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DONNA L. SPRATT
23 Samantha Drive
Coram, NY 11727
Tax ID #45-4729372

September 4, 2015

New York State Office of Indigent
Legal Services
80 S. Swan Street, 29th Floor
Albany, NY

August 12, 2015

Public Hearing
John P. Cohalan Jr. Courthouse
400 Carleton Avenue
Central Islip, NY

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PUBLIC HEARINGS ON
ELIGIBILITY FOR ASSIGNMENT
OF COUNSEL

10th Judicial District
John P. Cohalan, Jr. Courthouse
Courtroom #S-24

August 12, 2015
10:00 A.M.

REPORTED BY:

Donna L. Spratt
Court Reporter

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A P P E A R A N C E S:

LEONARD NOISETTE - Board Member of the New York State Office of Indigent Legal Services

JOSEPH WIERSCHEM - Counsel to the New York State Office of Indigent Legal Services

PATRICIA WARTH - Chief Hurrell-Harring Implementation Attorney at the New York State Office of Indigent Legal Services

JOANNE MACRI - Director of Regional initiatives at the New York State Office of Indigent Legal Services

RISA GERSON - Director of Quality Enhancement for Appellate and Post-Conviction Representation at the New York State Office of Indigent Legal Services

1
2 MR. NOISETTE: Good morning.

3 Again, good morning distinguished panel,
4 members and presenters.

5 We thank each of you for joining us
6 here today to discuss eligibility for
7 assignment of counsel.

8 Over fifty years ago, the Supreme
9 Court announced in Gideon v. Wainwright
10 that any person who is too poor to hire a
11 lawyer must be provided with counsel
12 during a criminal court proceeding.
13 Moreover, New York was a pioneer among the
14 states in providing a statutory right to
15 counsel for litigants in a range of Family
16 Court proceedings.

17 As early as 1975, the New York
18 State Legislature noted that because of
19 the possible infringements of fundamental
20 interests and rights, including the loss
21 of a child's society and the possibility
22 of criminal charges, litigants have a
23 constitutional right to counsel in certain
24 family court proceedings.

25 Despite the acknowledgment of these

1
2 principles, New York State, as well as
3 many other states, continues to struggle
4 with its obligation of providing adequate
5 support to ensure access to the courts for
6 those unable to afford to pay for an
7 attorney on an equal basis with those who
8 can afford private counsel.

9 We are pleased to report that
10 measures which will be informed by your
11 input here today are being taken to begin
12 addressing many of these unresolved
13 issues. As many of you know, a settlement
14 agreement was approved on March 11, 2015
15 in Hurrell-Harring et al v. The State of
16 New York in which the State acknowledged
17 responsibility for ensuring quality
18 mandated representation. The New York
19 State Office of Indigent Legal Services,
20 ILS, has been vested with the authority to
21 fully implement the terms of this historic
22 settlement agreement.

23 As part of this agreement, ILS must
24 develop and issue recommendations that
25 will be distributed statewide to guide

1
2 courts in counties located outside of New
3 York City in determining whether a person
4 is unable to afford counsel and,
5 therefore, eligible for mandated
6 representation in criminal proceedings.

7 The purpose of this public hearing
8 is to solicit your views, opinions and
9 comments on the criteria that should be
10 used and the process or method that should
11 be implemented in determining eligibility.
12 We are also interested in hearing about
13 any expected advantages and/or
14 disadvantages that you see in developing
15 uniform and comprehensive guidelines, as
16 well as any recommendations you have
17 concerning the review and/or appeal of
18 eligibility determinations.

19 We also welcome any information you
20 wish to share with us regarding the
21 related social and/or economic impact you
22 foresee these standards may have on your
23 communities.

24 Before we begin, we wish to extend
25 our thanks to our distinguished panel

1
2 members and our guests for taking time out
3 of your very busy schedules to be with us
4 here today and share your expertise,
5 insight and recommendations with us.

6 We would also like to extend a
7 special thanks to the Office of Court
8 Administration and specifically to the
9 District Director for the Tenth Judicial
10 District, Warren G. Clark, as well as Nick
11 Apostolico -- I'm sorry if I jumbled your
12 name Nick -- the Senior LAN Administrator
13 of the District Administrative Judge's
14 Office and all of the OCA staff here in
15 Central Islip, New York for allowing us
16 the unique opportunity to access this
17 courtroom and its facilities.

18 We welcome each of you and would
19 like to introduce you to each of our
20 distinguished members of the panel.

21 I, Leonard Noisette, am a member of
22 the Board of the New York State Office of
23 Indigent Legal Services and my day job is
24 Director of the Criminal Justice Fund at
25 the Open Society Foundations.

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To my left we have Joseph Wierschem, Counsel to the New York State Office of Indigent Legal Services.

To my further left, we have Patricia Warth, Chief Hurrell-Harring Implementation attorney with the office.

To my right, we have Joanne Macri, who is the Director of Regional Initiatives at the New York State Office of Indigent Legal Services, and to my far right, we have Risa Gerson, who is the Director of Quality Enhancement for Appellate and Post-Conviction Representation at the New York State Office of Indigent Legal Services.

With that, we invite our first speaker, John Gradess, Executive Director of the New York State Defenders Association.

Welcome.

MR. GRADESS: Good morning. This is very exciting to be in front of a bench like this. I almost don't have to worry how any of you will rule.

1
2 But I'm excited for another reason.
3 I feel like you've invited me to sit with
4 you on a tectonic plate, if you will, and
5 you're sitting on that plate, and for me
6 it kind of has above it a mine field and
7 below it -- it rests on a sea of
8 unrepresented people, so that's where I
9 think you're seated right now.

10 I want to help you from that spot
11 because more than ever, I think the time
12 has come to do these standards. We have
13 resisted for many years. You are
14 familiar, I think, with our paper from
15 ninety-four.

16 We've resisted for many years
17 taking a position on some of the thorny
18 questions regarding eligibility. We've
19 done this for a very specific reason
20 because it is such a mess in the State and
21 our job has been, and always will be, to
22 see to it that the people who deserve
23 representation get it, and in many
24 quarters of the state over the years,
25 we've had to take a pragmatic approach.

1
2 In the southern tier, one of your
3 defendant counties that you're solving the
4 problems of, there was a time when I
5 received a call from a judge who said, "I
6 want to appoint lawyers but the public
7 defender keeps turning them down. What do
8 you do?"

9 We would urge that judge to
10 exercise his judicial authority. In other
11 counties, we would primarily in single or
12 three-hat or single judge counties almost
13 imperious status is claimed by the judge
14 and often the defender would call us and
15 say "we're doing the eligibility now" and
16 we would say "okay, do it." We had to
17 weigh in any particular jurisdiction, what
18 was the best thing for the clients, and it
19 has been God awful.

20 Our thought was -- that is why I
21 say you're on a tectonic plate. Until we
22 had a state defender system and as long as
23 we had a county by county defender system,
24 eligibility would be used as a governor on
25 the expenditure of money. It would be

1
2 used through local standards to hold down
3 usage as a consequence and that is, in
4 fact, our observation. We were holding
5 back.

6 That is why I say you are on a
7 tectonic plate. Those days are over,
8 you're in the middle of it. We want to
9 join you.

10 The problem of the State in a
11 nutshell is the State provides too little
12 money so counties have acquired the
13 responsibility. That responsibility is in
14 the context of cash-strapped entities and
15 so for many jurisdictions, finding
16 procedures to hold down usage has been the
17 order of the day.

18 To a certain extent -- it varies
19 from place to place -- our defender
20 leaders have been coerced into
21 collaborating in that process. They've
22 been dragged in as unwilling accessories.

23 The paper that you have before you
24 was done by us. It wasn't going to be
25 changed, but there were some efforts to

1
2 tone it down at the margins, I guess, to
3 be honest with you. Because we were
4 approached by a number of organizations to
5 see if we could come up with one statement
6 that could be shared by the State bar and
7 commit to enhance and insure quality in
8 the criminal justice section itself and
9 the New York Association for Criminal
10 Defense Lawyers, but you know that old
11 commercial about -- the cartoon about the
12 -- from a camel to an elephant? That is
13 sort of what happened.

14 I think some of you saw the
15 E-mails. We're not here sharing a state
16 of consensus for all, but about two
17 percent we're sharing consensus. We're
18 hearing ninety-eight percent sort of
19 agreement out there, and I want to address
20 this morning the two percent. Because
21 it's been rather shocking to me that it
22 has emerged and it comes up in three
23 areas.

24 The resistance -- not the
25 resistance but the continued support,

1
2 we're taking into account spousal income.
3 The continuing -- and we can't seem to
4 kill it -- the idea of taking into account
5 parental liability which I clearly admit
6 at first blush has to appear to anybody
7 who's used to confusing the right to
8 counsel with some form of eligibility for
9 governmental services, one can easily see
10 why that mistake has been made, but the
11 third one is who should make this
12 decision?

13 I'm going to address all three of
14 those things in my remarks. Let me start
15 with a general proposition, that is the
16 continued misreading of seven twenty-two D
17 of the County Law.

18 That section is a small section of
19 law, but it is a wonderful section of law.
20 People should take it seriously, first by
21 taking a look at the sixty-four Criminal
22 Justice Act, because that is the act on
23 which Eighteen B is modeled.

24 When People v Wasinsky (phonetic)
25 was decided in 1985, our legislature set

1
2 about through, if you're in the senate
3 it's called the Warren Anderson Bill, if
4 you're in the assembly, it's called the --
5 Bartlett Bill, it was really Hughey
6 Lefkowitz's Bill that became Eighteen B.
7 Drafting of that bill changed partial
8 payment from the statute.

9 You will see in the legislative
10 history, it is modeled on the federal
11 statute, but it does not parallel with
12 federal statute. The federal statute
13 allows courts in their judicial capacity
14 when they find out or inquire about
15 resources, to enter a partial payment
16 order. New York statute does not do that.

17 New York's Legislature consciously
18 put in a single word. It first placed the
19 responsibility with lawyers, the attorney,
20 and secondly, put in the word "may" bring
21 this to the attention of the court.

22 In the remarks I've seen with some
23 of these spousal and juvenile liability,
24 they imply seven twenty-two D has a power
25 it does not have. We over the years have

1
2 watched the power being exercised.

3 There have been judges on the
4 southern tier who thought maybe creating a
5 sliding scale so everybody pays something
6 would be a good interpretation. I don't
7 know. That started in Fulton County,
8 expanded to Essex. Trying to stop it was
9 like trying to kill cockroaches in a new
10 apartment. You turn on the light, there
11 they are.

12 It was flat out wrong, because
13 judges can't do that. A lawyer must do
14 that according to law in the State. I
15 want to tell you in light of these remarks
16 I've seen from other bar leaders why that
17 is. It's because -- and each and every
18 one of you have seen a case like this --
19 there are cases where it takes a long time
20 to develop rapport with a client. There
21 are cases that require a weekly visit with
22 a client to build that rapport. There are
23 cases where your client doesn't trust you
24 to tell you the real story for eight or
25 nine or ten months.

1
2 There are cases where that doesn't
3 happen until the tenth month and they are
4 scheduled for trial in the twelfth month.

5 It is sometimes impossible under
6 the Sixth Amendment to throw your client
7 in, and resources are not the issue. The
8 Sixth Amendment is the issue. You may
9 have had a complex relationship. The
10 client may be a problem client.

11 You may know that case more than
12 any other lawyer could ever come to know
13 it because you have immersed yourself in
14 it.

15 You've come to know the client,
16 your client's family, you're the person
17 who should try it. That is why, quite
18 frankly, the word "may" is in the statute.

19 There is not a lot of law on this.
20 There will be those who say that is
21 Jonathan Gradess's opinion, but it is not
22 an accident that when we wrote that
23 statute, we changed that word.

24 I have argued this in courts that
25 tried to invade the province of the

1
2 defense where district attorneys have
3 found some landlocked asset that isn't
4 worth two dollars, trying to throw an able
5 defense lawyer off the case because they
6 want him off the case.

7 You need to look at this and think
8 about the comments you're hearing.
9 They're all based on this proposition.

10 Spousal income. The kinds of
11 things we've heard about spousal income
12 over the years. Spousal income, once you
13 permit it -- first, generally, let me say
14 this, there is no authority for spousal
15 income, no statutory authority for it.

16 A court does not derive
17 jurisdiction over the subject matter nor
18 does the court derive jurisdiction over
19 the person just because they're interested
20 in an inquiry about inability to afford
21 counsel of the person who is actually
22 before them. This is all based in a sense
23 on the law of necessities, a mistaken view
24 of reading of the law of necessities.

25 In the last couple of days using my

1
2 new Lexus Advanced account, I've been
3 reading cases that go back to the common
4 law when the obligation -- a woman
5 couldn't have an obligation. That didn't
6 change all that long ago. It was a man's
7 obligation to care for helpless women.

8 That, the support obligation, the
9 language of those cases is something you
10 should look at, and those lawyers were
11 pushing you to have that.

12 We've had cases where spousal
13 income allows the court to look at it.
14 "You have your girlfriend, tell her to
15 come in here." Your girlfriend is not a
16 spouse.

17 The wife that you have who is
18 receiving support income for another
19 child, "let's take a look at that income,"
20 or you have simply unmarried partners who
21 are declared, so it's a dangerous area.
22 It is even -- because the spouse is not
23 before the court.

24 It's a dangerous area because the
25 spouse isn't given a right to be heard.

1
2 It's a dangerous area because the spouse
3 doesn't get notice. It is kind of a
4 danger under the due process clause
5 because there is no authority to do it.

6 I understand, and there are cases
7 declaring this, that it's really hard to
8 represent -- have a system representing
9 poor people. You know, cited in an
10 earlier version of this paper there was an
11 article by Judge Newhart in eighty-six.
12 He wrote an article on -- suggesting that
13 if the State is going to prosecute every
14 case and pay for it, maybe they ought to
15 think about paying for the defense of
16 every case as well reasoned the article.

17 I wouldn't talk about that in
18 public until today, because I don't want
19 to be excoriated by the entire private Bar
20 that would not think too highly of that,
21 but the idea we should resort to nickle
22 and diming only when we come to poor
23 people absolutely at this point in my
24 career disgusts me. That is what is at
25 stake in these two areas of concern.

1
2 Let me take another one, sort of
3 on-the-ground experience that competes
4 with these E-mails floating around.
5 Here's a piece of that on-the-ground
6 experience.

7 This is a letter that -- I hope it
8 is not still out there -- you will find
9 this out in Washington County from one of
10 the defendant counties, five years before
11 Hurrell-Harring was filed, twelve years
12 before Hurrell-Harring was settled,
13 Washington County public defenders used to
14 send a form letter:

15 Dear parents, your child has been
16 charged with criminal offenses and has
17 made out an application for public
18 defender representation. However, based
19 upon your income, you should retain
20 private counsel to represent him.

21 If you do not and he still wishes
22 this office to represent him, he would be
23 supplied with a public defender attorney.
24 However, as soon as the case is completed,
25 the matter will be turned over to the

1
2 Washington County attorney so a lawsuit
3 may be commenced against you for
4 reimbursement of legal fees. Therefore, I
5 strongly recommend you retain counsel
6 immediately.

7 Please notify this office
8 immediately as to the name of the attorney
9 you have retained for your child.

10 This is a clue to how these things
11 take place. They don't take place with
12 the squirreled assets of some rich
13 millionaire who has two homes, one in
14 Chicago, one in New York, putting all the
15 money in the spouse's name to avoid paying
16 a public defender at the same time.

17 It happens by asking your wife who
18 works at McDonald's "how much does she
19 make?" What, the ninety-eight dollars a
20 week that your boyfriend is getting, we
21 want to count that in? It happens because
22 the counties cannot afford to fund
23 adequately, public defense services.

24 Earlier I said you're on a tectonic
25 plate. If you do what you must do, you

1
2 must create good standards. If you don't,
3 all that we've done will be a waste of
4 time. I urge you to, and I know you will,
5 but there is going to be a consequence;
6 more people getting lawyers, there
7 probably will be some costs associated
8 with that.

9 It's unclear how much it will be
10 because the reports are saying only two
11 point five percent of cases. There is a
12 footnote in our paper on two point five
13 are being rejected. For that reason it
14 may not be that big. Whether it will be
15 something or not is not an important
16 perception.

17 It will be something that is
18 important because that perception that now
19 exists with county officials. It is very
20 easy for many officials to merge the ideas
21 of a person accused of and presumed
22 innocent of a crime with what he or she
23 might look like at the end of that process
24 and mush them all in the convicted and
25 declare "we should not be paying for both

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the prosecution and the defense of that
convict."

It skips over the presumption of
innocence and turns the Sixth Amendment on
its head and has made New York a road map
for all that is wrong with the
representation of low income people.

MR. NOISETTE: I want to -- we have
a long list of witnesses. I want to make
sure -- you mentioned there were three
points that you wanted to address. It was
spousal support, parental liability.

Was there a third?

MR. GRADESS: One more thing on
paternal liability. I thought I was
watching my watch, perhaps I'm not.

On parental liability, there is an
interest. First if you're over sixteen,
you're an adult in New York. The Sixth
Amendment applies to you, it's an
individual constitutional right. There is
no authority for bringing your parents
into the case.

There is a paper attached to our

1
2 testimony which you should take a look at
3 which clarifies this. I'd be happy to
4 talk further about it.

5 Picture for a second a kid who
6 lives -- goes to Chaminade, graduated,
7 works all summer to get a car, goes to
8 college. The last words out of his
9 father's mouth, "I want to make sure that
10 you don't get in trouble because I want to
11 tell you, you get in trouble, I'm yanking
12 you. Any trouble, I don't want it to
13 happen. Don't let it happen. Make sure
14 it doesn't happen."

15 The kid drives to Otsego, happier
16 than hell. Somebody else in that car has
17 marijuana, he is arrested. The first
18 inquiry from the judge is "how much does
19 your father make? We should call him."

20 There is a privacy interest that
21 attaches. There is an individual right
22 and there isn't any authority to deal with
23 that.

24 The last thing is the question of
25 who. Our paper declares, and we believe

1
2 this to be correct, the provider, main
3 provider of defense services should
4 decide. That is the state of things in
5 New York right now with about fifty-four
6 percent of the providers who answered the
7 survey for the bar committee, the number
8 of people who are doing it.

9 The reason that that should be done
10 is because you are, as ILS, building the
11 future. You're building the future of a
12 system in which low income people and
13 people of means are treated the same.

14 Right now people of means and low
15 income people are not treated the same.
16 There is this invasive, nasty, cheap
17 nickel and diming inquiry that ought to be
18 taken away in your standards.

19 In most of the cases, people
20 qualify, but the idea of a -- and I
21 listened to a bar webinar last week on
22 client intake. They went on for one hour,
23 gave one credit and talked about the
24 complexity of client intake, what you want
25 to build -- hopefully building for a state

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2 system, the place where clients can walk
3 in off the street and find competent
4 counsel, be treated with respect and
5 dignity and have access to legal services
6 in the same way that the rich have.

7 That's what we're trying to build.
8 When that happens, it would be
9 fundamentally absurd to think of a third
10 party making that decision. It ought to
11 be part of -- the engagement of counsel --
12 part of the first step in the relationship
13 and confidentiality should attach, so it
14 saves time because it allows for the same
15 questions that occur on a bail inquiry,
16 starts the case earlier, you can have
17 early investigation and do many things
18 that a rich person's lawyer would do.
19 That is our position.

20 I'd be happy to answer questions if
21 I haven't talked too long.

22 MR. NOISETTE: I think we have time
23 for a couple of questions.

24 MS. MACRI: In terms of who should
25 be providing services, a lot of the past

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2 hearings, we've talked to some providers
3 about that process and, generally speaking
4 for the most part, they seem comfortable
5 with the idea that a lot of times the
6 information they gather for that financial
7 ability or financial will be used, for
8 example, counsel's first appearance in
9 preparation for a bail application; that
10 kind of thing.

11 That I want to ask you about. As
12 you know, we have counties where we have
13 institutional providers, assigned counsel,
14 administrative, a variety of different
15 providers or folks providing
16 representation.

17 How would that work if we have a
18 county that is all Eighteen B assigned
19 counsel? Would we ask that Eighteen B
20 attorney to go up to do the eligibility
21 determination? What would be your
22 recommendation?

23 MR. GRADESS: The descriptions of
24 these programs are actually pseudo. I'll
25 give you an example.

1
2 We gave technical assistance, all
3 assigned counsel, trying to figure out how
4 to do counsel's first appearance. They
5 also have this question of eligibility
6 which right now is poorly done by the
7 court, sometimes by the lawyers.

8 They're thinking of the creation of
9 a not-for-profit corporation,
10 house-assigned counsel program where some
11 issues could be made quickly by an
12 administrator or, in the alternative, you
13 could have the lawyers simply making a
14 decision upon a prompt assignment. It's
15 the prompt assignment that makes the
16 difference.

17 I think you have to figure it out.
18 There are different problems in different
19 counties, some of which have a legal
20 coordinator sitting in the middle of all
21 this, not recognized by statute. You
22 shouldn't be getting the information from
23 more than one client.

24 MS. MACRI: Currently this idea
25 that often times if we have assigned

1
2 counsel being called upon to a case, they
3 will have to share that financial
4 information with the courts to allow the
5 courts to make that determination.

6 So with respect to this idea of
7 confidentiality, do you feel comfortable
8 with the idea when these determinations
9 are made or information is collected to
10 make these determinations, they should be
11 uniformly shared with the courts or, for
12 example, when an agency is deemed to be
13 assigned, may need to determine if a
14 person's deserving of the resources and
15 that is it?

16 MR. GRADESS: It's certainly clear
17 with institutional defenders that is how
18 it should be shared with the court. It
19 should only be appealed from a negative
20 determination. All should be
21 confidential. It becomes difficult with
22 assigned counsel. You have the flipping
23 question in some jurisdictions which would
24 remain a problem.

25 You have the other problem of

1
2 people who see "meat in those there hills"
3 and disqualify people that should be
4 qualified. It should be the only job.

5 You do have the data check and
6 appeal process. It is entirely possible
7 to say this person qualifies. We have a
8 lawyer for arraignment. Determine he or
9 she is eligible, do it quickly. If it is
10 a yes, that is your case. Take it. There
11 is continuity. Nothing has to come back.

12 What we're envisioning is a
13 judicial declaration, delegation to
14 counsel. The courts, as many sometimes
15 say, they want to do -- want to do this.
16 Not hand it to their secretary, not give
17 it to their clerk but do this as a
18 judicial function, then they ought to do
19 it.

20 They don't, so the delegation to
21 somebody who has a duty to the client, who
22 knows how to assess the value of the case,
23 the value of the lawyers, the nature of
24 the charges, they can make that
25 determination quickly.

1
2 There will need to be resources for
3 it. I understand you're hearing this is
4 one jurisdiction, they need one person for
5 every five thousand clients, not going to
6 be a problem.

7 MS. MACRI: One last question.
8 We've had some recommendations about the
9 idea of creating some uniform tool that
10 would then be recommended to be used
11 statewide.

12 Do you have any position on that?
13 When I use the word tool, I mean this idea
14 of some type of format to adopt when doing
15 these determinations, understanding that
16 based on this county and what their county
17 income levels look like, etc., etc., but
18 they have some guidelines to follow.

19 Do you have any --

20 MR. GRADESS: My initial reaction
21 is that is a little path dependent on the
22 system we have. We are habituated to
23 these forms, checklists, but the reality
24 is what we're not habituated to is early
25 engagement of a client with a lawyer.

1
2 I was in an office not an hour from
3 here for many years where as a clinical
4 office we could only take low income
5 people. The interview didn't require a
6 form, it required an interview.

7 A half dozen of these questions
8 will give you an immediate request, others
9 may require inquiry. It's sometimes
10 better to save that part of the inquiry
11 till later so you don't do the kind of
12 things suggested, interfering with
13 rapport, engagement of a client with
14 counsel, that we're trying to facilitate.

15 The closer we can get to that, I
16 don't think that form is necessary. We
17 gave advice to some jurisdictions who have
18 used forms and where district attorneys
19 have subpoenaed those forms. If they do
20 use a form, they use it for their own part
21 -- make it part of their work product and
22 not have a form checked by everyone but be
23 part of work product, put it in the file
24 there. If there is a requirement that
25 somebody should look into that, they can

1
2 do it. After that, "I interviewed the
3 person, found him eligible."

4 MS. WARTH: Thank you, John.

5 I know this is an issue that has
6 been very important for years. I reviewed
7 the written documents you sent. I
8 appreciate this fact you're sharing with
9 us years and years of experience and
10 research you've done on this issue. It's
11 tremendously helpful to us.

12 I did want to do a follow up
13 question about parental income because as
14 you started off saying, one of the things
15 we realize throughout these hearings, so
16 many of the opinions and views of the
17 various people are based on their
18 experience.

19 Parental income is a very debated
20 topic, and we have had providers say to us
21 one of our concerns, particularly
22 providers that have colleges, private
23 colleges in their communities, "what do we
24 say to our constituents when we have very
25 high caseloads and we have a college

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student coming before us whose parents clearly have means, they can afford college and yet we have to provide services to them?"

I'm curious as to what your response would be to that.

MR. GRADESS: I think I would say the same thing to them as you. The right to counsel is an individual right that they -- the inquiry that associates it with sending them to college, which is the inquiry about necessities which is school, medicine and education, stops at that line of counsel.

There is no lack of cases that legitimately places necessities, particularly in the face of seven twenty-two E, which requires the county to pay for services for a person personally unable to afford them, inquiry has to be "are they personally unable to afford it?"

If they're getting tuition and allowances, by definition that is proof they're not personally able to afford it.

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2 The actual question that they're asking --
3 parents are -- they're paying for
4 college, they're not paying for a trip to
5 Cancun and not a lawyer. They didn't
6 expect you to be arrested for armed
7 robbery and it is on you. Therefore, it
8 is on us.

9 That is the way we build the
10 system. That is the system we're supposed
11 to be protecting. The rest of this is
12 business interests arising from people who
13 have accepted a two percent tax gap and
14 are now eating the problem.

15 We need to break free of that.

16 MR. WIERSCHEM: The seven
17 twenty-two D statute, the partial payment
18 statute, it's interesting. In 1964, was
19 there any legislative history provided,
20 guidance where the burden was placed on
21 the attorney to collect this information?

22 MR. GRADESS: As far as I know
23 there is not a lot. I recall for a long
24 time looking at this, once in this
25 landlocked case where I argued there is

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not a lot of legislative history generally regarding eighteen B.

There is -- what I haven't looked at is whether there is history in criminal justice about it, but I would assume if that is there, the premise was for judges to find it and New York's decision when modeling it after the Act changed it.

I don't like to say it speaks for itself, but in a way, it speaks for itself.

They made a very conscious change to make it the lawyer's decision, not the judge's, and to use the word embedding a discretionary decision for the lawyer, and I, for the life of me, can't figure out any other reason than the protection of the right to counsel, why that was done because it does emerge very clearly in many cases that the last thing you would want to do is change lawyers in mid stream. You would be throwing your client under the bus.

Lawyers have an absolute ethical

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2 obligation not to do that. That is my
3 sense. We can look further if you would
4 like. I'm not sure what we would find,
5 but we ought to.

6 Thank you very much.

7 MR. NOISETTE: Our next witness is
8 Marguerite Smith, Esq., New York
9 Federal-State Tribal Courts and Nations
10 Justice Forum.

11 MS. SMITH: I am Marguerite Smith.
12 I do not represent the New York Federal
13 and State Tribal Justice Forum, but I have
14 long been a participant.

15 Back in 2006, Justice Kay did what
16 she called a listening conference, and at
17 the time of that conference, she invited
18 representatives of the tribal nations in
19 New York -- judges, lawyers -- the full
20 array of participation in defense of
21 native Americans and their interests.

22 From that grew what has become a
23 nationally known as the State Tribal
24 Collaborative, and I believe I have
25 inaccurately cited -- given you the

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2 website for that, but I do hope you will
3 look at it.

4 We're looking to have, if not next
5 year, in 2016, certainly by 2017, a second
6 listening conference and people of many
7 concerns will be invited. This is my
8 fortieth year as an attorney admitted to
9 the bar of the State of New York, proudly
10 so.

11 One of the concerns is the fair
12 representation of all persons. I hear the
13 use of the term equal representation. I
14 applaud that term, but I define that term
15 in a way that often uses the word
16 equitable, equitable to mean one must know
17 the details of the circumstances of the
18 clients, the circumstances of the person,
19 the circumstances in which they live in
20 order to provide an equal level of
21 representation, so I submit that that is a
22 consideration you might want.

23 My remarks are brief.

24 I appreciate this opportunity to
25 assure that Native Americans are not

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2 invisible and yet one more inquiry -- I
3 know you know more around the state, I
4 don't know if you heard from the community
5 when you were near the Onendaga
6 Reservation. I do believe you will be
7 hearing from a judge of the Mohawk courts
8 when you are there later in the month way,
9 way, way upstate on the Canadian border.
10 Again, I'm glad to have this opportunity.

11 I can tell you that there are, to
12 my knowledge, four -- three or four of us
13 who are currently admitted as attorneys
14 who are Native American who are currently
15 admitted and practicing on Long Island. I
16 believe there is one young lady who I know
17 I've sent my letter of reference,
18 character recommendation to her, so she
19 will soon be admitted to the practice of
20 law.

21 I know there is another young lady
22 from my tribe, the Shinecock Indians, who
23 was admitted last year. Although she
24 currently practices in California, she's
25 admitted to practice before the New York

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State and federal bench, so we have that background.

We have resources, and although my brief paper does not make reference to resources, I would urge that as you prepare your work, as you prepare your lawyers, the lawyers who will represent our people, as we prepare the bench, we say that, look to the native nations as resources.

Very often you will find that people seem to appear without community and yet -- let's go to the bail question. If our people are tribally connected, they have community ties. Trust me, those ties, the extended family situation operates as it should. Those community ties will -- if an individual says they're coming back to court, if mom or elder is sitting in the background, there will be a great deal of pressure to indeed return to court.

If questions such as eligibility -- if you ask a person upon arrest "do you

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2 own a house" and they say yes, but if that
3 house is a reservation house, then there
4 is no bail available, bail bond corpus
5 available. There is no mortgaging of our
6 tribal properties.

7 So those are little details that if
8 you're not aware, we will not address. I
9 do a lot of lecturing for the bar and the
10 bench and general public on the matter of
11 Indian child welfare, about -- in the
12 course of that lecturing, we place
13 emphasis on identifying the native person
14 in the court system.

15 You don't do it by the visuals, you
16 don't do it by looking at me, by knowing
17 whether I have -- what kind of jewelry I'm
18 wearing or I'm not wearing leather today,
19 a couple of weeks ago you saw me in
20 leather, today you don't.

21 You don't identify us this way
22 because if I were wearing leather, that
23 doesn't mean I'm a Native American, and
24 that I have certain rights and privileges
25 attached to enrollment in a particular

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tribal nation.

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I've indicated there are thousands of people on Long Island who identify as Native American. Some are from indigenous tribes, some are reservation based. There are two reservations; Shinecock -- and I invite you to our pow-wow on Labor Day weekend -- there is also the Unkashock (phonetic) Nation in the Mastic area. It's a small location with many people struggling, and we in the east end find ourselves usually having the state police as our responding agency for reservation activity.

Off reservation on the east end of Long Island, you have a village police system and town police system and state police system and maybe the DEC and maybe the guys who do the coastline.

There are many, many police forces that may respond to allegations concerning a native person, and that will cause our individuals to be hauled into court. It is important that the representation --

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2 those who are concerned about assuring
3 representation are sure that the details
4 and differences of our circumstances are
5 well known.

6 Now, that is with regard to the
7 individual. My address, by the way, is a
8 post office box. That is my mailing
9 address. We don't have on territory a
10 mail delivery. When I give you a post
11 office box, that doesn't tell you where I
12 live. It doesn't tell you anything at all
13 except that I have a post office box.

14 Some judges will ask "you don't
15 live in a post box, do you?" But a person
16 may say "I live on Jones Street." Even
17 that does not always reveal that the
18 person is living on native territory and
19 is tribally connected.

20 Now where does the matter occur?
21 Does the matter -- does the alleged matter
22 occur on territory? If it occurs on
23 territory, perhaps the vehicle and traffic
24 law requirements that the arrest be made
25 as to an action that occurred on a public

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2 highway doesn't apply. If it's not a
3 public highway, if the reservation roads
4 are not public highways, then the arrest
5 is not proper. The conviction cannot be
6 had.

7 These are details of training of
8 lawyers that I'm very concerned about.
9 I'm very concerned there is awareness.
10 These matters may not come to any lawyer
11 frequently in one's career unless, perhaps
12 you are assigned to the East End Bureau,
13 but if you're not assigned to -- if you
14 are not familiar and do not know these
15 things, we would like you to be trained.

16 We want this to be part of your
17 basic legal education or certainly
18 orientation to the population with which
19 you're going to serve. That is part of
20 what is necessary.

21 There are police practices that
22 concern us, and when you represent an
23 individual, we submit, it is important
24 that you know not only the particular
25 facts as narrowly stated in the accusatory

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2 instrument but further, that you
3 understand the circumstances, that you
4 understand that perhaps there has been a
5 watch, perhaps someone taking -- stationed
6 near the reservation territory to take
7 license plates, to observe certain things,
8 and perhaps the arrest of the individual
9 is in a context that is far greater than
10 would be resolved by anything this
11 individual is accused of having done.

12 Those are important matters.
13 Again, training, awareness, knowing that
14 there is a community that stands, knowing
15 there is -- let's talk about moving these
16 matters through the court process. Let's
17 talk about accessing appropriate handling
18 of the matter at the -- through the
19 various stages.

20 Is drug court an appropriate
21 referral? What alternative sentencing
22 options might be available?

23 MR. NOISETTE: I'm sorry. I'm
24 mindful of the time. We appreciate your
25 comments.

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2 Some of the things you're beginning
3 to go into, I think, are beyond the scope
4 of the purpose of this hearing. I think
5 they're very important issues, but I think
6 I would sort of ask you to kind of confine
7 your remarks to eligibility.

8 MS. SMITH: Absolutely, and
9 eligibility, again, we're talking about
10 houses, all the things so, again, all the
11 things that everyone else talks about,
12 whether it is parental income or spousal
13 income. All of those -- emancipation of a
14 child, all of those other matters that are
15 considered and have been or should be
16 considered in assessing bail eligibility.

17 For example or -- eligibility for
18 counsel, which is your focus. All those
19 things do apply to our native population
20 and, again, not all of our people do live
21 on Indian territory, not all people are
22 affiliated -- enrolled in the tribe where
23 either on or near where there is an
24 occurrence but, nevertheless, they're
25 native people somehow related to a

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community.

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There is any number of details that we submit our lawyers must be trained to be aware of, to inquire about. My simple statement was there is a need for competent legal representation for indigenous persons, and we need lawyers who are well-trained and who use applicable law.

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You need to know is this state law that seems, the general application indeed, to be interpreted elsewhere when occurring within our territory and must have the time and use the time to know their clients.

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Again to the question of availability of counsel, I think that is probably -- any other remarks are probably here for your use. I appreciate your time and look forward to seeing good work from you.

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Thank you.

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MS. MACRI: Thank you, as well as Mr. Gradess for taking time to point out

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2 some of those, particularly with respect
3 to criteria that we're looking at.

4 Let me ask this in terms of that.

5 From your perspective, from your --
6 as an attorney practicing in this area, do
7 you think that then the kind of
8 responsibility of making the determination
9 process should lie with the individual,
10 the attorneys that are assigned to these
11 cases, institutional providers, Legal Aid,
12 Eighteen B counsel so that they can really
13 get to the meat and potatoes of these
14 kinds of concerns that we might have.

15 When somebody is asked do you own a
16 home, get to know the details "my home
17 can't be mortgaged because I'm on a
18 reservation," is that your perspective?

19 MS. SMITH: Most people, many
20 people who are finding themselves engaged
21 in the criminal justice system don't have
22 a clue when you're talking about
23 mortgaging homes, so it is indeed, I
24 believe, the lawyer's obligation to make
25 the inquiry, but it is further the court's

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2 obligation. I believe it is a both ended
3 obligation.

4 MS. MACRI: Thank you.

5 MS. GERSON: I do thank you for
6 raising concerns of indigenous people.

7 My question is do you have a sense
8 -- you state in your statement that you
9 represent a number of people pro bono.

10 Is there a sense that you're
11 getting that because of the different ways
12 in which indigenous people live; they have
13 a home that can't be mortgaged, they are
14 somehow less likely to be found eligible
15 for representation than others?

16 Is this something you're seeing?

17 MS. SMITH: I cannot declare that
18 as a matter of personal research, but I do
19 think it bears examination.

20 But I do think further that there
21 is a perception and a perspective among
22 many people that they're simply not being
23 listened to on any level of their
24 engagement with the legal system, that the
25 particularities of their circumstances are

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not being heard.

MR. NOISETTE: Thank you.

Next is Mr. William Ferris, past President of the Bar Association.

MR. FERRIS: On the list here there is Donna England, the present President, and me, who is the past President. What I can do -- my approach is going to be I want to tell you what we've done and the challenges we have ahead.

To do this, we have formed a task force in the Bar Association, and we included some of the judges. The judge here with me this morning, I would like your permission to bring him up, Honorable Andrew Crecca. He heads the task force.

We started dealing with the issues of the family court because representation, we know, deals not with just the criminal side but family court, we who are dealing with the removal of a child or some other issue that requires a person immediate have access to representation.

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2 If I may ask Judge Crecca to come
3 up, please.

4 JUDGE CRECCA: I promise to be
5 brief.

6 I'm currently a New York State
7 Supreme Court Justice. I sit just
8 upstairs on the third floor here.

9 MR. NOISETTE: Please state your
10 name for the record.

11 JUDGE CRECCA: Andrew C-R-E-C-C-A.
12 I currently serve as a supervising judge
13 of the matrimonial parts for Suffolk
14 County. I've also been the presiding
15 justice of our integrated DV part here in
16 Suffolk County since 2007.

17 Prior to that, so you understand a
18 little bit about my background, I served
19 as a County Court judge presiding over
20 felony trials out in Riverhead doing
21 criminal work. Before that, I had a whole
22 other life as a private practitioner, did
23 a lot of Eighteen B work, both in criminal
24 courts here in Suffolk County, both
25 felonies and misdemeanors. I also served

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2 as Eighteen B counsels for family court
3 representing respondents and other parties
4 in cases in family court. I sort of bring
5 a more global perspective to the issue.

6 Most recently the Board of
7 Directors of the Suffolk County Bar
8 Association, as Mr. Ferris indicated, put
9 together this task force to look at the
10 issue of assigned counsel qualifications,
11 what should they be, how should it be
12 done?

13 I think I'm going to, if I can,
14 serving as the chair of that task force
15 which we just got work started a few weeks
16 ago, but I would like to speak on behalf
17 of from a judge's perspective of this
18 issue.

19 Number one is I think I heard the
20 first speaker mention a lot of things
21 about how this is done. What I didn't
22 hear is we have a lot of these lofty ideas
23 being thrown at you. I don't think there
24 is a body in the room -- the law is clear,
25 people who can't afford counsel should

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receive it and will receive it.

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Quite frankly, having served for many decades in the court system as a prosecutor, as a private practitioner and now as a judge, my experience, both practicing in Manhattan and now the last twenty-five years practicing here in Suffolk County, people who need counsel get it.

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I don't perceive a problem about people who are entitled to counsel not receiving it. I can't speak for upstate north of the Bronx, but I certainly can speak for downstate. This is not issue.

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I think the issue is a little different. The issue is -- the reality is that the assignment of counsel is left to the sole discretion of the court. It is the court that determines whether or not someone is assigned counsel. That is the court's obligation under our current law in New York State as I understand it to be.

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It is not -- I disagree with the

1
2 former speakers -- it is not the role of
3 an assigned attorney to determine whether
4 or not someone is eligible to receive a
5 paid attorney. That is an obligation of
6 the court system, an obligation of our law
7 in New York State, and I think that comes
8 down from Gideon on, that is our
9 obligation as the court.

10 Here's the problem. I got a docket
11 full of tons of people. Somebody steps
12 up, I say "do you have a lawyer?" "No, I
13 don't." "Are you going to get a lawyer?"
14 "I can't afford one."

15 Then I have to make an inquiry in a
16 packed courtroom with a full docket and
17 make a determination whether this person
18 is entitled to counsel or not. That
19 decision should not have to be made in
20 thirty seconds and, more importantly -- if
21 I get one point across, this is the point
22 I would like to get across -- it shouldn't
23 be made without the proper information.

24 As a judge, I'm charged with the
25 task of making decisions, important

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2 decisions everyday. One thing I've
3 learned over the course of eleven years on
4 the bench is that the best decisions come
5 when I have the right information in front
6 of me. When I don't have the right
7 information in front of me, I can't make
8 good decisions. It's that simple.

9 What I would say is two things.
10 Number one is there should be no magic
11 formula. Judges should continue to be
12 given discretion to determine what is --
13 when someone should or should not have an
14 attorney, because that situation where the
15 kids are going to private school that was
16 brought up earlier, parents are paying the
17 bail, some of those situations we're going
18 to have to give them assigned counsel,
19 some we may not.

20 We need information so we can make
21 a decision.

22 How do we get that information?

23 Number one is, as I indicated, it's
24 not the attorney's role. You put them in
25 a very difficult position. Having

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2 represented clients as a defender,
3 Eighteen B counsel, you can't have me ask
4 my client questions about income and be
5 expected to divulge things. What if he
6 said, "I don't want the court to know I
7 work off the books"? That puts me as an
8 officer of the court in a horrible
9 position.

10 It is the court's obligation to
11 make the determination. It is also the
12 court's obligation to gather that
13 information that is needed to make the
14 decision. I don't think in open court, on
15 the record, under pressure is the way to
16 do it.

17 I think that what we need to do is
18 have, like we used to years ago, have them
19 see somebody within the court system, fill
20 out a form, answer some questions -- "how
21 much do you make, what assets do you own,
22 how many dependents do you have?" Those
23 type of questions are not intrusive and
24 they give us the information that we would
25 use anyway in the court to do that.

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2 Who should do that? My opinion is
3 probation service. Probation has always
4 been the traditional arm of the court and
5 one that provides service, whether a PSI
6 report to the court or other reports about
7 warrants. Things like that come from
8 probation.

9 I think we should be encouraging
10 local probation departments to take on
11 that task of asking those questions,
12 providing an information sheet, much like
13 they do on an ROR report or things to the
14 court or certain information is provided
15 to the court that gives the information we
16 need. We'll make the determination.

17 Certainly at that point if we don't
18 make the proper determination, if we don't
19 give somebody counsel who is entitled,
20 that is what the appellate process is for.
21 Then you have a judicial determination
22 that is appealable for a litigant.

23 I mean, I think that we shouldn't
24 over complicate this. We certainly should
25 take into account things like the cost of

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2 living in different parts of the state,
3 things like that. I'm not saying all
4 that, but give me the information I need.

5 I know if somebody makes fifty
6 thousand dollars here in Suffolk County,
7 they're supporting a family of four, it's
8 a good shot that that person's not going
9 to be able to afford counsel.

10 Why do I know that? Because I live
11 here, I'm a judge that is presiding here.
12 I live here, work here. We still need the
13 information.

14 I cannot tell you the countless
15 scores of litigants that come through my
16 courtroom every year who clearly can
17 afford counsel and are receiving free
18 counsel. Why? Because there is no way of
19 making a proper inquiry of them.

20 I can tell you this firsthand,
21 because I've had litigants in IDV court, I
22 was a criminal court judge, family court
23 judge and hearing matrimonial cases. If
24 they don't have counsel in the family
25 court cases or criminal cases in

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2 particular, I assign them counsel.
3 Usually they will get Judiciary Law
4 Section Thirty-five for the matrimonial.

5 Someone says they don't make any
6 money. I find out they work as a pizza
7 turner on the books for a hundred bucks a
8 week. Turns out at the end of the case I
9 go through a trial, they're making fifteen
10 hundred dollars a week off the books,
11 there's not much I can do about that. I
12 can report it. Meanwhile they've received
13 counsel for three years of litigation
14 before me in IDV court, or two years of
15 litigation. That is what we're seeing a
16 lot of.

17 People who see the other guy
18 getting a free attorney who were just
19 stepping up there, you know, "yeah, I
20 don't have a job," or "I don't work," I
21 have no way or verifying that. It is not
22 my role as the court to start looking at
23 tax returns, things like that, but you do
24 need somebody to gather that information
25 for me -- not tax returns -- but have them

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2 verify income. That is all. "How much do
3 you make?" It is that simple.

4 Again, it doesn't have to be a huge
5 inquiry by questionnaire sheet, "how much
6 money, how many dependents, what kind of
7 assets, liabilities on those assets?"
8 Then a judge will be in a better place to
9 make that decision.

10 Any questions?

11 MS. WARTH: Thank you very much.
12 This is incredibly helpful. I know you've
13 done a great job of outlining what your
14 vision is of how judges should gather
15 information, that probation should be
16 gathering that information.

17 What is not clear to me though is
18 whether or not you think that judges
19 should be given guidance on how to use
20 that information in making a decision
21 about eligibility?

22 I think that is an important
23 question because on the one hand I see
24 your perspective. There needs to be some
25 flexibility because areas are different,

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our counties are different.

On the other hand, if there is no guidance, there is no transparency, and people do feel that decisions are being made in an arbitrary way.

JUDGE CRECCA: I would tell you this. I can speak to you from an administration of justice point of view. I don't have a problem with guidelines as long as they're guidelines that aid the court and assist, because I think every circumstance is different.

I think if there are general guidelines that tell us what the cost of living is in certain areas of the state and what it costs to practically -- really costs to support a family of four or a family of two, whatever, those things would be helpful to the court.

I think that what you really need to be careful of is just telling the court there is a fixed number one way or the other, because I think somebody brought up, I may own a seven hundred fifty

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2 thousand dollar house in Suffolk County
3 but have a mortgage of six hundred
4 thousand dollars a month (sic) on it. It
5 is not just that atypical.

6 If somebody owned a house worth
7 that money in the Adirondack's, I don't
8 have to tell you folks, that's a
9 completely different situation.

10 Guidelines can be helpful if they're
11 generalized for New York, as long as there
12 is the flexibility that it's very clear
13 the ultimate determination is going to be
14 with the court.

15 I say that for this other reason.
16 Despite what some of the other speakers
17 said, I completely disagree, there is not
18 a judge in the world that I know of who
19 doesn't want someone to be represented by
20 counsel. We would much prefer someone
21 represented by counsel than a pro se
22 litigant. I can tell you that.

23 We always -- in my experience,
24 judges err on the side of caution. I
25 would give counsel. What I can tell you,

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2 though, is also this in the same respect,
3 too. People have to be held accountable
4 and responsible for the fact that if they
5 can afford counsel, they need to be able
6 to get that, to be able to step up and do
7 that, not misrepresent to the court.
8 There has to be some sort of a way of
9 gathering information from them that is
10 somewhat reliable.

11 MS. WARTH: As a follow up, is it
12 helpful also to have presumptions of
13 eligibility?

14 So, for example, a presumption that
15 somebody who is in custody, the
16 presumption that somebody who is in a
17 mental health facility is eligible for an
18 attorney or the presumption that somebody
19 who makes an income or who receives public
20 benefits?

21 JUDGE CRECCA: Who is making the
22 presumption?

23 MS. WARTH: As part of the
24 guidelines, do you think it would be
25 helpful to have presumptions?

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2 JUDGE CRECCA: I don't know,
3 because only the legislature can put in
4 place legal presumptions. I think that
5 most judges know if someone's
6 incarcerated, they need counsel. We just
7 had this discussion on the task force.

8 If you're in custody at
9 arraignment, it's a crucial part of the
10 legal proceedings, and you need to have
11 counsel by law at that arraignment.
12 Whether you can afford it or not is
13 another story, but at that arraignment.
14 We've been doing that here in Suffolk
15 County under a program that I certainly am
16 not -- don't know enough to speak about.

17 You have a lawyer assigned to you
18 Eighteen B at your arraignment at the very
19 least. I don't know if that answers your
20 question.

21 I don't think there should be
22 presumptions as part of the guidelines but
23 -- not presumptions, in my opinion. That
24 is my opinion.

25 MS. MACRI: I would follow up on

1
2 that particular concept.

3 As you probably heard, there is
4 counsel's first appearance being widely
5 adopted across the state in certain places
6 where probation services might not be
7 immediately available to do a
8 determination. Just if you're comfortable
9 making this opinion available to us in
10 terms of what your thoughts are with
11 respect to the idea of -- so somebody is
12 arraigned, there is no one available like
13 probation. It is a four or three in the
14 morning arraignment.

15 Should there be some kind of
16 recommendation that that individual should
17 have counsel available to them with the
18 post-determination of eligibility being
19 made later on, or what is your perspective
20 of that?

21 JUDGE CRECCA: The simple answer to
22 that is I think the law is clear. I don't
23 think it has always been followed in the
24 past in New York State; that that is a
25 critical stage of the criminal proceeding

1
2 and that a litigant, defendant, must be
3 afforded counsel at that arraignment. My
4 simple answer is that.

5 I got my teeth sharpened under Bob
6 Morgenthau in Manhattan, the DA's office.
7 We never did arraignments -- that's 1989
8 through the early nineties -- whether it's
9 assigned Legal Aid or Eighteen B for
10 arraignment only.

11 I guess my answer to you is as a
12 judge I wouldn't preside over an
13 arraignment without having somebody
14 represented by counsel. I would also tell
15 that person that a lawyer's been provided
16 for you for the purpose of arraignment,
17 but you need to go out and get a lawyer,
18 sir. Make sure when you come back to
19 court -- if they're ROR'd or in custody --
20 you need to get an attorney.

21 Chances are if they're in custody,
22 they won't be by the next date. I would
23 let them know it is their obligation to
24 get one if they were assigned one for
25 arraignment only.

1
2 MS. MACRI: With respect to this
3 idea of probation services conducting the
4 process of determining eligibility, we
5 have this concern of confidentiality, this
6 idea that information is being provided,
7 sometimes very important information that
8 is being heard for the judges to make a
9 determination.

10 Oftentimes this concern goes to who
11 becomes -- how does this information
12 become available to other parties, the
13 District Attorney's office, what have you?
14 If probation were to collect this
15 information, do you feel it should be
16 collected under seal and only shared with
17 the judge or should it be available -- the
18 District's Attorney's office might contact
19 probation and talk about recommendations,
20 for example, in certain situations.

21 Should this be something readily
22 available to all parties in the courtroom?

23 JUDGE CRECCA: Again, I don't
24 really see huge confidentiality issues on
25 this particular issue. You're asking

1
2 someone their income, assets, things like
3 that. I don't have a strong opinion one
4 way or the other.

5 I know with ROR reports, clearly
6 the DA is entitled to the information.
7 They have to make arguments with regard to
8 that. I don't think it's the same with
9 this information, because I don't think
10 the District Attorney has a role in
11 deciding whether or not someone receives
12 assigned counsel or not.

13 I wouldn't, as a judge, take
14 argument. I might let them be heard, but
15 it would have very little weight, but I
16 don't think it is relevant.

17 The answer is -- I know that is not
18 a great answer for you. I don't think it
19 is a huge concern that has been raised.
20 If I make the inquiry in open court,
21 certainly it's less confidential then, so
22 I do do that; "how much do you make, how
23 many dependents, do you own a home?"

24 I don't want to ask all those
25 things in front of a courtroom full of

1
2 people. I'm relegated to do that with the
3 current system. I would much rather say
4 "go see the office of probation services"
5 or whatever we're going to call it and say
6 "go there, give your information." I get
7 back an information sheet that gives me an
8 idea of income, dependents, things like
9 that.

10 Then I have some sort of
11 guidelines, sure, that are helpful to me
12 in determining what the poverty level is,
13 cost of living is. That would be the best
14 information I could have.

15 MS. MACRI: To follow up -- I
16 promise to stop here.

17 The idea of delay, how do you feel
18 in terms of offering an opinion with
19 respect to the idea if we were to propose
20 a guideline that says "this determination
21 needs to be made within a certain period
22 of time"?

23 One of the concerns we've heard in
24 other parts of the State, there is
25 sometimes a delay in the process of

1
2 determining eligibility, which then
3 further delays assignment of counsel and
4 proceedings, etc., etc.

5 Particularly concerning for us is
6 when folks are in custody. Do you feel
7 comfortable with the idea if we were to
8 propose a guideline, how quickly this
9 process should take place?

10 JUDGE CRECCA: I don't think you
11 need a guideline. Courts should be aware
12 of -- might want to do that through
13 educating the judges that while the
14 determination is being made, which is what
15 I do, I may give someone a lawyer, "you're
16 assigned Legal Aid or Eighteen B counsel
17 subject to qualifications," which seems
18 sort of what we do in arraignments now,
19 understanding if they don't qualify, they
20 have to go out and hire an attorney.

21 We can't keep doing what we're
22 doing; doling out free attorneys with no
23 information. That is not right either.

24 MR. NOISETTE: One question. In
25 your own determination or as you would

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provide guidance to your colleagues, do you think the severity of the offense is a relevant criteria in terms of one's eligibility?

JUDGE CRECCA: I think that goes -- not the severity of the offense necessarily, but I think it does in the sense it's going to the cost of being represented.

When I did criminal defense work, if I was representing someone who was accused of murder, the bill was a lot heavier than --

MR. NOISETTE: So, therefore, in that situation as a judge making a decision, determination as to whether someone is eligible, is that a legitimate criteria?

JUDGE CRECCA: Absolutely. I need to know in general what legal services from private counsel costs outside this -- it goes back to the idea -- I'm making this up -- say, to represent somebody on misdemeanor DWI's and I'm getting two

1
2 thousand, twenty-five hundred dollars,
3 whatever it is, that would be helpful for
4 judges to have an idea of the cost of the
5 legal services, but, again, I would think
6 a judge has a general idea of that.

7 Yeah, it definitely matters.

8 MR. NOISETTE: Thank you.

9 MS. MACRI: We would invite any
10 task force comments you wish to share with
11 us. We would just state that we have a
12 deadline of August twenty-sixth for anyone
13 in the audience regarding written
14 submissions.

15 Beyond that, if there is
16 recommendations as we move forward, we
17 invite you to submit them to our office.

18 JUDGE CRECCA: I'll turn it over to
19 Mr. Ferris.

20 MR. FERRIS: Thank you for allowing
21 him to speak. I'm going to change my
22 approach. I want to pick up on a question
23 you just asked; what information -- and
24 also depart from what the Judge says.

25 Is it a judicial determination of

1
2 whether or not a person is eligible for
3 assigned counsel or can afford his own
4 attorney?

5 The issue that you raised is is
6 that information provided, let's say, to
7 probation in terms of a person's assets,
8 money or income? In my experience here in
9 Suffolk County and when Legal Aid was
10 doing this many years ago, and probation,
11 because of funding, all that stopped. The
12 information is really very essential, just
13 in terms of income, home mortgage, how
14 many children.

15 The issue that you raised, it does
16 come up on the criminal defense side.
17 Once you get involved with a client,
18 sometimes you realize he has other sources
19 of income that he or she does not want to
20 divulge, so the attorney then is caught in
21 terms of representing that person, having
22 that information. As long as it is
23 something that has happened in the past,
24 not on-going, it certainly makes it a bit
25 easier.

1
2 By the same token, I don't think
3 that the attorney should then be required
4 to report to the court that information,
5 because that clearly is a violation of
6 zealously representing our clients in the
7 best way we can.

8 A clear line is just make a
9 determination as to whether a person is
10 eligible for representation paid for by
11 Legal Aid or by assigned counsel as
12 opposed to going into the more significant
13 areas in terms of whether or not the
14 person has other sources of income. That
15 should be entirely separate, and from my
16 experience -- and my experience should not
17 be something that we need to consider --
18 in terms of the first instance poor
19 representation, because that information
20 comes across -- is going to be gathered in
21 the course of that representation.

22 If we're going to start in terms
23 of he has other sources of income, it goes
24 back to the court, we're six, seven months
25 into the process, what are we doing? I

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think you would all understand what I'm saying.

I want to change that a little bit to explain that it is more than a nuance, it is an important difference.

I agree with the judge. We need guidelines for a court to consider. I want to address here in Suffolk County, really it is not going to be the same as some parts upstate.

I know that Joseph has been hearing this. I want to put things in perspective. My issue here is taking a practical approach.

Two to three years ago at the Bar Association, we attacked this problem in terms of making sure an attorney was representing defendants at arraignment here in Suffolk County, unlike other parts of the state. We have two main areas of arraignments.

When a person is arrested overnight, felonies, misdemeanors, whatever, they're brought here to D11, our

1
2 arraignment part. That part is manned
3 seven days a week. There is a judge
4 there, a DA there, Legal Aid. We also
5 have Eighteen B and private attorneys show
6 up also to represent clients. We have
7 those arraignments. In other parts, those
8 people are given field appearance tickets,
9 desk appearance tickets.

10 During the course of any day,
11 they're told to come back several weeks
12 down the road and show up in a courtroom
13 upstairs, two, three up to six hundred
14 cases a day on the court's calendar. They
15 also should receive immediate
16 representation.

17 Those were the two issues we
18 started to address. We've done this with
19 the cooperation both of Judge Hinrichs,
20 District Administrative Judge and Judge
21 Murphy, Supervising Judge of the District
22 Court. Legal Aid is an important part of
23 this, as well as Dave Besso, Assigned
24 Administrator, as well as the Bar
25 Association.

1
2 We have really come together to try
3 to deal with these issues, because over
4 the decades, I was a prosecutor for
5 twenty-four years, been on the so-called
6 dark side which I enjoy for another
7 twenty-four years, I do understand.

8 I work with prosecutors, Legal Aid
9 and Dave Besso. I do believe here in
10 Suffolk County, while each of our areas
11 might have some disagreements, essentially
12 we do agree in terms of making sure there
13 is representation in the first instance.

14 For many years defendants were
15 arraigned here in D11 or in street
16 arraignment part without representation.
17 We all realized we needed to make certain
18 changes to that. That was a couple of
19 years ago. We've done that.

20 We want to make sure that a person
21 who needs representation because he can't
22 afford it, gets it. Legal Aid is here,
23 they have been doing that very well.

24 The other part is if a person is
25 ineligible for Legal Aid because of a

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conflict -- they might represent a
codefendant -- they get Eighteen B.

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The other issue is if a person can
afford an attorney, how do we determine
that and make sure that a person does come
back with an attorney?

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We've done -- first appearance is
what we've done in D11. Right now the
process there is a coordinator has come
forward through the Assigned Counsel Plan
to find out if a person is eligible for
Legal Aid or private counsel. Part of the
task force the Judge was talking about was
to try to refine the criteria, if you
will, in terms of who is eligible. Those
are some of the things we deal with.

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I'm saying this, too. Here in
Suffolk County, we've already put in place
procedures to make sure that anyone who
appears in D11 or the street arraignment
part gets an attorney. Then sometimes the
eligibility part may follow within a few
days thereafter, but they get -- for
example, D11, if a person is determined to

1
2 be eligible not for Legal Aid, they will
3 have the first appearance attorney there
4 represent them on arraignment and they're
5 -- if not in custody, they're told to go
6 out get an attorney. If they're in
7 custody, that attorney will hold on to it
8 for the period of time for the next
9 appearance, or felony.

10 If the person is not eligible or
11 can have private counsel, they get it. If
12 they stay in custody, they're assigned
13 Legal Aid to make sure they have that done
14 quickly. There is a certain time limit
15 just on the structure of how the CPL
16 works. That is our guide.

17 When you talk about how quickly is
18 a determination made, it is made within
19 the time period between the first
20 arraignment. If it is a felony, they come
21 back with a felony examination or it is a
22 misdemeanor, to come back on the next
23 court date. In any event, they have an
24 attorney in the first instance.

25 During the last couple of years in

1
2 coordination with David Besso, Assigned
3 Administrator, and the Academy of Law part
4 of the Bar Association, we have been
5 provided with grants from the State to
6 provide training for attorneys in the
7 criminal practice who are Eighteen B
8 attorneys and for Legal Aid. We've also
9 done it now with respect to family court
10 practitioners also on the Eighteen B level
11 as well.

12 We're already providing that
13 training. We want to continue that. It
14 has been a good result and the Bar
15 Association, the Academy of Law, we have
16 incorporated to make it mandatory for
17 Eighteen B attorneys.

18 What I'm talking about right now is
19 the five western towns here in Suffolk
20 County. I heard one of the speakers talk
21 about the East End. I know we discussed
22 the East End before. Knowing Long Island,
23 the East End is sort of a different animal
24 than the five western towns.

25 Each town has its own autonomy.

1
2 They do things their own way. Legal Aid
3 has adapted to it, the Bar Association has
4 adapted to it, but the issue that comes in
5 is this: That is, what can we do to make
6 sure defendants charged, arrested over the
7 weekend or holidays on the East End
8 receive representation they need?

9 Right now we have input from Legal
10 Aid, we have a group, both the County
11 Attorney who has been very much part of
12 this, provided funding for a lot of
13 programs to date, and we're looking in
14 terms of how to provide that
15 representation on the weekends for each of
16 these five eastern towns because each town
17 does it differently.

18 You have to understand if there is
19 an attorney living in Riverhead or west,
20 there is an arraignment in Southampton,
21 you're not just talking about miles,
22 you're talking about length of time to get
23 there, with the judge, dealing the
24 people's schedules, overtime issues, those
25 are real issues.

1
2 We recognize the problem and we're
3 dealing with it. We hope to have a
4 solution for you, a recommendation for you
5 in the next couple of weeks.

6 MR. NOISETTE: Again, I think as
7 with one of the earlier witnesses, I ask
8 you to confine your comments primarily to
9 the topic of this discussion, which is
10 eligibility.

11 I guess on this I wanted to ask you
12 a question. Are there areas of the
13 eligibility determination practice that
14 you have been describing that you know are
15 problematic or need improvement in Suffolk
16 County?

17 Are there places where there could
18 be improvement in how you believe judges
19 currently determine --

20 MR. FERRIS: It comes down in
21 terms, again, of it needs to be done
22 quickly, done with the information that
23 the person, defendant is providing to it.
24 If there has to be some sort of
25 verification process, it must be done

1
2 quickly. That is why I say that the other
3 party in terms of other anything is beyond
4 the scope.

5 I think what really -- it must be
6 done quickly. What are we looking at?
7 Employment, income, looking at the
8 housing, other assets, whether the person
9 is self-employed but if so, it might be
10 important to know what kind of business he
11 is in. The business might have assets
12 where he or she may not have those assets.

13 I see that regularly. That person
14 should be taken into consideration in
15 terms of eligibility for assigned counsel.

16 MR. NOISETTE: Any other questions?

17 Thank you very much.

18 Next speaker is Elizabeth Nevins,
19 Associate Clinical Professor and
20 Attorney-in-Charge of the Criminal Justice
21 Clinic at Hofstra University's Maurice A.
22 Deane School of Law.

23 MS. NEVINS: Thank you for the
24 invitation to provide testimony at this
25 important public hearing.

1
2 I am a clinical supervisor at
3 Hofstra Law School. Every semester I
4 supervise eight students. Collectively we
5 represent indigent criminal defendants who
6 are charged with misdemeanors and
7 violations in Nassau County District
8 Court.

9 Since my arrival at Hofstra, I,
10 along with my students, have observed
11 really gross violations with regard to the
12 constitutional and statutory right to
13 counsel in Nassau County. Today I'm going
14 to limit my comments just to a picture of
15 the first of what we think are unjust
16 eligibility determinations processes that
17 are currently in use there and then
18 second, some recommendations for improving
19 those processes.

20 The first rule of eligibility
21 determinations in district court is that
22 there are no rules. There is no
23 consistency or transparency at any point
24 in the process. To understand this, you
25 need to know in district court, cases

1
2 start in three different ways, and
3 determination processes are slightly
4 different depending upon the defendant's
5 starting point.

6 First, for those who come through
7 arraignment, and this is defendants who
8 are arrested and held by police, at least
9 initially, Legal Aid serves as counsel in
10 almost every case. It tries to administer
11 a financial eligibility screening form but
12 is not able to do so for every defendant.

13 Sometimes even when they do fill
14 out the form, judges don't look at the
15 form. Most typically, as has been
16 described for the panel, the screenings
17 are done aloud in open court, but the
18 contents of the screening vary
19 tremendously depending upon who is sitting
20 that day and how crowded the courtroom is.

21 Defendants are asked if they own a
22 home but not the financial solvency of the
23 home or its condition. We've had clients
24 where they're living in really condemnable
25 properties, but they own a home.

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Therefore, they're not eligible.

They're asked about income, if they own a car but not if they need the car to drive to work. Sometimes they're asked completely random questions. My student with me was talking about an individual who was refused counsel because he had an I-Pad in the courtroom. Other times they've been asked what kind of phone they have. Therefore, that determination gets made.

Defendants are often denied counsel on the basis of other family members' assets or have it revoked even if originally assigned counsel if they made bail. There is no consistency standard or explanation to justify why one judge will appoint counsel or another one won't.

For those in Arraignments B, that is defendants with appearance tickets charging them with state law offenses, there is standard Eighteen B counsel there, but there is no screening until at least four to six weeks after their

1
2 arraignment for non-incarcerated
3 defendants.

4 When defendants do get screened, it
5 is in open court, in front of the random
6 calendar judge. If a defendant does get
7 assigned counsel, generally speaking, he
8 is not going to meet that counsel from
9 Legal Aid for another six weeks. That is
10 easily four months after the initial
11 arrest, and that doesn't talk about
12 conflict cases which is even longer or can
13 be.

14 Finally in the one fifty-five
15 courtroom -- I had sort of a power point,
16 slides you can follow along with,
17 basically; very basic. That is where
18 defendants are with appearance tickets
19 charging them with local law offenses, not
20 state law. This is where their cases
21 begin. There is never any assigned
22 counsel or eligibility screening, even
23 when a defendant, in our experience, has
24 asked for it.

25 Based on these illustrations, I

1
2 offer a number of recommendations. This
3 is a little packet. The standard for
4 determinations must be fair, clear and
5 consistent.

6 The law obviously does not
7 establish what the legal standard of
8 "unable to afford counsel" means, but the
9 fact that the standard varies by
10 jurisdiction, judge or day, I believe is a
11 due process and legal protection
12 violation.

13 The New York State Defenders
14 Association and others have promulgated
15 income guidelines typically based on
16 federal poverty levels to assist Chief
17 Defenders and others in making eligibility
18 determinations. I think these guidelines
19 are worthy of consideration and such a
20 clear standard is appealing because it
21 could help establish more consistency, but
22 the strict adherence to such numbers is
23 risky. It could violate the court's need
24 to determine eligibility based on a range
25 of criteria and circumstances that would

1
2 affect whether a person truly can afford
3 counsel on a particular case.

4 A better standard would provide
5 more flexibility and more specific
6 criteria for consideration without
7 specifying a rigid formula. I think the
8 federal system provides a helpful model
9 here.

10 They assign counsel where net
11 financial resources and income are
12 insufficient to obtain qualified counsel
13 with explicit consideration given to the
14 cost of providing the person and his
15 dependants with the necessities of life,
16 including bail relief. That is considered
17 money, the necessities of life.

18 The Office of Indigent Legal
19 Services must establish a definition of
20 "unable to afford counsel" and criteria
21 for making that determination that are
22 sufficiently uniform to produce fairness.

23 Second, the criteria examined must
24 be fair, relevant and consistent. One way
25 of promoting consistency and fairness is

1
2 to identify the most appropriate criteria
3 for making eligibility determinations and
4 ensuring that a mandatory screening relies
5 on those criteria in every case.

6 There are a lot of recommendations
7 that could be made here. I'll focus on a
8 few.

9 An individual must be assessed for
10 eligibility on his own. The determination
11 must be based on an individual's ability
12 to pay on his own, without regard to the
13 finances of other household members,
14 family or friends, unless such individuals
15 have indicated their willingness and
16 ability to pay in a timely way.

17 The federal Criminal Justice Act
18 provides an appropriate model for policy
19 in this area which, among other things,
20 ensures that an appointment of counsel is
21 not delayed while any investigation into
22 resources is occurring.

23 Only liquid assets should be
24 considered relevant. If a question is
25 whether a person can actually pay a lawyer

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2 in a matter as time sensitive as a pending
3 criminal case, the fact that she owns a
4 home or car she needs to get to work
5 everyday is patently irrelevant.

6 Expenses should be considered
7 relevant. This may seem obvious, but it
8 is a factor that gets routinely dismissed
9 or not considered in determinations.

10 In addition, support for
11 dependents, including child support and
12 childcare medical expenses, existing
13 debts, transportation needs -- I've never
14 heard that one discussed -- as well as the
15 costs of defending oneself are important
16 factors that the court must examine in
17 determining whether an individual is truly
18 able to afford counsel on his own.

19 In my larger comments, I point to
20 the fact defendants in district court when
21 you have an adjournment in contemplation
22 of dismissal, it costs money to get the
23 terms of the conditions that they're going
24 to require you to do before you get that
25 adjournment. The costs of representation

1
2 are even more than just finding a lawyer.

3 Third, standards and criteria's
4 must be transparent. To my knowledge, if
5 any guidelines or standards exist or are
6 used by judges in district court, they
7 have not been made public. To the extent
8 they are issued or followed by any courts,
9 they should be published and prominently
10 posted in the courthouse to insure that
11 the standards are being upheld and promote
12 fairness and confidence in the system.

13 Fourth, in agreement with the last
14 speaker, the determination must be made as
15 early as possible. It is beyond dispute
16 that the right to counsel attaches at
17 arraignment, not before, and lasts
18 throughout subsequent proceedings.

19 As was mentioned, the New York
20 State Defenders Association sent in a
21 report on this issue over twenty years ago
22 citing virtually every set of professional
23 standards that effective representation
24 compels the appointment of counsel at the
25 earliest possible stage of the

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proceedings.

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Defendants in Nassau County

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district court are structurally denied

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access to counsel for months or forever,

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even in cases where they are undoubtedly

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entitled to it. This must change.

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Fifth, the assessment should be

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confidential. There is simply no reason

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that this personal financial information

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needs to be shared in front of a courtroom

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full of people. Such a public airing can

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lead people to exaggerate their earnings

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for fear of embarrassment, but in

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derogation of right to counsel and the

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cost of accuracy of the information.

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In some matters, I do think

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disclosure of information may have Fifth

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Amendment implications. At a minimum,

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prosecutors should be precluded from using

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disclosures made during screenings against

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the defendant, so as not to require

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defendants to choose between exercising

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their Fifth and Sixth amendment rights.

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They should be conducted in writing

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2 and/or at the bench to maximize the
3 defendant's privacy. If the court must
4 maintain a written record of the
5 proceedings, it can keep the screening
6 document or other discussion of personal
7 financial information in the file under
8 seal.

9 Six, a defense attorney or
10 independent party should administer the
11 screening and make the initial
12 determination of eligibility. I think
13 that if I'm choosing between those two,
14 defense counsel should do it. It provides
15 for confidentiality and convenience, but I
16 do think it may impede the overwhelmed
17 defenders at arraignment. They have so
18 many things to do at the same time.

19 I think this should not be the job
20 of prosecutors or the court who have the
21 possibility for trying to streamline
22 dockets or otherwise potentially using it
23 to push things into plea bargaining or
24 pleas. They shouldn't do it.

25 I think they need the resources, I

1
2 put it first in the office of the public
3 defender, if not an independent court
4 administrator, not the sitting judge.

5 Seven, the screening process should
6 not be unduly onerous. The screening and
7 appointment process should not be so
8 burdensome as to discourage defendants of
9 availing themselves or their Sixth
10 Amendment right to counsel. It should not
11 appropriate excessive resources from Court
12 Administration.

13 Given the first of those concerns,
14 absolutely as happens, defendants should
15 not be forced to pay for this process,
16 even if it does impose some cost on the
17 state. That doesn't happen in Nassau
18 County. I want to make sure it doesn't
19 happen here.

20 I don't think they should have to
21 provide detailed proof of financial
22 circumstances nor should the administrator
23 be compelled to fact-check aciduously.

24 Reporting errors should not result
25 in harsh penalties for defendants seeking

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2 to provide information during screen
3 interviews. If defendants fear
4 prosecution because of unintentional or
5 minor errors, they might opt to forego the
6 screening altogether.

7 Eight, err on the side of providing
8 counsel. To the extent a person is on the
9 bubble or there is some minor conflicting
10 information regarding a person's
11 eligibility that cannot be avoided, courts
12 should assign counsel rather than risk a
13 Sixth amendment violation by failing to do
14 so.

15 It is also important that once
16 counsel has been assigned, that the
17 eligibility determination not be reopened
18 without really good cause based on new
19 information arising during the course of
20 litigation. I think multiple
21 determinations can make what is an
22 otherwise efficient system inefficient and
23 provide a possible avenue for abuse.

24 Denial should be a formally
25 appealable decision subject to de novo

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review.

In closing, I want to point you to my more detailed written comments which have a lot of authority. I want to applaud the efforts of the NYCLU and your office for taking this up. We remain committed to access for justice for poor people in Nassau County, and if we can be helpful through research, advocacy or consultation, I want you to know we're available.

Thank you.

MS. WARTH: I think you've done a really great job in helping strike the balance between the need for guidance and transparency and fairness.

You're saying there is the need for some flexibility by saying that whatever definition is adopted, it shouldn't be a strict definition but a definition more along what the federal public defender definition is as to eligibility for counsel, which is true ability to pay; is that correct?

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2 MS. NEVINS: Yes. I think we
3 should -- guidance is helpful in terms of
4 saying "you have to think of this and this
5 and this," because I think the tendency is
6 just think house, car, salary, done; maybe
7 dependents.

8 MS. WARTH: I agree with that.
9 That part of what you're recommending is
10 what should be considered, but also what
11 shouldn't. That should be clear in the
12 guidance.

13 One follow up question for your
14 recommendation number seven, you say the
15 screening process should not be unduly
16 onerous. I would certainly agree with
17 that.

18 Do you think it would help to ease
19 the screening process if there were
20 presumptions with regard to eligibility,
21 that some people are presumed eligible if
22 they receive public assistance or if
23 they're incarcerated pretrial detention?

24 MS. NEVINS: I think for the three
25 I mentioned, those two plus folks detained

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2 in mental health situations, it makes
3 perfect sense. I do think the reality is
4 a lot of those folks, at least folks on
5 benefits, they typically don't have a
6 problem getting assigned counsel.

7 I think people incarcerated often
8 do. Even if they have the resources,
9 getting public assistance is difficult,
10 particularly in a timely way.

11 All I know is I've observed a lot
12 of pleas taking place after the person was
13 found not eligible for counsel.

14 MS. MACRI: Thank you for taking
15 time to be here and I've heard of the
16 great work your clinic does. It's a
17 thrill to have you here to share
18 experiences.

19 In terms of the jurisdiction of --
20 going back to the issue of burdensome
21 processes, in your experiences in some
22 past cases, have you seen or heard about
23 where folks have been put at a loss; after
24 being assigned counsel in a quick process,
25 there has been some delay, they can't

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provide some documentation to establish that they're in need of counsel or eligible to be assigned counsel?

You've heard folks talk about not being able to get pay stubs, income tax returns. Have you seen that type of situation?

MS. NEVINS: Yeah, particularly with low income folks. There is not always my weekly pay stub that expresses exactly what I got paid. It can be hard to document what you get paid when you're getting piecemeal construction work.

We're a slightly different ball game. We get some through Eighteen B that's already determined you can be assigned counsel. We do kind of our own screening for folks who walk in.

I'm mostly talking about what I have observed in court, but sure -- or somebody is answering one set of questions, they're told no, but they come in, they say "come back again." Every time it is another six weeks. With

1
2 documentation you come back, but not with
3 the right documentation. Come back again.
4 Then you get asked some questions.

5 Someone was asked what do you do?
6 She indicated housekeeper. Boom, she got
7 assigned counsel. It had been months.
8 Once she answered that question, she got
9 counsel.

10 I don't know why it didn't happen
11 earlier. That day it worked. She
12 wouldn't have had documentation probably.

13 Thank you.

14 MR. NOISETTE: We'll take a short
15 break.

16 (Whereupon, there was a recess.)

17 MR. NOISETTE: The next speaker is
18 Kent Moston, Attorney in Chief, Legal Aid
19 Society of Nassau County.

20 MR. MOSTON: I would like to thank
21 ILS for holding these hearings. I have
22 been with Nassau County Legal Aid for
23 forty years. I've had the ability to see
24 three different types of screening systems
25 in place.

1
2 When I first started my office,
3 Legal Aid did the screening, they made the
4 recommendations to the judges in
5 arraignment court. In 1978 or
6 seventy-nine, that system was scrapped in
7 favor of the county executive creating a
8 Defense Screening Bureau as a subdivision
9 of the County Executive's office
10 commissioner of accounts.

11 The one good thing the Screening
12 Bureau did, it kept itself far away from
13 law enforcement. I have to stress this;
14 probation has no business doing screening.
15 Probation is law enforcement, probation is
16 part of the entity which is prosecuting
17 the individual who appears in the
18 courtroom. The police department has no
19 business, probation have no business.

20 Anybody in law enforcement should
21 have nothing to do with screening clients
22 for financial eligibility, so the Defense
23 Counsel Screening Bureau back in the late
24 seventies was created. It was thought
25 that that would be very cost-effective for

1
2 Nassau County and as a result of the
3 creation of the Screening Bureau, the
4 Legal Aid Society budget was cut by
5 forty-three percent. They lost seventeen
6 lawyers.

7 Within a year they realized that
8 the Screening Bureau was recommending the
9 same number of clients for the same amount
10 of counsel as we had when the Society was
11 doing it before the creation of the
12 Bureau.

13 Within a year or two, it was fully
14 funded and we hired back a whole bunch of
15 lawyers. That system stayed in place
16 until 2001 when, as a result of a scandal
17 in the Defense Counsel Screening Bureau
18 and other problems, the County decided to
19 scrap it in favor of a system where the
20 judges themselves did the primary
21 screening. The system which is in place
22 now is that system.

23 What happens is there is a one-page
24 financial form. I'm reluctant to call it
25 an affidavit, although it does have a

1
2 "swear to" line. Clients almost never
3 swear to it for the simple reason they're
4 locked up in the pen when this is being
5 taken down. You're not allowed to hand
6 them a pen in the bull pen area.

7 This one-page, very brief financial
8 document is handed up to the judge and the
9 judge, using whatever standards he or she
10 feels are appropriate, will make a
11 determination on financial eligibility.

12 We get wildly disparate results as
13 a result of this. I will give you some
14 indication of that.

15 We did a study in June and July of
16 cases coming into arraignment court where
17 clients indicated they couldn't afford
18 counsel and requested assignment of
19 counsel. There was within that two month
20 period, except for one judge, the denial
21 of counsel was seven percent. There was
22 one particular judge whose percentage of
23 denial was thirty-one point six percent.

24 I would like to take a moment to
25 read a couple of snippets from minutes

1
2 from this particular judge which give you
3 an indication of the quality of screening
4 that was going on. This is from a July
5 2015 proceeding. An eighteen year old kid
6 was charged with petit larceny.

7 "Mr. Defendant, are you working?"

8 "No."

9 "Who is at the rail?"

10 Counsel, the Legal Aid attorney
11 says, "I apologize, his mother."

12 The Court says, "You live with your
13 mom?"

14 The defendant says, "yes."

15 "Does she own or rent from
16 Freeport?"

17 DEFENDANT: No, own.

18 THE COURT: Is that his mother at
19 the rail?

20 The attorney says, "Yes, your
21 Honor."

22 The Court says, "You're going to
23 have to hire an attorney for your son. Do
24 you understand?"

25 "Yes," solely because there was an

1
2 indication she owned a home in Freeport
3 with no indication of anything else;
4 simply her owning a home.

5 This is from a proceeding on April
6 sixteenth, same judge. April thirteenth,
7 sorry. This is a case where the Legal Aid
8 Society was already assigned by another
9 judge after screening in arraignment
10 court.

11 This particular judge says:

12 "He owns a home? He can't have
13 Legal Aid represent him if he is a
14 homeowner. Legal Aid is for indigent
15 people."

16 The attorney says, "He was assigned
17 Legal Aid previously."

18 There was an off the record
19 conversation.

20 THE COURT: Sir, do you own a motor
21 vehicle?"

22 The defendant then says, "yes."

23 THE COURT: He owns a home and a
24 car and, therefore, is not eligible for
25 Legal Aid. The Legal Aid Society is

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removed."

We were taken off the case there by that judge. I can tell you we got back on these cases after some phone calls and other activity. We've had difficulties with this judge, which resulted in an Article 78 proceeding.

This highlights the disparate treatment clients get, depending on who is on the bench. Generally speaking, I have to say we are -- I believe that we are getting assigned, substantially, the cases that we should be assigned.

We will ultimately get the cases we should be assigned, but there are those kinds of situations where particular judges using whatever standards they're using will create circumstances which lead to great injustice.

I will echo the comments of Miss Nevins concerning a lot of what is going on in Nassau County. I want to amplify one point she mentioned about Arraignment B. The Legal Aid Society does not staff

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2 Arraignment B, only A which is the police
3 arraignment.

4 Clients come in in handcuffs.
5 Arraignment B are the defendants with
6 appearance tickets. Except for the
7 diversion cases that go into B, there is
8 no financial screening in B, even though
9 the judge at the initial call of the
10 calendar reads and -- mechanically reads
11 the rights under the statute that if
12 you're poor, you're entitled to counsel if
13 you can't afford an attorney.

14 Nobody is actually asked in
15 Arraignment B if they can afford an
16 attorney. Why? Because there is an
17 Eighteen B attorney present to assist in
18 the arraignment. That case will then get
19 adjourned. There has been no screening.

20 It goes to a private counsel part,
21 five or six weeks down the road. In that
22 private counsel part, it is very common
23 for a judge to say, "Mr. Defendant, you
24 appear here."

25 "Yes."

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"Where is your attorney?"

"I don't have an attorney. I can't afford an attorney."

"Step up."

Then a conversation will be taken wherein the defendant indicates that he is charged with this misdemeanor and the prosecutor is now offering the reduced charge to such and such. There will be a fine of fifty dollars or a conditional discharge or whatever.

The client's left in the situation where take that plea, go home today or get this case adjourned in hopes of getting counsel assigned, come back in six weeks for a Legal Aid part.

That is the way it operates in that courtroom. I leave it to you to make judgments.

Something about partial payment, seven twenty-two D. We do not do partial payment in Nassau County. It ended in 2001. The reason was that there was a perceived abuse of the system.

1
2 What was happening was that a judge
3 would be presiding in arraignment court,
4 and he would ask the client the
5 information about initial eligibility and
6 this client comes in, let's say, charged
7 with a first time driving while
8 intoxicated offense. No prior involvement
9 with the law whatsoever; nothing to
10 complicate the case. It's going to be an
11 easy plea, or would have been in 2001,
12 maybe not so much these days.

13 The judges in Nassau County who
14 would say "okay, I believe that you can
15 make partial payment. I am going to
16 direct that you pay fifteen hundred
17 dollars of the-- I'll assign counsel, but
18 direct that you pay fifteen hundred
19 dollars to that Eighteen B attorney out of
20 your pocket directly to him or her as the
21 initial payment of counsel."

22 What happens is the client is
23 placed in a situation where he goes out in
24 the hall and has to start peeling off
25 bills, handing the money directly to the

1
2 lawyer in the courthouse. This was
3 perceived as an abuse. As a result, the
4 administrative judge at the time, the
5 supervising judge in the criminal courts,
6 ended partial payment.

7 The partial payment is coming back.
8 I don't know if it is. I don't want it to
9 come back. I can't stress strongly enough
10 that money should not trade hands, should
11 not be paid out by clients to their
12 lawyers in the courthouse or anywhere
13 else. It should be done at Eighteen B
14 rates, sixty dollars an hour for
15 misdemeanors, seventy-five for felonies.

16 In a situation where a client is
17 forced to pay fifteen hundred dollars on a
18 first time driving while intoxicated case
19 that is disposed of the very next court
20 date, he could have hired an attorney for
21 much less than fifteen hundred dollars, so
22 in essence, what that judge did was assign
23 retained counsel.

24 As far as which system works
25 best --

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MS. MACRI: In those cases, did the clients have the money to pay?

MR. MOSTON: Not initially, but sometimes they could come into court, which was considered a be a successful system. At that time, lawyers were getting this money up front and not paid the hourly rate.

MS. GERSON: Successful for lawyers.

MR. MOSTON: Yeah. You know, I have to say that when we did the screening back in the late seventies, there was a perceived conflict of interest. We were put in a situation where we were in conflict with our clients about their financial eligibility. That was a problem.

There was another problem nobody talks about, which is that the private Bar perceived us as empire builders. We were not turning away clients that we should turn away because we wanted to build this vast Legal Aid empire in Nassau County.

1
2 When the Screening Bureau came in
3 in seventy-eight or seventy-nine, a lot of
4 us breathed a sigh of relief because if a
5 mistake was made and somebody from the New
6 York Post were to call us and say "why are
7 you representing so and so, that person
8 makes ninety thousand a year," we could
9 shrug our shoulders and say, "Why are you
10 calling us? Call the Screening Bureau."

11 That said, I think that it's very
12 important to realize the ultimate decision
13 on financial eligibility is up to the
14 court. Mr. McKiernan out of my office
15 says to explicitly call the court's
16 attention -- make various tries to get
17 recommendations on whether or not somebody
18 is qualified, but the ultimate judgment is
19 for the court.

20 The judges need to be educated.
21 Judges need to know owning a car does not
22 disqualify you, owning a house does not
23 disqualify you.

24 As far as this thorny issue of
25 spouses, kids, I leave that to you. I

1
2 understand both sides of that argument,
3 but I find a frightening lack of
4 understanding among many of the judges as
5 to exactly what it means to be eligible
6 for assigned counsel services.

7 With that, I'll say thank you.

8 MR. WIERSCHEM: In the arraignment
9 part B, a defendant goes the six week
10 period. What happens? They show up,
11 they're offered a plea. If they adjourn
12 it to see if they can get an attorney
13 assigned, where do they go, who do they
14 talk to?

15 MR. MOSTON: When a case is
16 originally arraigned in B, there is an
17 attorney present from Eighteen B. The
18 case gets adjourned to the private part,
19 private counsel part, and then the case
20 gets called.

21 Occasionally it gets disposed in
22 the manner I described or the judge will
23 then at that point do the screening, do it
24 then and then the case will get adjourned
25 for another five or six weeks to a Legal

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Aid part. That is where we find out that we got that client.

Nobody has told us up to that point. Surprise, surprise.

MS. WARTH: I appreciate your comments, particularly because you've seen three different methods of screening, so your insight is incredibly valuable to us.

I would like to try to dig in a bit -- a little bit deeper into the Screening Bureau and your thoughts on how that worked. If I'm correct, I take it from your comments that the Screening Bureau initially was created with the idea that Legal Aid was screening in too many people and the Screening Bureau would reduce the costs to the county, but that didn't happen.

MR. MOSTON: There was a perception; we were taking in too many cases when doing our own screening. Within a very short period of time within the Screening Bureau, the caseload went up. That wasn't true. I think we had to

1
2 get re-funded attorneys put back on staff.

3 The Screening Bureau operated okay
4 for a while. The reason why it was okay
5 and not great was because of personnel.
6 We would on occasion get a client come to
7 our door and say "the Screening Bureau
8 says I'm not qualified. I really can't
9 afford counsel."

10 We had a relationship with the
11 Screening Bureau at that time that we
12 could pick up the phone, "Could you take
13 another look at this guy? We believe he
14 does qualify."

15 In that situation, almost
16 invariably they would find this client
17 qualified and ultimately we would be
18 assigned. You put a more hostile group as
19 a third party administrator, you're not
20 going to get that result, especially if
21 you put in law enforcement, which I think
22 would be disaster.

23 MS. WARTH: Probation is aligned
24 with law enforcement?

25 MR. MOSTON: They have badges.

1
2 They're on the other side of the "V" in
3 the People against, and they just don't
4 belong in that process.

5 MS. WARTH: From your perspective,
6 part of what worked well with the
7 Screening Bureau, it wasn't aligned with
8 law enforcement, it was in the executive,
9 but personnel who had a mentality of
10 really trying to understand what the right
11 to counsel meant.

12 MR. MOSTON: And also were
13 sensitive to the court's need to move the
14 cases. That is a big factor on what goes
15 on in a county like Nassau.

16 We're handling many thousands of
17 cases a year. Judges in arraignment
18 court, by and large, want the case to
19 move. Judges in family court, by and
20 large, want the case to move.

21 They need lawyers in order for that
22 to happen, so that, generally speaking,
23 attorneys will -- we will get assigned
24 appropriately, but in many instances when
25 that doesn't happen, there are big holes

1
2 in the system as we've described.

3 MS. WARTH: Anything from your
4 experiences that didn't work well with the
5 Screening Bureau?

6 MR. MOSTON: Not really.

7 That issue of confidentiality with
8 the paperwork never materialized, but it
9 was all a question of cultivating a
10 relationship with the screeners to make
11 sure they were acting in the best
12 interests of everybody, and I have to say
13 it wasn't terrible.

14 It was expensive. I don't think
15 the county saved any money. They were
16 spending, I believe in 2001 when it went
17 out of business, a quarter of a million
18 dollars a year on it. I think that
19 ultimately the county probably broke even,
20 maybe came out a little ahead by
21 eliminating it, but it worked because the
22 person who was administering at the time
23 was properly focused.

24 MR. NOISETTE: I have a question.
25 You say that the number of people deemed

1
2 eligible once the Screening Bureau got
3 created was, if not similar to Legal Aid's
4 determinations, but higher perhaps. So I
5 guess I'm trying to understand this
6 question of what entity ought, in fact, to
7 do the screening.

8 It sounds like the Screening Bureau
9 and Legal Aid must have been using very
10 similar criteria, and so as you think
11 about this question of who, in fact,
12 should do the screening, the attorney or
13 an independent agency, if I thought I
14 heard you correctly, you seemed to be
15 inclined to lead toward an independent
16 agency or not?

17 MR. MOSTON: Right on the fence on
18 that, because I could tell you that we
19 lucked out with the Screening Bureau as it
20 was created at that time.

21 The Screening Bureau has a conflict
22 also, just like we would have one if we
23 were doing to screening. Their conflict
24 is they're looking to save the
25 municipality money, so they have a

1
2 financial interest in turning clients
3 away. If it is not explicit, it is
4 implicit in how that process takes place.

5 We experienced that because as
6 things developed with the personnel there,
7 we had a different result, but that
8 certainly wasn't guaranteed.

9 MR. NOISETTE: One last question.
10 You talked about this form that is
11 currently being used. It's a question of
12 how much the judges then rely on the
13 information on the form.

14 In your estimation, is the problem
15 that you're describing with the
16 information that is collected itself or
17 the inconsistent use of the information
18 related?

19 How similar is the information that
20 is collected on the current form to what
21 either Legal Aid used to do or the
22 Screening Bureau used to do?

23 MR. MOSTON: We had a multi-page
24 form in the old days, as did the Screening
25 Bureau. This is the one-page form

1
2 designed for speed. They wanted to get
3 the guy arraigned, get counsel assigned,
4 get the case on the way through the system
5 as quickly as possible.

6 Some of the judges I don't believe
7 even looked at it. Some judges looked at
8 it and ignored it. Some judges have their
9 own standards as I described, so we have a
10 very uneven result.

11 We have one judge rejecting
12 thirty-two percent of the clients who are
13 asking for assigned counsel. With
14 everyone, it's a total of seven percent.
15 Something is wrong there.

16 MS. GERSON: Are you finished?

17 MR. NOISETTE: Yes.

18 MS. GERSON: Seems like you have
19 one judge who is an outlier. Get rid of
20 that judge, you're not really having a
21 problem.

22 MR. MOSTON: Well, up until that
23 judge's appointment, which was recent,
24 things were going okay. They were.

25 We're bringing an Article 78 to try

1
2 to correct problems that we're having, but
3 that is not to say you're not going to get
4 another judge who does exactly the same
5 thing because of just a lack of education,
6 for lack of a better term, for the judges.

7 I mean, it is not just other
8 judge's use language that's very sloppy
9 also; indigency as opposed to ability to
10 retain counsel. They talk about
11 homeownership, they talk about bond, "you
12 posted bail, seventy-five hundred dollars
13 bail, you have to go get your own lawyer."

14 MS. GERSON: They're making those
15 decisions and denying assigned counsel.

16 MR. MOSTON: On occasion, not to
17 the extent I'm having with this judge.

18 MS. MACRI: In your experience,
19 this idea that when the judge makes this
20 determination of eligibility that, in
21 fact, they have information available in
22 terms of setting bail, have you seen any
23 correlation where bails possibly could be
24 set higher and it could be related, "we
25 have somebody with a lot of money

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accessible to them"?

Is that something you might have seen?

MR. MOSTON: That is a whole other issue but, yes. There are times when a prosecutor will say "how much money do you have" before making a bail recommendation.

The question is how much money do we deserve to keep this person from jumping bail?

MS. MACRI: In that April thirteenth case that you're referring to, how many -- I know you said eventually you got back on after you had been removed.

MR. MOSTON: When that judge left the part, probably a month.

MS. MACRI: We had at least a month delay?

MR. MOSTON: Yes.

That is something else, the whole notion of assigning counsel subject to, which is okay, but it's very important that that assignment be something more than just in name only. There are things

1
2 that need to be done on cases,
3 investigations that need to take place.

4 You got a client with mental
5 illness issues, that person needs to be
6 dealt with, serviced. We have social
7 workers in our office that jump on that
8 kind of thing. You have alibi's that need
9 to be run down.

10 A lot of things need to be done
11 after arraignment before the first court
12 date, especially if the person's out and
13 the first court date is five to six weeks.
14 There needs to be follow up by the
15 attorney who is doing the arraignment.

16 Also, it hasn't been mentioned,
17 attorneys in arraignment make strategic
18 determinations whether or not to make a
19 felony demand one eighty eighty.

20 Different attorneys have different
21 attitudes about what happens in a
22 particular case. Our lawyers are
23 instructed on how we approach a problem.
24 If another attorney gets retained or
25 assigned in the future, he may say "why

1
2 did you do that? You shouldn't have." We
3 say "yes, we should," but reasonable minds
4 will disagree. We have discussions about
5 that.

6 It is important that there be
7 continuity, and I think that if you look
8 at it, if there is some fifty-one,
9 forty-nine situations, go in favor of
10 assignment, not in favor of delaying and
11 looking to the guy's record.

12 MS. MACRI: You mentioned this form
13 gets filled out and sent -- given to the
14 judge. The judge either looks at it or
15 doesn't, what have you. Legal Aid fills
16 out the form?

17 MR. MOSTON: We're in the pen. We
18 tell the client "this piece of paper is
19 asking some questions. Hand it up to the
20 judge." The client is aware. It's not a
21 great situation.

22 We took on this responsibility
23 reluctantly but are leaned on by the
24 administrative judges.

25 MS. MACRI: This idea of having to

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2 share this confidential information with
3 the judge, have you had circumstances
4 where after doing so, that that
5 information has been read out into the
6 record or discussed openly in open court
7 in terms of what was --

8 MR. MOSTON: On occasion a judge
9 will say, "I see here you claim that you
10 blah, blah, blah," but we have never had a
11 situation -- I have to say never -- where
12 that information came back to haunt a
13 client, either in a criminal prosecution
14 or in any other collateral way. That has
15 not happened.

16 MR. NOISETTE: Thank you.

17 The next speaker is Laurette Mulry,
18 Assistant Chief Attorney in Charge, Legal
19 Aid Society of Suffolk County.

20 MS. MULRY: Good afternoon. I'm so
21 happy to follow my dear friend from Nassau
22 County, Kent Moston, who I hold in the
23 highest regard. I'm Laurette Mulry,
24 deputy attorney in charge of the Legal Aid
25 Society of Suffolk County and I'm here

1
2 with my esteemed colleague, Mr. Sabato
3 Caponi. He has our East End Bureau.

4 We are here today specifically to
5 give testimony with regard to the
6 procedures in place right now in Suffolk
7 County for screening, both in family court
8 as well as the criminal division.

9 I handle the family court side and
10 I'll yield to Mr. Caponi to discuss the
11 criminal division in terms of screening.

12 First at the outset I would like to
13 make a comment on the standards or
14 guidelines or threshold, if you will, and
15 what I would like to say is I hope that --
16 I certainly am not going to make a
17 recommendation or suggestion, I leave that
18 to the fine individuals on this esteemed
19 panel with the benefit of all testimony
20 that you heard thus far -- but I would
21 like to say whatever standard that you do
22 come up with, that I hope it will be
23 county-specific, because I do feel that
24 especially here in Suffolk County, the
25 cost of living in this county is much

1
2 different than other counties upstate. I
3 do feel that has to be taken into account.

4 I do feel there are other factors
5 also that have to be taken into account.
6 I would hope whatever threshold you
7 determine, I would like that word
8 threshold. I do think there are certain
9 presumptions that you can make from
10 anything below that, but look at it as a
11 threshold, not a wall, something you can
12 pass over to make other inquiry into the
13 wherewithal or ability to afford counsel.

14 I think that you definitely need to
15 take into account the complexity of the
16 individual case, the cost and locality for
17 hiring a private attorney for that case.
18 Think about what the duration of that case
19 will be. These are all factors that are
20 very important as to whether that
21 individual will be able to afford that
22 case now and in the continuing months to
23 come.

24 Let me discuss the procedures that
25 Legal Aid employs for conducting alibility

1
2 screenings in family court. By the way,
3 we were asked to do that several years ago
4 by Judge Freundlich. That is something we
5 have been doing as a courtesy to the
6 court, to provide that information.

7 I do appreciate the comments of
8 Judge Crecca when he said that the judges
9 have to have that information available so
10 they can make an informed decision. We do
11 believe that, but the information that we
12 gather we put together as a recommendation
13 to the court and purely that.

14 We give a recommendation as to
15 whether we feel this individual is able to
16 afford counsel or is unable to afford
17 counsel, sticking very closely to what the
18 Family Court Act specifically says.

19 In the instance when somebody comes
20 to family court and says that they cannot
21 afford counsel, "I don't have an attorney,
22 I would like to have counsel appointed for
23 me," in some instances the family court
24 judges will make an inquiry for their own
25 purposes and then assign or not assign.

1
2 In most cases family court judges, support
3 magistrates or referees will send them to
4 Legal Aid in this courthouse and also in
5 Riverhead in the Cromarty Complex, and at
6 that point we have individuals, an
7 investigator and client advocate here and
8 investigators in Riverhead, who conduct
9 eligibility interviews.

10 The client advocate here and
11 investigator in Riverhead are Spanish
12 fluent and able to conduct these
13 interviews with individuals Spanish only
14 speaking or English proficient. I do
15 think that is very important. That is by
16 virtue of assistance we had from the
17 Office of ILS when they come to our
18 office.

19 We have an intake form. The
20 individual first fills that out with
21 identifying information, questions having
22 to do with family members, dependents. It
23 takes into account household size and
24 questions about income, those questions.

25 Now that application form then goes

1
2 in with the investigator or client
3 advocate, whoever is conducting that
4 one-on-one interview. That person now
5 will look at the totality of the
6 circumstances for this individual, and
7 they may or may not ask for more verifying
8 information.

9 Certainly if they say they're on
10 public assistance, right off the bat we
11 ask for proof of that, SSI, SDD, food
12 stamps, etc. Further inquiry might be
13 taken into if there is income, what type
14 of income, do you own a house, own a car?
15 These things may be asked, but it's looked
16 at in the totality of the circumstances.

17 At the conclusion of that
18 interview, a recommendation is then made
19 to the court. It's purely a
20 recommendation. If the individual then is
21 deemed to be unable to afford counsel,
22 that is then presented to the court, and
23 the court makes the ultimate determination
24 as that is the judicial authority whether
25 or not to assign counsel. Legal Aid steps

1
2 in and will be available for an
3 assignment.

4 Those papers -- by the way, any
5 eligibility or intake forms are not
6 provided to the court nor is there any
7 verifying information provided to the
8 court. That is shown to the person that
9 is doing the interview. No copies are
10 kept, nothing is maintained on the file
11 except for the intake form at that point.

12 I'll tag team with Mr. Caponi to
13 talk about the eligibility process in the
14 criminal division.

15 MR. CAPONI: As I explained to some
16 members before, to really understand
17 Suffolk County you need to think of it in
18 terms of two separate entities; the five
19 western towns, which we out east call up
20 island, and the five eastern towns.

21 For the five western towns of
22 Suffolk County, we have nothing to do with
23 eligibility interviews on criminal cases.
24 If you are in custody, the probation
25 department conducts those interviews at

1
2 the same time they conduct an interview on
3 an instrument that is designed to predict
4 your flight risk.

5 If you're out of custody, the
6 judges conduct the interview on their own.
7 On the western end of the Island, we're
8 not involved.

9 For the eastern five towns of the
10 Island, it's different. There we conduct
11 the interviewing very similar to what is
12 done in family court. We have a two-page
13 form that's relatively simple. It asks
14 basic biographical information, financial
15 information, assets, income, employment,
16 family size, it goes into recurring debt.

17 At that point, we will make a
18 recommendation to the court. They will
19 make the final decision and either follow
20 or not. We do not initiate that process.

21 By the way, the client will go to
22 the court, qualify to be screened for
23 Legal Aid or indicate their inability to
24 afford counsel, and the judge will refer
25 them to be interviewed to our office.

1
2 How frequently that occurs with
3 different judges, that varies. I agree
4 with Judge Crecca. I believe that to a
5 judge, pretty much everyone in Suffolk
6 County would prefer that litigants have
7 counsel. I guess I agree in terms of
8 whether or not there is a person in the
9 county regarding assignment of counsel,
10 it's no pervasive but exists.

11 I've been in courts where judges
12 respond to litigants requesting counsel
13 and tell them "looks like these earrings
14 were made out of diamonds, or that
15 necklace, sell that jewelry and hire an
16 attorney."

17 I've been in courtrooms where if it
18 becomes clear that the client wants to
19 proceed to trial, is not willing to take a
20 negotiated disposition, the Legal Aid
21 Society is relieved because of that. Now
22 the person's forced to retain counsel.

23 I've seen situations where when
24 litigants make a request for counsel, the
25 judge says "you look like you're

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able-bodied, go out and get a job, hire somebody." These things do occur.

I'm not trying to portray a pervasive problem in the county, but it does exist and persists because the examples I'm giving you go back as far as eighty-eight, right up until last week. It's not a problem that is going away.

That is the process we use right now.

MR. NOISETTE: I had a question. Both of you sort of have stressed that your recommendation is just that, a recommendation.

I'm assuming that your recommendation is based on some guidelines or criteria that you have developed and have your staff developing. Therefore, it's a recommendation that you believe in.

What happens when your recommendation is not followed? Is there a role for you, a process by which you suggest that that recommendation be reconsidered or reviewed or is it over

1
2 once you make the recommendation and the
3 judge says thumbs up or thumbs down?

4 MS. MULRY: If that recommendation
5 is not followed, we do tell the client,
6 litigant, at that point that they really
7 should try to retain counsel. We give
8 them -- there is a form that does have a
9 lawyer referral service, Suffolk County
10 Bar Association, their number and advise
11 them to try to retain counsel, but we tell
12 them if that does not work out, you can't
13 -- you can make application to the judge
14 and ask again in the future to be
15 reassessed for assignment of counsel.

16 They do know that.

17 MR. CAPONI: It works differently
18 on the East End. Basically the judge
19 tells the individuals they need to go out
20 and get an attorney. After three, four,
21 five appearances without an attorney, they
22 just assign us. That is generally the way
23 it works, rather than we consider a person
24 eligible that they're going to be able to
25 go out and retain an attorney.

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MR. NOISETTE: Just a delay.

MR. CAPONI: It drags things out until finally the judge gives up and assigns us.

MS. MACRI: This pertains to the west end with probation being involved in the process.

When they're doing the determination of eligibility involved in that process, probation did you also say that they're also involved at that time in determining flight risk?

MR. CAPONI: Same instrument. They have one instrument they use which gathers geographical and financial information about the client. At the same time, they use that information to categorize the potential flight risk of the likelihood to return to court to a numeral value. A lot of time it overlaps.

It's a four or five page document they put together. Then that document is submitted to the court with copies to us.

MS. MACRI: As a follow up to that,

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2 is the individual made aware that when
3 they're meeting with probation, they're
4 sort of there for a multi-purpose
5 function, which is one, to determine if
6 they should be assigned counsel and two,
7 they're interviewing for a determination
8 or recommendation to the court about bail?

9 MR. CAPONI: In all honesty, I
10 don't know how the probation department
11 prefaces it. I've never been there when
12 they began that type of interview.

13 MR. NOISETTE: Thank you very much.

14 Next is the Amol Sinha and Jason
15 Starr.

16 MR. SINHA: I'm Amol Sinha,
17 Director of the Suffolk County Chapter of
18 the Civil Liberties Union. I'm joined by
19 Jason Start, Nassau County Chapter
20 Director. We are attorneys, chapter
21 directors. We work on a wide variety of
22 issues including criminal justice reform.

23 The New York Civil Liberties Union
24 is an affiliate of the American Civil
25 Liberties Union, a not-for-profit,

1
2 nonpartisan organization with eight
3 offices across the State and nearly fifty
4 thousand members. Our mission is to
5 defend and promote the principles, rights
6 and constitutional values embodied in the
7 Bill of Rights of the US Constitution and
8 the Constitution of New York.

9 On Long Island, we've had a
10 presence here in both counties for over
11 fifty years. We focus on a number of
12 issues, including ensuring fairness in the
13 criminal justice system, ending mass
14 incarceration and preventing punishment of
15 people because they're poor. We are
16 counsel to the class of criminal
17 defendants who are eligible for public
18 defense services in five counties --
19 Onondaga, Ontario, Schuyler, Washington
20 and here in Suffolk County.

21 The settlement of our litigation,
22 as you know, protecting those defendant's
23 rights to counsel gave rise to the mandate
24 for ILS to create statewide eligibility
25 standards and a plan for ensuring quality

1
2 and fairness in other aspects of the
3 indigent defense system.

4 No criminal defendant may be denied
5 counsel by reason of a defendant's
6 inability to pay for a lawyer.

7 Professional standards define such a
8 person as who cannot afford counsel
9 without substantial hardship and
10 specifically note that the defendants
11 should not be denied on the basis of the
12 finances of friends or family because bond
13 has been posted or because the person is
14 able to pay part of the cost of
15 representation.

16 Nor should access to justice and
17 fairness of the process depend on the
18 county the defendant is in. Statewide
19 standards for determination of eligibility
20 for counsel are needed to ensure fairness
21 in the process and prevent wrongful
22 denials of counsel.

23 We believe that statewide standards
24 are needed to prevent wrongful denial of
25 counsel. In the vacuum created by the

1
2 lack of statewide standards, criminal
3 defendants who cannot afford counsel are
4 denied access to publicly funded
5 attorneys.

6 In the NYCLU's investigation of
7 public defense services across the state,
8 including Suffolk County, we documented
9 policies that on their face deny counsel
10 to people who cannot afford a lawyer.

11 When the NYCLU filed the
12 Hurrell-Harring lawsuit, we found that
13 Suffolk County eligibility determinations
14 were made on the basis of a defendant's
15 income and the value of any assets that
16 the applicant owned, without accounting or
17 any of the applicant's debt, the amount of
18 equity in any assets, other financial
19 obligations or the actual cost of
20 retaining a private attorney to defend
21 against a charge.

22 In both Suffolk and Nassau
23 Counties, defendants under the age of
24 twenty-one have often been disqualified
25 based on personal income, regardless of

1
2 whether the defendant was estranged from
3 his parents or if the parents refused to
4 pay.

5 In one case, a Suffolk County
6 defendant was denied appointed counsel
7 because the court determined that his
8 weekly after-tax income of approximately
9 three hundred eighty dollars was
10 sufficient to afford an attorney.
11 However, the court did not inquire into
12 the defendant's financial status, family
13 obligations or actual ability to pay. He
14 was forced to choose between paying rent
15 and paying to retain an attorney, and the
16 defendant chose to pay rent and proceed
17 without counsel.

18 As other people highlighted, the
19 absence of objective, statewide
20 eligibility standards often leads to
21 irrational, ad hoc denials of appointed
22 counsel. Our investigation found that
23 judges in Suffolk County justice courts
24 routinely made eligibility determinations
25 based on arbitrary and subjective

1
2 standards, resulting in the denial of
3 counsel for individuals who should have
4 been found eligible for defense services.

5 We also believe that statewide
6 standards are needed to ensure fair
7 process. Eligibility standards must focus
8 not only on who is eligible but also on
9 how determinations are made.

10 Too often the NYCLU have identified
11 defendants who spend days or weeks in jail
12 without meaningful contact with their
13 attorney pending a decision on their
14 financial eligibility.

15 Until it was recently declared
16 unconstitutional, one county's provider
17 expressly prohibited defense counsel from
18 undertaking work on behalf of
19 non-incarcerated clients until the program
20 administrator issued a financial
21 eligibility determination, a rule that
22 resulted in the denial of counsel in
23 critical early stages. If counsel is
24 denied, the defendant loses his liberty.

25 One speaker mentioned the appeals

1
2 process as a potential remedy. Obviously
3 you would need a lawyer to represent you
4 in the appeals process.

5 In order to prevent delays in
6 representation, standards should require
7 that all criminal defendants be
8 presumptively deemed eligible. That
9 representation should not be delayed
10 pending a final determination and that
11 final eligibility determination is being
12 made as soon as practical.

13 In response to calls for reform, it
14 is often asserted every defendant who
15 cannot afford a private attorney will
16 eventually get a public defender or
17 assigned counsel. Providers often say
18 that, notwithstanding the absence of
19 formal policies or identifiable systems,
20 some of which we've heard about today that
21 existed in Nassau and Suffolk Counties,
22 their default is simply to represent any
23 client without a private lawyer at least
24 at arraignment.

25 Judges often note they have no

1
2 desire to allow a case to drag on while a
3 defendant tries in vain to find a lawyer
4 who he can afford, but there are four
5 reasons why this assertion underscores
6 rather than undercuts the need for
7 meaningful reform in terms of eligibility
8 standards.

9 First, ILS should not accept such
10 representations unless they're actually
11 backed up by data. Time and again in
12 investigations across the state, we've
13 heard this sentiment repeated in places
14 where one could find anecdotal evidence of
15 wrongful denial of counsel, including
16 instances where uncounseled guilty pleas
17 were accepted by the court.

18 While it is plausible that many
19 judges default to appointing counsel for
20 the sake of judicial economy, it is also
21 plausible that defendants who are wrongly
22 deemed ineligible for counsel quickly
23 plead guilty and thus conserve judicial
24 economy at great expense to justice or are
25 pressured to proceed pro se when they

1
2 would be eligible for assigned counsel.

3 While it is also plausible that
4 many institutional defendants default to
5 representing unrepresented defendants in
6 arraignment sessions, sadly there remains
7 across the state a significant number of
8 arraignments not covered by institutional
9 defenders. As one of the previous
10 speakers noted, in Nassau County virtually
11 all defendants charged with violations of
12 local law are unrepresented at arraignment
13 by the architecture of the system.

14 It is also plausible that following
15 arraignment, pressures to keep caseloads
16 down result in post-arraignment
17 eligibility decisions that wrongfully
18 terminate representation. I think Mr.
19 Moston gave examples happening in Nassau
20 County.

21 ILS should not base policy
22 decisions on plausible theories but actual
23 verifiable evidence. I'll give you an
24 example of the need for better data to
25 test the assumption of default public

1
2 defense representation from Suffolk
3 County.

4 The conventional wisdom is that the
5 Suffolk Legal Aid Society, if anything,
6 represents too many defendants, including
7 some who might be able to afford private
8 attorneys. This assumption seems to be
9 based on the Legal Aid Society's
10 well-deserved reputation as an
11 organization that strives to meet their
12 clients' needs under difficult financial
13 constraints.

14 Yet data produced to the NYCLU by
15 the OCA shows an inexplicably high number
16 of pro se criminal defendants in Suffolk
17 County, ten thousand five hundred
18 sixty-two in calendar year 2010, primarily
19 misdemeanor cases amounting to more than a
20 third of the total criminal cases in the
21 county and more than the annual caseload
22 of the Legal Aid Society and the county's
23 assigned counsel program combined.

24 If accurate, this data challenge
25 the notion that Legal Aid serves as the

1
2 default provider of representation in
3 Suffolk County and raises question about
4 whether eligible criminal defendants are
5 being denied or dissuaded from exercising
6 their constitutional right to counsel.

7 Again, we want to know that these
8 are decisions at least, in the western
9 five towns, they are being made by judges.

10 Those who make this representation
11 often leave out indigent defendants who
12 are not incarcerated at arraignment. That
13 is a population that should, according to
14 the presumption of release in New York's
15 bail statute, include the vast majority of
16 misdemeanor defendants.

17 Unlike defendants in jail,
18 defendants at liberty are generally not
19 presumptively represented by public
20 defense counsel. Judges in those cases
21 have less incentive to cut short a cycle
22 of adjournments by overriding a previous
23 eligibility denial to appoint counsel or
24 may feel freer to accept pro se
25 representation.

1
2 I want to stress that misdemeanor
3 defendants at liberty have no lesser right
4 to counsel than any other criminal
5 defendant.

6 Third, even if judges eventually
7 appoint public defense counsel, initial
8 denials result in delays in the provision
9 of counsel. Clients are in limbo,
10 searching for an attorney they can afford,
11 even if the futility of this search
12 becomes evident to the court and counsel
13 is appointed at some later time.

14 That delay, in and of itself, is a
15 deprivation of the right to counsel during
16 the critical pre-trial stage prior to the
17 trial. I refer to Mr. Moston's comments
18 of things that need to happen after
19 arraignment.

20 Finally fourth, if it were true
21 that in practice all eligible people
22 receive representation, then implementing
23 rational state-wide standards would do no
24 harm. Standards will bring greater
25 confidence in the defense system,

1
2 eradicate the risk and the perception of
3 arbitrary and unwarranted denials and do
4 so at no additional expense to the
5 counties who continue to bear the cost of
6 the funding representation for the poor.

7 In conclusion, we want to thank
8 you, the ILS, for the opportunity to offer
9 testimony today on the importance of
10 statewide eligibility standards. We look
11 forward to continuing to work together to
12 insure that the criminal justice system
13 does not punish anyone because they're
14 poor.

15 MS. GERSON: Do you have any views,
16 either of you, on whether there should be
17 different criteria based on the county?
18 We have heard that Suffolk County has one
19 of the highest cost of living, or maybe
20 the highest, in the state.

21 Would you like to comment on that?

22 MR. STARR: What we really want to
23 see is sort of a comprehensive assessment
24 of the totality of the circumstances. I
25 do think that the cost of living is

1
2 relevant. That is going to be very
3 different downstate than maybe in some
4 places upstate.

5 Certainly the cost of finding
6 counsel -- attorneys' rates are different
7 here than in other places. I think there
8 needs to be a real individual assessment
9 of the individual's ability to pay.

10 I'm not sure if we've taken a
11 position that there should be
12 county-specific standards, but certainly
13 the locality is relevant if you're looking
14 at what it would actually cost for someone
15 to hire and retain counsel, and also what
16 the cost of living means for what their
17 real assets are and reasonable ability to
18 access assets to use to pay for an
19 attorney.

20 MS. MACRI: The information you
21 provided regarding pro se defendants,
22 could you give me as to when the time
23 frame was in terms of looking at that
24 tally, the amount that -- even if it's
25 approximate, if you know; it was a year

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study?

MR. STARR: The data in Suffolk County, that was from the year 2010. Looking at those were ten thousand five hundred sixty-two pro se cases during that calendar year 2010.

Again, that number was larger than the number of cases Legal Aid or assigned counsel received.

MS. MACRI: I apologize if you do or don't know this, do you know if these cases were cases you said referred to the west end, correct?

MR. STARR: Probably misdemeanor cases. I referenced the west end simply because in the criminal cases there, the judge is making the determination. I don't know how many of those came from the west versus the eastern five towns, but Legal Aid is doing some of the assessment in the east end.

We recognize that, but that, you know, probably a vast majority are coming from the western five towns where it's

1
2 individual judges.

3 MR. NOISETTE: We have concluded
4 the ones that were on our list.

5 Anyone else in the audience that
6 would like the opportunity to come and
7 make remarks, we invite you to identify
8 yourself now.

9 MR. NIGRO: Robert Nigro,
10 Administrator Assigned Counsel Defender
11 Plan in Nassau County. I thought if there
12 were any questions in light of testimony
13 that has come before you, any questions
14 with respect to how the Eighteen B plan
15 works in Nassau County and qualifies
16 individuals for these benefits, I would be
17 happy to answer any.

18 MS. MACRI: Thank you for taking a
19 few moments to join us and allow us to
20 offer some questions to you.

21 MR. NIGRO: It cuts two ways in my
22 mind. I don't want to appear that the
23 Nassau County Eighteen B plan is looking
24 to cut people from that availability of
25 the benefit. However, we have our own

1
2 view of what we should be involved in in
3 that plan, and it has to do with the
4 integrity of that system and the viability
5 of it.

6 Any questions you have?

7 MS. MACRI: In terms of the process
8 itself, is it done -- do you share the
9 information? We've seen in other places,
10 other counties encountered situations
11 where the institutional provider will do
12 it one way and the assigned counsel
13 program will be required to submit to the
14 process another way.

15 What I mean by that, for example,
16 in some cases, institutional providers
17 will do the determination of eligibility,
18 maintain that information and make
19 assurances to the court that individual
20 should have assigned counsel versus the
21 assigned counsel being required to gather
22 this information, share it with the court
23 and, again, get feedback from the court.

24 Is that the kind of --

25 MR. NIGRO: As Mr. Moston

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2 explained, screening is done by the
3 judges. There was attempts in the past by
4 the administrator in my office to take
5 that question back to the county attorney.
6 It was decided by prior administrators and
7 continued by the present administrator,
8 they would leave it to the judges.

9 We don't do any screening on behalf
10 of Eighteen B, the same way Legal Aid does
11 not do it on behalf of Legal Aid. We do,
12 however, provide annually a chart based
13 upon Mr. Gradess' invaluable advice with
14 respect to what the federal poverty
15 guidelines are showing, depending upon
16 income by an individual, how many members
17 of a household, what the presumptive
18 levels of eligibility would be.

19 We have multiplied that out by two
20 hundred fifty and three hundred percent
21 multiples, multi limits decided by the
22 judges to provide that number. We provide
23 that to the judges annually with a
24 one-page affidavit questionnaire, because
25 my contract with the County requires that

1
2 we have the individual sworn but it is
3 left up to the judges to do that.

4 That's because, I think, if someone
5 does seek to have that benefit and lies,
6 they could be prosecuted for perjury.

7 MR. NOISETTE: Maybe I'm not
8 understanding. This data, this report
9 that you're describing, is that based on
10 attorneys involved with your plan
11 gathering that information?

12 MR. NIGRO: We don't gather any
13 information. I provide to the judges,
14 supervising judges of all the courts in
15 Nassau County a sheet they can use to
16 determine eligibility. It shows the
17 poverty level, different amounts of income
18 members of the household. They can figure
19 out if someone makes twenty-five thousand
20 dollars but there are five members of the
21 household, they would be eligible.

22 MR. NOISETTE: You just give them
23 data to help the decision making?

24 MR. NIGRO: I spend more time
25 trying to figure out when someone is

1
2 entitled to the benefit as opposed to who
3 is entitled.

4 MS. MACRI: Could you elaborate?

5 MR. NIGRO: There are issues the
6 respect to the scope of the law in New
7 York. Professor Nevins is correct. There
8 are matters brought in the first district
9 court in Nassau County which have to do
10 with zoning matters.

11 With certain zoning matters, if you
12 violate them enough, there is a potential
13 jail sanction, but there's no provision in
14 Nassau County or anyplace else where those
15 judges have available to them assignment
16 of counsel to advise individuals that they
17 can have counsel. Out of sixty-one
18 village courts, maybe two or three do.

19 Judges seek to assign counsel for
20 matters in those courts. Many times they
21 pass them over to the other court, but
22 availability of counsel on a first
23 appearance in a lot of those courts is
24 going unrecognized.

25 It would be impossible to have

1
2 someone in those courts every night or the
3 nights, that I see.

4 MS. MACRI: In terms of have you in
5 your experience as administrator had cases
6 where you received phone calls or been
7 contacted where someone has been denied
8 eligibility of counsel and that somebody
9 is asking you to help that individual to
10 reapply to the court?

11 MR. NIGRO: No. Where we have been
12 contacted, usually in family court where
13 both sides know each other's finances,
14 where there have been complaints that an
15 individual receives assignment of counsel
16 and the other because they have different
17 financial situations were not, that caused
18 consternation on their part.

19 Not regularly, but I have not been
20 advised where someone was denied the right
21 to counsel, assignment of counsel in
22 Nassau County. We take very seriously
23 this should be a rotational system. A few
24 of the guidelines in Article Eighteen B,
25 the only way we can rotational number of

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2 judges -- we have all court parts -- we do
3 attorneys of the day, attorneys standing
4 by in arraignment A and now everyday of
5 the year in B, days they're open.

6 In the other court parts that get
7 cases from these parts, part nine, part
8 ten, eleven, twelve, DCM, attorneys are
9 assigned everyday to be available and
10 through the generosity of ILS, those
11 positions which are not statutorily
12 mandated are underwritten by the State.

13 That enables us to have a
14 rotational system so Professor Nevins and
15 her group can be there on certain days to
16 pick up cases. There is no delay with
17 assignment of cases.

18 Arraignment A is relatively new to
19 us. There we don't expect attorneys to be
20 assigned because staffing it with
21 qualified attorney, unless it's a major
22 felony or a homicide would be difficult.
23 There are other places judges can go to
24 get those attorneys.

25 By having attorneys of the day

1
2 funded by the State available everyday in
3 parts allows us to do a rotational system.
4 They get those assignments through a
5 lottery through my office, and they're
6 available every day in every part to take
7 those cases.

8 I don't think anyone that appears
9 in front of a judge gets conflicted
10 assignment of counsel. They get a
11 non-conflicted Eighteen B attorney to
12 represent them.

13 The continuation of representation
14 can be difficult with respect to
15 arraignment A because certain things can
16 happen, but in those situations one
17 eighty-eighty say, where there would be --
18 the DA's office would need someone to
19 speak to the next day before they put it
20 in the Grand Jury, courts have the ability
21 to find another attorney in another part
22 or off our list to have them available.
23 Continuation ultimately is solved.

24 That is how we do it.

25 MS. MACRI: Have you experienced

1
2 situations where there has been delay
3 based on determining eligibility during
4 that one eighty eighty period?

5 MR. NIGRO: No, because the DA's
6 office can contact the judge in charge of
7 the Grand Jury, and that judge will assign
8 an Eighteen B attorney from the list of
9 attorneys of the day or from our regular
10 list, either the defendant in the Grand
11 Jury or a witness in the Grand Jury which
12 isn't really provided for in the statute
13 but available in Nassau County.

14 MS. MACRI: That is done on a
15 regular basis where that would happen?

16 MR. NIGRO: Where they need to,
17 they have access to attorneys, but the
18 idea with respect to screening
19 individuals, I don't have an example,
20 except to the extent that when individuals
21 get a benefit they're not entitled to, it
22 calls into question the integrity of the
23 system.

24 I have also the responsibility of
25 maintaining panels of qualified lawyers.

1
2 I will have a hard time staffing those
3 panels when qualified lawyers with many
4 years experience feel that "this is too
5 much work for me to do with the amount of
6 respect I get and the low rate of pay."

7 I would like to have a system by
8 which they are assigned, have enough
9 integrity and they don't have to feel
10 they're being paid seventy-five dollars an
11 hour to represent somebody who they
12 believe can pay them three hundred
13 seventy-five.

14 I would like to see integrity. If
15 it means partial payment, maybe that is an
16 option, but I understand reservations with
17 respect to that. A system that maintains
18 integrity, I don't know that you will save
19 a lot of money with respect to having a
20 panel, but you will have an open
21 transparent process by which attorneys are
22 assigned.

23 Everybody can say this had to be,
24 this is what was necessary, not because it
25 was expedient or any other reason.

1
2 MR. NOISETTE: On that point, is
3 there a way or an effort to at all
4 document, identify how pervasive the
5 problem of people being able to hire an
6 attorney but nonetheless getting assigned
7 counsel is or is it anecdotal?

8 How might one know whether that is
9 a problem?

10 MR. NIGRO: I don't know how that
11 would be done. Individuals who are told
12 by judges they cannot have an assigned
13 attorney try to find one. They come back,
14 the attorney is assigned regularly, but I
15 don't know how that would work.

16 Thank you.

17 MR. DEMERS: Michael D-E-M-E-R-S.
18 I came here today just as a citizen. I
19 don't have the background that you folks
20 have, but I do have a finance and business
21 background.

22 Just sitting here today, the
23 importance I think is that in any system
24 is that each individual in that department
25 does function within their area of

1
2 expertise. I guess I'm a little concerned
3 why a judge would get into the financial
4 background of somebody in court,
5 especially on a fly.

6 Knowing -- I've been into some of
7 the courtrooms for traffic violations --

8 MS. MACRI: We've all been there.

9 MR. DEMERS: I see their caseload.

10 For them to now -- being my background is
11 finance, so an underwriter basically looks
12 at the financial's of an individual to see
13 if they qualify, whether it be for a car
14 loan or a house loan.

15 How a judge with his caseload would
16 be required to basically underwrite his
17 financial ability for a public defender,
18 to me, that befuddles me.

19 To have a probation officer who is
20 not an expertise in the field at all try
21 to say "you qualify, you don't qualify,"
22 if you were to look at me and I told you I
23 don't own a home, I make well into six
24 figures but I don't know own a home, part
25 of the criteria that a judge is making is

1
2 whether I own a home or not, then now says
3 you're okay for a public defender, it
4 would be sorely mistaken.

5 Being self-employed I can make my
6 tax returns say very, very small but my
7 gross receipts might be half a million.
8 To have somebody without qualifications to
9 make that underwrite whether they can or
10 cannot afford a public defender, I think
11 is sorely a misuse of their time.

12 He's gone now, but the gentleman
13 who was talking about a committee that
14 that is what their sole responsibility is
15 -- maybe have a form they review, a
16 mortgage application, what it states,
17 assets, liabilities. You can see it.
18 Then we provide supporting documentation,
19 a tax return, so you can see it, instead
20 of having somebody who has no experience
21 now maybe assign people, you know.

22 The public defenders office, they
23 have limited resources but now they're
24 having to represent people who could
25 easily qualify and afford a private

1
2 attorney. Now their resources are being
3 used for that individual.

4 I'm going to get a little personal
5 now. I have had a family member who we
6 believe was wrongfully judged. The public
7 defender didn't ask any pertinent
8 questions to the case when we later found
9 out could have very easily overturned it.

10 I really believe because the public
11 defender wasn't -- like any other
12 business, you can get the cream of the
13 crop or the bottom of the barrel. When
14 there is limited resources, you're going
15 to get people who are coming in and out of
16 the system, maybe using it as a stepping
17 stone and not really taking into account
18 every aspect of what happened to that
19 person, really digging in because it is a
20 stepping stone.

21 I think that can influence when the
22 resources aren't there because of not
23 being properly screened and having a judge
24 on the fly say "how much money do you
25 make, do you own your home, own a car?"

1
2 Now that's determining whether they have a
3 public defender or not instead of really
4 thoroughly having an understanding, not,
5 you know, if they have a quota, they get a
6 bonus per se. I heard that term used.

7 Just -- I think personally being in
8 business for many years, if they're just,
9 I don't know, hired to do that one thing,
10 not based upon a bonus from an outside
11 source where if they meet a criteria they
12 get a bonus, especially in the justice
13 system, there is no place for that.

14 When you hear of a payment plan,
15 paying an attorney outside the courtroom,
16 to me that is surely a conflict of
17 interest. How is that ever allowed?

18 I think, in my opinion, for
19 whatever it is, an independent counsel who
20 has the understanding and expertise to
21 look at a financial statement, say a
22 self-employed person, "I need a forty-five
23 zero six T." "Why do you want that?"
24 Somebody who has a financial background
25 can say "that is going to show me what you

1
2 really make." That can save in multiple
3 areas.

4 For whatever it's worth.

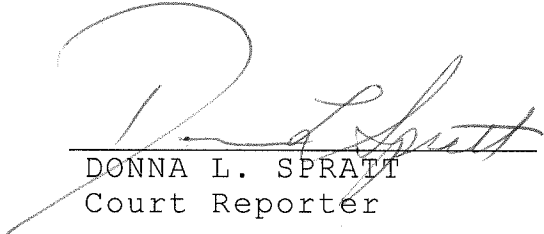
5 MR. NOISETTE: Thank you.

6 I think we'll adjourn. Thanks to
7 everyone for participating, for your
8 testimony and for your interest.

9 * * * * *

10 C E R T I F I C A T I O N

11
12 I, Donna L. Spratt, hereby certify that the
13 above and foregoing is a true and accurate
14 transcription of my stenographic notes.

15
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17 
18 DONNA L. SPRATT
19 Court Reporter
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