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August 26, 2015

New York State Indigent Legal Services Office
Attention: Ms. Tammeka Freeman
80 S. Swan St., 29th Floor
Albany, New York 12210

RE: *Recommendations on the criteria for financial eligibility determinations*

Dear Director Leahy:

I write on behalf of the Chief Defenders Association of New York (CDANY) to comment upon the various proposals regarding the appropriate procedures to be employed when making financial eligibility determinations.

CDANY is a membership organization of the appointed public defenders, conflict defenders, executive directors of non-profit indigent defense offices, and administrators of assigned counsel panels throughout New York State. Our organizations represent the vast majority of people prosecuted in New York State. Collectively, our members supervised indigent defense programs that represented over 400,000 individuals in the criminal, family, and appellate courts of New York in 2014.

CDANY and its membership welcome guidance from the Indigent Legal Services Office (ILS) concerning the appropriate criteria and procedures to be employed in determining whether a person is unable to afford counsel and entitled to constitutionally mandated representation. As these issues implicate a number of important

concerns, and there is currently a divergence of opinion on a number of these issues among our membership, I write to express our association's position on the primary issue which concerns our membership: the appropriate criteria for determining eligibility.

CDANY strongly believes that any standards for eligibility begin with a recognition that an individual determination of eligibility must be based upon whether a person is unable to afford counsel in the respective jurisdiction. The statutory language contained in County Law § 717 referring to indigency ("The public defender shall represent, without charge, at the request of the defendant, or by order of the court with the consent of the defendant, each indigent defendant who is charged with a crime...") conflicts with constitutional standards and should be excluded from any analysis of eligibility.

Although CDANY recognizes that eligibility determinations must be based upon an individualized determination of a person's ability to afford counsel, the promulgated guidelines should recommend financial guidelines where a person would be considered "presumptively eligible" for counsel. CDANY believes that any eligibility criteria promulgated by ILS which establish levels of "presumptive eligibility" must consider:

- the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged or complexity of the family court or appellate case; and
- New York State specific indexes of poverty for each jurisdiction, such as "The New York State Poverty Report" issued by the New York State Community Action Association, and "The Self Sufficiency Standard for New York State 2010" prepared for the New York State Self Sufficiency Standard Steering Committee.

A single presumptive eligibility standard employed in all non-NYC counties (e.g., 250% of the federal poverty guidelines) no matter the jurisdiction or type of case would likely be either over-inclusive or under-inclusive in many jurisdictions throughout the State. Therefore, CDANY recommends that ILS adopt jurisdiction-specific presumptive eligibility guidelines that account for the above factors.

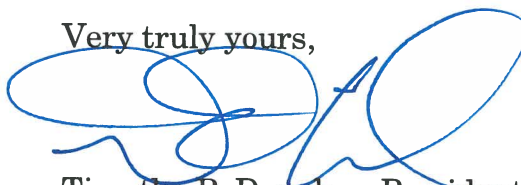
Additionally, CDANY believes that the constitutional right to counsel is an individual right and the assignment of counsel should not be dependent on the income or assets of anyone other than the defendant.

Finally, it is important to note that CDANY strongly believes that the State must assume financial responsibility for any additional resources required by a provider to comply with any promulgated standards.

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Thank you for your consideration of the above. Should you have the need for any additional information, please do not hesitate to contact me directly.

Very truly yours,



Timothy P. Donaher, President
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and Monroe County Public Defender
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