DETERMINING CLIENT ELIGIBILITY FOR APPOINTED COUNSEL: A STRATEGY FOR REFORM IN NEW YORK STATE

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INTRODUCTION

Throughout their history, publicly financed criminal defense services have experienced little organizational development. Unlike civil legal services, criminal defense services have developed primarily on the local level with little attention given to systemic issues, such as client eligibility. This paper reviews, the status of client eligibility decision making in New York State.[1] Although our fundamental contention is that the right to publicly financed counsel for all should exist in every jurisdiction which chooses to prosecute individuals for crime,[2] this paper focuses on defining eligibility for publicly financed counsel for those unable to afford counsel.

Over the past twenty-three years, issues relating to the right to counsel have proliferated. Much has been written on the scope of the right to counsel and the quality of representation provided by public defense services.[3] Yet, few studies have examined client eligibility standards closely; consequently,

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1. This paper does not reach many other important issues, such as: (1) What is the best model for delivery of criminal defense services? (2) Who should fund criminal defense services? (3) What is the appropriate role of the client community in the development of criminal defense services? and (4) How can criminal defense services more heavily influence the whole criminal justice system? These issues are of primary importance and should be addressed in future colloquia on public defense services.

2. This proposition flows logically from the general notion that where government pays for the prosecution of a criminal case, it should also pay for defense representation. Payment to prosecution and defense should be on the same basis, and services and resources provided to the prosecutor should be made equally available to the defense. The case for this proposition is made elsewhere. *See* Neuhard, *Free Counsel: A Right, Not a Charity*, 14 N.Y.U. REV. L. & SOC. CHANGE 109 (1986). It is only when this proposition is rejected for fiscal, political or practical reasons, that the issue of eligibility arises at all. *See also* Gammeltoft-Hansen, *Public Counsel for the Defense: The Danish System*, in THE DEFENSE COUNSEL 195 (W. McDonald ed. 1983).

3. The use of the phrase "public defense services" in this paper is meant to encompass systems providing counsel to the poor in criminal cases as required by the Constitution. In New

too often the issue of "inability to afford counsel" is transformed into an issue of "indigency."[4] A state of indigency, however, is not equivalent to being unable to afford counsel. One may be unable to afford counsel without being indigent. Factors such as the defendant's assets and debts, the seriousness and complexity of the case, the defendant's prior criminal history, and the average hourly fees of attorneys in the jurisdiction all affect the defendant's ability to afford counsel. Reliance on a standard of "indigency" leads to a consideration of a defendant's assets and debts exclusive of other important factors.

I
ELIGIBILITY IN NEW YORK STATE

New York State is comprised of fifty-seven counties and New York City, each with a unique public defense system. There is no statewide entity responsible for overseeing the functions of the county-based systems. Consequently, counties vary widely with regard to eligibility standards and processes for determining eligibility. One consequence of not having a uniform and coherent eligibility standard is that decision making is left to individual localities, which are plagued by shrinking revenue bases. Thus, there is continual economic pressure to reduce the scope of defense representation, with the eligibility determination process functioning as one of the mainstay tools for such reduction.

Eighteen New York State counties have adopted explicit "minimum" income allowance cutoffs below which a defendant is supposed to be presumed eligible for appointed counsel.[5] These "minimum" income allowances are, in practice, used as "maximum" income allowances above which a defendant is presumed ineligible for appointed counsel.[6] The cutoffs range from a weekly income of $47 per person to a weekly income of $176.[7] The remaining thirty-

York State these systems include public defenders, Legal Aid Societies, assigned counsel panels, or combinations thereof. *See* N.Y. COUNTY LAW § 722 (McKinney Supp. 1986).

For a review of the literature on public defense services, see, e.g., J.D. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE (1978); J.D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972); R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA (1977); THE DEFENSE COUNSEL (W. McDonald ed. 1983).

4. The Supreme Court has added to the confusion. It has used the term "indigent" interchangeably with phrases such as "unable to employ counsel", Powell v. Alabama, 287 U.S. 45, 60 (1932); Betts v. Brady, 316 U.S. 455, 457 (1942); and "too poor to hire a lawyer", Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

5. The counties with "minimum" income allowances are: Broome, Chenango, Columbia, Cortland, Erie, Franklin, Genesee, Greene, Monroe, Onondaga, Ontario, Orange, Orleans, Otsego, Rockland, Seneca, Suffolk, and Sullivan. Information on file at the New York State Defenders Association (NYSDA).

6. The degree to which the cutoffs are adhered to varies among counties. The Broome County Public Defender, for example, reports to the authors that he often provides services to defendants whose income exceeds the County's cutoff, while other chief defenders including those in Monroe, Chenango and Erie County, have reported strict adherence to the cutoffs.

7. The $176 cutoff is significantly higher than the average allowance of $105. It appears in

nine counties and New York City may have implicit income cutoffs used by particular judges, but these cutoffs have not been recognized by the counties.

II
ORIGIN OF INCOME ALLOWANCES

The origins of many of these income allowances exemplify the disarray inherent in the New York State public defense system. Some of the counties adopted their income cutoffs from standards set by the Third Judicial Department in 1977.[8] The Third Department recommended a net weekly income cutoff of seventy-five dollars, for a defendant with no dependents, as one of several factors to be considered in eligibility decision making. In setting the standard, the Third Department noted that in certain cases defendants with net weekly incomes in excess of seventy-five dollars may require appointment of counsel and that eligibility determinations must be individualized.[9] Nine years after the promulgation of these standards, four counties are still using the seventy-five dollars income cutoff, often exclusive of other factors, despite the fact that it was meant only as a general guideline.[10]

Another source of income cutoffs is the Legal Services Corporation (LSC) poverty guidelines. The LSC Guidelines are adjusted annually according to the official poverty threshold as defined by the Office of Management and Budget. The Legal Services Corporation's maximum income allowance ranges from 125% to 187% of the official poverty threshold. A person may be eligible for legal services despite income in excess of the maximum allowance if her unique financial problems warrant it.[11] In 1980, an upstate urban county with a Legal Aid Society carried over the LSC Guidelines to its criminal defense division. Thereafter, public defender offices in two other upstate

Genesee County, which periodically changes its cutoff to conform with the maximum income allowance under the Legal Services Corporation Guidelines.

8. New York State's Appellate Division is divided into four departments. The Third Judicial Department promulgated standards in a February 15, 1977 memorandum to all Third Department county, family, and city court judges; town and village justices in municipalities with populations over 10,000; county magistrates associations; public defenders; county bar associations; and administrators of assigned counsel plans.

9. It is clear, however, that this income cutoff was meant only to be a general guideline; other factors were and are required to be considered to ensure that those unable to afford counsel receive public defense representation. *See* Memorandum from Richard J. Comiskey, February 15, 1977, Third Judicial Department, and accompanying text entitled STANDARDS OF ELIGIBILITY FOR THE ASSIGNMENT OF ATTORNEYS TO REPRESENT INDIVIDUALS WHO ARE FINANCIALLY UNABLE TO OBTAIN COUNSEL.

10. Broome, Cortland, Franklin, and Otsego Counties are the counties which still use the Third Department's 1977 income cutoff.

11. Prior to 1984, the Legal Services Corporation Guidelines, 45 C.F.R. § 1611.5, stated that even if an applicant's income exceeded the maximum allowed, a Legal Services Corporation recipient agency could accept the case if special financial hardships existed, the cost of retaining counsel was beyond the means of the applicant or serious consequences would be likely to occur if counsel was denied. In 1984, § 1611.5 was rewritten to exclude considerations of the cost of retaining counsel and the consequences of denying counsel in situations where an applicant's income exceeds the maximum allowed.

counties, one urban and one rural, adopted the LSC income guidelines. Neither the criminal division of the Legal Aid Society nor the public defender offices, however, adopted the annual adjustment procedures of LSC. Thus, in 1984, all three counties still used the 1980 LSC maximum income allowance.[12]

The most alarming example of irrationality in the setting of eligibility guidelines occurred in the county with a fifty-seven dollars income cutoff.[13] There, the county court judge sought a concrete figure upon which to base his eligibility determinations for appointment of counsel. He requested the assistance of the county social service agency, which responded by supplying him with the average "standard of need" allowance of fifty-seven dollars for a family of one.[14] This fifty-seven dollar figure represents sixty-six percent of the gross income cutoff for public assistance.[15] Thus, a person may be eligible for public asistance in Chenango County and, yet be denied appointment of counsel on the basis of income. The irony of this situation is lost to county officials who simply state that the income cutoff is a "social service" standard.[16]

Ironically, the income cutoffs established by seventeen of the eighteen counties with income cutoffs are lower than those allowed under the LSC Guidelines. Therefore, in these seventeen counties, a person may receive public legal assistance in a civil matter but be refused representation in a criminal matter.

III
FACTORS CONSIDERED IN ELIGIBILITY DECISION MAKING

Little empirical research has been conducted regarding factors considered important in making eligibility determinations. Without clear eligibility guidelines, the potential for disparate decision making is great. The problem is especially acute in counties where courts either screen clients requesting counsel or serve as the sole arbiters of eligibility.

A preliminary study of this issue has been conducted as part of two larger studies of rural defense systems in New York State.[17] This study examined client and case factors considered by magistrates and judges making eligibility

12. The three counties are Genesee, Monroe, and Erie Counties. Genesee County has since increased its maximum to the 1983 level of the Legal Services Corporation Guidelines. Interview with the Genesee County Public Defender; information on file at the NYSDA.

13. Chenango County holds the dubious distinction of having the lowest income cutoff in the state. In 1984, the Chenango County Assigned Counsel Plan denied counsel to thirty-one percent of its applicants on the basis of non-indigency. Information on file at the NYSDA.

14. Telephone interviews with Linda Burke, Assigned Counsel Administrator, and Richard Breslin, an attorney in the Chenango County Department of Social Services (May 8, 1985).

15. The gross income cutoff is one hundred and fifty percent of the county's "standard of need." *See* 18 N.Y. ADMIN. CODE tit. 18, § 352.18.

16. *See* note 14, *supra*.

17. The two larger studies are assessments of the assigned counsel systems in Ontario and Clinton Counties. They have been undertaken by the NYSDA, at the request of the counties, as part of its contractual agreement with New York State to review, assess, and analyze the State's public defense system.

decisions in two counties where judges are primarily responsible for determining client eligibility.[18] Judges in both counties were asked: (1) the frequency with which they consider various factors in determining eligibility; (2) whether they use income cutoffs; and (3) the frequency with which they refuse to appoint counsel.[19]

18. The courts in both counties did the initial screening of clients, with periodic follow-ups conducted by the attorneys.

19. Their responses to these inquiries appear, in part, in Tables 1-3 below:

TABLE 1

"If you participate in the eligibility determination, please indicate which factors are considered in determining if an accused is unable to afford counsel."

	Usually or Always Considered	Sometimes Considered	Seldom Considered	Never Considered	Missing	Total
County "A"						
Cash and liquid assets	18 (100.0)	—	—	—	—	18 (100.0)
Ownership of real property	14 (77.8)	3 (16.7)	1 (5.6)	—	—	18 (100.0)
Debts	15 (83.3)	2 (11.1)	1 (5.6)	—	—	18 (100.0)
Living expenses	13 (72.2)	2 (11.1)	—	2 (11.1)	1 (5.6)	18 (100.0)
Resources of parent or guardian when def. is a dependent	5 (27.8)	7 (38.9)	2 (11.1)	3 (16.7)	1 (5.6)	18 (100.0)
Defendant's ability to make bail	11 (61.1)	2 (11.1)	1 (5.6)	3 (16.7)	1 (5.6)	18 (100.0)
County "B"						
Cash & liquid assets	8 (80.0)	1 (10.0)	1 (10.0)	—	—	10 (100.0)
Ownership of real property	9 (90.0)	—	1 (10.0)	—	—	10 (100.0)
Debts	9 (90.0)	1 (10.0)	—	—	—	10 (100.0)
Living expenses	8 (80.0)	1 (10.0)	—	1 (10.0)	—	10 (100.0)
Resources of parent or guardian when def. is a dependent	8 (80.0)	—	1 (10.0)	—	1 (10.0)	10 (100.0)
Defendant's ability to make bail	6 (60.0)	2 (20.0)	—	2 (20.0)	—	10 (100.0)

The judges frequently reported that the defendant's financial status[20] influences the eligibility decision.[21] The majority of judges in both counties noted that the defendant's ability to make bail usually or always affects the eligibility decision. Yet, national standards have universally dictated that a defendant's ability to make bail should not influence the judge's decision to appoint counsel, lest a defendant be forced to give up one constitutional right to gain another.[22]

The effect of the variation in factors allegedly considered in eligibility decision making is unknown. The magistrates and judges, however, did report significant variation in the estimated frequency with which they refuse to appoint counsel.[23]

Counties in New York State are in need of eligibility guidelines that are sensitive both to the defendant's financial status and to the probable cost of retained counsel. Unfortunately there has been little research done on the cost

TABLE 2

"Is there an income cutoff beyond which a defendant is not eligible for assigned counsel?"

	Percent Responding "Yes"
County A	33% (N=6)
County B	20% (N=2)

TABLE 3

"What percentage of persons requesting appointment (of counsel) are determined ineligible by you, without referral to an attorney?"

Percent	County "A"	County "B"
0 - 10%	10 (58.8%)	2 (40.0%)
11 - 20	0 (58.8)	0
21 - 30	2 (70.6)	1 (60.0)
31 - 40	1 (76.5)	0
41 - 50	2 (88.2)	1 (80.0)
50+	2 (100.0)	1 (100.0)
unknown	1 —	5 —
TOTAL	18 (100.0)	10 (100.0)

20. Judges in County A, however, varied considerably in their reported consideration of parental income.

21. Interestingly, only thirty-three percent of the judges in County A reported use of an income cutoff when, in fact, an income cutoff had been established in the county. In contrast, twenty percent of the judges in County B reported using an income cutoff, even though one was never promulgated by the County.

22. *See* STANDARDS FOR CRIMINAL JUSTICE § 5-6.1 (1982); THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS § 13.2; THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION § II(1)(b); and THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES § 1.5(a); *see also* Williams v. Superior Ct., 226 Cal. App. 2d 666, 38 Cal. Rptr. 291 (1964); Sapio v. State, 223 So. 2d 759 (Fla. Dist. Ct. App. 1969); People v. Valdery, 41 Ill. App. 3d 201, 354 N.E.2d 7 (1976); People v. Eggers, 27 Ill. 2d 85, 188 N.E.2d 30 (1963); McCraw v. State, 476 P.2d 370 (Okla. Crim. App. 1970).

23. *See* Table 3, *supra* note 19.

of private counsel in criminal cases.[24] Future research in this area should be directed toward obtaining hourly fees of experienced criminal defense attorneys, as well as the average number of hours spent on various functions in different kinds of cases that have gone to trial. The effect of a defendant's prior record on the cost of counsel should also be explored. It is important here to note that when estimating the probable expense of any case, the eligibility decisionmaker should presume that the case will go to trial. Clients who are denied counsel because they have enough funds to plea bargain, but not enough to take the case to trial, are in essence denied the right to counsel altogether.

IV

DEVELOPING ADEQUATE ELIGIBILITY GUIDELINES: WHO WILL TAKE THE LEAD?

Although the information needed to develop adequate eligibility guidelines can be clearly delineated, the impetus for change and who will act as a catalyst for reform are less certain. New York State law requires each county to establish a plan to ensure representation for defendants who are unable to afford counsel.[25] The pertinent statute, however, provides no guidance for determining client eligibility.[26] The court, of course, has the inherent power to provide publicly financed counsel to any defendant it deems unable to afford counsel.[27] The New York State Unified Court System, however, has never promulgated uniform client eligibility guidelines.[28] The inherent assumption of the court administration is that the problem of client eligibility can be resolved at the local level.

County governments are not likely to assume the lead because they have a political and economic interest in maintaining low-budget public defense systems. Local bar associations are also unlikely candidates for this job. Although the American Bar Association has been a strong supporter of pub-

24. The Maryland State Public Defender did conduct a survey of the cost of private counsel in the City of Baltimore during April, 1981. The average fee in misdemeanor cases was $373, while the average fee in felony cases was $2300. Similar research is presently underway in Massachusetts under the direction of the Committee for Public Counsel Services. Although these studies are steps in the right direction, future research needs to be more sensitive to the many other factors contributing to the cost of private defense representation.

25. N.Y. COUNTY LAW § 722 (McKinney Supp. 1986).

26. N.Y. COUNTY LAW § 722 offers almost no guidance for the implementation of the public defense system. It specifies three options for the structure of a public defense system (public defender, private legal aid society, or bar association assigned counsel plan), but it offers no guidance in regard to client eligibility, timeliness of entry of counsel, qualitative criteria for attorney participation in the public defense system, and supervision of the public defense system.

27. *See* Stream v. Beisheim, 34 A.D.2d 329, 333, 311 N.Y.S.2d 542, 547 (N.Y. App. Div. 1970).

28. As noted earlier, the Third Judicial Department did promulgate client eligibility guidelines in 1977. These guidelines, however, failed to incorporate consideration of the cost of retaining counsel. They also establish an arbitrary, albeit flexible, income cutoff and have not been revised since their inception.

licly financed legal services, local bar associations have generally opposed or remained neutral to the proliferation of these services.[29] Indeed, the legal services programs of the Office of Economic Opportunity were frequently "sold" to bar associations upon a promise that they would increase, not decrease, the number of fee generating cases for the private sector.[30]

Bar associations have also opposed group legal services for the middle class. State bar associations have litigated the legality of group legal plans, arguing that they violate professional ethics. Between the years 1963 and 1971, four Supreme Court cases held that rules of professional ethics could not be used to prevent groups from recommending attorneys to their constituents or from hiring salaried attorneys to represent their members.[31] In three of the cases, the complaints were filed by bar associations.[32] In the fourth case, suit was brought to restrain enforcement of a state barratry statute.[33]

The position of local bar associations on the issue of eligibility is likely to be determined by the kind of public defense system in the county. Bar associations in counties with institutionalized defense systems (public defender or Legal Aid Society systems) generally repel any attempts to broaden the scope of eligibility because of their interest in retaining cases for the private sector.[34] Those in counties with assigned counsel systems may also oppose efforts to broaden the scope of eligibility, but for different reasons. Prior to January 1, 1986, assigned counsel in New York State were reimbursed at the very low rate of $15 per hour out of court and $25 per hour in court. As of January 1, 1986, these rates were increased to $25 per hour out of court and $40 per hour in court.[35] Although the increased fees may make assigned counsel work attractive to neophyte attorneys, they are well below the average hourly rates charged by experienced attorneys in their private cases.[36] Low assigned coun-

29. For a review of this issue, see J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); G. BARAK, IN DEFENSE OF WHOM?: A CRITIQUE OF CRIMINAL JUSTICE REFORM (1980); Bamberger, *The Legal Services Program—Is it Socialized Law?* 51 MASS. L.Q. 313 (1966); Bethel & Walker, *Et tu, Brute!* 1 TENN. B.J. 11 (1965); Humber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. REV. 559 (1979); Pye, *The Involvement of the Bar in the War on Poverty*, 41 NOTRE DAME LAW. 860 (1966).

30. *See* Bamberger, *supra* note 29 at 317; Humber, *supra* note 29, at 570.

31. United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

32. *United Transp. Union*, 401 U.S. 576; *United Mine Workers*, 389 U.S. 217; *Brotherhood of R.R. Trainmen*, 377 U.S. 1.

33. NAACP v. Button, 371 U.S. 415 (1963).

34. Although the private bar's interest in retaining criminal law cases may have waned over the past twenty years, it still appears to be alive in many jurisdictions. One upstate urban defender, for example, has reported to the NYSDA that the local bar association's interest in maintaining retained criminal cases continues to impede his efforts to broaden the scope of client eligibility.

35. N.Y. JUD. LAW § 35(3) (McKinney Supp. 1986); N.Y. COUNTY LAW § 722-b (McKinney Supp. 1986).

36. *See* ALTMAN & WEIL, INC., THE 1984 SURVEY OF LAW FIRM ECONOMICS (1984).

sel rates, then, make the work unappealing to all but inexperienced attorneys. At the same time, however, many bar associations consider the assigned counsel system valuable because it produces clients for inexperienced attorneys and thereby acts as a no-cost training program.[37] The goal of these bar associations, then, becomes one of maintaining assigned counsel caseloads at a level that is sufficient to support inexperienced attorneys but not so voluminous as to require the participation of experienced attorneys.

Since the rights of persons unable to afford counsel often conflict with the interests of county governments and local bar associations, other groups must be relied upon to secure the constitutional right to counsel. The judiciary, with its inherent power to appoint counsel, clearly should participate in guideline development. Impoverished and low-income communities should also be at the forefront of this process. Members of these communities are intimately familiar with their cost of living, as well as with the limits beyond which a defendant may forfeit the right to counsel rather than sacrifice what little funds she has.[38] If our goal is to ensure the right to counsel for all, then such limits must be understood and incorporated into our eligibility decisions. In addition, since many members of poor and low-income communities are recipients of publicly financed legal services, their input concerning the quality of defense services would be extremely valuable.

The failure, so far, of all branches and all levels of government to develop adequate client eligibility guidelines calls into question the viability of a decentralized reform movement. Because the judiciary has a fundamental obligation to ensure appointment of counsel, the New York State Unified Court System should be called upon to coordinate a statewide effort to develop uniform eligibility guidelines. The ultimate catalyst for change, however, should be a statewide public defense commission comprised of attorneys and laypersons who have demonstrated an interest in public defense services, as well as representatives of impoverished and low-income communities throughout New York State. The commission should be charged with the duty of researching the cost of retaining counsel and developing client eligibility guidelines which would ensure that counsel will be appointed to those unable to afford it. The court, of course, would retain a power to exceed these advisory guidelines.

CONCLUSION

Throughout this paper we have focused on the lack of uniform statewide standards used in determining eligibility for publicly financed criminal defense services. We have considered the ambiguities that characterize the "mini-

37. The Association's work with county public defense systems frequently includes meetings with representatives of local bar associations. Almost universally, bar members have expressed an interest in maintaining assigned counsel programs on the basis that they are "cost-effective" and a valuable training tool for inexperienced attorneys.

38. *See* Pye, *supra* note 29, at 884.

mum" income allowances that exist in eighteen New York State counties and the resultant anomaly that allows, in some places, a broader scope of civil representation than criminal defense. From these distressing examples, which are supported by empirical data on eligibility decision making, we conclude that there is a need for a statewide effort committed to creating clear, well-publicized and meaningful eligibility standards applicable in all New York State counties. Attorneys and laypersons with demonstrated interest in public defense services, as well as representatives of the client community, must be involved in the process. Over time, such an effort will allow the forthright promise of the Constitution—the right to counsel for those unable to afford it—to become a uniformly applied reality.