionally, the PD Office screens and, where appropriate, assigns counsel at the pre-charge stage, when requested.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	Both the PD Office and the ACP ask for verifying information when necessary, such as when there is incomplete information.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The PD Office and the ACP do not request that judges issue partial payment orders at the time of assigning counsel.

### C. Data

Regarding the data collection, maintenance, and reporting requirements set forth in Procedure XVI of the Eligibility Standards, both the PD Office and the ACP submitted 2018 eligibility data to ILS. The data ILS received show the following:

- i) Of the 401 applications considered by the Schuyler County Public Defender Office, only 1 applicant was deemed ineligible. There were no requests for eligibility screening reconsiderations, appeals, or County Law § 722-d orders.
- ii) Similarly, regarding the criminal conflict cases sent to the Schuyler/Tompkins ACP, only 1 of the 108 applicants screened was deemed ineligible. There were no requests for eligibility screening reconsiderations, appeals, or County Law § 722-d orders.

In total, 509 people applied for assigned counsel, two of whom were deemed ineligible. This is an ineligibility rate of about 0.4%.

#### **D. Additional Information**

Like Ontario PD Leanne Lapp, Public Defender Wes Roe firmly believes that it is critical to preserving a person's legal rights that, when requested, an attorney intervenes and represents the person pre-charge. Thus, consistent with Procedure XII of the Criteria and Procedures, the Schuyler PD office also has protocols in place for doing so, as is demonstrated in the following narrative Mr. Roe recently shared with ILS.

An individual, previously known to the PD Office, called the Office and requested counsel because he believed the police were video-trailing him. By this time, the police already had obtained video-recordings that, alone, were incriminating of a crime. The PD Office successfully convinced the police to let up on trailing their client. Though the individual was ultimately charged and convicted of several crimes, Mr. Roe recognized that, because his Office intervened when it did, the police did not obtain a statement or confession that could have been used against him at trial.

### Suffolk County

Suffolk County's criminal court system is divided between the District Court, located in Central Islip on the County's West End, and ten town and village courts ("justice courts") on the East End. Criminal cases typically originate in the District Court -- which has criminal court jurisdiction for the five West End towns -- and in the East End justice courts. Accordingly, most eligibility decisions are initially determined in District Court or in one of the East End justice courts. The County Court is located on the East End in Riverhead.

Unlike three of the other *Hurrell-Harring* counties, where assigned counsel eligibility screening is conducted by a single entity (either the Public Defender Office or the office of an Assigned Counsel Program),<sup>6</sup> in Suffolk County, there is no single entity that conducts all the screenings for assigned counsel eligibility. As a result, eligibility determinations are made using different processes and mechanisms, depending on whether the defendant is arraigned in the District Court or in one of the East End justice courts.

#### **A. Current processes for deciding assigned counsel eligibility in Suffolk County**

Following are the processes currently used in District Court and in the East End justice courts for deciding assigned counsel eligibility:

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<sup>6</sup> As previously stated, in Schuyler County the Public Defender Office and the Regional Schuyler/Tompkins ACP coordinate efforts to screen defendants for assigned counsel eligibility.



## *1. District Court*

District Court conducts arraignments in two court parts: 1) D-11, where defendants who are detained after their arrest are arraigned; and 2) the Street Appearance Part (SAP), where defendants who are issued summonses following their arrest are arraigned. In both parts, Suffolk County has taken advantage of ILS' grant and distribution funding to ensure that defendants are represented by defense counsel at arraignment. In D-11, arraignments are covered by attorneys from the Suffolk County Legal Aid Society (SCLAS), unless there is a conflict, in which case, the arraignment is handled by a Suffolk County Assigned Counsel Defender Program (ACDP) attorney. In SAP, arraignments are handled by one of two ACDP attorneys who staff each arraignment session, unless the SCLAS already represents the defendant on another matter and knows of the new case, in which case, a SCLAS attorney will appear and represent the defendant at this arraignment.

### *(i) D-11*

The Suffolk County Department of Probation conducts pre-arraignment screenings of defendants who are arrested and detained prior to arraignment ("in-custody defendants") to assess whether the defendants should be released on their own recognizance ("ROR screening"). As part of this assessment, Probation also collects information needed to determine if the defendant is presumptively eligible for assignment of counsel and records this information on screening documents it shares with the judge.

Probation consistently provides ILS with written monthly reports of the number of defendants screened, and, of these, the number Probation deemed presumptively eligible for assignment of counsel. This data is further discussed below. However, neither Probation nor the court collects and maintains data as to how frequently the judge accepts or rejects the recommendation of presumptive eligibility, or the extent to which courts rely on the information provided by Probation.

For defendants who are not presumptively eligible for assignment of counsel, the court must determine if further screening is necessary. Generally, judges assign counsel to those defendants who are remanded to pre-trial detention and say they cannot afford to retain counsel. Additionally, judges are more likely to assign counsel to those who are arraigned on felony offenses. In other cases, judges give defendants a one-page written notice instructing them to bring to their next court appearance an array of documents: identification; names, addresses and phone numbers of at least two friends or family members who can verify the defendant's information; bank books and statements; income tax returns or W-2 and 1099 forms; recent paystubs for all household members; proof of any financial hardship; proof of Social Services awards; proof of any other benefits; and the parent or guardian of any defendant under 21 years of age.

Based on our court observations, ILS learned that at least one judge urges defendants to retain private counsel instead of telling them how to apply for assigned counsel. For defendants who were not remanded to custody, this judge informed them that the attorney who represented them at arraignment was no longer their attorney and had been relieved from further representation.

The judge instructed the defendants to retain an attorney for the next court date. If they could not afford a private attorney, they should wait until the next court date and ask that judge to screen them for assigned counsel eligibility.

(ii) *SAP*

Since May 2017, the ACDP has been staffing an office on the 4<sup>th</sup> Floor of the District Court building to screen SAP defendants for assigned counsel eligibility. ILS has visited the 4<sup>th</sup> floor screening office on several occasions, and, during a recent visit to the ACDP Offices, met with the screener, ACDP Administrator Daniel Russo, and Deputy Administrator Stephanie McCall, regarding the processes currently being used for screening SAP defendants for assigned counsel eligibility. ILS learned the following:

In SAP, at the beginning of the court calendar, judges announce to everyone in the courtroom that defendants have the right to counsel and the right to an assigned counsel if they cannot afford an attorney. The arrainging attorney also does, and, as observed by ILS, repeats the announcement at various times during the court proceedings to ensure that it is heard by everyone who enters the courtroom.

Following arraignment, the judge refers those defendants who were not remanded to pre-trial detention to the 4<sup>th</sup> floor SAP Screening Office for screening. ILS observed one judge, for instance, telling each defendant: “I am adjourning your case, and you need to return to court with a lawyer. If you cannot hire your own, go right next door and speak to the person so they can screen you for a Legal Aid attorney. Right next door.”

Additionally, the arrainging attorney provides written notification to those defendants, informing them of the time, date and location of their next court appearance, and informs them to retain an attorney for that next scheduled date. For those defendants who cannot afford to pay for an attorney and wish to apply for an assignment of counsel, the notice instructs them to “immediately go to the SAP Screening Office on the 4<sup>th</sup> floor of th[e courthouse] building,” and bring with them all the paperwork pertaining to their cases.<sup>7</sup>

At the screening office, the eligibility interview is conducted in a confidential setting where the ACDP staff person assists each defendant in completing the application form. He reviews the information provided and makes a decision while the applicant is still in the office. He then fills out a three-part Notice of Financial Eligibility Recommendation, listing the applicant’s name, address, docket number of the case, and the name of the judge, and indicating that a recommendation will be made to the judge that the applicant is either financially eligible for an assignment of counsel, or is not. He retains the original of the document for the ACDP files, and hands the remaining two copies to the defendants with instructions that, on their next court date, they should provide one copy to the court to inform the court that they have been screened and found eligible, and that they should retain the second copy for their records. He also tells them that, on the adjourned date, an attorney will be assigned to their case, unless the judge has a problem with the eligibility recommendation. SCLAS staffs all court appearances in the District

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<sup>7</sup> This notice was one of the eligibility documents that ILS assisted the ACDP in finalizing. It, and any other document mentioned in this report, can be made available for review upon request.

Court, and thus a SCLAS attorney will always be present at that second court appearance to accept the assignment, unless there is a conflict, in which case the matter is assigned to the ACDP panel attorney assigned to that courtroom.

For those defendants whom the ACDP deems ineligible, a Reason for Ineligibility Recommendation form, which concisely explains the reasons that the application has been denied, is given to the defendant. Additionally, the screener provides the defendant with a copy of ILS' Sample Right to Seek Review, which the ACDP adopted for its use.

The SAP calendar is rotated weekly to a different court part, and so, consequently, each week a different District Court judge will preside over the SAP cases. ILS has learned that all except one of the judges consistently send defendants to the SAP screener to be screened. The judge who does not use the SAP Screening Office conducts a brief on-the-record inquiry to determine if defendants are eligible for assigned counsel.

The ACDP has reported to ILS the data it has collected and maintained on the number of applicants screened and, of these, the number deemed eligible and the number deemed ineligible, as well as the names of the arraigning judges. This data is discussed in more detail below.

## *2. East End Justice Courts*

The eligibility determination process is different on the County's East End. As noted in the last Eligibility Report, if a defendant is arraigned and remanded in one of the East End justice courts, the judge presumes the defendant financially eligible and assigns counsel, unless the defendant is already being represented by private counsel. If the defendant is not remanded, the judge conducts a brief inquiry into the defendant's financial situation, asking, for example, whether or not the defendant is working. If it is obvious that the defendant cannot afford to retain counsel, the judge assigns counsel. If the defendant's ability to pay for counsel is not obvious, the judge instructs the defendant to go to SCLAS to apply for assigned counsel, and provides the defendant with a form containing the directions to SCLAS and a list of the documents to bring. If SCLAS has a conflict, the case is referred to the ACDP.

Defendants who go to SCLAS are interviewed by a SCLAS investigator (either in person, or by phone for those defendants who are unable to travel to the SCLAS office because of transportation issues), and assessed for assigned counsel eligibility. To ensure legibility, the SCLAS investigator personally completes the application based on the information the applicant provides.

### **B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

The following assessment of the County's compliance with the Eligibility Standards over the past year is based on the information we gleaned from court observations ILS conducted in 2018, the conversations ILS held with staff members of the SCLAS and the ACDP, and our review of the data we received:

1. D-11

- As previously stated, in D-11, Probation screens for presumptive eligibility of those defendants who are detained pre-arraignment and, in so doing, uses the presumptive factors set forth in the Eligibility Standards.
- Since October 3, 2016, Probation has consistently collected, maintained, and reported to ILS on a monthly basis, data representing the number of eligibility screenings it conducted in D-11, and, of those, the number of applicants it deemed presumptively eligible for assigned counsel. The data received for calendar year 2018 reveals that, in 2018, 12,614 defendants were screened, of which 9,410 (or 75%), were presumed eligible – slightly lower than the average percentage (77.25%) deemed eligible during calendar year 2017.
- As for those defendants who are not assigned counsel at arraignment and released pre-trial, ILS has observed at least one judge instruct the defendants to wait until the next court date and ask that judge to screen them for assigned counsel eligibility; other judges give the defendants a notice listing the documents they must bring to their next court appearance to be assessed for eligibility then.

2. SAP

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The SAP screener estimates that 95% of the applications are decided based on one of the eligibility presumptions.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	The ACDP has not met an applicant with equity in a non-liquid asset sufficient to affect the eligibility determination. The SAP screener recently noted: “Most of the people we see don’t own anything.”
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The application asks about receipt of public assistance, but solely to determine presumptive eligibility.

<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	Where necessary, the SAP Screener consults with the ACDP Administrator to assess whether an applicant's resources are sufficient to pay the actual cost of a retainer.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	Though the ACDP screening program was intended for defendants referred from the Street Appearance Part, the ACDP reports that District Court judges are increasingly sending unrepresented defendants to the Screening Office to be screened. The ACDP reports that judges accept the recommendations of the screener.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	The ACDP takes steps to maintain the confidentiality of the defendants' financial information, including shredding the completed applications and storing them electronically.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	To date, the SAP screener has decided all applications within 24 hours of screening, most often while the applicant is still meeting with the screener. When defendants from a non-SAP part of the District Court call the ACDP and request an attorney, the ACDP ensures that they are screened immediately.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The SAP screener knows to request documentation if, for instance, he has reason to believe that the defendant gave inaccurate or misleading information.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (orders for partial payment)</i>		Since implementation, no judge has issued a partial payment order at the time of assigning counsel.

Regarding Procedure XVI's data collection requirements, to date, ILS has received data from the ACDP covering the period January 2018 to December 14, 2018 (the last day of the year that the District Court conducted SAP arraignments before the start of the new year). The data reveals that, for this period, 1,223 defendants were screened by the SAP screener, 7 defendants were deemed ineligible for assigned counsel, 1 did not complete the application process, and another retained counsel. This is an ineligibility rate of slightly less than 1%.

While there is no data from the courts to indicate how many of the 1,214 defendants deemed eligible for assigned counsel were actually assigned counsel by the judge, there is reason to

believe that judges are generally following the ACDP’s eligibility recommendation and that the SAP screening program has been beneficial to the District Court. As previously stated, an increasing number of judges are using the program even when they are not presiding over the Street Appearance Part.

### 3. East End Town and Village Courts

As previously noted, SCLAS screens for financial eligibility in the East End Town and Village Courts. The following is a brief assessment of SCLAS’ compliance with the Standards over the past year:

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	SCLAS screens every application to ensure that counsel is assigned to those who need it.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	Screening staff estimate approximately 70%-80% of applicants are deemed eligible based on a presumption.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	For any non-liquid assets that are potentially considered, SCLAS obtains information about the value of the asset and any equity the applicant has in it.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	SCLAS obtains information about need-based public assistance to assess the applicant’s presumptive eligibility for an assignment of counsel.
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	Although the assigned counsel application does not prompt the screening staff to assess the actual costs of retaining counsel, SCLAS does consider this factor.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	According to SCLAS, East End magistrates generally adopt SCLAS’ eligibility recommendations.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Courts generally do not ask defendants detailed questions about their financial ability to retain counsel in open court, and SCLAS takes steps to

		ensure the confidentiality of the information they obtain.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	SCLAS generally decides applications within 24 hours of receiving them, and immediately notifies applicants. Individuals who contact the office seeking counsel prior to court involvement are assigned an attorney provisionally until an eligibility screening can be conducted.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	SCLAS requests verifying documentation from applicants in close calls, such as where the defendant appears to have sufficient income to pay for counsel, but has significant financial debt or liabilities, or where the defendant is self-employed and the net income cannot be easily discerned.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (orders for partial payment)</i>		East End judges have traditionally not ordered partial payment orders at the time of assigning counsel, and SCLAS does not request them.

Pursuant to the requirements of Procedure XVI regarding data, SCLAS has collected and reported to ILS its eligibility data for calendar year 2018. According to the data reported, during that period, SCLAS screened 181 applicants on the East End, and, of those, 3 applicants were deemed financially ineligible. It is not clear whether any of these 3 applicants appealed or requested reconsideration of the denial. This is an ineligibility rate of about 1.6%.

### **C. Additional Information**

Although a few District Court judges continue to screen and make their own eligibility determinations, having Probation screen in-custody defendants in D-11 for presumptive eligibility for assigned counsel, and, concomitantly, the ACDP screening for assigned counsel eligibility in the Street Appearance Part, have proven helpful in bringing some uniformity and consistency to the screening process in District Court. However, because Probation collects data on only the number of people screened and the number they find eligible for assigned counsel representation, there is no reliable information on how often judges accept or reject Probation's recommendations.

For those defendants who appear in SAP, the ACDP is able to conduct a more thorough screening for financial eligibility of counsel so defendants can be assigned counsel on their next court date, and ILS has learned that more and more District Court judges are referring defendants to be screened by the ACDP. Although this program has been successful in promoting implementation of the Eligibility Standards, there is still at least one judge who does not use this

screening program, and applies her own unspecified criteria in determining eligibility. Additionally, based on the observations of ILS staff members, there is some variation with how frequently and consistently the SAP judges remind defendants of their right to assigned counsel. Generally, at the beginning of the court calendar, judges announce to everyone in the courtroom that defendants have the right to counsel and the right to assigned counsel if they cannot afford to retain one. In some courts, this announcement is repeated at the beginning of the afternoon calendar. But, considering the limited seating inside the SAP courtrooms, the length of each court calendar, and the constant ebb and flow of defendants to each courtroom throughout the day, many defendants in SAP complete a court proceeding without ever learning that they have a right to assigned counsel.

In Suffolk County, ILS will continue to work with the County and Court administrators to achieve the goal of full implementation of the Eligibility Standards in District Court so that defendants who cannot afford to retain counsel are informed of their right to an assignment of counsel, and will apply and be assigned counsel.

### Washington County

Although the Washington County Public Defender Office is the primary provider of mandated representation in Washington County, the Assigned Counsel Program (“ACP”) has the responsibility for screening and making recommendations for assigned counsel eligibility in the County Court and the 24 Town and Village Courts (“justice courts”). Tom Cioffi is the ACP’s Supervising Attorney and Marie DeCarlo-Drost is the Administrator.

#### **A. Current process for deciding assigned counsel eligibility**

The ACP has several ways in which persons can apply for assigned counsel: applications are accepted by personal delivery, as well as by fax, mail, email, text-messaging, and by ACP staffers positioned once weekly at two outreach court locations in the northernmost (Whitehall Town and Village Court) and southernmost (White Creek Town Court) locations of the county. If the individual does not have a computer or smart device or is unable to travel to the ACP Office, the ACP will interview the applicant by phone.

With the implementation of the Counsel at Arraignment program in 2016, the Public Defender Office now provides arraignment coverage for every defendant in the county. At arraignment, staff attorneys from the Public Defender Office regularly inform non-custodial defendants (those who are released after arraignment) of their right to assigned counsel. The arraiving attorneys hand the defendants a packet containing the application form and a cover letter, on which an attorney’s name is indicated as having represented a defendant at arraignment. The cover letter also informs the defendants of the ways that the application can be delivered to the ACP, and that, to assist the ACP in its determination of eligibility, the defendants are encouraged to provide the ACP with the charging documents and a form of identification.

If it is evident that the defendant cannot afford to pay for private counsel, such as where the defendant is homeless, unemployed, or a student, the arraiving attorney will ask the court to



assign counsel; in some courts, the judge will, *sua sponte*, assign counsel. Defendants who are remanded to pre-trial detention are assigned counsel at arraignment. If they are subsequently released, they may be asked to complete an assigned counsel application.

Unless a case is disposed of at arraignment, the arraignment attorneys remain on the case as provisionally assigned, until a determination of eligibility is made. This is so, unless the Public Defender Office identifies a conflict, in which case the ACP assumes responsibility for the case after arraignment.

Upon receipt of the completed application forms, ACP staff immediately review them and generally make an eligibility decision within 24 hours, unless more information is needed from the applicant, or the case presents a problem that needs to be discussed with Mr. Cioffi. If the decision is that the applicant is eligible for counsel, the ACP notifies the Public Defender Office and, if there is a conflict, assigns an ACP panel attorney to the case, then sends a notice of the conflict assignment to the court from which the charges originated. If the arraignment is done in a Centralized Arraignment Part (CAP), notice of the assignment is sent to the judge of jurisdiction. An approval letter is also sent to the applicant, identifying the name and contact information of the assigned attorney. For applicants deemed ineligible for assigned counsel, the ACP notifies them in writing, explaining the reason for the denial and informing them of the right to request reconsideration or an appeal of the denial, or both. To ensure immediate notification, all applicants are notified of the ACP’s eligibility decision by email, rather than by regular mail.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The ACP considers applicants’ total financial circumstances, ensuring that those who qualify are assigned counsel.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The ACP estimates that, in 2018, more than 90% of the applications received were decided based on a presumption.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	Over the past year, the ACP did not encounter any applicant with sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application.

<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The ACP asks about the applicant's receipt of need-based public assistance to determine if the applicant is presumptively eligible for counsel.
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	This issue has arisen infrequently, since nearly all applicants lack any financial resources to retain counsel. Mr. Cioffi observed that even for defendants who are not presumptively eligible, "they still do not have the resources to pay an attorney to represent them for that particular charge."
<i>Procedure X (delegation of screening responsibility)</i>	Consistent with ILS C&P	Since implementation, the courts have consistently followed the ACP's eligibility recommendations.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Washington County magistrates no longer elicit information about a defendant's financial circumstances on the record, and the ACP ensures the confidentiality of the information received is maintained.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	The ACP screens and decides all eligibility applications within 24 hours of receiving them. The ACP also screens and assigns counsel pre-charge, if requested, and there is a reasonable potential of criminal liability.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The ACP requests verifying documentation when necessary, such as when the information disclosed on the application does not make sense. Applicants can apply by mail, fax, email, and personal delivery, and at two satellite locations for those with transportation issues.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (orders for partial payment)</i>	Consistent with ILS C&P	The ACP does not request orders for partial payment at the time of assignment, and the judges have not <i>sua sponte</i> issued such orders.

### **C. Data**

Regarding the collection, maintenance and reporting of eligibility data required under Procedure XVI of the Standards, the ACP has consistently reported data to ILS on a quarterly basis. The data information received by ILS show that, in calendar year 2018, the ACP received 2,267 applications, of which 2 were deemed ineligible for financial reasons. This is an ineligibility rate of just about 0.1%. There were no requests for reconsideration or appeals, or for partial payment orders pursuant to County Law § 722-d.

### **D. Additional Information**

The ACP continues to be housed in the basement of the county municipal building, a relatively isolated location. The office does not include an interview room, and applicants must speak through a window in the basement hallway outside the ACP's office when applying for counsel. Mr. Cioffi notes that the office space, and this process of communicating with defendants, are less than professional. The ACP staff have used the space effectively although all the staffers note that it would send a better signal to applicants if they were being interviewed in a more professional space. ILS continues to have conversations with County officials about this issue, but County office space issues are complicated and involve more considerations than just funding.

## **III. CONCLUSION**

The primary goals of the Eligibility Criteria and Procedures are to fairly and efficiently discern between those defendants who are eligible for assignment of counsel and those who are not. A fair process ensures that people who cannot afford private counsel are assigned counsel while those who can afford counsel are not. An efficient process not only protects against the needless expenditure of administrative resources, but it also ensures timely access to counsel.

Now that the *Hurrell-Harring* Counties have been implementing the Criteria and Procedures for nearly three years, ILS asked the providers whether they believe that the Eligibility Standards are achieving the goals of fairly and efficiently discerning between those persons who can retain counsel and those who cannot. The providers were unanimous and unequivocal in their responses that the Standards achieve those goals. Kathy Dougherty, for example, opined that "the Standards are extremely appropriate." She explained that they are not resulting in people being assigned counsel who could otherwise afford to retain counsel. Rather, people who need assigned counsel are getting it. Julia Hughes, Schuyler/Tompkins ACP Program Coordinator, agreed. Describing Schuyler as a poor county, she noted: "The Guidelines are in line with addressing the societal issues [the applicants in Schuyler face], and because they are so easy to apply, they guarantee that almost everyone [who applies] gets counsel, because no one there can afford to pay for a private attorney." Leanne Lapp added that, in her opinion, the Eligibility Standards achieve the goal of fairness in that they are being applied uniformly to every applicant, and they achieve the goal of efficiency in that the presumptions help to speed up the screening process. On the issue of efficiency, Wes Roe noted that his office has established a system that ensures that the process works expeditiously to guarantee people ready access to counsel, as the Standards intend.

The providers also reminded us that the low ineligibility rates do not mean that everyone who is charged with a crime is eligible for assigned counsel. They told us that some people do not apply, and instead retain private counsel. They reiterated what ILS repeatedly heard in 2015 when our office conducted public hearings about assigned counsel eligibility: people who can retain counsel do so.<sup>8</sup>

The providers also reminded us that retaining private counsel is a significant expense, and one that can destabilize both low-income and moderate-income households. The fact that even people of moderate incomes cannot afford to retain counsel was emphasized during the public hearings ILS conducted in 2015 on eligibility for assignment of counsel, when one person testified as follows:

The word Indigent [sic] conjures images of a homeless, vagrant, down and out, a pauper, barely surviving within society. The reality is nothing could be further from the truth. As your office is aware, the constitutional right to appointed counsel is based upon financial inability to retain counsel. An individual could own property, have automobiles, [have] a good job but their liabilities for all of that could exceed their ability to retain private counsel, therefore [the person] would still qualify for an assigned attorney. When the public sees someone, who appears to be doing quite well, assigned an attorney, then they assume the system has failed, when in fact it probably has not.<sup>9</sup>

A May 2016 article in the *Atlantic*, reinforces this point. This article discussed a 2013 Federal Reserve Board survey in which 47% of respondents indicated that they would not be able to come up with \$400 for an emergency.<sup>10</sup> The article further notes research showing that “[n]early half of American adults are ‘financially fragile’ and ‘living close to the financial edge.’”<sup>11</sup>

Of course, most people arrested for crimes are not just financially fragile, but are actually quite poor.<sup>12</sup> In a 2015 report, the Prison Policy Initiative (PPI) examined 2004 data from the Bureau of Justice Statistics on the incomes of people prior to their incarceration. PPI found that prior to

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<sup>8</sup> See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement: Final Report*, at pp. 18-19, available on ILS’ website at: <https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Background%20Study/Background%20Study%20Full%20FINAL%20021216.pdf>.

<sup>9</sup> *Id.* at 12, citing Written submission of Daniel L. Palmer, County Manager, Essex County (on behalf of the Essex County Board of Supervisors), pp. 1-2.

<sup>10</sup> See Neal Gabler, “The Secret Shame of Middle-Class Americans,” *The Atlantic*, May 2016, available at: <https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/>.

<sup>11</sup> *Id.*

<sup>12</sup> See, for example, Bruce Western, *PUNISHMENT AND INEQUALITY IN AMERICA* (New York: Russell Sage Foundation, 2006); Bruce Western and Becky Pettit, “*Incarceration & social inequality*” (Daedalus, Summer 2010). See also, Radley Balko, “*The ongoing criminalization of poverty*,” Washington Post, May 14, 2015 (discussing three recent reports that discuss how law enforcement tends to focus on low-income communities, thus arresting and incarcerating low-income people at disproportionate rates).

their incarceration, people had a median annual income of \$19,185 -- 41% less than non-incarcerated people of similar ages.<sup>13</sup>

Put simply, the overwhelming majority of people arrested and charged with crimes cannot afford to retain private counsel, even if they have some source of income. The ILS Eligibility Standards make it clear that the legal standard for assigned counsel eligibility is *inability to pay for private counsel*, and not impoverishment. The experience of the *Hurrell-Harring* providers is that, in focusing on inability to pay and stripping away unnecessary bureaucratic hurdles, the Eligibility Standards have made the constitutional right to assigned counsel, set forth in *Gideon v. Wainwright*,<sup>14</sup> a reality.

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<sup>13</sup> Bernadette Rabuy and Daniel Kopf, “Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned,” Prison Policy Initiative, July 9, 2015, available at: <https://www.prisonpolicy.org/reports/income.html>.

<sup>14</sup> 372 U.S. 335 (1963).