

BRENNAN  

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CENTER  

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FOR JUSTICE  

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ELIGIBLE FOR JUSTICE:  
GUIDELINES FOR  
APPOINTING  
DEFENSE COUNSEL

The Access to Justice Program

## 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, measurable change in the public sector.

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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.

## INTRODUCTION

The landmark Supreme Court case *Gideon v. Wainwright* requires states to provide counsel to all persons charged with felony crimes who are unable to afford private counsel without substantial hardship.<sup>1</sup> Later cases extend the right to counsel to all persons facing a threat of incarceration for a period greater than six months (who are unable to afford counsel without substantial hardship).<sup>2</sup> The challenge for states and counties that must pay for such counsel is determining which individuals are genuinely unable to afford private counsel.<sup>3</sup>

In this report, we provide policymakers and other public defense system stakeholders with an easy-to-follow blueprint for running a screening process that: 1) complies with the Sixth Amendment to the U.S. Constitution, as interpreted by *Gideon* and its progeny; 2) can be adapted to different jurisdictions with their particular needs and resources; and 3) conserves taxpayer dollars.<sup>4</sup>

Underlying these guidelines is the premise that most people facing criminal charges are unable to afford private counsel and thus qualify to receive government-appointed counsel.<sup>5</sup> Therefore, the goal of a sensible screening process should be to accurately and efficiently screen in most defendants, while efficiently screening out the few individuals who are not qualified, all without spending too much money.

In preparing these guidelines, we considered the following: 1) existing national standards, particularly those proposed by the American Bar Association, the National Legal Aid and Defender Association, the National Conference of Commissioners on Uniform State Laws, and the National Advisory Commission on Criminal Justice Standards and Goals;<sup>6</sup> 2) relevant caselaw; 3) practices currently in use across the country; and 4) views of public defenders, appointed counsel and contract counsel (collectively “defenders”) from 28 states (plus Guam and a sovereign Indian nation) and at least 61 jurisdictions.<sup>7</sup>

## GUIDELINES

1. **Screen people seeking the appointment of counsel to ensure that they are financially eligible.**
2. **Apply screening criteria and processes uniformly, and commit them to writing.**
3. **Ensure that screening is performed by someone who does not have a conflict of interest.**
  - a. Do not allow prosecuting attorneys to screen.
  - b. Do not allow individual defenders and public defender programs to screen their own clients.
  - c. Do not allow the presiding judge to screen, although screening by other judges or court employees is a good option.
4. **Ensure that counsel is provided to those unable to afford it.**
  - a. Consider the price of retaining private counsel to handle the particular category of case.
  - b. Consider unavailable to pay for counsel the income a defendant needs to pay for living and employment expenses and to maintain financial stability.
  - c. Consider unavailable to pay for counsel the assets a defendant needs to pay for living and employment expenses, and any illiquid assets that cannot be quickly converted to cash.
  - d. Do not deny counsel because a defendant has made bail.
  - e. Do not deny counsel based on the income or assets of the defendant's friends and family.
  - f. Err on the side of providing counsel, and avoid overly stringent screening criteria that chill the exercise of the right to counsel.
5. **Streamline screening to speed up the process and save money.**
  - a. Use a multiple of the federal poverty guidelines to create a presumption of eligibility.
  - b. Presume eligibility when an individual receives need-based public benefits, cannot post bond, or resides in a correctional or mental health facility.
6. **Ensure that required procedural protections are in place.**
  - a. Maintain the confidentiality of information divulged during the screening process.
  - b. Do not re-examine eligibility determinations during the life of a case unless there is a compelling reason to do so.
  - c. Allow clients to appeal a determination of ineligibility to a judge or magistrate.

## GUIDELINES WITH COMMENTARY

### 1. **Screen people seeking the appointment of counsel to ensure that they are financially eligible.**

Screening is a good idea in almost every jurisdiction. In theory, a jurisdiction with adequate resources could satisfy its constitutional obligation to provide counsel to those unable to afford it by providing every defendant with an attorney, regardless of the individual's income or assets. However, most jurisdictions struggle to find the resources they need to finance constitutionally adequate indigent defense services. By spending scarce resources on people who are able to afford private counsel, jurisdictions risk providing substandard counsel to everyone – a result that would be both constitutionally impermissible and bad public policy. News stories of wealthy individuals receiving publicly funded counsel also lead legislatures to question whether they are providing too much funding for public defenders. As a practical matter, then, the relatively small expense of running a screening process is certainly worthwhile.

Many of the public defenders responding to our questionnaire prefer systems that screen. One defender in San Luis Obispo County, California characterized the county's failure to screen as “particularly galling as I am a contract defender paid on a flat fee basis, and, as such, my workload is negatively affected by judicial indifference [to screening].” This observation – that a failure to screen can undercut the quality of the services provided, ultimately harming the defendants – has potential relevance for all jurisdictions with limited resources, regardless of the structure of their systems.<sup>8</sup>

For these reasons, if screening can reduce a jurisdiction's expenses, jurisdictions should screen. This is particularly true given that screening can be done accurately, efficiently, and cost effectively, as explained in Guideline 5.

### 2. **Apply screening criteria and processes uniformly, and commit them to writing.**

States should use uniform screening criteria and procedures as much as possible. After all, when fundamental rights – like the right to counsel – are at stake, the Constitution requires that similarly situated people be treated similarly.<sup>9</sup> Moreover, as the Supreme Court has stated, the “touchstone of due process is protection of the individual against arbitrary action by government.”<sup>10</sup> And states cannot be sure that they are fulfilling their

Sixth Amendment obligation to provide counsel if they allow counties, judges, or other actors to exercise untrammelled personal discretion over who gets counsel and who does not. For a variety of constitutional reasons, then, uniform criteria and procedures are needed.

In addition to fulfilling a constitutional imperative, uniform screening within a state is good public policy. Uniform screening enables states, counties, and public defenders to forecast future resource and budgetary needs. Furthermore, by promoting fair treatment of individuals, uniform screening helps to increase public trust in the criminal justice system.

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NO ONE WANTS TO SCREEN. PDS DO NOT WANT TO BE ACCUSED OF SCREENING, THE COURTS DO NOT WANT TO TAKE THE TIME, AND THE COUNTY DOES NOT WANT TO PAY FOR A VERIFICATION UNIT.

*Attorney from Sacramento County, California*

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The requirement of uniformity involves several components. First, explicit, written standards should instruct the person who conducts the screening as to the factors that are to be considered when determining eligibility. If eligibility criteria are left entirely to a screener's discretion, one individual may consider money spent for certain expenses (such as childcare) to be unavailable for defense costs, while another screener may not. Uncertainty regarding eligibility criteria creates an unacceptable risk that a person found eligible by one screener might be found ineligible if screened by someone else.

Although statewide uniformity of screening criteria and procedures is desirable, local variations in the cost of retaining private counsel and in the cost of living may require that particular jurisdictions depart from statewide standards (although screening "procedures" should always remain uniform). As a general guideline, each jurisdiction – e.g. a county or judicial district – should use uniform screening criteria insofar as relevant costs are consistent in the jurisdiction, particularly the cost of retaining private counsel and the cost of living. Where these costs are unique, income and assets eligibility criteria should be adjusted to reflect this reality. As discussed further in Guideline 4, decisions regarding eligibility should always rest on the individual's actual ability to afford counsel.

Some states currently have uniform screening criteria and procedures throughout the state. These include, for example, Massachusetts, New Hampshire and Oregon.<sup>11</sup>

However, other states lack uniform screening criteria or procedures, or both. In New York, for example, each county is free to determine its own screening criteria and procedures.<sup>12</sup> In California, the website of the Los Angeles County Public Defender warns, “[N]ot every court handles the issue of financial eligibility for the Public Defender in the same way.”<sup>13</sup> Defenders in Arizona, Arkansas, Florida, Illinois, Michigan, Oklahoma, Pennsylvania, Tennessee, and Virginia all told us that screening practices varied throughout their states.<sup>14</sup>

Some defenders added that screening practices can even vary from judge to judge. One public defender from Illinois wrote:

The bulk of defense work in the state is done by judges appointing public defenders, and the judge’s standards of poverty can vary wildly. I have seen some cases where the [public defender] has been appointed by one judge, and later another will review that appointment, especially if the defendant is on bond and there is cash on file with the court.

Even in states where screening is governed by state law, actual practice can vary widely. A public defender from Ohio told us that although Ohio has an official statewide process,<sup>15</sup> counties seem to pick and choose which parts of the state standard to use: small counties with limited resources tend to screen for indigency, while larger counties tend not to do so.

### **3. Ensure that screening is performed by someone who does not have a conflict of interest.**

To ensure the legitimacy of the screening process, several general principles are important. First, it is essential that screeners be free of any conflict of interest or other ethics violation. Second, the screening process should not overly empower the prosecutor’s office. And third, the screening process should not cast doubt on the defense counsel’s loyalty to his or her client or on the presiding judge’s impartiality.

Given these principles, a number of people and entities can appropriately serve as screeners, including: 1) the committing magistrate, court personnel, or judges other than the presiding judge; 2) the pretrial services branch of the adult probation department; 3) an independent pretrial services division; 4) another government agency; or 5) a non-govern-

ment (“third-party”) organization with a government contract. Screening should not, however, be conducted by the prosecutors’ office, by the particular defender who would take the case, or by the presiding judge. A rule promulgated in spring 2008 by the Nevada Supreme Court provides a good model, stating that a “determination of indigency should be performed by an independent board, agency, or committee, or by judges not directly involved in the case.”<sup>16</sup>

Special concerns arise when screening is performed by a non-government entity. Such screening can reduce conflict of interest and fairness problems, cost relatively little, and allow jurisdictions to take advantage

of the expertise and specialized knowledge of dedicated screeners. However, jurisdictions using third party screening must ensure that counsel is appointed in a timely manner, that screeners do their job fairly and accurately, and that screeners are not motivated by financial or other incentives to deny counsel to eligible people.

**a. Do not allow prosecuting attorneys to screen.**

In some jurisdictions, a defendant’s first encounter is with the prosecuting attorney, and the defendant receives counsel only if the prosecutor determines that counsel is necessary or that a plea bargain cannot be worked out.<sup>17</sup> In other jurisdictions, the prosecutor does not conduct the initial screening, but is free to challenge a determination of financial eligibility.<sup>18</sup>

But when prosecutors are involved in screening, a substantial risk arises that they will threaten to deny or remove the defendant’s counsel as a means of persuading defendants to plead guilty. Moreover, prosecutors who screen defendants risk violating both the American Bar Association (ABA) Model Rules of Professional Conduct, which bar attorneys from giving legal advice to an opposing party,<sup>19</sup> and the ABA Standards for Criminal Justice, which bar prosecutors from communicating with defendants who have not waived their right to counsel.<sup>20</sup>

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THERE ARE 52 JUDGES IN NEBRASKA IN COUNTY COURT AND 52 JUDGES IN DISTRICT COURT. THERE ARE AS MANY WAYS TO DETERMINE INDIGENCY AS THERE ARE JUDGES.

*Attorney in Hall County, Nebraska*

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Beyond any problems created by actual improper conduct, the involvement of prosecutors in screening creates an appearance of unfairness that undermines the justice system. Simply put, prosecutors should not screen.

**b. Do not allow individual defenders and public defender programs to screen their own clients.**

Conflict of interest concerns, confidentiality rules, and harm to the attorney-client relationship all caution against screening by either the defender or the public defender program that represents a particular client. As a practical matter, many public defender programs do screen their own clients, but as an ethical matter, they should not. If a defender program must screen, it should institute procedural protections, such as ensuring that the individual defender assigned to the case does not assess eligibility.<sup>21</sup>

The ABA Model Rules of Professional Conduct state that a conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer.”<sup>22</sup> The comments to that rule state that “the lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”<sup>23</sup>

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WHEN PUBLIC DEFENDERS SCREEN FOR ELIGIBILITY, YOU CAN’T AVOID THE APPEARANCE THAT YOU’RE CONTROLLING YOUR BUDGET ON THE BACKS OF YOUR CLIENTS.

*Attorney in San Mateo County, California*

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materially limited by a personal interest of the lawyer.”<sup>22</sup> The comments to that rule state that “the lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”<sup>23</sup>

Defenders’ personal interests come into play in several ways when they are asked to screen their own clients. For example, in order to provide adequate representation to their clients, public defenders must maintain manageable caseloads.<sup>24</sup> For salaried defenders, and defenders with a contract to represent all defendants in a given geographic area, this may create an incentive to conclude that potential clients are ineligible for representation. Thus, an assistant public defender in Schuyler County, New York, told investigators from the NAACP Legal Defense and Education Fund “that he uses eligibility requirements to limit the number of clients he will represent.”<sup>25</sup> Defenders may also have an incentive to reject cases that are time-intensive, controversial, or undesirable in some other way. The Schuyler County defender exemplifies this risk, too – he reported “telling eligible defendants that if they are willing to work out a deal with the DA that day, he will represent them.”<sup>26</sup>

Even when a defender lacks such incentives, or is careful not to allow personal interest to sway the eligibility determination, the appearance of conflict can fatally undermine the attorney-client relationship.<sup>27</sup>

**c. Do not allow the presiding judge to screen, although screening by other judges or court employees is a good option.**

According to the ABA Model Code of Judicial Conduct, a judge should uphold “the integrity and independence of the judiciary” and “avoid impropriety and the appearance of impropriety” in all activities.<sup>28</sup> Screening by presiding judges might lead to the violation of these precepts in a variety of ways. Presiding judges may use eligibility determinations as leverage over defendants to induce plea bargaining. They may also assign or refuse to assign counsel depending on which outcome they believe will move their dockets more quickly, or learn information during screening that might affect their judgment regarding a case.

All of these concerns can be avoided, or at least minimized, by relying on a judge other than the presiding judge, or on other court personnel, to conduct the screening. In

Florida, for example, judges are involved in screening only when a clerk finds a defendant ineligible for services.<sup>29</sup> Alternatively, a clerk of the court, another court employee, or a third party can gather information for the screening process, and a judge (other than the presiding judge) can become involved in the process only when making final eligibility decisions.

Care must be taken, however, to ensure that a judicial screener does not have a financial incentive to deny counsel. Such an incentive might be present in states where public defenders compete for funding with the courts themselves. The generally insufficient amount of funds allocated for public defenders and for court operations might provoke

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THE DEFENDANT IS USUALLY TOLD HE MUST FIRST TALK TO A PROSECUTOR ABOUT HIS CASE & GET A PLEA OFFER BEFORE HE IS ALLOWED TO HAVE A LAWYER APPOINTED. IF THE PARTICULAR DISTRICT ATTORNEY IS DECENT, HE WILL STEER THE DEFENDANT TO THE PUBLIC DEFENDER OFFICE IF THERE IS ANY NEED FOR COUNSEL (WHICH IS FRAUGHT WITH PERIL — HAVING THE DISTRICT ATTORNEY SCREEN CLIENTS?)

*Public Defender from Tipton County, Tennessee*

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conflict over which function should take precedence.<sup>30</sup> Jurisdictions must take every precaution to ensure that this conflict over funding plays no role in decisions regarding the financial eligibility of individual defendants. If funding for the judiciary and for public defenders is intertwined, it may be necessary to remove responsibility for screening from the judicial branch.

**4. Ensure that counsel is provided to those unable to afford it.**

The essential criterion of successful screening is that counsel be provided to those unable to afford it on their own. The Constitution requires states to provide lawyers “for defendants unable to employ counsel.”<sup>31</sup> The federal government uses this standard to determine eligibility for defense counsel in federal cases,<sup>32</sup> as do many states and counties.<sup>33</sup> A number of national guidelines, and many jurisdictions, have interpreted this standard as requiring the appointment of counsel when a defendant is unable to afford counsel without “substantial hardship.”<sup>34</sup>

All screening must ultimately be based on a comparative assessment of a defendant’s financial resources (income, liquid assets, expenses, debt and other financial resources and obligations) and the costs of employing counsel. As the Supreme Court has warned, defendants may be unable to afford counsel even if they do not satisfy a particular jurisdiction’s criteria for indigency, and if this is the case then they are constitutionally entitled to

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MY ONLY FEAR IS THAT A PD OFFICE CAN ARTIFICIALLY ALTER ITS CASELOAD BY DENYING ELIGIBILITY TO KEEP CASELOADS SMALL.

*Attorney from Monroe County, Pennsylvania*

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counsel.<sup>35</sup> Unfortunately, many jurisdictions instruct screeners to assess only whether defendants are “indigent,” which may or may not include an assessment of whether they can afford counsel.<sup>36</sup>

Jurisdictions must avoid finding individuals ineligible based on strict income or asset cut-offs, or on assumptions about an individual’s financial situation premised only on partial information. The Constitution bars jurisdictions from finding defendants categorically ineligible for counsel without conducting a careful assessment of the individual’s actual financial situation.<sup>37</sup> Factors like unusual expenses or a high cost of counsel for the charges involved, or extraordinary expenses for healthcare or other necessary items, can easily render a defendant unable to retain counsel despite income exceeding cut-off levels.

Unfortunately, some jurisdictions, including Georgia and Ohio, retain an absolute bar on eligibility for counsel for defendants whose income is over a particular multiple of the federal poverty guidelines.<sup>38</sup>

Nor should jurisdictions find people categorically ineligible based on speculation regarding the individual's financial situation. Speculation is an impermissible basis for the denial of a constitutional right. At least one company offers to screen defendants' financial eligibility using "software to capture relevant financial data and perform a credit history assessment to determine a defendant's debt-to-income ratio and financial position relative to Federal Poverty Guidelines."<sup>39</sup> This method appears to rely on credit checks to make assumptions regarding an individual's income, assets and debts that will determine whether a defendant is eligible for counsel. At the very least, defendants must be given the chance to challenge these assumptions.

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QUESTIONING ELIGIBILITY STARTS OFF REPRESENTATION ON A VERY BAD FOOT.

*Attorney from Napa County, California*

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This is not to say that jurisdictions cannot presume eligibility based on certain criteria. After all, the Constitution does not bar jurisdictions from providing counsel to people who can afford it. When it proves too expensive to engage in screening precise enough to identify every ineligible, it may be more reasonable to rely on certain presumptions of eligibility. Some presumptions which have proved particularly effective are discussed further in Guideline 5.

Following are some principles for jurisdictions to follow in considering whether an individual defendant can retain counsel without substantial hardship:

- a. **Consider the price of retaining private counsel to handle the particular category of case.**

In determining whether someone can afford counsel, jurisdictions should take into account the actual cost of obtaining counsel.<sup>40</sup> Some jurisdictions do well in adhering to this principle. For example, the cost of counsel is considered under guidelines adopted by the Indiana Public Defender Commission.<sup>41</sup> Similarly, Washington State's rules provide for the court doing the screening to "consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community."<sup>42</sup>

Jurisdictions should not look to the compensation paid by the court to assigned counsel as the measure of the actual cost of counsel, because in many jurisdictions such compensation is far below the market rate.<sup>43</sup> In some places, the appointed counsel compensation rate is so low that courts are unable to persuade attorneys to take cases.<sup>44</sup> Even in jurisdictions where courts can persuade attorneys to take cases, individual defendants may be unable, on their own, to locate attorneys willing to accept the low appointed counsel rate. Appointed counsel can be reasonably sure of getting paid eventually by the government, but counsel in private practice know that a substantial proportion of their clients will fail to pay at the conclusion of the representation, either because they are incarcerated or for some other reason.<sup>45</sup> As a result, attorneys tend to charge higher fees to paying clients than to government funders.<sup>46</sup> Nevertheless, some jurisdictions do rely on assigned counsel rates when conducting screening.<sup>47</sup>

As the National Legal Aid and Defender Association notes, in addition to attorneys' hourly rates, the cost of obtaining counsel includes all "costs which may be related to providing effective representation."<sup>48</sup> Thus, jurisdictions should take into account the costs associated with investigation of the case and retaining expert witnesses.<sup>49</sup> This is the practice in Maryland, where the financial eligibility statute states: "Need shall be measured according to the financial ability of the person to engage and compensate competent private counsel and to provide all other necessary expenses of representation."<sup>50</sup>

It is also important to take into account the fact that most privately retained criminal defense attorneys require payment of a substantial retainer fee, or even of the attorney's full fee, up front.<sup>51</sup> Defendants who cannot afford to pay a substantial amount immediately, and so cannot find a lawyer to represent them, are constitutionally entitled to receive free counsel.<sup>52</sup>

Finally, jurisdictions should survey the costs charged by private counsel to provide a defense against the most common categories of charges.<sup>53</sup> Screeners can then rely on those figures to determine whether defendants actually can afford counsel in particular cases.

**b. Consider unavailable to pay for counsel the income a defendant needs to pay for living and employment expenses and to maintain financial stability.**

When determining whether defendants have enough money to pay for private counsel, jurisdictions should consider unavailable to pay for counsel the portion of the defendant's

income that the defendant needs to pay for the expenses of daily living and to maintain employment. These expenses generally include the costs of food, housing, clothing, medical care, child or other dependent care, and transportation.<sup>54</sup> Income in the form of means-tested public assistance benefits should also be considered unavailable, because such benefits usually provide less income than people need to survive without substantial hardship.<sup>55</sup>

Unfortunately, some jurisdictions treat as available to pay for counsel income spent on employment-related expenses. For example, the Ohio Public Defender, in its instructions to individuals completing an affidavit of indigency, treats income spent on child care as available “if any adult member of the applicant’s household is unemployed and able to provide supervision,” regardless of whether that member actually is willing to care for a child.<sup>56</sup> The Ohio public defender also treats the funds defendants use for auto repairs as available to pay for counsel (although it does consider unavailable income needed by the defendant for other commuting costs).<sup>57</sup>

Jurisdictions also should consider unavailable to pay for counsel the income needed to assure a defendant’s financial stability. The Wisconsin State Public Defender, for example, considers income spent on student loan payments to be unavailable.<sup>58</sup> Likewise, the Ohio Public Defender considers income spent on minimum monthly credit card payments to be unavailable.<sup>59</sup>

**c. Consider unavailable to pay for counsel the assets a defendant needs to pay for living and employment expenses, and any illiquid assets that cannot be quickly converted to cash.**

In addition to available income, jurisdictions should evaluate whether a defendant has available assets that could be used to pay for private counsel. Jurisdictions should treat as available a defendant’s liquid assets, such as cash, bank accounts, stocks and bonds. However, just as jurisdictions should consider unavailable all revenue used for the basic expenses of daily living or to maintain employment, jurisdictions should consider unavailable all assets used for such purposes, such as a defendant’s primary residence, household furnishings, and clothing, and the car a defendant uses to get to work.<sup>60</sup> Several states have model practices in this regard. Wisconsin appropriately considers unavailable all assets needed “to hold a job, or to shelter, clothe and care for the person and the person’s immediate family.”<sup>61</sup> Massachusetts likewise considers unavailable “[a]ny motor vehicle necessary to maintain employment.”<sup>62</sup>

Because counsel must be appointed quickly, jurisdictions should also consider unavailable all assets that cannot be converted to cash within days after an arrest.<sup>63</sup> The Constitution provides that the right to counsel attaches at the first appearance before a judicial officer, prior to such critical events as plea negotiations, and the entry of a guilty plea.<sup>64</sup> National standards require an appointment as soon as possible after an individual is incarcerated.<sup>65</sup> And aside from any constitutional imperatives, early appointment also constitutes good financial policy for jurisdictions. For example, once appointed, an attorney can advocate for bail, which, if granted, may enable the government to avoid the costs associated with jailing the individual.<sup>66</sup> For these reasons, many jurisdictions consider property to

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THE PROBLEM ARISES WHEN THE CLIENT DOES NOT QUALIFY BUT ALSO DOES NOT HAVE ENOUGH MONEY TO HIRE PRIVATE COUNSEL. THIS IS A VERY COMMON PROBLEM IN OUR JURISDICTION.

*Attorney from El Paso County, Colorado*

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be unavailable if it cannot be “readily” or “reasonably” converted to cash.<sup>67</sup> In applying either standard, the decision-maker must use as the touchstone whether the individual can convert the asset to cash in time to obtain counsel in time for critical pre-trial proceedings.

Unfortunately, though, some state and local screening practices explicitly require screeners to view the non-liquid assets of potential clients as available to pay for counsel, without regard to how difficult or time consuming it would be to convert them to cash, and often without regard to whether the client needs the assets to live or work. Examples include:

- **Arizona:** Screeners consider as available to pay for counsel the equity in a defendant’s primary residence and vehicle.<sup>68</sup>
- **Texas:** In Collin County, defendants are ineligible for the appointment of counsel if they own a home or have more than \$2,500 in assets (excluding the value of their primary car).<sup>69</sup>
- **Florida:** Defendants are ineligible for the appointment of counsel if they “own[ ], or ha[ve] equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net equity value of \$2,500 or more, excluding the value of the person’s homestead and one vehicle having a net value not exceeding \$5,000.”<sup>70</sup>

- **New Hampshire:** Residents charged with a juvenile offense or misdemeanor offense may be found ineligible for the appointment of counsel if they own real estate worth more than \$10,000. Those charged with a felony other than homicide are ineligible if they own real estate worth more than \$20,000.<sup>71</sup> No exceptions are made for a primary residence or for real estate necessary for one's business. A person whose sole asset is the family home could be denied free counsel, even if the home is worth only \$20,000.

Before considering any liquid or illiquid assets, or even income, available to pay for private counsel, jurisdictions should subtract the value of any debt the individual owes.<sup>72</sup> For example, jurisdictions should subtract the value of credit card debt and student loans.<sup>73</sup>

Moreover, defendants must never be required to assume debt that would jeopardize their ability to pay for the “necessities of life.”<sup>74</sup> Jurisdictions may require defendants to sell illiquid assets, or to use those assets to secure a loan, so long as they retain enough equity and assets to survive without substantial hardship.<sup>75</sup> For example, a defendant could be required to sell a particularly expensive car used for employment and buy another, cheaper one, if he or she were able to do so in time to retain counsel. But a defendant could not be required to assume a home equity loan for such a large amount that the defendant would risk losing the home, or be unable to afford another home if the first home were sold. Nor can a defendant be required to assume debt that the individual is unable to pay back without substantial hardship.<sup>76</sup>

Finally, jurisdictions may examine whether an asset has been conveyed, or debt has been incurred, solely to render the individual eligible for the appointment of counsel.<sup>77</sup>

**d. Do not deny counsel because a defendant has made bail.**

Jurisdictions should not deny counsel because a defendant or someone else has posted a bond to allow him to make bail.<sup>78</sup> The ability to post bond does not by itself establish an individual's ability to afford the expense of retaining private counsel. Consequently, jurisdictions that deny counsel to individuals who post bond risk denying counsel to individuals who are constitutionally entitled to receive counsel.<sup>79</sup> Moreover, denying counsel to those who post bond encourages people who can afford either bail or private counsel, but not both, to avoid posting bond, and therefore to remain in jail at county and taxpayer expense. It also makes those defendants less able to participate in their defense, which can result in unnecessarily long sentences and in avoidable appeals – both of which increase the costs to taxpayers.

For these reasons, many jurisdictions, including Washington State<sup>80</sup> and Ohio,<sup>81</sup> explicitly inform screeners that the ability to post bond should not bar the appointment of counsel.

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I HAVE HEARD JUDGES TELL DEFENDANTS THAT SINCE THEY ARE MAKING PAYMENTS ON A BOND, THEY CAN JUST MAKE PAYMENTS ON A LAWYER. THE PROBLEM BEING THAT NO CRIMINAL ATTORNEY THAT HAS ANY SENSE WILL TAKE A CRIMINAL CASE ON A PAYMENT PLAN.

*Attorney from Montgomery, Tennessee*

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However, some jurisdictions do treat posting of a bond by the defendant or by a family member as evidence that the defendant possesses additional resources.<sup>82</sup> For example, in Shelby County, Tennessee, the Uniform Affidavit of Indigency Form asks whether a client or family member is able to post

bond,<sup>83</sup> and one Tennessee public defender told us that judges in his county will actually incarcerate defendants who have posted bond but not hired an attorney. In Wisconsin, the State Public Defender considers “available assets” to include “[a]ny money belonging to the person and expended to post bond to obtain release regarding the current alleged offense.”<sup>84</sup> In Florida, when defendants seek review of a finding that they are not indigent, there is a presumption against eligibility if “the applicant has been released on bail in an amount of \$5,000 or more.”<sup>85</sup> Such requirements serve neither the Constitution nor public policy.

**e. Do not deny counsel based on the income or assets of the defendant’s friends and family.**

Screeners should consider unavailable the income and assets of family members or friends when those resources are not under the direct control of the defendant and therefore not actually available to the defendant.<sup>86</sup> The right to counsel belongs to the defendant, and the decision whether to retain counsel cannot be left to a third party. Accordingly, some jurisdictions appropriately bar consideration of the resources of friends or relatives.<sup>87</sup>

In some cases, it may be acceptable to treat certain third parties’ resources as available to the defendant – as in jurisdictions where spouses are liable as a matter of law for each other’s criminal defense costs, or parents are liable for the costs of their minor children’s criminal defense.<sup>88</sup> Thus, in Midland County, Texas, “[a]ny resources from friends or family, except spousal income available to a defendant, may not be considered” available for the costs of defense.<sup>89</sup> However, because spouses and parents may be reluctant to pay legal costs, and because it may take time for defendants to enforce legal obligations estab-

lishing their right to this support, the better practice is for jurisdictions to provide free counsel to defendants and seek reimbursement from liable spouses or parents afterward.

Unfortunately, many jurisdictions consider assets or income possessed by a family member to be available to pay the costs of retaining private counsel, regardless of whether such family members are liable as a matter of law for such criminal defense costs. Virginia takes into account “regular support from an absent family member,” as well as “the income, assets, and expenses of the spouse, if any, who is a member of the accused’s household, . . . unless the spouse was the victim of the offense or offenses allegedly committed by the accused.”<sup>90</sup> And a public defender from Hall County, Nebraska, informed us that no attorney is appointed in that county if the spouse is found capable of providing for the family.

**f. Err on the side of providing counsel, and avoid overly stringent screening criteria that chill the exercise of the right to counsel.**

Jurisdictions should avoid imposing requirements that discourage qualified individuals from exercising their right to counsel. One common barrier is the requirement that individuals prove they have made efforts to secure private counsel. In Tennessee, for example, the state’s Affidavit of Indigency Form asks defendants to provide the names and contact information of those private attorneys who have refused to represent them.<sup>91</sup> Similarly, New Jersey considers, “[w]here appropriate, the ability of the defendant to demonstrate convincingly that he has consulted at least three private attorneys, none of whom would accept the case for a fee within his ability to pay.”<sup>92</sup> While this is one way for individuals to prove that they cannot afford counsel, delaying the appointment of counsel until people have contacted and been denied by multiple attorneys is constitutionally unacceptable.<sup>93</sup> Reaching out to multiple attorneys may cause particularly long delays for individuals who are incarcerated.

Jurisdictions also should not impose excessive expense reporting requirements that discourage eligible defendants from exercising the right to counsel. For example, one public defender informed us that Tipton County, Tennessee asks defendants to state all their expenses for the last six months and those they expect to incur over the next six months. The defender observed that it is nearly impossible to complete such a worksheet accurately.

Nor should jurisdictions impose harsh punishment on defendants for unintentional or minor errors in describing their income and assets. Such punishment may dissuade indi-

viduals from exercising their right to counsel, for fear that an innocent error will lead to a large penalty. In Massachusetts, for example, the Governor’s fiscal year 2005 budget assumed that the Committee for Public Counsel Services (CPCS), which oversees the provision of defense services to people eligible for such services, “will collect three million dollars . . . by contracting with collection lawyers to sue any client who ‘materially underestimates or misrepresents his income or assets or ability to pay to qualify for legal representation intended for destitute, indigent or marginally indigent persons[.]’”<sup>94</sup> According to a CPCS newsletter, an unintentional misstatement could expose an individual defendant to suit for the estimated value of the lawyer services received:

[T]he allegedly careless or fraudulent client would be sued, not for the \$150 or \$300 which he arguably should have paid – but for the \$5,000[,], \$7,500, or \$10,000, which is defined as the ‘fair market value of attorney services[.]’ This wild inflation – five thousand dollars is twenty-five times the average cost of legal representation for a District Court case – is designed to give collection outfits an incentive to participate in this scheme.<sup>95</sup>

Overzealous enforcement is unlikely to result in significant cost savings for jurisdictions, particularly when the cost of ensuing court proceedings is factored in. It is likely, however, to result in the waiver of the right to counsel by eligible defendants.

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A MAJOR PROBLEM IN THIS JURISDICTION: IF AN INCARCERATED INDIVIDUAL IS RELEASED AFTER POSTING A LARGE BOND, THE JUDGE WILL REMOVE THE PUBLIC DEFENDER FROM THE CASE – EVEN IF THE BOND WAS MADE BY SOMEONE ELSE.

*Attorney from Montgomery, Tennessee*

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In contrast, the eligibility rules in Ohio, where “the pivotal issue in determining indigency is not whether the applicant ought to be able to employ counsel but whether the applicant is, in fact, able to do so,”<sup>96</sup> do a good job of reminding screeners not to get

excessively caught up in the details of a potential client’s finances. The rules also warn screeners that “[t]he procedure whereby it is determined whether or not a person is entitled to have publicly provided counsel shall not deter a person from exercising any constitutional, statutory, or procedural right,”<sup>97</sup> and instruct screeners not to apply the eligibility rules with such “stringency . . . as may cause a person to waive representation of counsel rather than incur the expense of retained counsel.”<sup>98</sup> In North Dakota, similar rules remind screeners that “[c]lose questions regarding defendant’s indigency should be resolved in favor of eligibility” and that

an effort should be made to ensure early appointment of counsel.<sup>99</sup> Such rules should serve as a model for other states seeking to reform their screening procedures.

Finally, jurisdictions should avoid screening regimes that would cost more than the jurisdiction might save by denying counsel to those few ineligible people whom such regimes would identify. For example, a report found that in Lancaster County, Nebraska, a court's reliance on a staffer to verify the information provided by defendants cost \$9 per defendant, but did not produce greater honesty from defendants and did not uncover financial information that would make the difference between eligibility and ineligibility.<sup>100</sup> The justification for such a measure is clearly tenuous, at best.

## **5. Streamline screening to speed up the process and save money.**

In practice, it is not necessary to engage in a time-consuming eligibility assessment for each defendant, because there are shortcuts that jurisdictions can and should take. First, jurisdictions can appropriately presume eligibility for persons whose income is beneath the level defined as poor by the federal poverty guidelines. Second, jurisdictions can use other indicators strongly associated with an inability to pay for private counsel to judge eligibility for counsel, such as a defendant's receipt of needs-based public benefits, inability to post bond, residence in a mental health facility, and residence in a correctional institution.

### **a. Use a multiple of the federal poverty guidelines to create a presumption of eligibility.**

The federal poverty guidelines provide a convenient shortcut for quickly determining that some defendants are eligible for counsel, obviating the need to screen them further.<sup>101</sup> Given the poverty of the vast majority of the prospective client population, most defendants can quickly and appropriately be deemed eligible simply because their income is beneath the level defined as poor by the federal poverty guidelines. These guidelines are based on the cost of food and other essentials for families of different sizes.<sup>102</sup> The guidelines set the poverty level extremely low, making it likely that even people with incomes exceeding the guidelines by 100% will spend their entire incomes on basic necessities, so that it would be impossible for them to afford counsel without substantial hardship.<sup>103</sup> The best practice – which is followed in many jurisdictions – is to use a multiple of the guidelines in determining eligibility.<sup>104</sup> Jurisdictions with particularly high costs of counsel or of living should use even higher multiples.

**b. Presume eligibility when an individual receives need-based public benefits, cannot post bond, or resides in a correctional or mental health facility.**

In addition to presuming eligibility for individuals whose income falls beneath a multiple of levels established by the federal poverty guidelines, jurisdictions can save money and time by presuming eligibility for people who receive need-based public benefits (such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, disability benefits, or public housing), who cannot post bond, or who reside in mental health facilities or correctional institutions.<sup>105</sup>

Many jurisdictions already presume defendants to be eligible for free counsel when they receive certain need-based public benefits. For example, in Louisiana defendants are presumptively deemed eligible if they receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance,” or “reside[] in public housing.”<sup>106</sup> In Washington State, people are deemed eligible if they receive “[t]emporary assistance for needy families, general assistance, poverty-related veterans’ benefits, food

stamps . . . refugee resettlement benefits, medicaid, or supplemental security income.”<sup>107</sup>

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THEORETICALLY, THE INDIGENT CLIENT COULD DO A WRIT OF CERT TO THE CRIMINAL COURT, AND HAVE THAT COURT ORDER THE LOWER COURT TO APPOINT A LAWYER. OF COURSE, WITH NO LAWYER, IT IS IMPOSSIBLE FOR INDIGENT PEOPLE TO KNOW THIS PROCESS, SO THAT NEVER HAPPENS IN PRACTICE.

*Attorney in Knox County, Tennessee*

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Jurisdictions should also presume that defendants who are unable to post bond are eligible for appointment of counsel. Even though, as previously discussed, the ability to post bond does not establish

that an individual can afford private counsel, the inability to post bond may be equated with indigence. After all, the advantages of making bond include regaining freedom, the capacity to continue employment, and an ability to help with one’s own defense.<sup>108</sup> Thus, a public defender in King County, Washington, advised us that clients in that jurisdiction who remain in custody are presumed to be indigent because the county assumes that they would have posted bond to regain their freedom if they could afford to do so.

Because the vast majority of people incarcerated in a correctional institution are indigent,<sup>109</sup> jurisdictions can save time and money by presuming eligibility for these individuals,

as well. Likewise, jurisdictions should consider providing counsel automatically to all defendants housed in a mental health facility. Louisiana and Nevada presume eligibility in both instances,<sup>110</sup> while Washington State provides counsel to everyone involuntarily committed to a mental health facility.<sup>111</sup>

Of course, jurisdictions should treat these presumptions as rebuttable, retaining the capacity to deny counsel in the rare instances in which a person is able to afford counsel despite receiving public assistance, being unable to post bond, or residing in a correctional facility or mental health institution.

**6. Ensure that required procedural protections are in place.**

**a. Maintain the confidentiality of information divulged during the screening process.**

For a number of reasons, the screening system should maintain the confidentiality of information that defendants provide during the screening process.<sup>112</sup> First, defendants must not be forced to choose between their Sixth Amendment right to counsel and their Fifth Amendment right not to incriminate themselves.<sup>113</sup> Potentially incriminating information revealed to the screener should be shielded by statute, court rules, a protective order, or by other means. In Washington, D.C., for example, where screening is done by the Pretrial Services Agency, a statute provides:

Any information contained in the agency's files, presented in its report, or divulged during the course of any hearing shall not be admissible on the issue of guilt in any judicial proceedings, but such information may be used in . . . perjury proceedings, and for the purposes of impeachment in any subsequent proceeding.<sup>114</sup>

Additionally, some of the information that defendants must reveal in order to establish eligibility for defense services may be highly personal. For example, a defendant may reveal that she is the victim of domestic violence and so is unable to rely on her husband's income,<sup>115</sup> receives public assistance,<sup>116</sup> has a disability for which she receives public benefits, or has extraordinary medical expenses. Defendants should not be forced to choose between their right to privacy and the right to counsel.<sup>117</sup> In addition to this constitutional consideration, shielding information revealed to the screener is a good idea

because defendants who fear that the information they provide may be used against them are unlikely to volunteer relevant information.<sup>118</sup> Shielding the information can improve the accuracy and efficiency of the screening process, and ensure that eligible people are provided with counsel.

Some jurisdictions expressly provide for confidentiality by statute or court rule. For example, in Vermont, “[a]ny financial information furnished or disclosed . . . [during the eligibility determination] shall be confidential and available for review only by the clerk or judicial officer or the person submitting the financial information.”<sup>119</sup> Vermont even provides that “[a] person who knowingly violates [this provision] shall be fined not more than \$500.00, and shall be liable in a civil action for any damages resulting from improper disclosure.”<sup>120</sup>

Unfortunately, some other jurisdictions explicitly state that information provided to the screener will become part of the defendant’s court file and thus, presumably, a matter of public record.<sup>121</sup> Some jurisdictions even require screening to be done in open court. In Tennessee, for example, a statute provides that “[a]ll statements made by the accused seeking the appointment of counsel shall be by sworn testimony in open court or written affidavit sworn to before the judge.”<sup>122</sup>

If no statute, rule, or regulation exists to protect the information the defendant reveals to the screener, then having a public defender do the screening may be the only way to protect the confidentiality of that information.<sup>123</sup> However, as discussed above, it is preferable not to involve the defender handling the case in the screening process.

**b. Do not re-examine eligibility determinations during the life of a case unless there is a compelling reason to do so.**

Protecting the interests of taxpayers may require that eligibility be re-examined during the life of a case. However, jurisdictions should ensure that the potential for such re-examination does not become a tool to punish a defendant or public defender.

For example, eligibility re-examinations should take place only at pre-determined intervals (for example, when a case is transferred from one court to another), or upon public disclosure of certain pre-determined types of new information (for example, the client winning the lottery). Massachusetts takes such an approach, with a party’s eligibility

amenable to review only “if information regarding a change in financial circumstances becomes available to a probation officer or other appropriate court employee, through the court’s verification system, or from some other source, including the party.”<sup>124</sup>

A prosecutor should not be allowed to request an eligibility re-examination as a way to punish a defendant for being uncooperative. Nonetheless, according to a public defender practicing in New Hampshire, eligibility in his state sometimes is reevaluated during the life of a case solely because the prosecution has raised the issue. Likewise, in Missouri, “[u]pon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant.”<sup>125</sup>

**c. Allow clients to appeal a determination of ineligibility to a judge or magistrate.**

Defendants who have been determined to be ineligible for the appointment of counsel should be accorded the right to appeal to a judge or magistrate, and should be informed of this right.<sup>126</sup> A number of states have instituted such an appeals process, either through statute or rule, although the process varies from state to state:

- **Vermont:** After a clerk or other judicial officer makes an initial determination regarding eligibility, that determination is reviewed by the presiding judge of the trial court.<sup>127</sup> Then, pursuant to statute, “the applicant, the state, or the office of the defender general may appeal the determination to a single justice of the [state] supreme court.”<sup>128</sup>
- **Massachusetts:** A “party has the right to reconsideration in a formal hearing of the findings and conclusion as to the party’s entitlement to assigned counsel.”<sup>129</sup>
- **Florida:** Defendants found ineligible by the clerk conducting the initial screening have the right to appeal to a judge.<sup>130</sup> According to one public defender in Florida practicing in Pinellas and Pasco counties, 98% of such appeals result in a determination that the client is indigent.
- **Georgia:** Parties denied counsel have the right to appeal their indigency determinations.<sup>131</sup>

Unfortunately, in many states, immediate review of a trial court's determination that an individual is not eligible for counsel requires a defendant to pursue some form of extraordinary appellate relief, such as a direct or "extraordinary" appeal to the state's high court, a motion for a "supervisory order," or a petition for "special action."<sup>132</sup> Because most unrepresented defendants will not know how to seek such relief, few such individuals will be able to exercise their right to appeal, and, ultimately, their right to counsel.

## CONCLUSION

The message of this report is that determining eligibility for free counsel can be guided by simple procedures that protect the public fisc while also effectuating the Sixth Amendment. Screening for eligibility is actually a valuable part of the justice system, preventing unnecessary expenditures by communities on counsel for ineligible defendants and ensuring quality representation for eligible defendants by lawyers unburdened by excessive caseloads. This report considers constitutional requirements and policy concerns, as well as information gathered from defenders across the country, in formulating a set of guidelines for instituting effective screening procedures. We invite jurisdictions across the country to preserve taxpayer revenue, while protecting constitutional rights, by taking advantage of these "best practices."

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## ENDNOTES

- 1 372 U.S. 335, 344-45 (1963) (stating that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”). A felony is usually punishable by at least a year in prison. Black’s Law Dictionary (8th ed. 2004).
- 2 *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972).
- 3 Many states have delegated to their counties the responsibility for providing public defense services. However, the provision of such services – and the decision of how who is eligible for such services – is ultimately a state responsibility. *See* American Bar Ass’n Standing Comm. on Legal Aid and Indigent Defendants, *Ten Principles of a Public Defense Delivery System 2* (2002). Although this Report refers to “jurisdictions” with the understanding that counties are often left to their own devices to establish screening processes, we recommend that all screening be uniform throughout each state. *See* Guideline 2 of this report.
- 4 One topic that we do not address here is whether and how jurisdictions should charge public defender application fees or seek reimbursement for the cost of the representation. This topic has important constitutional and public policy ramifications that merit a separate report.
- 5 *See* Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep’t of Justice, Educational and Correctional Populations 10 (2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>.
- 6 *See* American Bar Ass’n, *Criminal Justice Standards: Providing Defense Services*, Standards 5-4.1 to 5-4.3 (3d ed. 1992); Nat’l Legal Aid and Defender Ass’n, *Standards for the Administration of Assigned Counsel Systems*, Standard 2.3 (1989); Nat’l Legal Aid and Defender Ass’n, *Guidelines for Legal Defense Systems in the United States*, Standards 1.5 to 1.7 (1976); Nat’l Advisory Commission on Criminal Justice Standards & Goals, *Report of the Task Force on the Courts*, Standard 13.2 (1973); Nat’l Conf. of Comm’rs on Uniform State Laws, *Model Defender Act*, §§ 1, 2(a)(2), 4, 9(b) (1970). *See also* Robert L. Spangenberg, Nat’l Inst. of Justice, U.S. Dep’t of Justice, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (1986).

The existing national standards provide some guidance for jurisdictions. However, taken together, they are not uniform in their recommendations, do not provide enough information for jurisdictions to craft their own eligibility screening programs based on best practices, and do not adequately reflect current screening practices or best practices.

- 7 In 2005, the Brennan Center distributed an electronic questionnaire to public defenders. Our goal was to learn what was happening in as many jurisdictions as possible around the country, to provide a defender perspective on screening, and to spot-check the implementation of official rules. In seeking such information, we did not undertake to secure statistically accurate results, nor did we undertake to verify the factual accuracy of the responses. Public defenders who participated were assured that their identities would be kept confidential. The full results are available on request from Laura K. Abel, Brennan Center for Justice, 161 Avenue of the Americas, 12th Floor, New York, NY 10013, (212) 998-6737, [laura.abel@nyu.edu](mailto:laura.abel@nyu.edu).

- 8 “Flat fee” contract systems have been generally discouraged by the ABA and NLADA. According to the ABA, “assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation.” ABA Criminal Justice Standards: Providing Defense Services, *supra* note 6, Standard 5-2.4. NLADA suggests that “in developing a fee schedule, the effect of the fee schedule upon the quality of the representation should be considered. Fee structures should be designed to compensate attorneys for the effort, skill and time actually, properly and necessarily expended in assigned cases.” NLADA Guidelines for Legal Defense Systems, *supra* note 6, Guideline 3.1 Assigned Counsel Fees and Supporting Services.
- 9 *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)).
- 10 Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citation omitted).
- 11 The Massachusetts indigency screening procedure, and the criteria screeners should use, are set out in Mass. Gen. Laws Ann. ch. 211D §§ 2, 2 1/2, and in Supreme Judicial Court Rule 3:10. The New Hampshire indigency screening procedure, and the criteria screeners should use, are set out in N.H. Rev. Stat. Ann § 604-A:2 and N.H. Code of Admin. Rules § 1003.02.; Or. Rev. Stat. § 151.485(2) (requiring the Public Defense Services Commission to develop a financial eligibility form and “adopt uniform statewide guidelines and procedures that prescribe how to use the form and determine financial eligibility for appointed counsel”).

Additionally, the Nevada Supreme Court has proposed new, written criteria that would be applicable statewide but would provide for procedural variations in each judicial district based on “the unique circumstances and case management systems existent in the various judicial districts.” In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008), available at <http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf>. Although each judicial district was required to submit a plan regarding the administration of the new system by May 1, 2008, the order is currently stayed indefinitely for all but two counties. In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Mar. 21, 2008), available at <http://www.nvsupremecourt.us/documents/orders/ADKT411.order.pdf>.

- 12 American Bar Ass’n, Gideon’s Broken Promise: America’s Continuing Quest For Equal Justice 12 (2004). For a description of the problems caused by wide variety in eligibility standards and screening mechanisms in New York State, see N.Y. State Defenders Ass’n, Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center (1994), available at [http://www.nysda.org/elig\\_toc.htm](http://www.nysda.org/elig_toc.htm).
- 13 Los Angeles County Public Defender, Frequently Asked Questions, available at <http://pd.co.la.ca.us/FAQS.html#Anchor-Ho-14980>.
- 14 A report by a Pennsylvania Supreme Court committee confirms, “The Commonwealth

- maintains . . . no written indigency guidelines.” Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (2003), p. 184, available at <http://www.courts.state.pa.us/index/supreme/biasreport.htm>.
- 15 See Ohio Code § 120.03(B)(1) (requiring the Ohio public defender commission to issue financial eligibility rules for the conduct of county-run indigent defense systems); Ohio Admin. Code § 120-1-03.
  - 16 In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008), available at <http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf>. The order is in effect in two counties, and has been stayed in all other counties. In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Mar. 21, 2008), available at <http://www.nvsupremecourt.us/documents/orders/ADKT411.order.pdf>.
  - 17 American Bar Ass’n, Gideon’s Broken Promise: America’s Continuing Quest For Equal Justice 23-25 (2004).
  - 18 See, e.g., Wis. Stat. Ann. 977.06(4) (“A circuit court . . . shall review any indigency determination upon the motion of the district attorney.”).
  - 19 American Bar Ass’n, Model Rules of Prof’l Conduct, R. 4.3 (2004) (“The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client”).
  - 20 American Bar Ass’n, Criminal Justice Standards: Prosecution Function, Standards 3-3.10, 3-4.1 (3d ed. 1993).
  - 21 See NLADA, Assigned Counsel Systems, *supra* note 6, Standard 2.3(b) (“Individual assigned counsel shall not have responsibility for determining initial or continuing eligibility of clients.”).
  - 22 American Bar Ass’n, Model Rules of Prof’l Conduct, R. 1.7(a)(2).
  - 23 *Id.* at R. 1.7, cmt. 10.
  - 24 American Bar Association, Formal Op. 06-441 (2006).
  - 25 NAACP Legal Def. & Educ. Fund, Inc., The Status of Indigent Defense in Schuyler County 15 (2004).
  - 26 *Id.*
  - 27 The need to avoid even the potential for a perceived conflict of interest is heightened in the public defense context. Public defenders’ clients do not get to choose their attorneys, so they may have stronger than usual concerns about trust and loyalty than defendants who can retain the lawyer of their choice. When a public defender conducts eligibility screening, client concern is likely to increase.
  - 28 American Bar Ass’n, Model Code of Judicial Conduct, Canons 1, 2 (2004).
  - 29 Fla. Stat. § 27.52(4).

- 30 For example, in Maine, the judiciary has considered closing courthouses or curtailing the hours that they are open in order to free up funds for appointed counsel. Trevor Maxwell, *State Strains to Pay Lawyers: To Cover the Court-Appointed Lawyer Program's \$1.2 Million Deficit, Maine May Limit Courts' Hours or Close Courthouse Doors*, Portland Herald, Feb. 27, 2008, p. A1.
- 31 *Gideon*, 372 U.S. at 340 (stating that the Sixth Amendment has been construed to mean that “in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived”) (citing *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)).
- 32 18 U.S.C. § 3006A(b) (requiring the appointment of counsel for those “financially unable to obtain counsel”). In fact, in statements made before the Senate Commission on the Judiciary in 1963, Attorney General Robert F. Kennedy noted that this provision “studiously avoids the term ‘indigent.’ Instead it adopts the test of financial inability to secure a necessary part of adequate representation.” *Criminal Justice Act of 1963: Hearings on S.63 and S.1057 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 11 (1963) (statement of Robert F. Kennedy, Att’y Gen. of the United States).
- 33 *See State v. Tymcio*, 325 N.E.2d 556, 560 (Ohio 1975); *State v. Dean*, 471 N.W.2d 310, 314 (Wis. Ct. App. 1991) (recognizing that even if a “legislature’s indigency criteria are not met, the court can still declare the defendant indigent for purposes of appointing counsel to protect the defendant’s constitutional right to counsel”).
- 34 *See* ABA Criminal Justice Standards: Providing Defense Services, *supra* note 6, Standard 5-7.1 (“Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”); NLADA, Standards for Assigned Counsel Systems, *supra* note 6, Standard 2.3(a) (“Any person who cannot retain private counsel without substantial hardship to that person, or to his or her family, shall be eligible to receive the assistance of assigned counsel in all situations in which a constitutional, statutory or other right to counsel exists”); NLADA, Guidelines for Legal Defense Systems, *supra* note 6, Guidelines 1.5 (“Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation”); In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008), available at <http://www.nvsupremecourt.us/documents/orders/ADKT411Order.pdf> (“A person will be deemed ‘indigent’ who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own.”).
- 35 In *Hardy v. United States*, the Court warned:

Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. . . . Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.

375 U.S. 277, 289 n.7 (1964) (quotation marks and citations omitted) (holding that indigent defendants are entitled to a full transcript of their trial court proceedings on their appeal as of right). *See also* 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 11.2(e) (1984) (“The appellate courts agree that indigency is not a synonym for ‘destitute.’ A defendant may

- have income and assets yet still be unable to bear the cost of an adequate defense.”).
- 36 See Mass. Sup. Jud. Ct. R. 3:10 (in determining eligibility, “the judge shall make one of the following three determinations: (i) the party is indigent, (ii) the party is indigent but able to contribute, or (iii) the party is not indigent.”); Tenn. S. Ct. R. 13, § 1(d)(1) (“In the following cases, . . . the court or appointing authority shall advise any party without counsel . . . that counsel will be appointed if the party is indigent and requests appointment of counsel”).
- 37 See *Smith v. State*, 155 P.3d 793, 795 (Okla. Ct. Crim. App. 2007) (“In order to insure that a defendant is not improperly denied counsel to which he or she is constitutionally entitled, the district court must make a record inquiring about the defendant’s financial status and reflecting that the defendant understands that the presumption of non-indigency created by the posting of bond is rebuttable and that he or she may still be entitled to court appointed counsel upon sufficient proof of indigent status.”).
- 38 See, e.g., Ga. House Bill 1245, § 15 (“In no case shall a person whose maximum income level exceeds 150 percent of the federal poverty level or, in the case of a juvenile, whose household income exceeds 150 percent of the federal poverty level be an indigent person or indigent defendant.”) (effective May 14, 2008); Ohio Admin. Code § 120-1-03(B) (2) (“Applicants with an income over 187.5 per cent of the federal poverty level shall be deemed not indigent”).
- 39 D-Med Corporation & National Association of Counties, *Are Indigent Defense Costs Destroying Your Budget?*, available at [http://www.urbancounties.org/Content/Content-Groups/Programs\\_and\\_Projects/Financial/FSC/D-MedMarketingPiece.pdf](http://www.urbancounties.org/Content/Content-Groups/Programs_and_Projects/Financial/FSC/D-MedMarketingPiece.pdf).
- 40 NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.5.
- 41 Ind. Pub. Defender Comm’n, *Standards For Indigent Defense Services In Non-Capital Cases*, Standard C.2 (2006) (“The determination of eligibility for the appointment of counsel will include an estimation as to the costs of retaining private counsel.”), available at <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf>.
- 42 Wash. Rev. Code § 10.101.020(2).
- 43 See American Bar Ass’n, *Gideon’s Broken Promise: America’s Continuing Quest For Equal Justice 9-10* (2004); In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008) (directing indigence screeners to consider “local private counsel rates”).
- 44 American Bar Ass’n, *Gideon’s Broken Promise: America’s Continuing Quest For Equal Justice 9-10* (2004).
- 45 Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595, 599-600 (1993) (listing reasons).
- 46 Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 Indiana L.J. 571, 589 (2005).
- 47 See, e.g., Ohio Admin. Code § 120-1-03(C)(1) (“A defendant may be found not indigent if the individual possesses liquid assets in excess of the assigned/appointed counsel fees paid

- for a case of equal seriousness in the county in which the charges are brought.”).
- 48 NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.5(b).
- 49 *Id.*
- 50 Md. Ann. Code art. 27A, § 7(a).
- 51 Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595, 599 (1993).
- 52 *See* Barry v. Brower, 864 F.2d 294, 299-300 (3d Cir. 1988) (holding that defendant was constitutionally entitled to appointment of counsel, despite joint equity in \$80,000 house, where six attorneys each had demanded “a substantial initial cash outlay” before representing him, and “none of them [was] willing to forego an up-front payment because of his interest in his jointly held residence”); Alaska R. Crim. Proc., Rule 39.1(d)(3) (“In assessing a defendant’s ability to pay the likely cost of private representation, the court should assume that at least 50 percent of the likely fee must be paid immediately and that the total fee must be paid within four months.”).
- 53 *See* Ohio Admin. Code § 120-1-03(C)(1) (“In lieu of using the assigned/appointed counsel fee, other methods of determining fees for competent counsel may be used, including a survey of attorneys representing defendants in criminal cases”).
- 54 *See* NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.5 (advising jurisdictions to regard as unavailable liquid assets “needed for the support of the person or his dependents and for the payment of current obligations”).
- 55 According to one recent study, 29% of families with incomes under 200% of the poverty level experience critical hardships, such as lack of food, medical care, housing, or basic utilities. Seventy-four percent experience serious hardships, such as worrying about having enough food, being forced to rely on inadequate medical care (such as emergency rooms) or child care. Heather Boushey et al., Economic Policy Institute, *Hardships in America: The Real Story of Working Families* 2, 4, 28 (2001).
- 56 Instructions for Completing Financial Disclosure/Affidavit of Indigency Form OPD-206R § IV(23) (Office of the Ohio Pub. Defender, effective Sept. 29, 2005), *available at* [http://opd.ohio.gov/reimb/reim\\_Aug\\_26\\_2005\\_memo.pdf](http://opd.ohio.gov/reimb/reim_Aug_26_2005_memo.pdf); Ohio Admin. Code § 120-1-03(K).
- 57 *Id.* at § IV(24).
- 58 Wis. Admin. Code § PD 3.03(2).
- 59 Ohio Instructions for Completing Financial Disclosure/Affidavit of Indigency Form § VII(51), *available at* [http://www.lcmunicipalcourt.com/CmsData/Site/Documents/FinancialDisclosureForm\\_AffidavitofIndigency.pdf](http://www.lcmunicipalcourt.com/CmsData/Site/Documents/FinancialDisclosureForm_AffidavitofIndigency.pdf).
- 60 *See* NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.5(a).
- 61 Wis. Stat. § 977.07(2).
- 62 Mass. Sup. Jud. Ct. R. 3:10, § 1(h).

- 63 See NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.5(a); Barry v. Brower, 864 F.2d 294, 299-300 (3d Cir. 1988) (“The Constitution requires states to meet a ‘present’ need for counsel. If by their nature an accused’s assets cannot be timely reduced to cash and cash is required, the ‘present’ financial inability to obtain counsel which defines indigence for Sixth Amendment purposes appears.”).  
Whether jurisdictions can and should consider some portion of such assets available to reimburse the government for the cost of appointing counsel is a separate question. Reimbursement and co-pays are beyond the scope of this report.
- 64 *Rothgery v. Gillespie Country*, 128 S. Ct.2578, 2583 (2008); American Bar Ass’n, Gideon’s Broken Promise: America’s Continuing Quest For Equal Justice 22 (2008).
- 65 *Id.*
- 66 The costs of incarcerating pretrial detainees include the daily cost of housing people in prison, and the inability of incarcerated people to work and pay income taxes or child support. NAACP Legal Defense & Educ. Fund, Inc., Assembly Line Justice: Mississippi’s Indigent Defense Crisis 20 (2003), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf>.
- 67 See Mass. Sup. Jud. Ct. R. 3:10, § 1(h) (stating that the defendant’s liquid assets shall be defined as “[c]ash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in a motor vehicle or in other tangible property; provided that any equity in real or personal property is reasonably convertible to cash”); Wis. Stat. § 977.07(2) (instructing screeners to consider any assets “which can be converted to cash within a reasonable period of time”).
- 68 We learned this from a public defender who responded to the questionnaire described *supra* note 7.
- 69 Ed Housewright, *Collin Cuts Indigent Defense Costs, Raises Legal Concern*, Dallas Morning News, Aug. 4, 2007, at A1.
- 70 Fla. Stat. § 27.52.
- 71 N.H. Code Admin. R. Adm 1003.02(f)(1)(b)-(c).
- 72 See Official Committee of Disputed Litigation Creditors v. McDonald, 42 B.R. 981, 987 (D. Tex. 1984) (“Numerous courts have noted that a consideration of the accused’s debt situation is appropriate in determining his eligibility for appointed counsel.”).
- 73 See, e.g., La. Rev. Stat. 15:175B(1) (listing “outstanding obligations” as a factor for screeners to consider).
- 74 Whitehead v. State, 130 S.W.2d 866, 878 (Tex. Crim. App. 2004).
- 75 Michigan, for example, looks at the “availability and convertibility, without undue financial hardship to the defendant and the defendant’s dependents, of any personal or real property owned.” Mich. R. Crim. Proc., Rule 6.005(B)(4).
- 76 See Alaska R. Crim. Pro., Rule 39.1(c)(6) (“In assessing available credit, the court shall consider only the amount the defendant can realistically afford to repay.”).

- 77 See Minn. Stat. § 611.17(b)(3) (instructing screeners to examine “whether the transfer of an asset is voidable as a fraudulent conveyance”).
- 78 See ABA Criminal Justice Standards: Providing Defense Services, *supra* note 6, Standard 5-7.1 (“Counsel should not be denied because . . . bond has been or can be posted.”); NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.5(a); Elliott v. District Court of Denver, 402 P.2d 65, 66 (Colo. 1965); People v. Eggers, 188 N.E.2d 30, 32 (Ill. 1963).
- 79 See Ramirez v. State, 779 So. 2d 364, 365 (Fla. Dist. Ct. App. 2000) (holding that a trial court violated the Constitution when it denied appointment of counsel to a defendant solely because his mother had posted a bond of more than \$5,000). See also 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 11.2(e) (1984) (stating that “the defendant cannot be forced to relinquish one constitutional right in order to obtain the other”).
- 80 Wash. Rev. Code § 10.101.010(4) (providing that “available funds” should be calculated “after provision is made for bail obligations”).
- 81 Ohio Rev. Code § 120.03(B)(1) (“Release on bail shall not prevent a person from being determined to be indigent.”); Ohio Admin. Code § 120-1-03(C)(3).
- 82 See Mo. Rev. Stat. § 600.086(1).
- 83 Shelby County, Tenn., Uniform Affidavit of Indigency, Question 11, *available at* [http://co4.shelbycountyttn.gov/court\\_clerks/criminal\\_court/FORMS/UnifAffidavitIndig%20CC7-87\(a-b\).pdf](http://co4.shelbycountyttn.gov/court_clerks/criminal_court/FORMS/UnifAffidavitIndig%20CC7-87(a-b).pdf). Likewise, Tennessee Code Annotated § 40-14-202(c)(6) states that when making a determination of indigency, the court shall take into account “[t]he amount of the appearance or appeal bond, whether the party has been able to obtain release by making bond, and, if the party obtained release by making bond, the amount of money paid and the source of the money.”
- 84 Wis. Admin. Code § PD 3.03(1)(b).
- 85 Fla. Stat. § 27.52(4)(a)(1). See also Ramirez, 779 So. 2d at 365 (interpreting this provision as creating a presumption against eligibility, but refusing to deny counsel solely on the basis that the defendant has posted bail).
- 86 See Dubose v. State, 662 So.2d 1189, 1191 (Ala. 1995); Knapp v. Hardy, 523 P.2d 1308, 1311 (Ariz. 1974); Roberts v. State, 438 S.E.2d 905, 906-07 (Ga. 1994); Schmidt v. Uhlenhopp, 140 N.W.2d 118, 122 (Iowa 1966); Tinsley v. Commonwealth, 185 S.W. 668, 670, 674 (Ky. Ct. App. 2006); Baldwin v. State, 444 A.2d 1058, 1067-68 (Md. Ct. Spec. App. 1982). See also ABA Criminal Justice Standards: Providing Defense Services, *supra* note 6, Standard 5-7.1 (“Counsel should not be denied because . . . friends or relatives have resources to retain counsel.”); N.Y. State Bar Ass’n, Standards for Providing Mandated Representation, Standard C-2 (2005) (“Mandated representation shall not be denied because . . . friends or relatives have resources to retain counsel.”), *available at* [http://www.nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726](http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726).
- 87 In Alabama, the state supreme court has agreed with the holding of the state court of criminal appeals that “the assets of friends and relatives, not legally responsible for the defendant, are not included within the [statutory] definition of ‘assets.’” Dubose, 662 So.2d at 1191

- (citing *Russaw v. State*, 572 So.2d 1288 (Ala.Cr.App.1990)). In Ohio, “[n]o applicant shall be denied counsel based on the financial status of a member of the client’s household when that household member has no legal duty to support the applicant, or when that household member refuses to provide or pay for counsel.” Ohio Public Defender, Standards and Guidelines for Appointed Counsel Reimbursement, State Maximum Fee Schedule for Appointed Counsel Reimbursement, County Public Defender Office Reimbursement Standards 2 (2000). Moreover, “no child shall be denied counsel solely because the child’s parents or guardians are unwilling to disclose their financial status or to provide or pay for counsel.” *Id.* See also Ohio Admin. Code § 120-1-03(C)(4) (“Counsel shall not be denied solely because an applicant’s friends or relatives have resources adequate to retain counsel.”). The federal government’s practice is that “[t]he initial determination of eligibility should be made without regard to the financial ability of the person’s family, unless his family indicates a willingness and financial ability to retain counsel promptly”). Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures, ch. 2, § 2.06 (2005).
- 88 See *United States v. O’Neill*, 478 F. Supp. 852, 854 (E.D. Pa. 1979) (holding spouse liable for legal fees for criminal defense representation under Pennsylvania common law); *United States v. Connecticut*, 645 F. Supp. 44, 45 (E.D. Wis. 1986) (holding spouse liable under Wisconsin marital property law); *In re J.B.*, 603 A.2d 368, 368-69 (Vt. 1991) (noting that counsel must be provided to juvenile with parents unwilling to pay for private counsel but that state may seek reimbursement from parents).
- 89 Midland County, Texas, Indigent Defense Plan, § IV.B (2005), *available at* [http://www.co.midland.tx.us/DCourts/318/Forms/Midland\\_County\\_Indigent\\_Defense\\_Plan\\_2005.pdf](http://www.co.midland.tx.us/DCourts/318/Forms/Midland_County_Indigent_Defense_Plan_2005.pdf).
- 90 Va. Code Ann. § 19.2-159(B)(1), (2).
- 91 Tennessee Uniform Affidavit of Indigency Form (July 1, 1993) per Tenn. Sup. Ct. R. 13, *available at* <http://www.tsc.state.tn.us/geninfo/Publications/Forms/TrialCourtForms.htm>.
- 92 N.J. Rev. Stat. § 2A:158A-14(g).
- 93 See Alan J. Tomkins & Elizabeth Neeley, Preliminary Evaluation of the Lancaster County Indigency Screener Project 17 (2003) (“If the defendant must search for private counsel in order to show the court that counsel cannot be arranged with the funds available to the defendant, it delays justice.”), *available at* [http://ppc.unl.edu/publications/documents/indigency\\_final\\_report.pdf](http://ppc.unl.edu/publications/documents/indigency_final_report.pdf).
- 94 *Chief Counsel’s Message*, CPCS Children and Family Law Newsletter (Comm. For Public Counsel Servs., Boston, Mass.) Winter 2004, at 3, *available at* [http://www.mass.gov/cpcs/newsletters/Winter\\_2004\\_Newsletter.pdf](http://www.mass.gov/cpcs/newsletters/Winter_2004_Newsletter.pdf).
- 95 *Id.* at 4. See also Mass. Gen. L. 211D, § 2 1/2(e) (“If the court finds that a person has materially misrepresented or omitted information concerning his property or assets for purposes of determining indigency, and that such person does not meet the definition of indigency, the court shall immediately terminate any assignment or appointment of counsel made under chapter 211D and shall assess costs of not less than \$500 against such person.”).
- 96 Ohio Admin. Code § 120-1-03(A).
- 97 *Id.* § 120-1-03(H).

- 98 *Id.*
- 99 North Dakota Commission on Legal Counsel for Indigents, Procedures to Determine Eligibility for Appointment of Indigent Defense, § III(1), (2) (2006).
- 100 Tomkins & Neeley, *supra* note 93 at i, 23-24.
- 101 Section 673(2) of the Omnibus Budget Reconciliation Act of 1981 (codified at 42 U.S.C. § 9902(2)) requires the Secretary of the Department of Health and Human Services to update the poverty guidelines annually. The 2008 Federal Poverty Guidelines are *available* at <http://aspe.hhs.gov/POVERTY/08poverty.shtml>.
- 102 John Iceland, Experimental Poverty Measures: Summary of a Workshop 3 (2005).
- 103 *See* note 55 and accompanying text. *See also* Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 Indiana L.J. 571, 601-03 (2005).
- 104 *See, e.g.*, Fla. Stat. § 27.52(2)(a) (defendant presumptively eligible if income is equal to or below 200% of the federal poverty guidelines); In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008) (treating as presumptively eligible defendant earning less than 200% of the federal poverty guidelines); Wash. Rev. Code § 10.101.010(1)(c) (defendant eligible if income is 125% or less of federal poverty guidelines).
- 105 *See* ABA Criminal Justice Standards: Providing Defense Services, *supra* note 6, Standard 5-7.1 & Commentary (stating that eligibility for welfare or public assistance should be used to indicate “presumptive eligibility”).
- 106 La. Rev. Stat. Ann. § 15:175(A)(1)(b).
- 107 Wash. Rev. Code § 10.101.010(1)(a). *See also* In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008) (presuming eligibility if defendant receives “public assistance, such as Food Stamps, Temporary Assistance to Needy Families, Medicaid, Disability Insurance, [or] reside in public housing”); N.M. Rules Ann., Form 9-403 (presuming eligibility if defendant receives “temporary assistance for needy families (TANF), general assistance (GA), supplemental security income (SSI), social security disability income (SSDI), food stamps, medicaid, disability security income (DSI), public assisted housing or Department of Health, Case Management Services (DHMS)”); Va. Code Ann. § 19.2-159(B) (stating that “the court shall determine whether or not the accused is a current recipient of a state or federally funded public assistance program for the indigent” but providing that the presumption is rebuttable “where the court finds that a more thorough examination of the financial resources of the defendant is necessary”).
- 108 *See* Ric Simmons, *Private Criminal Justice*, 42 Wake Forest Law Rev. 984-85 (2007) (noting that “defendants who are incarcerated prior to trial are 35% more likely to be convicted than those who are not – if the defendant is facing a felony charge, he is 70% more likely to be convicted if he is in jail before trial and is much more likely to plead guilty”).
- 109 Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep’t of Justice, Defense Counsel in Criminal Cases 1 (2000), *available* at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

- 110 La. Rev. Stat. Ann. § 15:175(A)(1)(b); In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008). The Nevada order is in effect in two counties, and has been stayed in all other counties. In the Matter Concerning the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Mar. 21, 2008),
- 111 Wash. Rev. Code § 10.101.010(1)(b).
- 112 According to the New York State Bar Association, “Rules, regulations and procedures concerning the determination of initial eligibility and continuing eligibility for mandated representation shall be designed so as to protect the client’s privacy and constitutional rights and to not interfere with the attorney’s relationship with his or her client.” N.Y. State Bar Ass’n, Standards for Providing Mandated Representation, Standard C-4 (2005), *available at* [http://www.nysba.org/AM/Template.cfm?Section=Substantive\\_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726](http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2726).
- 113 United States v. Pavelko, 992 F.2d 32, 34 (3d Cir. 1993) (holding that statements made in the context of a financial eligibility determination under the Sixth Amendment cannot be used against a defendant on the issue of guilt in violation of the Fifth Amendment). *See also* Simmons v. United States, 390 U.S. 377, 394 (1968) (holding that defendants cannot be forced to choose between asserting their Fourth and Fifth Amendment rights because it is “intolerable that one constitutional right should have to be surrendered in order to assert another”).
- 114 D.C. Code § 23-1303(d).
- 115 Publicly stating that the defendant is a victim of domestic violence may place the defendant at heightened risk of abuse. *See* Myrna S. Raeder, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System*, 69 S. Cal. L. Rev. 1463, 1468 n.18 (1996) (noting that one study of women murdered by their batterers found that 45 percent of the murders “were generated by the man’s rage over the actual or impending estrangement from his partner”).
- 116 This information is so sensitive that many federal and state laws protect its confidentiality. *See* 42 U.S.C. § 602(a)(1)(A)(iv) (requiring states receiving federal public assistance funds to “[t]ake . . . reasonable steps . . . to restrict the use and disclosure of information about individuals and families receiving assistance under the program”); N.Y. Soc. Serv. Law § 136 (restricting disclosure of names of welfare applicants and recipients, and deeming violation of the statute by a newspaper a misdemeanor).
- 117 *See* U.S. v. Lexin, 434 F. Supp. 2d 836, 854 (S.D. Cal. 2006) (denying news organization’s request for access to documents regarding individual’s application for appointed counsel, because “a defendant who requests appointment of counsel would necessarily be forced to choose between his constitutional right to counsel and his constitutional right to informational privacy”).
- 118 *Id.*
- 119 Vt. Stat. Ann., title 13, § 5236(f).
- 120 *Id.* at § 5236(g).

- 121 *See, e.g.*, Va. Code Ann. § 19.2-159(C) (requiring defendants seeking appointment of counsel to execute a written financial statement which “shall be filed with and become a part of the record of such proceeding”).
- 122 Tenn. Code Ann. § 40-14-202(b).
- 123 The significant risk of self-incrimination forms a basis for the NLADA’s recommendation that public defenders screen so that “[a]ny information or statements used for the determination should be considered privileged under the attorney-client relationship.” NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.6.
- 124 Mass. Sup. Jud. Ct. R. 3:10, § 7(a).
- 125 Mo. Rev. Stat. § 600.086.
- 126 According to the NLADA Guidelines, “[a] decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal. The person should be informed of this right to appeal and if he desires to exercise it, the clerk of the court should perfect the appeal.” NLADA Guidelines for Legal Defense Systems, *supra* note 6, Standard 1.6.
- 127 Vt. Stat. Ann. § 5236(c).
- 128 *Id.*
- 129 Mass. Sup. Jud. Ct. R. 3:10, § 7(b); *see also* Fla. Stat. § 27.52(2)(e) (“The applicant may seek review of the clerk’s determination that the applicant is not indigent in the court having jurisdiction over the matter at the next scheduled hearing. If the applicant seeks review of the clerk’s determination of indigent status, the court shall make a final determination.”); Haw. Rev. Stat. § 802-4 (“Unless otherwise ordered by the court, the determination of indigency shall be made by a public defender, subject to review by the court.”).
- 130 Fla. Stat. § 27.52(2).
- 131 Georgia Standards for Determining Indigence § 4 (2006), *available at* [http://www.gpdsc.com/cpdsystem-standards-determining\\_indigence.htm](http://www.gpdsc.com/cpdsystem-standards-determining_indigence.htm).
- 132 *See* State v. Wolverton, 533 N.W.2d 167, 174 (Wis. 1995) (holding that the proper way to appeal from a denial of publicly funded counsel is to seek leave to appeal to the court of appeals); State v. Gardner, 626 S.W. 2d 721, 722 (Tenn. Crim. App. 1981) (addressing issue of “whether the appellant/defendant is an indigent” via “an extraordinary appeal by permission from this Court”); People v. Power, 330 N.E.2d 857 (Ill. 1975) (granting motion for issuance of a “supervisory order” regarding trial court’s failure to determine whether defendant was indigent); Knapp v. Hardy, 523 P.2d 1308, 1390 (Ariz. 1974) (“We granted this petition for special action to review the orders of the Superior Court of Maricopa County which denied defendant association of private counsel with the public defender.”).



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