

BRENNAN

CENTER

FOR JUSTICE

ELIGIBLE FOR JUSTICE:
GUIDELINES FOR
APPOINTING
DEFENSE COUNSEL

Executive Summary

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measureable change in the public sector.

ABOUT THE BRENNAN CENTER'S ACCESS TO JUSTICE PROJECT

The Access to Justice Project at the Brennan Center for Justice at NYU School of Law is one of the few national initiatives dedicated to helping ensure that low-income individuals, families and communities are able to secure effective access to the courts and other public institutions. The Center advances public education, research, counseling, and litigation initiatives, and partners with a broad range of allies – including civil legal aid lawyers (both in government-funded and privately-funded programs), criminal defense attorneys (both public defenders and private attorneys), policymakers, low-income individuals, the media and opinion elites. The Center works to promote policies that empower those who are vulnerable, whether the problem is eviction; predatory lending; government bureaucracy (including, in some instances, the courts themselves); employers who deny wages; abusive spouses in custody disputes or in domestic violence matters; or other problems that people seek to resolve in reliance on the rule of law.

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EXECUTIVE SUMMARY

For more than four decades, the Supreme Court has been clear: the Constitution requires states to provide a lawyer to people facing criminal charges who are unable to afford their own counsel. Unfortunately, neither the Supreme Court, nor any other source, has detailed how communities should determine who can afford counsel and who cannot. As a result, eligibility is determined differently almost wherever one looks: some communities don't have any official screening processes at all, while others apply widely varying criteria and procedures.

The result has been a policy disaster.

Without fair standards for assessing eligibility, some people who truly cannot afford counsel without undue hardship are turned away. This may be because a relative posted bond for them, or they have a house or a car that they could sell to pay for a lawyer. Yet these arbitrary assumptions about who can pay and who cannot are devastating to families and communities. Families that truly cannot afford to pay for counsel may have to go without food in order to pay legal fees. Wage-earners forced to sell the vehicle they use to commute to work, in order to pay for counsel, may lose their jobs. People who simply cannot come up with the necessary resources end up trying to represent themselves, often pleading guilty because they are not aware of their rights.

On the other hand, some individuals receive counsel who should not. In these times of fiscal austerity, every dollar spent representing someone who can afford to pay for counsel robs resource-poor indigent defense systems of money that could be better spent representing people who are truly in need. The result is that indigent defense systems already stretched to their breaking points – with enormous caseloads for each attorney, and no funding for essential functions such as investigators and experts – are stretched further. This, too, results in constitutional violations, as people entitled to adequate representation end up getting a lawyer who cannot provide them with a meaningful defense.

Finally, without clear guidelines for how to determine who should be appointed counsel, decisions whether to appoint counsel hang on the serendipity of where an individual lives, the personal characteristics of the decision-maker, institutional conflicts of interest, or any of the other improper factors that substitute for more reliable standards and procedures.

In this report, the Brennan Center for Justice at New York University School of Law presents information about best practices for determining financial eligibility for free counsel. The report gathers, in one place, existing standards and procedures, relevant judicial precedent, and the specific views of many defenders in communities around the country. The report then makes six recommendations:

- First, screening – determining who can and who cannot afford private counsel – is a critical step for almost every jurisdiction. Well-designed screening can save money by ensuring that communities provide counsel only to individuals who are unable to afford their own lawyers. It can also raise the quality of defense services by concentrating communities’ limited resources where they are truly needed. And it can usefully reduce the risk of backlash against the public defense system fueled by perceptions that taxpayer money is used to represent wealthy defendants.
- Second, communities should establish uniform screening criteria, in writing. Uniform, written requirements would greatly reduce the dramatically inconsistent treatment of individuals that we found in our investigation.
- Third, communities should protect screening from conflicts of interest. Prosecutors, defense attorneys, and presiding judges all have interests – for example, in controlling their workloads by resolving cases – which conflict with their need to be objective when deciding who should receive free counsel. Decisions about eligibility should be made by those who are not involved with the merits of individuals’ cases.
- Fourth, to evaluate genuine financial need, screening must compare the individual’s available income and resources to the actual price of retaining a private attorney. Non-liquid assets, income needed for living expenses, and income and assets of family and friends should not be considered available for purposes of this determination.
- Fifth, people who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of the federal poverty guidelines should be presumed eligible for state-appointed counsel. Such presumptions are useful shortcuts that can save money by streamlining the screening process. Each should be subject to rebuttal upon evidence that a defendant can in fact afford a private attorney.

- Finally, screening processes must provide procedural protections, including a guarantee of confidentiality, the right to appeal determinations of ineligibility, and a promise not to re-examine determinations of eligibility absent compelling reason. Existing systems give useful examples of these protections and offer helpful guidance for jurisdictions looking to improve their screening processes.

None of these recommendations would be expensive to implement. And, once in place, these recommended practices can save money, improve the quality of public defense services, and promote compliance with the Constitution. We invite policymakers and other public defense system stakeholders to take advantage of these practical recommendations to preserve taxpayer money and protect constitutional rights in an equitable and consistent way.

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