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GUIDELINES AND FORMAT FOR DETERMINING
ELIGIBILITY FOR ASSIGNMENT OF COUNSEL
IN THE STATE OF WISCONSIN

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(Adaptable for use in other jurisdictions)

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Foreword

The National Center for Defense Management (NCDM) was established in 1974 by a grant from the Law Enforcement Assistance Administration (LEAA) to the National Legal Aid and Defender Association (NLADA). NCDM's objective is to improve the efficiency of systems for the defense of the poor, to maximize their quality and to maintain their cost-effectiveness through sound planning, management assistance and management training.

Under the terms of the LEAA grant, the principal goals of the National Center for Defense Management are:

- o To establish statewide appellate defender programs.
- o To develop inservice training programs.
- o To provide systems development studies of statewide public defender systems.
- o To provide management evaluations of defense delivery programs.

This monograph is in furtherance of these goals and objectives. Eileen Wolfner, the author, is deputy director, Office of Projects Development, Appellate Division, First Department, New York Supreme Court. The views expressed of course are her own and do not necessarily represent the views of the National Legal Aid and Defender Association.

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Special acknowledgement is reserved for the Office of Projects Development of the Appellate Division, First Department of the Supreme Court of the State of New York, whose main objective is to provide quality defense services to indigent defendants and under whose auspices the original "Guidelines" were written in 1976.

INTRODUCTIONA. Background

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has made the Sixth Amendment right to appointed counsel applicable to "any person hailed into court, who is too poor to hire a lawyer,"* and has held that this right is incorporated into the due process clause of the Fourteenth Amendment; it therefore applies to state and federal prosecutions.

The question remained whether the Sixth Amendment's "all criminal prosecutions" language included misdemeanors as well as felonies. The Supreme Court answered this question in 1972, holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial.**" This ruling, while imposing new financial burdens upon the criminal justice system, has given additional meaning to the concept "equality before the law" for indigent defendants; legal defense services must now be provided to all indigents accused of crimes - felonies or misdemeanors - whenever imprisonment is a possible penalty.

Courts across the nation have become more aware of the need to provide quality legal representation to indigent defendants. Similarly, the client

*Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

**Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

community has become better informed about their right to effective legal defense. It is now recognized not only that counsel is of crucial importance at trial, but that lawyers must actively involve themselves with numerous facets of a client's case, from pre-trial investigation and preliminary hearings to the provision of expert witnesses and scientific testimony, through post-conviction remedies, appeals and in other collateral matters.

An individual charged with the commission of a crime is confronted with the awesome power of the State manifested by its agents -- judges, prosecutors, investigators and bailiffs -- and by a legal code containing complex, technical terminology. Without assistance of counsel, the accused, generally unfamiliar with legal language, institutions and processes, finds it difficult to understand the relevant law, much less to know the appropriate ways in which to present an effective defense.

It is widely acknowledged that, especially for accused indigents, "lawyers in criminal courts are necessities, not luxuries."* One consequence of the Argersinger decision has been the need to develop standards and procedures for determining eligibility for assignment of counsel which are fair and uniformly applied to all defendants within each jurisdiction. This concept of equal treatment is implicit in the Fourteenth Amendment. The National Study Commission on Defense Services aptly pointed out that "the flagrant violation of the Equal Protection Clause by states which establish or permit different standards for eligibility within the state...is a problem of constitutional dimension."**

*Gideon v. Wainwright.

**National Study Commission on Defense Services, National Colloquim on the Future of Defender Services, Financial Eligibility for Representation, p. 115.

One method for ensuring that all defendants are accorded equal justice is for each state to establish written standards which are applied equally and without coercive overtones. The standards should be known and understood by the public at large, the private bar, the judiciary, and the defendant population.

The state may alter the "economic" variables within the written formula to properly reflect urban, suburban, or rural standards of living, but the same eligibility standard must be maintained for all similarly situated accused persons. The chief difficulty lies in devising standards which are free of administratively burdensome screening and verification procedures.

B. Nature of the Request.

On July 1st, 1977, Wisconsin became the nineteenth state to establish a state-wide, trial-level defender program. The legislation provides that the Wisconsin State Public Defender Board shall promulgate rules regarding the determination of indigency, establish the percentage of cases in each county to be handled by local counsel, and approve personnel and employment policies for the Office of the Wisconsin Public Defender.

In order to fulfill these specific mandates, as well as to implement regional defender offices throughout the state, exploratory talks were held with the staff of the National Center for Defense Management in July of 1977. The Center was asked to prepare a Statement of Work outlining the available technical assistance services which would address the areas of eligibility determination, certification of attorneys, location and staffing of regional offices and the development of an office policy and procedure manual for the new defender system.

The Wisconsin Council on Criminal Justice (the State Planning Agency), in conjunction with the Wisconsin State Public Defender, considered and approved the proposed Statement of Work prepared by the Center. On July 19, 1977, the approved proposal was forwarded to Mr. Herbert Portzen of the LEAA Region V Office in Des Plaines, Illinois.

After discussions at the Regional level, a revised formal technical assistance request was transmitted on August 19, 1977 to the Assistant Administrator of the LEAA Office of Regional Operations in Washington, D. C.. On August 29, 1977 the technical assistance request was approved by LEAA and referred to the Center for action.

This report covers the eligibility component of the Center's technical assistance efforts on behalf of the Wisconsin State Public Defender.

C. Methodology.

In order to complete this aspect of the technical assistance request, the Center secured the services of Eileen Wolfner, Deputy Director of the Office of Projects Development (OPD), Appellate Division, First Department, New York Supreme Court. Under Ms. Wolfner's direction, OPD had developed "Proposed Guidelines for Determining Eligibility for Assignment of Counsel."

For almost two years, OPD analyzed the literature concerning client eligibility for assignment of counsel.* OPD surveyed hundreds of Legal Aid and Public Defender organizations across the nation to determine (1) what definitions and standards existed, (2) how they were being applied, and (3) what screening and verification procedures were being used. Few jurisdictions had

*See Proposed Guidelines for Determining Eligibility for Assignment of Counsel, for a detailed bibliography of research sources used in developing the "Guidelines", pp. iv-ix.

any definable standards. The majority based their determinations on income, relying on basic poverty definitions promulgated by the Office of Economic Opportunity. "Formulas" disregarded the crucial distinction between the ability to afford necessities of life and the ability to afford assistance of competent counsel. Thus, OPD's "Proposed Guidelines" synthesizing the recommendations of major legal academicians and the requirements of the United States Constitution was one of the first written compilations of uniform standards in America. They were subsequently introduced on a three-month, experimental basis in the Kings County (Brooklyn, New York) Criminal Court to assess their efficacy.

Evaluation procedures were devised to test three main areas: (1) the applicability of the principles; (2) the practicality of the eligibility questionnaire; and (3) the effect of the new standards on orderly court administration. Objective questionnaires were distributed to judges, supervisors and screeners.

The results of the experiment were very favorable.* At the outset, there was serious concern that the introduction of a new system would delay the processing of cases. However, participants agreed that the arraignment process was not impeded; there was no change in the disposition rate and no appreciable slowdown. Most had no difficulty with the implementation process, especially after the initial familiarization period. On both a theoretical and practical level, the standards and procedures were deemed a success.

The Center commissioned Ms. Wolfner to prepare, in conformity with Section 977.07(2) of the State Public Defender Act, specific written standards relating to income, assets, and the anticipated cost of representation for determining the ability of a person to contribute to the cost of legal services. The consultant also agreed to design an eligibility questionnaire by which it can be

*Eileen Wolfner, Guidelines for Determining Eligibility For Assignment of Counsel: Analysis and Evaluation Results, pp. 6-26.

determined whether or not a person's assets -- less reasonable and necessary living expenses -- are sufficient to cover the anticipated cost of effective representation.

This report is based on: an extensive review of eligibility practices in various jurisdictions; the work of groups such as the American Bar Association, the National Study Commission on Defense Services and the National Legal Aid and Defender Association; and Wisconsin statutes. It also draws heavily from the materials developed and implemented by Ms. Wolfner at OPD.

The report is organized in four principal parts: The first outlines the legal requirements of the Wisconsin statute and discusses how the guidelines originally written for the City of New York were adapted to fulfill those requirements. Three of the adaptations necessitated by the statute are critiqued here. The second presents the revised "Guidelines" for Wisconsin. The third presents the methodology, implementation techniques and materials designed to make the "Guidelines" operational in Wisconsin. The fourth section recommends an evaluation of the "Guidelines" after they have been in operation three to six months. Additional materials are attached as appendices.

The guidelines and commentary which follow must be read in the spirit of fidelity to justice, not economy. The purpose of these eligibility standards is not to exclude those who are above an arbitrarily selected income level; it is to promote the integrity of our legal system by assuring that financial need will not deny an accused citizen the effective assistance of competent counsel.

ADAPTATIONS OF ELIGIBILITY "GUIDELINES" TO WISCONSIN LAW

The legal requirements for determining eligibility for assignment of counsel are enumerated in Section 977.07(2) of the Wisconsin Statute which reads:

The representative of the state public defender making a determination shall ascertain the assets of the person which exceed the amount needed for the payment of reasonable and necessary expenses incurred, or which must be incurred to support the person and the person's immediate family. Such assets shall include disposable income, cash in hand, stocks and bonds, bank accounts and other property which can be converted to cash within a reasonable period of time and is not needed to hold a job, or shelter, or clothe and care for the person and the person's immediate family. Assets which cannot be converted to cash within a reasonable period of time, such as a person's home, car, household furnishings, clothing and other property which has been declared exempt from attachment or execution by law, shall be calculated to be assets equivalent in dollars to the amount of the loan which could be, in fact, raised by using these assets as collateral. If the person's assets, less reasonable and necessary living expenses, are not sufficient to cover the anticipated cost of effective representation when the length and complexity of the anticipated proceedings are taken fully into account, the person shall be determined to be indigent in full or in part.

The determination of the ability of the person to contribute to the cost of legal services shall be based upon specific written standards relating to income, assets and the anticipated cost of representation. If found to be indigent in full or in part, the person shall be promptly informed of the state's right to recoupment under (Section) 256.66, and the possibility that the payment of attorney's fees may be made a condition of probation, should the person be placed on probation. Furthermore, if found to be indigent in part, the person shall be promptly informed of the extent to which he or she will be expected to pay for counsel, and whether such payment shall be in the form of lump sum payment or periodic payments. The payment and payment schedule shall be set forth in writing. Payments for services of the state's public defender or other counsel provided under this chapter shall be paid to the state public defender for deposit in the state treasury.

Although the guidelines developed by the Office of Projects Development (OPD) for use in the First and Second Judicial Departments in New York basically are compatible with the framework established by Section 977.07(2), some adaptations were necessary.

In order to protect accused persons from inconsistent and arbitrary eligibility determinations, Wisconsin law prescribes that all such determinations be based upon specific written standards. This is essential in order to accord due process to criminal defendants. The "Guidelines" which follow, provide written, fair, and flexible standards by which reasoned determinations of eligibility can be made uniformly throughout the state.

Wisconsin law further requires that an individual's assets include disposable income, cash-on-hand, stocks and bonds, bank accounts and other property which can be converted into cash within a reasonable time. These "liquid assets" are of primary importance in ascertaining the defendant's ability to retain competent counsel.* The statute also provides that such assets should be considered only if they are not needed to sustain the defendant and his family with the necessities of life.

Forcing a defendant to forego necessities of life causes "undue hardship to himself and his family." Therefore, an "emergency" clause allows the defendant to deduct from available liquid assets, any expenses which he has incurred or will incur as a result of a recent emergency in his family.**

The statute requires that the defendant's living expenses be deducted from his available assets. The "Guidelines" incorporate this concept and define these assets as "non-obligated income." Standards set by the Bureau of Labor Statis-

*See pp. 21-23 for detailed discussion of liquid assets.

**See p. 20.

tics (BLS) are employed in defining average living expenses for a family residing in either an urban, suburban or rural area.

BLS standards correlate a family's income bracket with the average amount that a particular economic group expends for the necessities of life.* The BLS standards include the cost of food (according to nutritional standards formulated by the National Research Council of the National Academy of Sciences), home furnishings/operations, rent, utilities, insurance, medical care costs, health insurance, taxes, transportation expenses, clothing and other expenses.**

In order to conform with the requirements of Section 977.07(2), the "Guidelines" include non-liquid assets to the extent that they can be used as collateral for loans. The "Guidelines" define non-liquid assets as luxury items and stipulate that the Judge must grant an adjournment to give the defendant time to ascertain whether he can borrow against these assets.***

Finally, in making eligibility determinations, the statute takes into account the cost of adequate counsel. The proposed administrative rules drafted by the State Public Defender's Office set forth a schedule of attorneys' fees based on a survey of the private bar in the state. The "Guidelines" have incorporated these results.

Although the "Guidelines" are designed to comply with Wisconsin Law, some observations should be made about the statute. For example, Section 977.07(2) requires that defendants' "Home, car, household furnishings, clothing and other property which has been declared exempt from attachment or executed by law, shall be calculated to be assets equivalent in dollars to the amount of the loan which could be, in fact, raised by using these assets as collateral."

*See pp. 25-29.

**See Autumn 1976 Urban Family Budgets and Comparative Indexes for Selected Urban Areas, p. 5.

***See pp. 30-33.

This provision would appear to jeopardize a desired protection against "undue hardship" since many of these assets may be defined as necessities of life.

A recent study of the right to counsel in criminal cases suggests that stringent financial eligibility standards may coerce a defendant to waive representation rather than incur the expense of private counsel.* The authors point out that requiring a defendant to obtain a loan based on his non-liquid assets assumes future earnings by the defendant. Banks are very hesitant to accept future earnings as collateral for loans. In the case of a defendant in a criminal proceeding where imprisonment and loss of employment are distinct possibilities, uncertainty about future earnings is greatly increased. The defendant's borrowing power is correspondingly reduced.* These are the very reasons why the defendant is typically unable to arrange a deferred payment for private counsel. Furthermore, it is unrealistic to expect the defendant to find a legitimate lender since "...lending money to a defendant in a criminal case is a risky venture to the lender, the interest that the defendant has to pay would be much higher than normal. ...At the extreme, he might be forced into the hands of loan sharks, surely a consequence any jurisdiction would want to avoid.* In any case, forcing the defendant to pay interest on borrowed money, in addition to the cost of bail, can be construed as punitive.

Section 977.07(2) further requires that a defendant who possesses some resources must make partial payment to the Public Defender (for deposit in the State Treasury). Consequently, the proposed eligibility questionnaire enables the Defender to determine if the defendant has any resources available for this purpose. The defender may require the payment to be made in one lump sum or in installments.

*Krantz, Smith, Rossman, Froyd, Hoffman, Right To Counsel In Criminal Cases: The Mandate of Argersinger v. Hamlin, Ballinger Publishing Company, Mass. 1976, pp. 320-324.

A partial payment scheme, unless carefully administered, will conflict with the hardship concept. "Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost."*

Indeed, principal national standards disapprove of recoupment except where a defendant makes fraudulent claims in the financial eligibility statement. For example, the American Bar Association states that:

Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility.**

The National Advisory Commission on Criminal Justice Standards and Goals recommends that a defendant be required to contribute to the cost of representation that amount that he is able to pay at the time*** (emphasis added). The Commission noted:

The standard makes a defendant liable for partial costs of defense representation only if, at the time of the prosecution, he is able to bear the costs. Thus, it does not go as far as the Uniform Law Commissioners' Model Public Defender Act, which, in Section 9(b), authorizes reimbursement to the State for defense representation if, after 3 years, the individual is able to pay for it. The adverse effects of a criminal prosecution, both financial and otherwise, are so great for both convicted and acquitted defendants, that there should not be added the deterrent disincentive to gainful employment that the Model Public Defender Act would provide.***

*National Advisory Commission on Criminal Justice Standards and Goals, Courts, Section 13.2 (1973).

**A.B.A., Providing Defense Services Standard 6.4.

***National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 13.2 (1973).

The National Legal Aid and Defender Association excluded recoupment from its "Proposed Standards for Defender Services," (1976).

Most recently, the National Study Commission on Defense Services rejected recoupment, citing such factors as the chilling effect upon the right to counsel, the detriment to rehabilitation and the administrative costs. The Commission observed that:

The recent experiences of every system studied which demonstrate the lack of revenues derived from reimbursements confirm the futility of attempting to obtain funds from those who were originally unable to afford the cost of representation.*

In light of these facts, yet in order to conform to the requirements of Section 977.07(2), the Wisconsin State Public Defender might be guided by the National Study Commission, which recommended that the accused's contribution be limited to the lesser of 10% of the anticipated cost of representation or one trial day. The Commission continued:

For those jurisdictions wishing to require recoupment but nonetheless wishing to ensure that their statutes would withstand scrutiny, the following suggestions are made. Whether or not reimbursement should be ordered should be determined at the conclusion of the proceedings, based on the present ability of the defendant to pay all or a portion of the costs of legal assistance. No order of reimbursement should be ordered, however, unless the defendant at the time that eligibility was first established, was notified of the potential obligation to reimburse the state or county. Should the defendant obtain legal representation at state or county expense in connection with a criminal appeal, or in a matter ancillary to a criminal proceeding or a habeas corpus proceeding, the state or county should be authorized to obtain reimbursement from the defendant through application to a judge of the court of original jurisdiction other than the sentencing judge. No order of reimbursement, however, should be made unless the defendant has the present ability to pay and has been given notice of the potential obligation to reimburse. Any application for reimbursement by the state or county should be made to the court no later than thirty days following the termination of the proceedings in issue, whether trial or appellate.

*Guidelines for Legal Defense Systems in U.S., (1976).

Following the application, the defendant's attorney should file a statement of the costs of legal representation at public expense and the defendant should file a declaration of his financial status, all of which would be utilized by the court in making the determination regarding reimbursement. In determining the amount of payment to be made and the method of payment, the court should take into account the financial resources of the defendant and the nature of the burden that payment of costs would impose. The resources of a spouse, relatives, and other persons should not be considered in making the determination. The defendant should have the right to obtain a modification or termination of the reimbursement order at any time while it has force and effect on the basis that the order works manifest hardship to the defendant or his dependents brought about by circumstances which have changed since the order for reimbursement was ordered. ...Collection should be effected as in other civil cases, with the same exemptions and with the same procedures. The branch of the prosecutor's office which processes claims and collections should handle the case and the defender office should not take part in the collection process, since that would place it in an adverse and untenable relationship with its clientele. If the claim is unpaid within a specified period of time, the collection unit should have the authority to reduce the claim to judgment, and execute the judgment in the same way that other civil judgments are executed.*

The Public Defender is responsible for making the determination of legal indigency (Section 977.05(5)(h)) and the assignment of counsel (Section 977.08 (1)). It is contemplated that a paralegal assistant will complete and verify the eligibility questionnaire prior to arraignment. However it is preferable that the eligibility interview be conducted by the attorney -- whether defender or private counsel -- assigned to the case.** This ensures confidentiality and promotes early development of the attorney/client relationship. The National Study Commission comments:

*See Guidelines, pp. 120-121.

**During the period July 1, 1978 to June 30, 1979, the Court should make a tentative appointment of counsel prior to the determination of eligibility; that attorney, as the Court's delegate, should conduct the eligibility inquiry and make the determination, to be approved and adopted by the court.

The inquiry into a person's financial status is a sensitive one. A judge should be spared that inquiry in order to protect the court's objectivity and an applicant's apprehension that economic status is relevant to justice. To entrust financial screening to a clerk or a specially selected administrator is an intrusion into a person's privacy by a bureaucrat who will have no future need for the information. But if the defender office or assigned counsel program makes the initial inquiry, it will be helpful in developing a total picture of the potential client and may reveal information which is essential to effective representation. It will also prevent the leak of information which, e.g. as in a tax fraud or child support action, may be directly relevant to the question of guilt or innocence and hence, should be protected under the attorney-client privilege. Most importantly, the inquiry will be dignified, not done in a crowded courtroom; it will be made by a party who has a legitimate and continuing need to know all he can about the client; it will be covered by the attorney-client privilege; and it will form an integral part of the trust which must be developed to make the right of counsel more than a mere constitutional formality.*

The completed eligibility form is protected by the attorney-client privilege and may not be examined by an auditor or any other party. In this regard, the Commission notes:

A defendant who has been determined to be ineligible by the defense program and who desires court review of that decision would be required to waive the privilege so that the form could be submitted to the court. In those cases, the defendant has no interest in invoking the privilege because his dispute is with the defender or assigned counsel over the privileged information itself. Of course, a defendant could refuse to waive the privilege and forego court review, thereby ensuring the protection of the financial information which he has provided.

Because counsel is so essential to the fact-finding process in any case, and since the denial of counsel may sound the death knell of a claim or defense, a court determination of ineligibility should be immediately reviewable. The method of review should be simple and expeditious. By requiring findings of fact and conclusions of law at the trial level, there is some assurance that the trial judge will carefully scrutinize the reasons for his decision.**

*Guidelines, p. 100.

**Ibid, p. 101.

In addition, since bail is the second determinant, eligibility cannot be decided prior to bail's being set. It should be the Public Defender who decides whether or not bail should be subtracted from the defendant's available resources and finally, if the defendant is eligible for publicly compensated counsel.

In New York, the Judge was selected to be the eligibility determiner. This decision was based on the ABA Standards for Providing Defense Services which states in Standard 6.3, "the formal determinant of eligibility should be made by the judge or an officer of the court selected by him."* The commentary suggests that an impartial arbiter make the final decision and explains why Public Defender offices should not make the eligibility decision:

"An overzealous or understaffed defender may be tempted to bend the standards to extend or restrict the services he is providing. It is important that the formal determination of eligibility for assistance be made by a judge or other public official so that the public and the bar can be confident that the determination does not mask the desire of counsel to obtain or avoid the opportunity to act as counsel for the defendant whose eligibility is in question."**

Furthermore, allowing the public defender to make the determination might interfere with the attorney-client relationship. The public defender may in the screening process, make determinations that the defendant considers adverse to his interests, thereby jeopardizing the trust necessary for the preparation of an adequate and fair defense. The proposed administrative rules (Section 208(1)) somewhat ameliorate this situation by permitting the defendant to request a court review of the Public Defender's determination. The eligibility questionnaire requires that the defendant be informed of his right to appeal an unfavorable decision by the Public Defender.

*A.B.A. Standards Relating to Providing Defense Services, (Approved Draft, 1968), Standard 6.3.

**Ibid, at 6.3(b).

III

GUIDELINES FOR DETERMINING WHETHER A DEFENDANT IS FINANCIALLY ABLE TO OBTAIN ADEQUATE PRIVATE COUNSEL

A. Principles and Concepts: Explained and Defined.

This section is divided into two parts. The first develops the basic principles underlying the "Guidelines." The second part explains the policy and procedures to be used in their operation.

The financial position of defendants, arrested and facing criminal prosecution, runs the gamut of extreme wealth to abject poverty. It is a well-known fact that a wealthy individual will assess his situation and liquidate whatever assets are essential for him to retain competent counsel. In fact, when questioned, the vast majority of defendants, regardless of wealth, prefer to retain their own counsel; defendants believe that a private attorney will work harder for them. For example, in one study on the subject, urban and rural judges stated that "most defendants would prefer to retain their own private attorneys and therefore that 'chiseling' was rare."*

In contrast, individuals falling in the poverty category are given assigned counsel or none at all. In many cases, they are already receiving public assistance. Legal representation is clearly beyond their means.**

A more critical situation confronts the individual who falls between these two extremes: those persons in the lower middle and middle income brackets

*"Courts Weigh Curbing Free-Counsel Abuses," New York Law Journal, July 17, 1976, p. 1 col. 2.

**Krantz, Smith, Rossman, Froyd, Hoffman, Right To Counsel In Criminal Cases: The Mandate of Argersinger v. Hamlin, Ballinger Publishing Company, Mass. 1976, p. 312.

who are not impoverished but who cannot afford adequate counsel without substantial hardship to themselves and/or their families. A study by the Center for Criminal Justice, Boston University, has pointed out:

This range includes individuals with very modest uncommitted funds, which under some circumstances might be adequate for a counsel assisted guilty plea to a simple misdemeanor or ordinance violation, as well as individuals whose familial responsibilities extend beyond the legally recognized family unit. It also includes middle-income defendants with a very intricate and costly defense of a serious misdemeanor charge. Accepting public responsibility only for the destitute leaves the lower-middle and middle-income persons in a precarious position. These persons all too frequently are pressured, cajoled, and sold in (what) Abraham Blumberg calls 'the practice of law as a confidence game.' Ineffective assistance is their lot; the letter of the Sixth Amendment may be met, but the spirit is denied.*

The unfortunate result is that only the rich and the very poor obtain counsel. It is therefore imperative to define "legal indigency" and to determine what the term "financially unable to obtain counsel" means as a test for eligibility.*

Black's Law Dictionary's definition of indigency -- that is the state of being "needy" and "poor" -- has been widely rejected when used to determine if an individual is unable to to afford counsel.** Similarly, in reviewing an in forma pauperis action under 28 U.S.C. Section 1915, the Supreme Court in Adkins v. E.I. DuPont, 335 U.S. 331, 339 (1948) stated that:

We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for costs...and still be able to provide himself and dependents with the necessities of life."

*Ibid., p. 315.

**See New York County Law, Section 722-a (McKinney 1972).

The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, chaired by Professor Francis A. Allen of the University of Michigan Law School, issued a report (hereinafter cited as the Allen Committee Report) which led to the implementation of the Criminal Justice Act.

The Allen Committee report totally rejected the term "indigency" because it suggests welfare, poverty laws, and a total absence of financial resources. The U. S. Attorney General, upon submission of the Allen Report to the President, pointed out that the Committee had purposely avoided using the term indigency "...because of its implication that only an accused who is destitute may need appointed counsel or service."*

The Allen Report urged that a more appropriate way to approach eligibility criteria is to consider whether the accused lacks the financial resources adequate to permit him to hire counsel. The Committee advised that the poverty of the accused had to be viewed as a "relative concept ... and must be measured in each case by reference to the particular need or service in consideration.**

The emerging concept of "Legal Indigence" has been adopted by many commissions, academicians, and committees which have studied this problem. There is wide acceptance that many middle income class individuals are "legally indigent" since they are unable to pay for effective and adequate counsel.***

A New Hampshire commission, in its effort to prepare guidelines for eligibility in that State, has concluded that it is inaccurate to equate the provision

*Senate Report 346, 88th Congress, First Session 13 (1963).

**Allen Committee Report, p. 7.

***H. Packer, T. Ehrlich, O.S. Pepper, "New Directions in Legal Education: A report Prepared for the Carnegie Commission on Higher Education" 6 (1972). See also Krantz, op., cit., p 316.

of court assigned counsel with poverty and that a standard which requires a defendant to be a "Pauper" in order to obtain free counsel is "too restrictive to pass constitutional muster."*

It is clear that financial inability to afford counsel is not synonymous with "indigency." Therefore, the key test for determining eligibility should be whether or not the defendant is financially able to afford adequate counsel without substantial hardship to himself or his family.

What, then, is "adequate counsel" and what constitutes "substantial hardship"?

"Adequate counsel" contemplates an attorney who has the requisite knowledge and experience to render effective assistance of counsel in defending his client against the crime charged. The problem arises when a defendant has some financial resources to apply towards his defense but not enough to obtain the services of an experienced attorney.

A report entitled "The Criminal Justice Act in the Federal District Courts," prepared by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, clearly stated that:

The purpose of the Criminal Justice Act is to assist defendants "who are financially unable to obtain an adequate defense." (Subsection (a); emphasis supplied). The act cannot have been intended and it should not be administered so as to drive defendants of limited means into the arms of inferior attorneys. If a defendant lacks the means to engage a lawyer who is qualified to conduct a Federal criminal defense, he should be eligible for appointment of counsel, even though he has enough resources to engage a lawyer of low skill or experience.**

*National Center for State Courts, Northeast Regional Office, Defense Services in New Hampshire, LEAA, Boston, Mass., 1976, p. 55.

**"The Criminal Justice Act in the Federal District Courts," Subcommittee on Constitutional Rights, Committee on the Judiciary, U. S. Senate, 90th Congress, 2d Session, pp. 25-26.

A large number of states have recognized the importance of ensuring that a defendant receive competent counsel and have incorporated this concept into their statutes. The New Jersey statute, for example, reads:

Eligibility for the services of the Public Defender shall be determined on the basis of the need of the defendant. Need shall be measured according to the financial ability of the defendant to engage and compensate competent private counsel. ... (Emphasis added.)*

At this juncture the concept of "substantial hardship" must be defined and related to a defendant's "financial inability" to obtain "adequate counsel". The present trend in the legal field is towards the humanitarian view that a defendant should not have to divest himself of all his real and personal property in order to become financially capable of retaining counsel. Home, clothing, furniture, etc., must be considered "necessities of life;" to coerce a person to dispose of such basic necessities to himself and/or his family is to inflict "substantial hardship."

The "hardship" concept is not only valid but vital in devising eligibility guidelines. In the Commentary to its Standards Relating to Providing Defense Services, the American Bar Association emphasized that:

"...eligibility is not to be determined on the supposition that one is entitled to be provided counsel only after he has exhausted every financial resource that might be required for other vital personal or family necessities, such as food, shelter or medicine. At the point at which payment of a fee to retain counsel would inflict substantial hardship on the family unit, or on himself, society's obligation to provide counsel arises."**

*2A New Jersey Statutes Annotated 158 A-14.

**American Bar Association Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services, Standard 6.1 (Approved Draft 1968), p. 54.

Similarly, the National Study Commission on Defense Services, the National Advisory Commission on Criminal Justice Standards and Goals, and the National Legal Aid and Defender Association endorse the notion of "substantial hardship."*

In a recent analysis of eligibility determiners, the "hardship" concept was judged to be of such overriding importance as to be a necessary consideration at every phase of the process of determining eligibility:

The following should guide the development of financial eligibility standards for non-felony public defense counsel: No defendant should be found financially ineligible for publicly provided criminal defense counsel unless he can purchase effective counsel assistance in the private market-place without substantial hardship to self or family...The standards should be known and understood by the public, should be based on fair and honest appreciation of the economic hardship to an individual trying to obtain effective private counsel, should be applied equally and with no coercion...**

Clearly, the "hardship" concept must be incorporated into the eligibility guidelines. However, a question remains as to what the "hardship" concept means in concrete terms vis a vis its application to the guidelines presented here. It simply means that when a defendant's financial resources are considered in order to determine if he is capable of retaining adequate counsel we must always keep in mind a defendant's day-to-day personal and familial expenses; payment for which must come from his financial resources. These on-going expenses for shelter, clothing, food, transportation, etc., must be considered "necessities of life" of which no person should be deprived.

*National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the U. S., N.L.A.D.A. (1976), p.97; National Advisory Commission on Criminal Justice Standards and Goals, Courts, (1973), p. 257; National Legal Aid and Defender Association, Standards for Defender Services, NLADA (1976), p.4.

**Krantz, op. cit., p. 317, See also National Center for State Courts, op. cit., p. 103.

Therefore, in order to determine how much of a defendant's monthly income can be applied to his criminal defense, we must first deduct expenses for the "necessities of life."

In applying the "hardship" concept to liquid assets, we must consider any recent emergency expenses which the defendant has incurred but, as yet, has not paid. A defendant who has incurred unforeseen medical expenses, which will deplete all of his available liquid assets, should not be denied free counsel. This would violate the spirit of the "hardship" concept.

It should be noted that bail will also be considered an emergency situation; in light of the fact that a defendant may have exhausted all available liquid and/or non-liquid assets to obtain release from jail. If that is the case, a defendant should not be forced to choose between release from jail and adequate counsel.

The "hardship" concept also applies to most non-liquid assets. Such items as household furnishings, clothing, etc., generally fall into the category of "necessities of life." If a defendant were forced to sell these "necessities of life," this too would constitute a violation of the "hardship" concept.

However, it should be pointed out that non-liquid assets which can be characterized as "luxury items" (i.e. color television sets, jewelry, stereos, new automobiles, etc.) will be considered in evaluating a defendant's financial eligibility.

The following section discusses each eligibility determinant in detail, how it was derived, and how it can be applied as a guideline in determining whether a defendant is financially unable to retain counsel.

B. Guidelines for Determining Eligibility for the Assignment of Counsel.

Three Determinants:

1. Defendants Estimated Available Financial Resources.
2. Financial Resources Committed by Defendant to Procure Bail Bond.
3. Cost of Obtaining Adequate Private Counsel.

Determinant I

Defendant's Estimated Available Financial Resources

The first determinant is broken down into three factors:

- A. Defendant's available liquid assets;
- B. Defendant's estimated, non-obligated monthly income; and
- C. Cash available from sale of defendant's luxury non-liquid assets.

Factor A: Liquid Assets

Liquid assets are defined as cash, bank accounts, stocks, bonds, demand notes, insurance policies and other paper which can be readily converted into cash.

The use of liquid assets as a determinant in ascertaining financial ability to employ private counsel is only logical since liquid assets, in whatever form they may be, must be viewed as savings and, as one study has noted, "on the assumption that savings are put away for emergencies, they should be applied to one's defense in a criminal prosecution."* However, the assets of a defendant which are immediately available to him in cash form must be considered not a mere factor, but rather, the most important factor in determining whether defendants can immediately obtain private counsel.**

*Krantz, op. cit., p. 324.

**Ibid.; see also NLADA, op. cit., National Advisory Commission on Criminal Justice Standards and Goals, Courts, Standard 13.2 (1973).

Liquid assets take on this primary role since "a defendant in a criminal case is frequently under time pressure to obtain counsel as early as possible. For this reason, assets that cannot be quickly liquidated may be of little value for the purpose of retaining an attorney."* Few respectable criminal attorneys will accept a case on a credit basis and many will require a substantial cash retainer or advance before accepting a case.** Thus, even if a defendant has a substantial income and substantial non-liquid assets, the defendant will, nonetheless, probably be unable to obtain private counsel immediately if he has no liquid assets. A policy could be adopted of withholding appointed counsel from a defendant who lacks liquid assets but who does have substantial non-liquid assets and of requiring that the defendant sell some of his non-liquid assets so that he can retain private counsel. In fact the adoption of such a policy is recommended with regard to certain luxury non-liquid assets. However, requiring a defendant to sell some of his non-liquid assets may cause prolonged delay in processing defendant's case.

It was previously noted that a defendant's savings are applicable to a determination of his ability to afford counsel, since one of the purposes of savings is to meet emergencies and a criminal prosecution is clearly an emergency. It is possible that a defendant may confront other emergencies at the same time he is facing criminal prosecution. The defendant may have recently incurred expenses due to unforeseen medical bills, funeral costs, etc. Such, as

*National Center for State Courts, op. cit., p. 82. See also Krantz, op. cit., p. 325.

**NLADA, op. cit., p.156; Criminal Justice Act in the Federal District Courts, op. cit., p. 25; Krantz, Ibid., p. 320; Silverstein, Defense of the Poor in Criminal Cases in American State Courts, Vol. 1: National Report, (American Bar Foundation, 1965), p. 112.

yet unpaid, emergency expenses are to be deducted from liquid assets before a determination is made whether defendant has sufficient liquid assets to afford private counsel; this is in keeping with the "hardship" standard outlined above. However, emergency expenses should be deducted from liquid assets only if the needed services have been (or will soon be) contracted for and are unpaid for at the time of the determination of eligibility. It should be stressed that only serious, emergency expenses will qualify for deduction. Mortgage payments, car payments and the like, although important and necessary, can be anticipated; these are more a function of net income than they are of liquid assets. Thus, under these guidelines, such routine, predictable obligations are deducted from net income, not liquid assets. This is the case even though defendant may, at times in the past, have used his savings as a source of payment to meet his regular obligations.

Summarizing a defendant's available liquid assets consists of his total liquid assets less any recent, unpaid commitments for emergency purposes.

Factor B: Defendant's Estimated Non-Obligated Monthly Income

This is defined as the estimated amount a defendant has available from income (such as wages, pensions, bonuses, social security, business income, interest, etc.) after monthly living expenses (necessities of life) have been deducted.

Income will be used as a factor on the assumption that individuals who have "monies" remaining after deduction for "necessities of life" will be able to divert this non-obligated income to the procurement of private counsel without violating the "hardship" concept.

Income is one of the most commonly misused criteria for establishing the defendant's ability to retain counsel. The problem, and hence the abuse, is in directly fixing an income level as a guideline without considering the nec-

essary living expenses. This has been the major pitfall plaguing jurisdictions attempting this approach.

Judge Hastings astutely described the problem where a defendant:

may be employed regularly at a substantial wage, but have a number of dependents who require all his income for living purposes, and as a consequence have no income or surplus property available for an adequate defense.*

Obviously it is difficult to set an income cut-off-point. In establishing strict income based determinations the total financial situation of the defendant can be overlooked. Decisions of trial courts to deny counsel to defendants based on the defendant's income alone have been reversed. For example, a conviction was overturned in People v. Gillespie, 41 Mich. App. 748, 201 N.W.2d 104 (1972) on the ground that the trial court committed error in refusing to assign counsel. The defendant had an annual income of \$7,000, yet an in-depth inquiry into his finances would have disclosed that retaining counsel would have resulted in a substantial hardship. The appellate court directed the assignment of counsel for the defendant.**

Although there is an element of "arbitrariness" in setting a fixed income standard for determining eligibility, if it is "used sensitively and with due consideration for unusual circumstances, a fixed income standard, set at a reasonable level, would make justice"*** available to those truly in need of legal assistance.

The eligibility criteria used by Government agencies for social services are unrealistic and inappropriate for purposes of "legal indigency". As the re-

*Hastings, "The Criminal Justice Act of 1964" 57 J.Crim.L., C.P.S. 426-428 (1966).

**See also Wood v. United States, 389 U.S. 20 (1967), and State v. Mickle, 525 P. 2d 1108 (Hawaii, 1974).

***Krantz, op. cit., p. 319-20.

searchers for the Center for Criminal Justice point out, "allowing for a new car every twelve years, a skirt every five years, one book a year, a bottle of beer a week, and no phone"* is obviously not in keeping with humanitarian concepts of "necessities of life."

The Bureau of Labor Statistics (BLS) is the one agency highly recommended by most jurisdictions studying the problem of eligibility. The major reasons for relying on BLS budgets are the following:

1. BLS organizes its budget into three major categories for hypothetical families: lower level, intermediate level, and higher level.
2. The budgets are revised to reflect changes in the cost of living.
3. BLS constructs budgets for urban, suburban and rural areas based on studies of cost of living in those centers.
4. BLS determines an estimated cost for the "necessities of life" for an average family of four.

The lower and intermediate levels for standards of living are the most realistic for use in determining eligibility for assignment of counsel since BLS presents objective criteria for measuring necessities of life and conversely, hardship.**

A closer examination of the BLS standards demonstrates this point. The BLS budgets are prepared for:

a precisely-defined hypothetical urban family of four persons consisting of a 38-year-old husband employed full time; his non-working wife; a boy of 13; and a girl of 8. The family has, for each budget level, average inventories of clothing, home furnishings, major durables and other equipment. The budgets, which pertain only to urban families, are not intended to represent a minimum or subsistence level of living nor how families of these types actually spend their money.***

*Krantz, op. cit., p. 327.

**Krantz, op. cit., p. 329; National Center for State Courts, op. cit., App.4-2.

***U.S. Department of Labor, Bureau of Labor Statistics Middle Atlantic Region, "City Worker Family Budgets For New York - Northeastern New Jersey Up Sharply Between 1973-1974", May 27, 1975, p. 13.

Table 8 (below), shows the components incorporated into the budget, the three levels of living, and the price changes over different periods of time.

Table A
Summary of annual budgets for a four-person family at
three levels of living, urban United States
Autumn 1977*

| Component | Lower Budget | Intermediate Budget | Higher Budget |
|--------------------------------|-----------------|------------------------|------------------|
| Total budget | \$10,481 | \$17,106 | \$25,202 |
| Total family consumption: | \$ 8,657 | \$13,039 | \$17,948 |
| Food | \$ 3,190 | \$ 4,098 | \$ 5,159 |
| Housing | \$ 2,083 | \$ 4,016 | \$ 6,085 |
| Transportation | \$ 804 | \$ 1,472 | \$ 1,913 |
| Clothing | \$ 828 | \$ 1,182 | \$ 1,730 |
| Personal care | \$ 282 | \$ 377 | \$ 535 |
| Medical care | \$ 980 | \$ 985 | \$ 1,027 |
| Other family consumption | \$ 489 | \$ 909 | \$ 1,499 |
| Other items | \$ 472 | \$ 763 | \$ 1,288 |
| Social security and disability | \$ 632 | \$ 961 | \$ 985 |
| Personal income taxes | \$ 720 | \$ 2,342 | \$ 4,980 |

Note: Because of rounding, sums of individual items may not equal totals.

Changes in Budgets, 1976 - 77.

From Autumn 1976 to Autumn 1977, the total cost of the lower budget rose 4.4 percent, and the intermediate and higher budgets rose 5.4 and 6.1 percent, respectively, as shown in table B on the next page. These were slightly smaller increases than in 1976.

*Ibid., p. 11.

Table B
Percent Change In Four-person Family Budgets Autumn 1976 to Autumn 1977

| Component | Budget Level | | |
|------------------------------------|--------------|--------------|--------|
| | Lower | Intermediate | Higher |
| Food----- | 6.2 | 6.2 | 6.2 |
| Housing----- | 6.1 | 4.5 | 4.5 |
| Shelter----- | 6.5 | 4.4 | 4.2 |
| Renter costs----- | 6.5 | 6.4 | 6.5 |
| Homeowner costs*----- | - | 4.0 | 3.9 |
| Housefurnishings & operations | 5.0 | 5.0 | 5.0 |
| Transportation----- | 4.8 | 4.9 | 4.9 |
| Clothing----- | 3.6 | 3.6 | 3.6 |
| Personal care----- | 6.4 | 6.2 | 6.4 |
| Medical care----- | 9.4 | 9.4 | 9.4 |
| Other family consumption----- | 4.5 | 4.6 | 4.5 |
| | | | |
| Total consumption less shelter---- | 6.0 | 5.7 | 5.6 |
| Total consumption----- | 6.1 | 5.4 | 5.3 |
| | | | |
| Other items----- | 4.7 | 4.4 | 4.4 |
| Social Security----- | 4.6 | 7.0 | 8.1 |
| Personal income taxes----- | -12.7 | 4.7 | 9.1 |
| Total budget----- | 4.4 | 5.4 | 6.1 |

*On the assumption that the home was purchased 6 years ago, these costs reflect changes in purchase prices and mortgage interest rates from 1970 to 1971 and changes in property taxes, insurance, fuel and utilities, and repairs and maintenance from 1976 to 1977.

With the exception of housing, consumption costs went up about the same for each budget level; medical care showed the largest increase, 9.4 percent. Homeowner costs increased less than rental costs, primarily due to a reduction in interest rates between 1970 and 1971 (See Footnote to Table B). Because homeowners are included only in intermediate and higher budgets, total consumption costs rose less for these levels than the lower level which includes only renter costs. This result was offset by a decrease in personal taxes in the lower budget so that the increases in total budget costs were more for the higher two levels.

The Boston University study analyzed the major budget components in the following manner:

Major Components

Food.

Lower-Income standard. — Based on the United States Department of Agriculture's (USDA) low-cost food plan, "which has been used widely to estimate money allowances for food in public assistance programs." Compared with the moderate -- and high-cost plans, the lowcost plan has larger quantities of foods that provide high nutritional returns for cost -- potatoes, dry beans and peas, and flour and cereal -- and small quantities of meat, poultry and fish, and fruits and vegetables other than potatoes.

Moderate-Income standard. — Based on the USDA's moderate-cost plan. It is considered suitable for the average American family. It includes larger quantities of milk, eggs, meat, fruits, and vegetables than the low-cost plan. It allows for some of the higher-priced cuts of meat, a few out-of-season foods, and some convenience foods. Thus, it provides for more variety and less home preparation than the low-cost plan.

Housing.

Lower-Income standard. — Limited to rental housing. Includes shelter (the major expense in the housing total), heat, utilities, household operations, and housefurnishings.

Moderate-Income standard. — The cost is a weighted average for renter and homeowner families. Twenty-five percent of families at the moderate standard are assumed to live in rental housing.

Transportation.

The differences in cost result mostly from the proportion of automobile ownership specified for each budget. The proportions of ownership also vary between metropolitan and non-metropolitan areas and among cities within the metropolitan category.

Lower-Income standard. — Compared with the moderate standard, the lower budget includes a smaller mileage allowance for an eight-year old car, fewer repairs, no comprehensive insurance, lower personal property tax, and no out-of-town travel on planes, trains or other public vehicles. Roughly fifty percent of families in urban areas are assumed to own a car.

Moderate-Income standard. — The allowance includes the replacement of an automobile every four years with a two-year-old used car, operating expenses, insurance, and some public transportation.

Clothing and Personal Care.

Clothing costs are calculated at replacement rates, because the budgets are for established families with members in age brackets likely to have a stock of basic clothing items. The categories of items for replacement --coats, sweaters, pajamas, street shoes-- were the same in the three standards. Variations in costs stem primarily from differences in the qualities of items. The lower budget cost is about thirty percent lower than the moderate budget. Personal care constitutes about three percent of total family consumption at the three budget levels. The moderate-standard cost is about twenty-five percent higher than the lower, primarily because of increases in the allowances for beauty shop services for the wife.

Medical Care.

Urban American costs of total medical care are almost identical in the lower and moderate budgets according to BLS allowances. In practice expenditures for medical care are lower at lower income levels, because many of these families either defer needed treatment or receive it at reduced cost in clinics. The higher BLS allowance is specified as a desirable norm for a self-supporting family and includes group hospital and surgical insurance coverage for both the lower and moderate standards (in accord with the practice of over 75 percent of the population under sixty-five years of age).*

In sum, the components listed above indicate those items that are included within the budget categories as necessities of life. Table A (supra) indicates the amount needed to maintain the standard of living at each level, allowing for the cost of necessities of life. Two things must be noted: BLS figures contain estimates of what the average hypothetical family consumes at each income

*Krantz, op. cit., pp. 330-331.

level,* and BLS figures for necessities of life do not include any legal fees.

*Note for Explanation of Consumption: "The 1974 estimates of consumption were derived by applying price changes reported in the Consumer Price Index to the appropriate autumn 1973 cost of each main budget class of goods and services. Mortgage payments for a home purchased six years ago were estimated by applying the changes reported by the Consumer Price Index in home purchase and mortgage interests rates between 1967 and 1968 to the costs of these items in the autumn 1973 budgets. The last direct pricing for the budgets was in 1969.

Because of the time required to compute budget costs for three levels of living for each published area at the required level of disaggregation, the Bureau is not able to provide estimates at current price levels. For the New York-Northeastern New Jersey area, the all items CPI rose 1.9 percent from October 1974 (the month used for estimating autumn costs in the area) to March, 1975. However, changes in the total family budgets differ from the change in the area's all-items CPI for at least three important reasons: (1) the CPI does not take account of changes in personal income taxes; (2) consumption weights used in the CPI are different from consumption weights in the budgets; and, (3) treatment of homeownership costs differs.

The method of updating by changes in the Consumer Price Index provides only an approximation of current budget costs because the Consumer Price Index reflects spending patterns and prices for commodities and services purchased by wage earners and clerical workers generally without regard to their family type and level of living. Other costs, personal income taxes, and Old Age, Survivors' Disability and Health Insurance (OASDHI) were also updated to 1974.

Differences in age and family size affect the budget levels. A young New York couple without children, for example, would need less for living expenses \$3,797, \$6,067, and \$8,583, respectively, about half the family consumption costs for the budget-type four-person family. On the other hand, a family with three school-age children would need \$8,989, and \$14,352 and \$20,319 for consumption goods and services for these three levels of living, about 16 percent more than the budget-type four person family." U. S. Department of Labor, op. cit., p. 13.

The annual cost of living chart (below) breaks down the annual cost that average individuals in different age categories, with or without children must expend in order to sustain their standard of living without substantial hardship.

Table C*
Annual consumption budgets for selected family types, urban United States
Autumn 1977¹

| Family size, type, and age | Lower Level | Intermediate Level | Higher Level ² |
|--|-------------|--------------------|---------------------------|
| <u>Single person, under 35 years</u> | \$ 3,030 | \$ 4,560 | \$ 6,280 |
| <u>Husband and wife under 35 years:</u> | | | |
| No children | \$ 4,240 | \$ 6,390 | \$ 8,790 |
| 1 child under 6 | \$ 5,370 | \$ 8,080 | \$11,130 |
| 2 children, both under 6 | \$ 6,230 | \$ 9,390 | \$12,920 |
| <u>Husband and wife 35-54 years:</u> | | | |
| 1 child, 6 - 15 years | \$ 7,100 | \$10,690 | \$14,720 |
| 2 children, older 6-15 years ² | \$ 8,657 | \$13,039 | \$17,948 |
| 3 children, oldest 6-15 years | \$10,040 | \$15,130 | \$20,820 |
| <u>Husband & wife, 65 years and over³</u> | \$ 4,410 | \$ 6,650 | \$ 9,150 |
| <u>Single person, 65 years and over⁴</u> | \$ 2,420 | \$ 3,650 | \$ 5,030 |

*The figures are lowered for Wisconsin by 14% due to Metropolitan/Non-Metropolitan difference.

¹For details on estimating procedures, see "Revised Equivalence Scale," BLS Bulletin 1570-2.

²Costs for the BLS budgets for a 4-person family from which estimates for other family types are derived.

³Estimated from the equivalence scale value of 51 percent of the base (four-person) family. Costs based on detailed BLS budgets for a retired couple may differ slightly from estimates obtained by the scale values.

⁴Estimated from the equivalence scale value of 28 percent of the base (four-person) family. May differ slightly from estimates obtained by applying a ratio of 55 percent to the BLS Budget for a Retired Couple.

The next step is to apply Bureau of Labor Statistics information to determine eligibility. For this purpose, monthly estimates are more valid than annual figures in order to determine the amount of funds that the defendant has immediately available. A defendant's income prior to his arrest is irrelevant since such income has either already been expended or will be reflected in liquid assets and/or non-liquid assets. Based on BLS estimates, a table has been designed to indicate the monthly rate of consumption of individuals, depending on age and number of defendants. Subtracting this figure from the defendant's net monthly income yields the defendant's non-obligated income. By adding this amount to the defendant's available liquid assets (if any), and to cash available from the sale of luxury non-liquid assets (if any), it can be determined if the defendant has sufficient funds to retain adequate counsel.

Factor C: Non-Liquid Luxury Assets.

Factor C is the third component needed to evaluate the defendant's financial resources. This factor is the cash available from the sale of defendant's luxury non-liquid assets. Non-liquid asset is defined as any real or personal property owned by the defendant which is not immediately convertible into cash.

Generally, the cash value of a defendant's non-liquid assets should not be taken into consideration in determining defendant's financial ability to obtain counsel for two reasons:

1. Most, if not all, personal and real property assets "are by nature not liquid in the sense of ready conversion to cash at market value."*
2. Most non-liquid assets must be considered "necessities of life"; to require a defendant to sell such needed assets would violate the "hardship" standard.**

*NLADA, op. cit., p. 157.

**National Center for State Courts, op. cit., p. 80-81.

The liquidity problem has already been examined in the discussion of defendant's liquid assets. To reiterate, "given enough time, all assets are liquid. However, in the context of speedy trials ... the length of time available for converting assets to cash is very limited. Hence the types of assets that are liquid in this span of time are correspondingly limited."*

In addition to the problem of liquidity, the reality is that in most cases a defendant will not own many non-liquid assets that could be classed as "luxury" items (as opposed to those non-liquid assets -- such as an economy car, home, basic furnishings, etc. -- that must be considered necessities of life). (See State v. Mickle, where the Supreme Court of Hawaii held that defendant cannot be denied free counsel merely because he owns an economy automobile since a vehicle must be considered a reasonable necessity of life.**)

However, where an interview with defendant reveals that he owns investment properties or such clearly non-essential commodities as expensive jewelry or furs, an extravagantly expensive car, a color television set or an expensive stereo set, such assets should be taken into consideration since these can be converted into cash fairly rapidly. However, the cash value of such assets can only be considered in determining eligibility if the court is willing to adjourn the proceedings to give defendant time to convert his luxury assets to cash. If the court is not willing to grant such an adjournment, the determination as to defendant's available financial resources must be based solely on defendant's available liquid assets (Factor A) and non-obligated monthly income (Factor B).

*Krantz, op. cit., p. 325.

**525 P. 2d 1108 (Hawaii, 1974).

Any questionnaire attempting to ascertain what investment properties and luxury items defendant possesses should be limited in scope, since "it is unlikely that the benefits to be obtained from a complete enumeration of all an accused's items of real and personal property would justify the amount of time consumed."* In addition, if the current market value of defendant's luxury items is to be considered as part of his available financial resources, any payments made by defendant on such items must be deducted from their current market value in order to reach the true amount of cash realizable from the sale of the item for the purposes of procuring counsel.

Non-liquid, luxury assets owned by defendant should be considered as a resource and as a means of securing cash. Nevertheless, it should be re-emphasized that the defendant should not be forced to use his necessities of life as collateral. Thus, a defendant can borrow cash using his luxury assets as collateral if the court is willing to give him sufficient time to determine if in fact he can obtain a loan.

Determinant II

Financial Resources Committed by Defendant to Procure Bail Bond

Once the defendant's estimated available financial resources are determined, the eligibility determiner must consider the amount of bail that a defendant must post in order to gain release from jail.

Bail is here defined as the security posted to ensure the defendant's appearance in court. (For a description of the provisions for bail under Wisconsin law, see section 969 Wisconsin Statutes)

*National Center For State Courts, op. cit., pp. 80-81.

The amount a defendant himself pays or posts in order to obtain freedom from detention must be deducted from defendant's available financial resources before a determination can be made as to whether defendant has sufficient resources to enable him to retain counsel. A defendant should never confront the Hobson's choice of release from jail before trial or adequate counsel at trial; both are vital components in preparing a defense.* As one report has noted: "The cost of obtaining release on bond is one of the expenses of an adequate defense. If the defendant is not free on bond, but has sufficient resources to obtain that release, he should not be denied eligibility on the ground that these funds could be used instead to pay a lawyer or other costs of defense. A defendant should not be put to the choice between a lawyer and release on bond.**

To deduct from defendant's available resources the amount he has expended or posted to procure bail is only logical. The fact that the defendant has expended or posted "x" amount of his assets or income means he no longer can apply that particular amount toward obtaining counsel. The defendant will be unable to avail himself of these assets from the time of arraignment through the duration of the proceedings against him. As one observer has noted: "...In many cases defendants have borrowed money to secure their release and cannot borrow further and even those who use their own funds for bail may not be left with assets to retain counsel."*** However, if the defendant has posted bail, using his available assets as collateral, he can then be asked to contribute these funds to the Wisconsin State Treasury after his case is adjudicated.

*Ibid., p. 322. See also Silverstein, op. cit., p. 107-108.

**Criminal Justice Act in the Federal District Courts, op.cit., p. 62.

***Ibid., p. 321.

In devising these guidelines, there is an implicit rejection of the "bail-as-bar" test under which some jurisdictions automatically disqualify defendants from receiving free counsel if they have been able to raise bail. This practice has been widely criticized.*

When a defendant with no visible assets or income manages to raise a large amount of money to make bail further inquiry should be made as to how he was able to raise bail. However, defendant's ability to raise bail should never be an automatic disqualifier. As Lee Silverstein has written, when a defendant has been released on bail "... the circumstances of his release should be inquired into carefully, but the release, of itself, ought not to be a disqualification for an appointment of counsel. Indeed this is constitutionally dubious."** Similarly, if the defendant's friends or relatives have resources and have posted bail for him, such aid should not be taken into consideration in determining the defendant's ability to retain counsel.***

Silverstein concludes that:

"... if a defendant's uncle or employer signs a property bond, how does this fact alone show that the defendant himself can hire a lawyer? It may be that the uncle or employer not being under any legal obligation to support the accused, will feel that he has done enough in signing the property bond, or the relative may have real estate but no spare cash to hire a lawyer; even if he has enough money to pay the premium on a surety bond, it does not necessarily follow that he has enough more money (sic.) for a lawyer."**

This line of reasoning has been followed in developing these Guidelines:
Defendant's ability to obtain freedom from detention should not be allowed to

*See American Bar Association Standards, for Providing Defense Services, Standard 6.1; National Advisory Commission, Courts, op. cit., Standard 13.2; NLADA, op. cit., p. 155; National Center for State Courts, op. cit., p. 84.

**Silverstein, op. cit., p. 107 and 116.

***Krantz, op. cit., p. 312.

totally prejudice the determination as to whether he is eligible for state-compensated counsel.

Determinant III

Cost of Obtaining Adequate Private Counsel

In order to determine whether or not an individual can afford to pay for a given commodity or service not only must the individual's financial resources be determined, but a determination must also be made as to how much the commodity or service costs.* This simple law of the marketplace has been followed in developing eligibility guidelines for many social welfare programs such as the Food Stamp Program, Medicaid, Day Care and Manpower Programs.**

Just as one must determine the cost of an adequate diet in order to determine whether an individual can afford to feed himself properly, it follows that in order to determine a defendant's financial ability to retain adequate private counsel, a defendant's available financial resources must be balanced against the cost of obtaining competent counsel in the locality in which the defendant is being prosecuted.***

The cost of a competent private attorney hinges on two important factors: (1) the seriousness of the charges brought against the defendant, and (2) the

*See Allen Committee Report, op. cit., p. 7.

**See "Study on Public Welfare," Report for the Subcommittee on Fiscal Policy of the Joint Economic Committee, U. S. Congress, 1974, p. 59.

***See Allen Committee Report, op. cit., p. 25; See also *Anaya v. Baker*, 427 F. 2d 73 (10th Cir. 1970) 2A N.J. Stat. Ann. 158-14.

duration of the case (i.e. at what stage the case reaches disposition). However, both these factors are inherently variable. Charges may be dropped or reduced, and the fee of private counsel will vary depending on whether defendant pleads guilty at an early stage in the proceedings or elects to go to trial.

In an effort to estimate the amount a typical private attorney would charge for a given case, the Wisconsin State Public Defender conducted a survey of more than 8,000 attorneys. Based on the results, a chart has been devised to allow the Public Defender to compare the defendant's available resources with the amount required to retain adequate counsel to defend against the crime charged.

When making the eligibility determination at arraignment, the Public Defender should presume that the defendant will demand a jury trial. Therefore, he should not declare a defendant ineligible for free counsel if the defendant has sufficient financial resources to afford private counsel for the purpose of entering a guilty plea, but insufficient funds to go to trial. In that situation, the Public Defender should find the defendant marginally indigent and prescribe the amount of money the defendant should contribute to his defense.

In this manner a criminal defendant's economic situation will never interfere with his guaranteed constitutional right to go to trial. In this way the concept of equal justice is best served.

- + Defendant's total liquid assets
 - recent, unpaid emergency expenses
-

=s Defendant's available liquid assets

- = Defendant's monthly net income
 - estimated monthly expenditures for the necessities of life
-

=s Defendant's estimated, non-obligated monthly income

- + Current market value of defendant's luxury, nonliquid assets
 - Dollar amount of payments remaining on luxury, nonliquid assets
 - + Estimated amount defendant can borrow on luxury assets.
-

=s Cash Available from sale of luxury, nonliquid assets

- + Cash available from sale of luxury, nonliquid assets
 - + Defendant's estimated non-obligated monthly income
 - + Defendant's available liquid assets
-

=s Defendant's estimated available financial resources (DETERMINANT I)



- =s Defendant's estimated available financial resources (DETERMINANT I)
 - Cash committed by defendant to procure bail bond (DETERMINANT II)
-

=s Defendant's estimated financial resources available for the purpose of retaining private counsel



Defendant's estimated financial resources available for the purpose of retaining counsel

TO BE COMPARED WITH

Estimated cost of obtaining private counsel in the locality in which the defendant is prosecuted (DETERMINANT III)



If the defendant has no financial resources available for retaining counsel, he is to be declared eligible for state-compensated counsel. If the defendant has some resources available, he is to be declared marginally indigent. If the defendant's available resources for the purpose of retaining counsel are equal to or greater than the estimated cost of obtaining private counsel he is to be declared ineligible.

IV
RECOMMENDATIONS
METHODOLOGY AND IMPLEMENTATION TECHNIQUES FOR THE "GUIDELINES"
TO DETERMINE ELIGIBILITY FOR THE ASSIGNMENT OF COUNSEL

The Eligibility Questionnaire Form Wisc/78 implements the principle embodied in the "Guidelines (See Appendix A). The questionnaire tracks each determinant in the order of importance. The interviewer gathers the information for the Public Defender Attorney (PDA) at arraignment. The PDA is presented with sufficient clearly delineated information to make a prompt, just determination of eligibility based on a fair and uniform standard.

A. Eligibility Questionnaire - Technical and Procedural Adaptations for use in the State of Wisconsin.

The questionnaire reflects the knowledge gained from the Kings County (Brooklyn, New York) Criminal Court experimental use of the O.P.D. original in 1977. The revisions should facilitate the use of the form without sacrificing relevant content. The pressures of time and caseload volume necessitated the single space format designed for New York City. In Wisconsin, the Public Defender's Office should have sufficient time to conduct a more detailed interview; thus, a two-page format is appropriate.

Graphically, the new format provides a simple computation system for the interviewers. For example, a "Verification Section" has been added to the right hand side of the page and aligned with the pertinent information to be verified. Following the interview, the interviewer indicates whether the information was verified by placing a check mark in the "Yes" or "No" column. Thus, the Public Defender knows at a glance what information is reliable.

Sections A, B and C are markedly divided. The "Remainders," which represent the total figures, appear in red boxes. Red print is utilized to highlight especially significant areas of the form.

The New York City experiment established that a few questions were confusing or irrelevant. These have been reformulated. Several questions have been added because Wisconsin prescribes more rigorous requirements than does New York. Also, the Public Defender's paralegal staff has the time to conduct a thorough interview and accepts this function as one of their duties. In New York City, the Criminal Justice Screener was hostile to the additional work.

The top of the form identifies the defendant. Juxtaposing the defendant's social security number with the question on Welfare and Medicaid will expedite verification by the interviewer. In Section A, the questions are now more direct and incisive. For example, instead of asking, "Do you have a savings account," the question reads, "How much do you have in your savings account?" Lines have been added to allow for more than one banking institution. Information on stocks and bonds is followed with a request for the broker's name, address and phone number. A question regarding whether the defendant owns a stamp or coin collection was also added.

Several of the questions in Section B have been clarified to more accurately reflect the defendant's financial position. The form asks if the defendant has more than one place of employment, whether the positions are full or part-time and what are the employers' telephone numbers.

Following the experiment, some judges suggested that a question be included regarding the defendant's means of support if he is not on welfare, not employed, and not receiving unemployment compensation or other recorded forms of income. Therefore, a direct question to determine support has been added.

The Chart on the Estimated Monthly Expenditures for the Necessities of Life is based on the Bureau of Labor Statistics' (BLS) most recent figures. The Chart should be revised annually and keyed to updated figures published by the Bureau of Labor Statistics.

In Section C, minor revisions have been made regarding the ownership of one or more cars or trucks, registration number(s) of the vehicle(s), and the defendant's luxury assets. These, too, will facilitate verification. In order to comply with the statutory requirement that assets not deemed "necessities of life" be considered as collateral for potential ability to obtain a loan, a question addressing this issue has been incorporated into Section C.

The perjury statement has been expanded to emphasize the inherent danger to the defendant for deliberately giving a false statement. It also reminds the defendant that he must inform the State Public Defender's Office if his financial situation has changed. This completes the first page of the Questionnaire.

On the second page, a guide to the reported cost of retaining counsel in Wisconsin is based on the results of a recent survey of more than 8,000 private attorneys, conducted by the Wisconsin State Public Defender.* To the left of the various categories of crime, a column allows the Public Defender to check the type of crime the defendant is charged with and then to select the approximate cost of private counsel for that case. The Public Defender Attorney (P.D.A.) can immediately ascertain if the defendant can afford counsel by looking at the last arithmetic calculation, which indicates the defendant's available resources at arraignment.

*These figures were made available to the consultant by Ronald Brandt, Deputy State Public Defender. Mr. Brandt has indicated that the figures which he provided will be incorporated into administrative rules to be published by the State Defender.

The Statute (Section 977.07(2)) states that if a defendant is

"...found to be indigent in part, the person shall be promptly informed of the extent to which he or she will be expected to pay for counsel, whether such payments shall be in the form of a lump sum payment or periodic payments. The payment and payment schedule shall be set forth in writing..."

Consequently, the form is structured to reflect a defendant's marginal financial status. It allows the P.D.A. to stipulate in writing, that based on the financial information available, the defendant has some funds to contribute to his defense. The P.D.A. indicates in the space provided the amount of money that the defendant must contribute and the time frame for payment. In order to comply with the proposed administrative rule concerning the court's right to review indigency determinations, the Questionnaire asks the P.D.A. if he has advised the defendant of his right to appeal the eligibility determination. He indicates this and completes the determination by signing his name.

An appeal section has been included whereby the judge can easily review the financial information, the calculations that have been made, and the decision regarding eligibility for assignment of counsel. The judge merely checks off the appropriate box, indicating that the defendant is eligible, ineligible or marginally indigent. If he is marginally indigent, the judge inserts the amount which he determines the defendant can afford to contribute towards his defense.

B. Written Standardized Instructions:
To Ensure Use of Eligibility Questionnaire.

The consultant has drafted instructions for use by the participants in the eligibility process to clarify and standardize the policies and procedures developed for the State Public Defender. Instructions reduce the chances for misunderstanding or misinterpretation. They provide a clear and uniform method for applying the "Guidelines" and using the questionnaire. With written instructions, no one person is indispensable for explaining or perpetuating the training process.

It is essential that the instructions are explicit, succinct and concise. The instructions are designed to anticipate problems or questions concerning use of the form.

C. RECOMMENDATION: A BASIC TRAINING AND DEMONSTRATION SESSION BE MADE MANDATORY FOR ALL NEW PUBLIC DEFENDER ATTORNEYS AND PARALEGAL INTERVIEWERS.

Based on the New York City experience, an orientation session is mandatory for the proper processing of the eligibility questionnaire. Training sessions were given to the Criminal Justice Agency screeners responsible for conducting interviews in New York City. Later, when new personnel attempted to use the form without this training, misunderstandings developed.*

Similarly, each judge scheduled to preside at arraignment was sent a copy of the "Guidelines" and the eligibility questionnaire for New York City.** Every judge was briefed to ensure that he fully comprehended the principles

*See "Guidelines For Determining Eligibility For Assignment of Counsel - Evaluation Analysis and Results," pp. 19-21.

**Judges determine eligibility in New York City.

in the "Guidelines" and understood the use of the form. Any problems or questions that the judges raised were were worked out in advance of the implementation phase. The "Guidelines" will not be properly implemented without prior training sessions.

Recommended Format for Training - Demonstration Session
(Orientation for Attorneys and Interviewers can be conducted simultaneously)

TRAINING AND DEMONSTRATION MATERIALS RECOMMENDED
FOR INSTRUCTION OF ATTORNEYS AND INTERVIEWERS:

1. Instructions
2. Blank Eligibility Questionnaire
3. Hypothetical Example* with accompanying completed questionnaire.**
4. Synopsis of the "Guidelines"***

RECOMMENDED PROCEDURES TO FOLLOW:

1. The blank Eligibility Questionnaire, Instructions, and synopsis should be distributed before the training session. In this manner, the participants can familiarize themselves with the materials and prepare any questions they may have.
2. The training session should begin with a discussion of the principles embodied in the Guidelines (use the synopsis as a guide).

The concepts that must be defined and understood are:

- (a) legal indigence;
- (b) adequate counsel;
- (c) substantial hardship;
- (d) necessities of life.

It should be emphasized that the Guidelines are a uniform and standard method for determining eligibility. Point out that Wisconsin law requires that guidelines be written and applied fairly and reasonably to all defendants.

3. At this stage, a brief explanation and clarification of the eligibility questionnaire should be given. Each section should be highlighted to explain how the questionnaire follows the formula in the "Guidelines". In this manner, the principles and the methodology are combined and it is easy to see how the "Guidelines" are designed to function. Encourage questions.

*Attached as Appendix E.

**Attached as Appendix F.

***Attached as Appendix G.

4. Next, a "dry-run" demonstration should be given. A hypothetical example (describing the defendant, his/her financial situation, and the nature of the charges) should be developed before the orientation session.* The instructor can proceed in two ways: (1) he can distribute the hypothetical example and ask each person to "interview" the person sitting next to him; or, (2) he can read the hypothetical situation and ask each person to fill out the blank questionnaire.
5. The arithmetic calculations should then be made. The instructor should compare the class's answers to the correct ones on the sample completed questionnaire. The instructor should again encourage questions.
6. If a "dry-run" demonstration is not possible, a hypothetical completed questionnaire should be distributed.
7. The instructors should request the attorneys to make an eligibility determination. The instructor should then ask incisive questions to probe why the attorney made that particular decision.
8. An experienced individual -- perhaps, the consultant -- should conduct the initial training session. After the process has been learned, any experienced supervisory personnel can conduct the session.
9. If there are any questions regarding procedures or policy, the instructions can serve as a guide.
10. The training session should not take longer than 30 minutes.
11. Judges and Public Defender attorneys should read the "Guidelines" before they make eligibility decisions.

*The attached Hypothetical example was designed to cover as many aspects of the questionnaire as possible.

THREE TO SIX MONTHS AFTER THE "GUIDELINES" HAVE BEEN IN OPERATION,
AN EVALUATION SHOULD BE CONDUCTED TO ASCERTAIN THEIR EFFICACY

An evaluation should determine (1) if the "Guidelines" are an effective and practical formula for determining eligibility for assignment of counsel; and (2) if the Eligibility Questionnaire has proven to be an efficient and useful tool for gathering information pertinent to the defendant's ability to retain private counsel. No new system is free of "bugs". Necessary revisions should be made based on the results of the evaluation.

Each jurisdiction has different requirements. The evaluation should identify problem areas and suggest improvements, if any. A particular jurisdiction may wish to alter one or two items which are not appropriate for that area. The evaluation will "fine-tune" the system and eliminate technical problems. Based on the New York experience, the evaluation can generate valuable information in revising the "Guidelines."

A. Methodology.

Several approaches can be taken in designing an evaluation survey. If funds are available, the Public Defender's Office should retain professional assistance to design and conduct the evaluation. In that way, revisions can be made based on a scientifically sound study. In the alternative, the Public Defender's Office can design an evaluation format. Of course, there are inherent and obvious problems in attempting to evaluate "in-house" procedures. However, it is possible for the Public Defender's Office to formulate and conduct an unbiased, empirically sound and valid study.

B. Approach:

The evaluation should address (at least) the following questions:

1. Do the Guidelines fulfill all state legal requirements?
2. Is the Eligibility Questionnaire the most effective and efficient implementing tool?
 - a. If not, what are the difficulties with the format?
 - b. What sections should be altered and how?
3. How do the Guidelines effect the administrative process of the courtroom? Of the Public Defender's Office?
4. What impact have the Guidelines had on eligibility determinations?
 - a. Have more defendants been found ineligible since the Guidelines were first implemented?
 - b. If "yes," what are the cost savings to the State of Wisconsin?
 - c. How many more defendants are now found marginally indigent?
5. How long is the actual interview time?
 - a. Can it be reduced?
 - b. Can it be conducted more efficiently?
6. How long (average time) does it take for the Public Defender Attorney to make an eligibility determination?
7. Specifically, what difficulties did the Public Defender Attorney have with the format?
 - a. Arithmetic calculations?
 - b. Time pressures?
 - c. Areas of concern?

These questions briefly suggest some of the areas that should be examined.

The approach used in New York was an objective study. Since the Office of Projects Development (OPD) did not have sufficient staff to gather raw data over a

three month period, the evaluation was aimed at determining the effects on the administrative functioning of the agency conducting the interview and on the orderly administration of the arraignment parts.

The methodology used for gathering pertinent data for the evaluation was an objective questionnaire. Separate questionnaires were designed for the Judges, the Criminal Justice Agency supervisors and the Criminal Justice Agency screeners. The Judges' questionnaire was designed to examine three main categories:

1. the Judges' use of the "guidelines" (both practically and conceptually);
2. the Judges' use of the Eligibility Questionnaire (the problems and benefits encountered in determining eligibility);
3. the administrative effects, if any, of the "Guidelines" on the practical functioning of the courtroom.

The supervisors' questionnaire was divided into two areas. The first sought to ascertain their attitudes towards the "Guidelines" on a practical as well as philosophical level; and the second sought to gather information on how the supervisors view the screeners' reactions to the "Guidelines" and the experiment.

The Evaluation Questionnaire designed for the screeners first analyzed their attitudes and sentiments towards the "Guidelines." Second, it ascertained the time factors and practical effects involved in the use of the form. The Evaluation solicited recommendations for change, if there were any major problems with the format. Third, the evaluation form asked the screener to estimate the ability of the defendant to comprehend and respond to questions.*

This approach, though not an empirical study, proved successful and is recommended for use by the Public Defender's Office.

*Sample Evaluations are attached as Appendix H, I, J.

APPENDIX A

ELIGIBILITY QUESTIONNAIRE

ELIGIBILITY QUESTIONNAIRE

APPENDIX A

INFORMATION HAS BEEN VERIFIED: CHECK YES NO

NAME _____ TELEPHONE NUMBER (____) _____ Area Code

PERMANENT ADDRESS _____ (STREET, CITY) _____ (STATE)

CAN YOU AFFORD PRIVATE COUNSEL? YES NO DOCKET INDICTMENT No. 151 _____
 SOCIAL SECURITY NUMBER _____ ARE YOU RECEIVING WELFARE PAYMENTS OR MEDICAID YES NO
 (IF "YES" DO NOT COMPLETE this form, write WELFARE OR MEDICAID across the Interviewer's Box)

SECTION A LIQUID ASSETS

HOW MUCH CASH DO YOU HAVE AVAILABLE? _____ \$ _____ (AMOUNT)

HOW MUCH DO YOU HAVE IN YOUR SAVINGS ACCOUNT(S)? (1) _____ + \$ _____ (AMOUNT)
 BANK, BRANCH ADDRESS _____
 (2) _____ + \$ _____ (AMOUNT)
 BANK, BRANCH ADDRESS _____

HOW MUCH DO YOU HAVE IN A CHECKING ACCOUNT(S)? (1) _____ + \$ _____ (AMOUNT)
 BANK, BRANCH ADDRESS _____
 (2) _____ + \$ _____ (AMOUNT)
 BANK, BRANCH ADDRESS _____

DO YOU OWN ANY STOCKS OR BONDS? _____ + \$ _____ (AMOUNT)
 (TYPES) _____ ADDRESS _____ TELE. NO. _____

DO YOU OWN ANY LIFE INSURANCE POLICIES WITH A CASH VALUE? _____ + \$ _____ (AMOUNT)
 (COMPANY NAME) _____

DO YOU OWN ANY STAMP OR COIN COLLECTIONS? (IF YES enter amount at right.) _____ + \$ _____ (AMOUNT)

HAVE YOU HAD IN THE LAST MONTH A DEATH OR SERIOUS ILLNESS OR OTHER EMERGENCY IN YOUR FAMILY FOR WHICH YOU PERSONALLY WILL HAVE TO PAY BILLS? IF YES, ENTER AMOUNT AT RIGHT. _____ = \$ _____ (AMOUNT)
 (TYPE OF EMERGENCY) _____ - \$ _____ (AMOUNT)

A = \$ _____ (REMAINDER)

SECTION B NON-OBLIGATED INCOME

LIST ALL PLACES WHERE YOU ARE PRESENTLY EMPLOYED:

1. _____ FULL TIME PART TIME \$ \$ _____ (MONTHLY TAKE HOME PAY)
 ADDRESS _____ TELE. NO. _____
 2. _____ FULL TIME PART TIME + \$ _____ (MONTHLY TAKE HOME PAY)
 ADDRESS _____ TELE. NO. _____

DO YOU RECEIVE UNEMPLOYMENT BENEFITS? _____ + \$ _____ (AMOUNT PER MONTH)

WHAT OTHER INCOME OR BENEFITS DO YOU RECEIVE? _____ + \$ _____ (AMOUNT PER MONTH)

(TYPE, E. G. BUSINESS INCOME; SOCIAL SECURITY; PENSION PAYMENTS, S.S.I. VETERANS BENEFITS, ETC.) _____ = \$ _____ (TOTAL INCOME PER MONTH)

IF YOU HAVE NO INCOME HOW ARE YOU SUPPORTED?
 AGE OF DEFENDANT _____ NUMBER OF DEPENDANTS SUPPORTED BY DEFENDANT _____

ESTIMATED MONTHLY EXPENDITURES FOR THE NECESSITIES OF LIFE

| | UNDER 35 | 35 & OVER |
|----------------------------|----------|-----------|
| Defendant Alone | 331 | 469 |
| Defendant And 1 Dependant | 463 | 614 |
| Defendant And 2 Dependants | 587 | 776 |
| Defendant And 3 Dependants | 681 | 946 |
| Defendant And 4 Dependants | 770 | 1098 |
| Defendant And 5 Dependants | 859 | 1235 |
| Defendant And 6 Dependants | 949 | 1366 |
| Defendant And 7 Dependants | 1085 | 1561 |
| Defendant And 8 Dependants | 1220 | 1757 |
| Defendant And 9 Dependants | 1356 | 1892 |

_____ - \$ _____ (ESTIMATED MONTHLY EXPENDITURES FOR NECESSITIES OF LIFE)

B = \$ _____ (REMAINDER)

SECTION C NON-LIQUID LUXURY ASSETS

DO YOU OWN A CAR(S), TRUCK(S)? (1) _____ (ADD DOWN) \$ _____ (ADD DOWN) \$ _____
 REGISTRATION NO. _____ (YR./MAKE/MODEL) (TOTAL \$ AMT. OF REMAINING PAYMT'S) (ACTUAL CASH VALUE IF OVER \$2000)
 REGISTRATION NO. _____ (2) _____ + \$ _____ (PAYMENTS REMAINING) + \$ _____ (CASH VALUE IF OVER \$2000)
 (YR./MAKE/MODEL)

DO YOU OWN JEWELRY OR FURS? _____ + \$ _____ (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 (TYPE)

DO YOU OWN REAL ESTATE? _____ + \$ _____ (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 (LIST ADDRESS)

(TYPE OF PROPERTY)

DO YOU OWN A STEREO SET? _____ + \$ _____ (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 (TYPE)

DO YOU OWN OTHER LUXURY ITEMS? _____ + \$ _____ (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 (E.G. SPORTING EQUIP., BOATS, COLOR TV) (TYPE)

= \$ _____ (TOTAL PAYMENTS) = \$ _____ (TOTAL)

- \$ _____ (TOTAL PAYMENTS)

+ \$ _____ (APPROXIMATE AMOUNT)

C = \$ _____ (REMAINDER)

Is there a realistic possibility of borrowing against the above assets to obtain funds to retain counsel without an undue hardship to yourself or your dependants? YES NO

The Defendant asserts and declares under penalty of perjury that the foregoing information is true. The Defendant also states that if his/her financial situation changes during the pendency of this case he/she will promptly report such changes to a representative of the State Public Defender (Note: Perjury is a Felony and will subject you to up to three (3) years in prison, Sec. 945.32 (1) (a) Wis. Stats.)

Dated _____ 19____ (SIGNATURE)

FOR INTERVIEWER'S USE ONLY:

ENTER REMAINDERS FROM SECTION A, B, & C:

REMAINDER A \$ _____
(LIQUID ASSETS)

+

REMAINDER B \$ _____
(NON-OBLIGATED INCOME)

SUBTOTAL = \$ _____

+

REMAINDER C \$ _____
(NON-LIQUID LUXURY ASSETS)

TOTAL = \$ _____
DEFENDANT'S AVAILABLE FINANCIAL
RESOURCES AT ARRAIGNMENT

INTERVIEWER'S NAME _____
(Signature)

FOR PUBLIC DEFENDER'S USE ONLY:

Select either TOTAL or SUBTOTAL from Interviewer's Box. (TOTAL can be used in determining defendant's financial resources only if the Judge is willing to adjourn the case to allow defendant time to liquidate luxury assets (Section C).)

\$ _____ (TOTAL or SUBTOTAL)

- \$ _____ (MINUS CASH BAIL POSTED BY DEFENDANT)

= \$ _____ (DEFENDANT'S AVAILABLE RESOURCES FOR
RETAINING PRIVATE COUNSEL)*

* This figure is to be compared with the Estimated Cost of Private Counsel, for the crime charged, as shown below in order to determine whether defendant can afford counsel.

SCHEDULE OF ESTIMATED COST OF PRIVATE COUNSEL

| DEFENDANT CHARGED WITH: CHECK APPLICABLE BOX(ES) | IN COUNTIES IN WHICH HOURLY RATE IS MORE THAN \$40 | IN COUNTIES IN WHICH HOURLY RATE IS LESS THAN \$40 |
|--|--|--|
| 1. <input type="checkbox"/> - 1st or 2nd Degree Murder | \$3,500 | \$3,000 |
| 2. <input type="checkbox"/> - Other Armed Felony | \$2,200 | \$1,800 |
| 3. <input type="checkbox"/> - Other Drug Related Felony | \$1,600 | \$1,200 |
| 4. <input type="checkbox"/> - Other Felony | \$1,600 | \$1,200 |
| 5. <input type="checkbox"/> - Traffic Misdemeanor | \$ 400 | \$ 300 |
| 6. <input type="checkbox"/> - Other Misdemeanor | \$ 500 | \$ 400 |
| 7. <input type="checkbox"/> - Juvenile | \$ 500 | \$ 400 |
| 8. <input type="checkbox"/> - Appeal to Court of Appeals | \$2,000 | \$1,500 |

These figures are not fixed amounts. They serve only as a guide. The Public Defender should apply his knowledge and experience as to the actual cost of counsel in relation to the case before him.

DEFENDANT IS ELIGIBLE, NOT ELIGIBLE FOR PUBLICLY COMPENSATED COUNSEL.

DEFENDANT IS marginally indigent and can afford to contribute \$ _____ towards his defense. This payment will be made in lump sum or in periodic payments of \$ _____ every week month.

THE DEFENDANT HAS BEEN ADVISED OF HIS/HER RIGHT TO APPEAL TO THE COURT THE ELIGIBILITY DETERMINATION MADE ABOVE. THE DEFENDANT DOES DOES NOT WISH TO EXERCISE THAT RIGHT.

PUBLIC DEFENDER'S NAME _____ DATED _____ 19 _____

FOR APPEAL PURPOSES ONLY:

This Court has reviewed the Public Defender's Eligibility Determination and finds the Defendant ELIGIBLE NOT ELIGIBLE marginally indigent and can afford \$ _____ towards his defense. This payment will be made in lump sum or in periodic payments of \$ _____ every week month.

JUDGE _____
(Signature)

DATED _____ 19 _____

APPENDIX B

PARALEGAL INTERVIEWERS:
INSTRUCTIONS FOR THE USE OF
THE ELIGIBILITY QUESTIONNAIRE

PARALEGAL INTERVIEWERS:

INSTRUCTIONS FOR THE USE OF THE ELIGIBILITY QUESTIONNAIRE

Purpose of the Questionnaire:

The Questionnaire is designed to provide the Public Defender Attorney (PDA) at arraignment with a logical and realistic picture of the defendant's available resources. Once this is established, the PDA can make a fair and reasoned determination as to the defendant's ability to retain counsel. The Questionnaire follows the principles developed in the "Guidelines" and considers much more than just the income of the defendants. For example, the actual monthly expenses of a defendant and his dependents is being considered. The Chart on "Estimated Monthly Expenditures for Necessities of Life" was designed to allow for a standard of living in the intermediate range. The figures in that Chart include allowances for restaurant meals, home furnishings, an older model car, entertainment and other items which are not strictly bare necessities. The Chart is used to ensure that the defendant and his family do not deprive themselves of these things so that they can hire an attorney.

Format:

The Questionnaire has two pages. The first page is divided into three sections to reflect immediately available cash (liquid assets), monthly income and expenses, and non-liquid luxury assets. The second page summarizes the information; the eligibility determination is calculated on this page.

Page One:

Section A allows the PDA to determine at a glance how much actual cash the defendant has on hand. It allows the defendant to deduct expenses in the event of a recent emergency, where he was required to pay the bills.

Section B reveals a defendant's total monthly income and estimated expenses for the support of himself and his dependents. Please note that the income of a parent or spouse is not necessarily included because there is no requirement that the income be used to pay an attorney who represents the defendant. If the defendant is a youth and has responded that he cannot afford counsel, include only his income, if any, in the calculations. However, if the defendant indicates that his parent or his spouse will definitely contribute to his defense, then these funds can be taken into consideration.

Finally, Section C is designed to highlight any luxury items owned by the defendant, which are at least potentially convertible into cash. The PDAs have been advised to utilize this section only if they grant an adjournment so that the defendant will have time to sell these items and obtain cash.

GENERAL INSTRUCTIONS:

Give the defendant a brief explanation of the purpose of the form and the fact that the PDA is the eligibility determiner. State that he can appeal an adverse decision to the judge. Explain that the form takes into consideration the cost of living and does not require that a defendant exhaust all his resources to pay for an attorney. It is also important that the defendant understand that the form must be signed and that he is subject to perjury charges if the figures are deliberately misrepresented.

All questions on the form must be completed. The exception is when the defendant indicates that he is either able to afford counsel, or on a Welfare or Medicaid program. In these instances, write either "Welfare," "Medicaid," or "Private Counsel" across the interviewer's box and leave the rest of the form blank.

If a question is not applicable to the defendant or if an item has no value, put "0" in the blank. If the value of an item is unknown and the defendant cannot make an estimate, put "DK" in the blank. In the event a defendant refuses to answer a question, put "RA" in the blank. All blank questions must be completed in some fashion.

The form requires that specific numbers be entered in each of the blanks. If the precise figure is unknown, use an approximate figure -- but let the defendant provide the estimate, not the Interviewer.

After all the figures have been entered, add them up. The calculations should be made at the end. It is easier to concentrate and a defendant may become restless or irritable waiting. Be sure to bring down any figures that have a negative (minus) sign since this will offset positive (plus) numbers.

All information should be verified. A column titled "Information Verified" on the right hand side of the first page will assist you. Just place a check in the "Yes" or "No" column next to the requested data. If the information has been determined "incorrect," write incorrect across that line and replace it with the correct data.

If you have any recurring problems with the form, report them to your supervisor so that the form can be improved.

SPECIFIC INSTRUCTIONS:

Name: Fill in the defendant's complete name; last name first.

Permanent Address: Fill in the defendant's complete address.

Telephone: Enter the defendant's telephone number. If the defendant does not have a telephone, ask him if there is a number where he can be reached.

Social Security Number: Be sure to enter the correct social security number. This number will be helpful in verifying information provided by the defendant.

Counsel: If the defendant states that he can afford private counsel, do not complete the rest of the form; instead, write "Private counsel" in the interviewer's box. If the defendant states that he cannot afford a private lawyer, or if he is unsure, check "no" and complete the rest of the form.

Welfare: If the defendant states that he is receiving Welfare or Medicaid, check "Yes" and do not complete the rest of the form; instead, write "Welfare" or "Medicaid" in the interviewer's box. This information should be verified. If the defendant has a Welfare or Medicaid I.D. card, this will be sufficient. Otherwise a call should be made to the Department of Social Services. If the Department states that the defendant is not on Welfare or Medicaid, write "Welfare" or "Medicaid" across the box and indicate "incorrect data." This will serve to notify the PDA of the conflicting information.

Section A:

Cash: The answer to this question should reflect only the defendant's available cash. "Cash available" means the actual dollars and cents at home, in a drawer or on his person. If the defendant states he has no cash, enter "0".

Checking and Savings Accounts: Use an approximate figure and round off the figures. If the defendant has more than one checking or savings account, place the amount in all such accounts in the blanks provided and write the names and addresses of all banks in the space provided. Thus, if the defendant has two savings accounts, one with \$200, and the other with \$500, you will enter \$200 on one line and \$500 on another line.

Stocks: If none, write "0" in the blank. If the defendant owns either stocks or bonds, indicate the kind (e.g., U. S. Government Bonds, I.B.M., etc.) and the approximate current market value of all such assets in the blank space.

Ask the defendant the name of his broker, the address and telephone number. If he has none, write N/A on the line.

Stamp or Coin Collection: If the defendant does not own such a collection, write "0" in the blank. If he does, ask him the approximate worth of the collection and enter the amount on the appropriate line.

When the entire form is completed, add up all the figures from the prior five questions and place the total in the space marked "total."

Emergency Question: This section is limited to unusual situations in the past month where the defendant is responsible for paying the bills. For example, if the defendant must pay the cost of major surgery, a funeral, auto accident, etc., which occurred during the prior month, he may deduct the cost from his liquid assets. Dental or ordinary medical bills, travel expenses, etc., are not considered emergencies. Indicate the type of emergency in the space and ask the defendant if he is willing to provide a copy of any bills he will pay for the emergency.

If it is applicable, after the form is completed, subtract the cost of the emergency from the total arrived at previously and write the result in the space marked "Remainder A." This figure represents the defendant's available liquid assets and completes Section A.

Section B:

Employment: List all the places where the defendant has worked in the preceding month and include the name, address and telephone number of all employers. Enter a check mark to indicate whether the defendant was employed full- or part-time for each employer. Anything less than 35 hours a week is considered part-time employment. Write the defendant's total monthly take home pay from all jobs in the blank.

Employment Compensation: Write in the space provided the amount the defendant receives monthly from unemployment compensation.

Other Benefits: Write the total monthly amount of any other benefits received and the type of benefit in the space provided. Add up all the answers to the previous three questions and place the result in the space marked "total income."

No Income: If the previous answers do not indicate the defendant's source of income, ask him how he supports himself and write the answer in the space provided. If the defendant refuses to answer, or indicates an illegal source of income, put "RA" in the blank. The form must indicate the defendant's livelihood or that he refused to disclose his livelihood.

Age: Indicate the defendant's age.

Number of Dependents: Indicate how many persons the defendant actually supports. The defendant's relationship to that person or his legal obligation to support the dependent is not important, provided the defendant actually supports the dependent. If the spouse or any children of the defendant are employed full-time, they are considered self-supporting and do not qualify as dependents. If the defendant has been ordered by a court to provide child support or alimony, these persons are to be considered dependents of the defendant. For example, if a defendant provides approximately one-half support for his mother, common-law wife, and her child, he has three dependents.

Expenses: Circle on the Chart the defendant's estimated monthly expenses, based on his age and number of dependents and enter the figure in the space provided. If the defendant is exactly 35 years old, circle the section of the chart that covers 35 and over.

Subtract the figure for expenses from the "total income" indicated above and write the result in the space labeled "Remainder B." This completes Section B and shows the defendant's non-obligated resources.

Section C:

Car/Truck: If the defendant owns a car or a truck, indicate the year, make and model. If the defendant owns more than one car or truck, enter it in the space provided. Request the registration numbers for all vehicles. This will simplify verification procedures for you. In this way, the Department of Motor Vehicles can easily verify this information.

In the space provided, write the estimated cash value unless the car or truck is worth under \$2,000. If its value is under \$2,000 write "0" under cash value. If a cash value has been indicated, but the car or truck has not yet been totally paid for, indicate the amount the defendant still must pay in the space labelled "payments due."

Jewelry, Furs, Color Television, Stereo: If the defendant owns any of these items, the estimated value must be indicated. If any money is still due on these items, indicate the amount under "Payments due."

Real Estate: If the defendant owns real estate, indicate the type of real estate and the location of the property. Ask the defendant the estimated value of the property and if any payments are still being made. Enter the estimated value of the property in the place provided and enter the payments remaining.

Other Luxury Items: Indicate anything not listed above that might be considered a luxury item like antiques, art, sporting equipment, boats, and the total payments still due.

Borrowing: The defendant must be asked if any of his luxury assets can be used as collateral to obtain a loan. The loan then would be used towards the use of retaining private counsel. If the funds from the loan are not sufficient to retain counsel, then the defendant will be classified as "marginally indigent" and whatever he is able to contribute to his defense will be given to the State Public Defenders Office for deposit in the state treasury. Enter the luxury asset(s) that the defendant states can be used for collateral and request the approximate amount he can receive for the item. Instruct the defendant that he is not to use any assets for borrowing purposes if it jeopardizes the "necessities of life" for himself and his dependents.

Perjury Statement: Have the defendant sign in the space provided. Non-English speaking defendants need not sign the form.

When the form is completed, add up the total payments the defendant still must make on all the luxury items, and write the result under total payments. Add up the cash value of all luxury items owned and indicate in the appropriate place. Subtract the total payments from the cash value of the luxury items and write the result in the space marked "Remainder C." This completes Section C, and it shows the value of the defendant's non-liquid assets. This figure will be used in determining indigency only if the defendant is given time to sell these assets and to convert them into cash.

Interviewer's Box: In the space marked "Remainder A," enter the total obtained from Section A. In the space marked "Remainder B," write the total obtained from Section B. Add these figures to obtain the "Subtotal." This figure represents the defendant's available financial resources after expenses. In the space marked "Remainder C," place the results of Section C. Add this figure to the subtotal to get the "Total." The PDA at the arraignment will subtract the cash bail and compare the result to the estimated cost of private counsel in making his determination. Sign your name in the space provided.

When you are adding, it is important to indicate any negative (-) amounts, so that they will offset any positive (+) figures. Thus, if A = +\$2000, and B = - \$3000, the subtotal = -\$1000. If C = +\$2000, the total is +\$1000.

APPENDIX C

PUBLIC DEFENDER ATTORNEYS (PDA's):
INSTRUCTIONS FOR USE OF ELIGIBILITY QUESTIONNAIRE

It is crucial, since you are making the eligibility determination for the assignment of counsel, that you fully comprehend the principles embodied in the "Guidelines for Determining Eligibility for the Assignment of Counsel." Please read the copy that you were given at orientation. The following instructions highlight the salient principles of the Guidelines and demonstrate the use of the questionnaire. Please read the instructions carefully.

1. The Eligibility Questionnaire is designed to assist all Public Defender Attorneys (PDA) in making determinations relevant to the defendant's ability to afford private counsel. The questionnaire follows the logic of the "Guidelines." It presents, in summary form, the defendant's available resources at arraignment. Determinations of legal indigency can therefore be made based on a uniform standard.

2. The Paralegal Interviewers are responsible for completing the questionnaire. They have been instructed to inform you when a defendant has refused to answer a question by writing "RA" next to the blank question. If a defendant does not know the answer, a "DK" is inserted next to the question. You, therefore, know the reason why that area is not completed.

3. If the defendant states he is on Welfare, receiving Medicaid payments, or that he can afford counsel, the questionnaire is not completed. The Paralegal Interviewer has been instructed to write "Welfare," "Medicaid" or "Private Counsel" across the interviewer's box. This notifies you as to why the form is incomplete.

4. The Interviewer attempts to verify all the pertinent financial information given by the defendant. On page 1 of the questionnaire, a column has been provided so that the interviewer can easily check off the information that has been verified. For your own edification, you should check to determine if the relevant data on which you are basing your decision has been verified. If the information is incorrect, the Interviewer will write "incorrect" across that line. If the information has been supplied, the correct data will be noted.

(5) The first eligibility determinant is the defendant's estimated available financial resources. This information is divided into three sections on the Eligibility Questionnaire:

- Section A summarizes the defendant's available liquid assets;
- Section B summarizes the defendant's estimated non-obligated monthly income;
- Section C summarizes the potential availability of cash from the sale of luxury non-liquid assets.

6. The interviewer enters the "Remainders" from Section A, B, and C in the interviewer's box. Remainders A and B represent the Subtotal; and Remainders A+B+C represent the Total. All computations are done by the interviewers.

Section A:

Liquid assets, because of their immediate availability, are of primary importance in ascertaining legal indigency. If the defendant had emergency expenses within the last month, this has already been deducted from liquid assets. The Interviewers have been instructed that an emergency situation is likened to non-reoccurring medical expenses or burial expenses. They are told to ask the defendant if he is willing to produce the bills for these expenses.

Section B:

This section first reveals a defendant's monthly income. If the defendant does not indicate his means of support, the PDA is advised to question him further as to his source of income. After a defendant's monthly income has been determined, a deduction is made for the estimated monthly expenditures for the necessities of life. This is done by the Interviewer ascertaining the defendant's age, the number of dependents he supports, and by circling the appropriate number on the Chart provided on the form. It is this amount that is deducted from monthly income to reveal the defendant's nonobligated income. To reiterate, "Section Remainders" A and B = SUBTOTAL BOX.

Section C:

This section enumerates the cash value of the defendant's non-liquid luxury assets. To fairly assess the cash value, a deduction is made where the defendant must make payments on the item(s). Generally, this Section should only be used in conjunction with the defendant's other resources (A+B), if the Judge is willing to adjourn the case to allow time for the defendant to liquidate these assets. In that event, the TOTAL amount (A+B+C) can be used to determine if a defendant has sufficient funds to retain adequate counsel. However, if the Court is unwilling to grant an adjournment, then only the SUB-TOTAL should be examined for eligibility determination. If you determine that a defendant has sufficient collateral enabling him to borrow money to obtain counsel, the Court must be willing to adjourn the case to ascertain if in fact the defendant can obtain a loan. Note: The defendant should not be forced to borrow against items that are "necessities of life."

7. The second determinant is the amount of cash bail a defendant must post to gain release from jail. This figure is deducted by the Public Defender attorney from either the total or sub-total. When a defendant with no visible assets or income manages to raise a large amount of money to make bail, the Public Defender Attorney is advised to make further inquiry. However, a defendant's ability to raise bail should never be an automatic disqualifier for assignment of counsel.

8. The final determinant is the cost of private counsel. The Public Defender should apply his knowledge and experience to the financial facts supplied to him on the questionnaire. The seriousness of the crime charged and the possible complexities of the particular case should be carefully considered. The cost of retained counsel figures on the questionnaire should serve as a reference tool. The defendant's available resources, minus cash bail posted, should be compared with the cost of adequate counsel for the highest crime charge.

The form provides you with an easy method for making these calculations. On the left hand side of the Cost of Retained Counsel Chart, place a check mark next to the highest crime charged. On the right hand side, circle the amount that private counsel would charge for that category of crime. Compare that figure with the amount remaining on the line marked "defendant's available resources at arraignment." If the defendant's resources exceed the cost of private counsel, in your opinion, he is ineligible for a publicly compensated attorney. If the defendant has some funds but not a sufficient amount to retain counsel, check the marginally indigent box. Explain to the defendant that he must contribute \$_____ to his defense. The funds must be paid to the State Public defender for deposit in the State Treasury. The format provides you with a section to fulfill these requirements. (This is pursuant to Section 977.07(2) of the Wisconsin Statutes.) You must promptly inform the defendant that the payments will be either in lump sum or periodic payments. The payment and payment schedule must be in writing.

9. If the defendant is dissatisfied with your decision, you must inform him of his right to appeal your determination to the court. In the appropriate section check the appropriate box indicating if the defendant was informed of his right to appeal and if he wishes to exercise that right.

10. Your signature to the form finalizes the eligibility determination procedure.

This format provides the PDA with sufficient information at arraignment to make a reasoned decision as to the defendant's ability to retain counsel. If there are any major problems, please list them and bring them to the attention of the Public Defender's Administrative Office.

APPENDIX D

JUDGES INSTRUCTIONS
EXPLANATION FOR USE OF THE "GUIDELINES" TO
DETERMINE ELIGIBILITY FOR THE ASSIGNMENT OF COUNSEL

1. The "Guidelines to Determine Eligibility for the Assignment of Counsel" provide a fair and uniform method for determining eligibility for assignment of counsel. Section 977.07(2) Wisconsin Statute mandates that Guidelines be written. The "Guidelines" have been enclosed for your convenience.
2. Please read the "Guidelines" carefully. The Judge, though not the initial determiner of eligibility, has the authority to contravene the Public Defenders decision. This is supported by the proposed administrative rules promulgated by the Public Defenders Office stating that the Court has a right to review the indigency determination made by the Public Defender.
3. There is an appeals section on page 2 of the Eligibility Questionnaire that is reserved for the Judges use. The defendant has been informed by the Public Defender of his right to appeal. If an appeal is made, the Judge should apply his knowledge and experience to the facts that are on the questionnaire. He should consider the defendant's available resources, the seriousness of the crime charged, the possible complexities of this particular case and the probabilities of the cases going to trial. This data should then be weighted against the Judges knowledge of counsel fees and the schedule provided on the questionnaire which outlines average attorney fees for different categories of crimes. The totality of this information should then form the basis for a reasoned decision as to the defendant's eligibility for assignment of counsel.
4. If the defendant has been declared eligible or not eligible the Judge checks the appropriate box. However, if the defendant is considered "Marginally Indigent" the Judge checks the appropriate box and indicates the amount of money the defendant must pay to the Public Defenders office. He must indicate if the payment will be made in a lump sum or in partial amounts. This requirement is pursuant to Section 977.07(2) of Wisconsin Statutes. The Judge should then enter his signature at the bottom of this section.
5. The following is a synopsis of the "Guidelines." It will serve to inform you of the salient principles, definitions and methods used in determining eligibility for assignment of counsel:

Definition of Terms

1. The concept of "legal indigence" embraces the idea that many middle income individuals are unable to pay for effective and adequate counsel. This is true because the assets of the defendant have to be compared with the nature and severity of the crime charged before being found ineligible for public counsel. The key test for determining eligibility cannot be destitution. Rather, it rests on whether or not the defendant is financially able to afford adequate counsel without substantial hardship to himself and his family.
2. Adequate counsel contemplates an attorney who has the requisite knowledge and experience to render effective assistance of counsel in defending his client against the crime charged. A defendant may have sufficient funds to afford an attorney for a low grade misdemeanor charge, yet not be financially able to retain counsel for a serious felony charge. The defendant, because of his limited funds, should not be forced to engage counsel of either limited skills or no experience.
3. Substantial hardship arises if the defendant is forced to divest himself and his family of his home, clothing, food, medical care, furniture, etc. These are considered his "necessities of life," and he should not be coerced into selling or foregoing such necessities in order to retain counsel. Applying the hardship concept to the "Guidelines" simply means that, in considering a defendant's financial resources to determine if he can afford adequate counsel, the defendant's daily personal and familial expenses are subtracted from his available financial resources. Therefore, before a determination of how much of a defendant's monthly income can be applied to his criminal defense, we first deduct expenses for the necessities of life.

SYNOPSIS

DETERMINANT I: DEFENDANT'S ESTIMATED AVAILABLE FINANCIAL RESOURCES

Definition: Financial resources available for use in retaining private counsel. This consists of Factors A, B, and C.

Computation: Total dollar amount by adding Factors A, B, and C.

Factor A: Defendant's Available Liquid Assets

Definition: Resources immediately available in cash or readily converted to cash (i.e. bank accounts, stocks, bonds, etc.)

Computation: Total liquid assets minus recent unpaid emergency expenses incurred by the defendant, incorporating the hardship clause.

Comments: This is the primary factor in ascertaining whether defendant has available financial resources to obtain counsel, since liquid assets are immediately available for this purpose.

Factor B: Defendant's Estimated Non-Obligated Monthly Income

Definition: An estimate of the amount of income a defendant should have available each month to pay private counsel without substantial hardship to himself or his family.

Computation: Monthly income from all sources minus Bureau of Labor Statistics estimated monthly expenditures for "the necessities of life" based on a moderate income chart which also considers the person's age, marital status, number of dependents and geographical location.

Comments: Estimated, non-obligated monthly income is to be added to net liquid assets to determine the amount of cash defendant should have in any given month for expenditures beyond those defined as necessities of life.

Factor C: Cash Available From Sale of Luxury, Non-Liquid Assets

Definition: The current market value of defendant's actual interest in investment properties and certain items of luxury personal property owned wholly by defendant which is not immediately convertible into cash.

Computation: Total of current market value of investment properties and certain items of luxury personal property minus total dollar amount of payments still to be made on such property or items.

Comments: If defendant owns investment property or certain items of luxury personal property which, if sold, would give him sufficient funds (alone or when combined with liquid assets and non-obligated income) to retain private counsel, defendant's case should be adjourned until such time as he liquidates such luxury items. Cash available from sale of such items (after subtracting remaining payments to be made) will be added to non-obligated income and liquid assets.

DETERMINANT II: CASH COMMITTED BY DEFENDANT TO PROCURE BAIL

Definition: The amount of cash defendant has himself remitted as security to obtain a cash bond or as premium to obtain an insurance company bond.

Computations: Any amount allocated out of defendant's own assets or income for the purpose of securing a bail bond is to be deducted from defendant's estimated financial resources (Determinant I) prior to any determination as to whether defendant is financially able to employ private counsel.

Comments: A defendant should not have to choose between release from jail before trial and adequate counsel at trial. Each is a separate right; each is vital to the defense. A defendant who is presumptively innocent should not have to forfeit one to secure the other.

DETERMINANT III: ESTIMATED COST OF OBTAINING COMPETENT PRIVATE COUNSEL IN THE LOCALITY IN WHICH THE DEFENDANT IS BEING PROSECUTED

Definition: The total estimated cost of compensating a competent attorney for representing a client from arraignment through a jury trial, based on the seriousness of the charges initially brought against the defendant.

Comments: The estimated cost of obtaining private counsel will be compared with defendant's estimated available financial resources remaining after the amount of such resources committed in order to procure a bail bond is deducted (i.e. Determinant III is to be compared with Determinant I after Determinant II has been subtracted from Determinant I).

If defendant's remaining available resources equal or exceed the cost of private counsel, defendant will be ineligible for state compensated counsel. If defendant's available resources are less than the cost of counsel, defendant is considered eligible for state compensated counsel.

APPENDIX E

TRAINING AND DEMONSTRATION MATERIALS
HYPOTHETICAL FACT PATTERN FOR COMPLETED ELIGIBILITY QUESTIONNAIRE

THE FOLLOWING HYPOTHETICAL SITUATION IS POSITED
IN ORDER TO DEMONSTRATE THE USE OF THE QUESTIONNAIRE

A defendant, age 45, was arrested and charged with Vehicular Homicide, an E Felony. He is married and has two children. The defendant and his wife have \$2,000 in a joint savings account and \$500 in a joint checking account. He also has \$200 in cash at home.

The defendant's child sustained serious injuries in the accident out of which the charges grew and is presently in the hospital. Defendant's Blue Cross will cover the hospitalization but not the doctor's fee. The projected doctor's fee is \$1,000.

Defendant is employed as a bus driver. His monthly gross income is \$1,200. He receives \$50 a month in Veteran's disability payments for injuries sustained during the Korean War.

The car the defendant was driving when the accident occurred was owned by him, however it was totally demolished. The luxury items owned by the defendant include: a color television, the present market value of which is \$200; and a stereo which is worth \$300.

For reduction of this fact situation to the questionnaire, see Appendix E.

APPENDIX F

JOHN DOE QUESTIONNAIRE

FOR INTERVIEWER'S USE ONLY:

ENTER REMAINDERS FROM SECTION A, B, & C:

REMAINDER A \$ +1700
(LIQUID ASSETS)

+

REMAINDER B \$ +304
(NON-OBLIGATED INCOME)

SUBTOTAL = \$ 2004

+

REMAINDER C \$ +500
(NON-LIQUID LUXURY ASSETS)

TOTAL = \$ +2504
DEFENDANT'S AVAILABLE FINANCIAL
RESOURCES AT ARRAIGNMENT

INTERVIEWER'S NAME Thom Roe
(Signature)

FOR PUBLIC DEFENDER'S USE ONLY:

Select either TOTAL or SUBTOTAL from Interviewer's Box. (TOTAL can be used in determining defendant's financial resources only if the Judge is willing to adjourn the case to allow defendant time to liquidate luxury assets (Section C).)

\$ +2504 (TOTAL or SUBTOTAL)
- \$ 500 (MINUS CASH BAIL POSTED BY DEFENDANT)
= \$ 2004 (DEFENDANT'S AVAILABLE RESOURCES FOR
RETAINING PRIVATE COUNSEL)*

* This figure is to be compared with the Estimated Cost of Private Counsel, for the crime charged, as shown below in order to determine whether defendant can afford counsel.

SCHEDULE OF ESTIMATED COST OF PRIVATE COUNSEL

| DEFENDANT CHARGED WITH: CHECK APPLICABLE BOX(ES) | IN COUNTIES IN WHICH HOURLY RATE IS MORE THAN \$40 | IN COUNTIES IN WHICH HOURLY RATE IS LESS THAN \$40 |
|--|--|--|
| 1. <input type="checkbox"/> - 1st or 2nd Degree Murder | \$3,500 | \$3,000 |
| 2. <input type="checkbox"/> - Other Armed Felony | \$2,200 | \$1,800 |
| 3. <input type="checkbox"/> - Other Drug Related Felony | \$1,600 | \$1,200 |
| 4. <input checked="" type="checkbox"/> - Other Felony | \$1,600 | \$1,200 |
| 5. <input type="checkbox"/> - Traffic Misdemeanor | \$ 400 | \$ 300 |
| 6. <input type="checkbox"/> - Other Misdemeanor | \$ 500 | \$ 400 |
| 7. <input type="checkbox"/> - Juvenile | \$ 500 | \$ 400 |
| 8. <input type="checkbox"/> - Appeal to Court of Appeals | \$2,000 | \$1,500 |

These figures are not fixed amounts. They serve only as a guide. The Public Defender should apply his knowledge and experience as to the actual cost of counsel in relation to the case before him.

DEFENDANT IS ELIGIBLE, NOT ELIGIBLE FOR PUBLICLY COMPENSATED COUNSEL.

DEFENDANT IS MARGINALLY INDIGENT AND CAN AFFORD TO CONTRIBUTE \$ _____ TOWARDS HIS DEFENSE. THIS PAYMENT WILL BE MADE IN LUMP SUM OR IN PERIODIC PAYMENTS OF \$ _____ EVERY WEEK MONTH.

THE DEFENDANT HAS BEEN ADVISED OF HIS/HER RIGHT TO APPEAL TO THE COURT THE ELIGIBILITY DETERMINATION MADE ABOVE. THE DEFENDANT DOES DOES NOT WISH TO EXERCISE THAT RIGHT.

PUBLIC DEFENDER'S NAME James Doe DATED May 21 19 74

FOR APPEAL PURPOSES ONLY:

This Court has reviewed the Public Defender's Eligibility Determination and finds the Defendant ELIGIBLE NOT ELIGIBLE MARGINALLY INDIGENT and can afford \$ 1000 towards his defense. This payment will be made in lump sum or in periodic payments of \$ 500 every week month.

JUDGE [Signature] DATED May 21 19 74
(Signature)

ELIGIBILITY QUESTIONNAIRE

NAME JOHN DOE TELEPHONE NUMBER (608) 293-4692
 PERMANENT ADDRESS 296 EASTWOOD ROAD RACINE, WIS. (STREET, CITY) (STATE)
 CAN YOU AFFORD PRIVATE COUNSEL? YES NO DOCKET/INDICTMENT No. 2014/78
 SOCIAL SECURITY NUMBER 131-36-0284 ARE YOU RECEIVING WELFARE PAYMENTS OR MEDICAID YES NO
 (IF "YES" DO NOT COMPLETE this form, write WELFARE OR MEDICAID across the Interviewers Box)

INFORMATION HAS BEEN VERIFIED? CHECK YES NO

SECTION A LIQUID ASSETS

HOW MUCH CASH DO YOU HAVE AVAILABLE? \$ 200 (AMOUNT)
 HOW MUCH DO YOU HAVE IN YOUR SAVINGS ACCOUNT(S)? (1) NATIONAL BANK BRANCH #4 + \$ 2000 (AMOUNT)
 BANK, BRANCH ADDRESS _____ (AMOUNT)
 (2) _____ + \$ _____ (AMOUNT)
 HOW MUCH DO YOU HAVE IN A CHECKING ACCOUNT(S)? (1) NATIONAL BANK BRANCH #4 + \$ 500 (AMOUNT)
 BANK, BRANCH ADDRESS _____ (AMOUNT)
 (2) _____ + \$ _____ (AMOUNT)
 DO YOU OWN ANY STOCKS OR BONDS? _____ + \$ _____ (AMOUNT)
 (TYPES) _____
 BROKERS NAME _____ ADDRESS _____ TELE. NO. _____
 DO YOU OWN ANY LIFE INSURANCE POLICIES WITH A CASH VALUE? _____ + \$ _____ (AMOUNT)
 (COMPANY NAME) _____
 DO YOU OWN ANY STAMP OR COIN COLLECTIONS? (IF YES enter amount at right.) _____ + \$ _____ (AMOUNT)
 HAVE YOU HAD IN THE LAST MONTH A DEATH OR SERIOUS ILLNESS OR OTHER EMERGENCY IN YOUR FAMILY FOR WHICH YOU PERSONALLY WILL HAVE TO PAY BILLS? _____ = \$ 2700 (AMOUNT)
 IF YES, ENTER AMOUNT AT RIGHT.
AUTO ACCIDENT - CHILD INJURED, DOCTOR BILLS - \$ 1000 (AMOUNT)
 (TYPE OF EMERGENCY) _____
 A = \$ + 1700 (REMAINDER)

SECTION B NON-OBLIGATED INCOME

LIST ALL PLACES WHERE YOU ARE PRESENTLY EMPLOYED:
 1. CITY BUS CO. 124 WESTWOOD DR. 123-4567 FULL TIME PART TIME \$ 1200 (MONTHLY TAKE HOME PAY)
 ADDRESS _____ TELE. NO. _____ + \$ _____ (MONTHLY TAKE HOME PAY)
 2. _____ FULL TIME PART TIME + \$ _____ (MONTHLY TAKE HOME PAY)
 ADDRESS _____ TELE. NO. _____ + \$ _____ (AMOUNT PER MONTH)
 DO YOU RECEIVE UNEMPLOYMENT BENEFITS? _____ + \$ _____ (AMOUNT PER MONTH)
 WHAT OTHER INCOME OR BENEFITS DO YOU RECEIVE? _____ + \$ _____ (AMOUNT PER MONTH)
VETERAN'S DISABILITY = \$ 1250 (TOTAL INCOME PER MONTH)
 (TYPE, E. G. BUSINESS INCOME; SOCIAL SECURITY; PENSION PAYMENTS, S.S.I. VETERANS BENEFITS, ETC.)
 IF YOU HAVE NO INCOME HOW ARE YOU SUPPORTED? _____
 AGE OF DEFENDANT _____ NUMBER OF DEPENDANTS SUPPORTED BY DEFENDANT 3

ESTIMATED MONTHLY EXPENDITURES FOR THE NECESSITIES OF LIFE

| | UNDER 35 | 35 & OVER |
|----------------------------|----------|-----------|
| Defendant Alone | 331 | 469 |
| Defendant And 1 Dependant | 463 | 614 |
| Defendant And 2 Dependents | 557 | 726 |
| Defendant And 3 Dependents | 681 | 946 |
| Defendant And 4 Dependents | 770 | 1098 |
| Defendant And 5 Dependents | 859 | 1235 |
| Defendant And 6 Dependents | 949 | 1366 |
| Defendant And 7 Dependents | 1085 | 1561 |
| Defendant And 8 Dependents | 1220 | 1757 |
| Defendant And 9 Dependents | 1356 | 1892 |

B = \$ + 304 (REMAINDER)

SECTION C NON-LIQUID LUXURY ASSETS

DO YOU OWN A CAR(S), TRUCK(S)? (1) _____ (ADD DOWN) \$ _____ (ACTUAL CASH VALUE IF OVER \$2000)
 REGISTRATION NO. _____ (YR./MAKE/MODEL) (TOTAL \$ AMT. OF REMAINING PAYMENTS) + \$ _____ (ACTUAL CASH VALUE IF OVER \$2000)
 REGISTRATION NO. _____ (2) _____ (PAYMENTS REMAINING) + \$ _____ (CASH VALUE IF OVER \$2000)
 (YR./MAKE/MODEL) (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 DO YOU OWN JEWELRY OR FURS? _____ (TYPE) (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 DO YOU OWN REAL ESTATE? _____ (LIST ADDRESS) (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 (TYPE OF PROPERTY) _____
 DO YOU OWN A STEREO SET? _____ (TYPE) + \$ _____ (CASH VALUE)
 DO YOU OWN OTHER LUXURY ITEMS? Color T.V. + \$ _____ (CASH VALUE)
 (E.G. SPORTING EQUIP., BOATS, COLOR TV) (TYPE) (PAYMENTS REMAINING) + \$ _____ (CASH VALUE)
 = \$ 0 (TOTAL PAYMENTS) = \$ 500 (TOTAL)
 - \$ 0 (TOTAL PAYMENTS)
 Is there a realistic possibility of borrowing against the above assets to obtain funds to retain counsel without an undue hardship to yourself or your dependants? YES NO
 (TYPE OF ASSET) _____ + \$ 500 (APPROXIMATE AMOUNT)
 C = \$ + 500 (REMAINDER)

The Defendant asserts and declares under penalty of perjury that the foregoing information is true. The Defendant also states that if his/her financial situation changes during the pendency of this case he/she will promptly report such changes to a representative of the State Public Defender (Note: Perjury is a Felony and will subject you to up to three (3) years in prison, Sec. 946.32 (1) (a) Wis. Stats.)

Dated 5/21 19 78 John Doe
 (SIGNATURE)

APPENDIX G

SYNOPSIS

GUIDELINES FOR DETERMINING WHETHER A DEFENDANT
IS FINANCIALLY ABLE TO OBTAIN ADEQUATE PRIVATE COUNSEL

DETERMINANT I: DEFENDANT'S ESTIMATED AVAILABLE FINANCIAL RESOURCES

Definition: Financial resources available for use in retaining private counsel. This consists of Factors A, B, and C.

Computation: Total dollar amount obtained by adding Factors A, B, and C.

Factor A: Defendant's Available Liquid Assets

Definition: Resources immediately available in cash or readily converted to cash (i.e. bank accounts, stocks, bonds, etc.).

Computation: Total liquid assets minus recent unpaid emergency expenses incurred by the defendant, incorporating the hardship clause.

Comments: This is the primary factor in ascertaining whether defendant has available financial resources to obtain counsel, since liquid assets are immediately available for this purpose.

Factor B: Defendant's Estimated Non-Obligated Monthly Income

Definition: An estimate of the amount of income a defendant should have available each month to pay private counsel without substantial hardship to himself or his family.

Computation: Monthly income from all sources minus Bureau of Labor Statistics estimated monthly expenditures for "necessities of life" based on a moderate income chart which also considers the person's age, marital status, number of dependents and geographical location.

Comments: Estimated, non-obligated monthly income is to be added to net liquid assets to determine the amount of cash defendant should have in any given month for expenditures beyond those defined as necessities of life.

Factor C: Cash Available from Sale of Luxury, Non-Liquid Assets

Definition: The current market value of defendant's actual interest in investment properties and certain items of luxury personal property owned wholly by defendant which is not immediately convertible into cash.

Computation: Total of current market value of investment properties and certain items of luxury personal property minus total dollar amount of payments still to be made on such property or items.

Comments:

If defendant owns investment property or certain items of luxury personal property which, if sold, would give him sufficient funds (alone or when combined with liquid assets and non-obligated income) to retain private counsel, defendant's case should be adjourned until such time as he liquidates such luxury items. Cash available from sale of such items (after subtracting remaining payments to be made) will be added to non-obligated income and liquid assets.

APPENDIX H

JUDGES: EVALUATION OF EXPERIMENTAL USE OF
"GUIDELINES FOR DETERMINING ELIGIBILITY FOR ASSIGNMENT OF COUNSEL"
Brooklyn, New York
1977

A. EVALUATION OF JUDGES' USE OF THE GUIDELINES
BOTH PRACTICALLY AND CONCEPTUALLY

| | <u>YES</u> | <u>NO</u> |
|---|------------|-----------|
| 1. In general, is the defendant capable of deciding if he can afford counsel? | _____ | _____ |
| 2. The Guidelines state that defendants receiving welfare or Medicaid are unable to afford adequate counsel. Do you agree with this principle? | _____ | _____ |
| a) If No, what is the basis for disagreement? | _____ | _____ |
| b) Are you applying it in practice? | _____ | _____ |
| 3. If the "Welfare" question is answered in the affirmative, the questionnaire is not completed. Do you agree with this policy? | _____ | _____ |
| a) If No, why do you disagree? | _____ | _____ |
| b) If No, do you recommend that every defendant complete the eligibility questionnaire? | _____ | _____ |
| 4. The first determinant encompasses three aspects of the defendant's financial situation. Do you agree that liquid assets are the primary and most important aspect in the defendant's ability to retain adequate counsel? | _____ | _____ |
| a) If no, what do you consider more important? | _____ | _____ |
| 5. Liquid assets are used for emergency situations. The Guidelines incorporate an "emergency clause" whereby recent unpaid bills (e.g. funeral expenses) may be deducted from liquid assets. Do you agree with this in principle? | _____ | _____ |
| a) Are you applying this factor in practice? | _____ | _____ |
| b) If No, what are the objections? | _____ | _____ |

6. The second aspect pertaining to the defendant's ability to retain adequate counsel is the defendant's non-obligated income. This factor takes into consideration the cost of the defendant's necessities of life (what it actually costs him and his dependents to live) and then subtracts that cost from his monthly income. Only the "non-obligated" income is considered when determining legal indigency. Do you agree with this?

- a) In practice, does this give you a more accurate estimation of the defendant's available income? _____
- b) If No, what is the basis for disagreement? _____

- c) If No, why does it not fulfill this function? _____

7. The Guidelines use the Bureau of Labor Statistics to determine the cost of the necessities of life for a hypothetical family in Wisconsin. Do you agree with the use of this authority?

- a) If No, what is the basis for disagreement? _____

8. The third and final factor taken into consideration in determining eligibility is the defendant's "non-liquid" luxury items. Unless enough time is granted to liquidate these assets, they should not be calculated into the defendant's available financial resources. Do you agree with this premise?

- a) In practice, are you applying this principle in determining defendant's financial status? _____
- b) If No, what is the basis for disagreement? _____

9. The second determinant is the amount of bail posted by the defendant. The principle is that the ability to post bail should not necessarily imply ability to afford adequate counsel. After questions are asked regarding the source of the bail and if defendant applied his assets for bail, this should be deducted from his available financial assets. Do you agree with this premise?

- a) In practice, are you applying this principle in determining defendant's financial ability to retain adequate counsel? _____
- b) If No, what is the basis for disagreement? _____

(i) If No, how do you handle the question of bail?

(ii) What principle do you apply?

10. The cost of private counsel is the third and final determinant. The cost of adequate counsel must be weighed against the defendant's ability to pay. Do you agree with this in principle?

a) If No, what is the basis for your disagreement? _____

11. In the past, only "income based" information was sought. No correlation was made to determine whether defendant had enough funds to retain counsel for the crime charged. Do you find this to be a valid and useful correlation?

a) If No, what is the basis for disagreement? _____

12. It is difficult to ascertain more than approximations of what adequate counsel costs vis-a-vis the crime charged. The judge makes the final determination of the defendant's eligibility for assigned counsel. Do you agree?

a) If No, what are your reasons? _____

13. Do the Guidelines assist you in making a more informed decision on defendants' eligibility for assigned counsel?

a) If Yes, what information in particular do you find more helpful in determining eligibility? _____

b) If No, what information would you rather see gathered and analyzed? _____

14. Since there is now a set standard and formula to guide you in determining eligibility, do you find this has alleviated any of the burden of having to evaluate each defendant's situation?

a) If No, what calculations did you make in past? _____

b) Was it a uniform system for determining eligibility? _____

15. Is there any information that is being gathered that you find irrelevant?

a) If yes, please specify. _____

16. Verification of defendant's information has always been considered to be more costly than it was worth. However, since the eligibility questions are being asked in conjunction with the ROR questions, it is thought that the defendant will answer more truthfully. Since the defendant's priority is to be released from jail, the theory is that he will provide PTSA with accurate information, since he knows that this information is being verified. Do you agree with this problem?

a) If No, what is the basis for disagreement? _____

17. Were there any questionnaires that were incomplete? _____

a) If Yes, was the percentage: _____

Large: _____

Small: _____

Negligible: _____

18. The screeners were asked to inform you if the information was refused or unknown by the defendant. Was this done? _____

a) If No, did you attempt to solicit the information from the defendant? _____

19. If sections of the questionnaire were not completed, what procedure did you use to make a determination? _____

a) Did the lack of information make your calculations more difficult? _____

20. Which sections of the questionnaire were most frequently left incomplete? _____

A _____, B _____, C _____ ?

21. Was the box summarizing the defendant's financial resources completed the majority of times? _____

22. The formation of a Marginally Indigent Defendants Legal Panel is under consideration. It would consist of attorneys willing to accept reduced fees for representing defendants unable to afford the average fee, but able to contribute a reduced fee to their defense. Based on your experience with the new Guidelines, do you believe there would be a significant number of defendants to warrant such a panel? _____

a) If No, what are your reasons? _____

B. EVALUATION OF THE JUDGES' USE OF THE QUESTIONNAIRE:
THE PROBLEMS AND THE BENEFITS IN DETERMINING ELIGIBILITY

23. The new questionnaire is designed to follow the eligibility guidelines. The format is organized to gather the three financial factors in columns and provide a "total" figure at the bottom of the page. Does this new format provide you with a more rapid and concrete method of determining eligibility?

a) If No, please explain.

24. The former questionnaire does not present total figures. The information is gathered but not summarized or related to any standard. Is the new form better suited for determining eligibility?

a) If No, why?

25. Do you have any additional comments regarding the differences between the old and new form?

a) If Yes, please comment.

26. Is the print too small for your use?

a) If Yes, what specifically should be larger?

27. Is there sufficient space for your use?

a) If No, in what section(s) would you like more space given?

28. For experimental purposes, the questions were placed on one page. One section is for the use of the PTSA screener and the second is for the use of the judge. Is this format acceptable to you?

a) If No, would you prefer a two-page format, separating the screener's section from the judge's section?

b) Would you prefer a one-page format with the screener's information on the front page and the judge's information on the reverse side?

29. The form was designed so that the judge need only peruse one small section. The first step is to select either the total of Factors A and B, or the totals of Factors A, B, and C. Was this initially a difficult item on the form?

a) If Yes, was the initial difficulty due to the unfamiliarity of a new approach? Comments: _____

b) Are you now encountering any specific problems with the selection? If Yes, what are those problems? _____

30. The second determinant involves subtracting the amount of cash bail from the defendant's available assets. Although this is the only arithmetic computation that the judge has to make, were there any difficulties with the computations initially?

a) If Yes, has familiarity with the form eradicated the difficulties? _____

b) If No, what problems are you still encountering? Comments: _____

31. The Cost of Private Counsel Chart is only a guide to help the judge determine if the defendant has sufficient funds to retain counsel for the crime charged. Initially did you encounter any difficulty with the chart?

a) If yes, was it due to an unfamiliarity with the Chart? _____

b) If No, what were your problems and have they been resolved? _____

32. Did the Chart assist you in making an eligibility determination?

a) Partially? _____

b) If No, why? _____

c) If No, how did you make your determination? _____

33. If your answer is "Yes" or "Partially," to No. 32 above, specifically, how did it assist in your decision making?

34. Has the decrease in the need to evaluate extensive data made it easier to make definitive indigency calculations? _____

35. Do the benefits of having uniform guidelines outweigh any disadvantages encountered in the use of the form? _____

C. EVALUATION -- ADMINISTRATIVE EFFECTS OF GUIDELINE IMPLEMENTATION

36. The Court's evaluation is now limited to only a small percentage of defendants. Are you now able to devote the time available to a more substantive analysis of the question of eligibility?

Comments: _____

37. Has limiting the screening to this "marginal group" accelerated the eligibility evaluation process? _____

a) If No, please comment: _____

38. Initially, did the questionnaire slow the arraignment process? _____

a) If Yes, to what extent: _____

Significantly _____

Somewhat _____

Very Little _____

39. By the end of your time in arraignment, did the questionnaire slow the arraignment process? _____

a) If Yes, to what extent? _____

Significantly _____

Somewhat _____

Very Little _____

40. After you gained familiarity with the new questionnaire, was the amount of time that you needed to determine eligibility reasonable? _____

41. In your opinion, during the experiment, had:
- More defendants been found ineligible for assigned counsel? _____
 - Less defendants been found ineligible for assigned counsel? _____
 - The same amount of defendants been found ineligible for assigned counsel? _____
 - a) If more, to what in the formula do you attribute this gain? _____
 - b) If less, to what in the formula do you attribute this decline? _____
42. Are there:
- More defendants being assigned to the Legal Aid Society? _____
 - Less defendants being assigned to the Legal Aid Society? _____
 - The Same amount of defendants being assigned to the Legal Aid Society? _____
 - a) If More, to what do you attribute this rise? _____
 - b) If Less, to what do you attribute the decline in assignments? _____
43. Are there:
- More adjournments for defendants to retain counsel? _____
 - Less adjournments for defendants to retain counsel? _____
 - The same amount of adjournments for defendants to retain counsel? _____
 - a) If more, to what do you attribute this? _____
 - b) If less, to what do you attribute this? _____

44. Do you feel the use of eligibility guidelines affects, in any way, the number of dispositions at arraignment? _____

a) If Yes, is the dispositional rate: _____

Higher _____ or Lower _____

45. When a defendant who is not eligible for assigned counsel appeared before you in another part without counsel what action did you take?

Comments:

a) Is this the same action you took prior to the implementation of the Guidelines? _____

46. In general, how have the Guidelines affected your decision making process?

47. If the administrative and practical problems encountered during the experimental period were rectified, do you believe that the Guidelines should be implemented? _____

48. This space is reserved for the judge to comment on the Guidelines, specifically on issues not raised by the preceding questions

(Signature)

(Date)

APPENDIX I

SUPERVISORS: EVALUATION OF EXPERIMENTAL USE OF
"GUIDELINES FOR DETERMINING ELIGIBILITY FOR ASSIGNMENT OF COUNSEL
Brooklyn, New York
1977

EVALUATION OF THE EXPERIMENTAL USE OF THE ELIGIBILITY GUIDELINES

| | <u>YES</u> | <u>NO</u> |
|--|-------------------------|-------------------------|
| 1. The questionnaire form is based upon a set of Guidelines which has broadened the established concepts of indigency. Do you agree with the underlying theory of the Guidelines? a) If No, please comment. | _____ | _____ |
| 2. After the initial demonstration, did you believe that the screeners fully comprehended the <u>principle</u> behind the Guidelines? a) If No, do you think that it is important for the screener to understand the principle? b) Do you think that a better understanding would create a more positive attitude and an improved work product from the screeners? | _____ _____ _____ | _____ _____ _____ |
| 3. The experimental use of the questionnaire was only one of several new projects that the Pretrial Services Agency participated in. Did this in any way affect the screeners' attitude and their use of the questionnaire? a) If Yes, please comment: | _____ | _____ |
| 4. Initially, there were problems with the "Estimated Monthly Expenditures For the Necessities of Life" chart. A conversion chart was introduced to make arithmetic calculations easier for the screeners. Did it in fact assist the screeners? a) If No, what in your opinion are the major problems the screeners are having with the Chart? | _____ | _____ |

CONTINUED

1 OF 2

5. Do you feel the screeners are still having major problems with the format of the questionnaire? _____

a) If Yes, what section(s) would you change? (Within each section, please indicate what changes you would recommend.)

Section A: _____

Section B: _____

Section C: _____

6. If the screeners had problems with the form, would improving the format help them work more efficiently? _____

7. What do you consider is the average time for a screener to conduct an:

a) Eligibility Interview: _____

b) ROR Interview: _____

8. By the end of the experiment, did the actual time for an eligibility interview decline? _____

9. The majority of screeners stated that they did not find the arithmetic computations difficult. When you reviewed the questionnaires, did you find mathematical errors:

a) Frequently _____

b) Infrequently _____

c) Rarely _____

10. Did the defendants have difficulty answering any of the questions? _____

a) If Yes, did the defendants have the same problems with similar questions on the previous questionnaire? _____

b) Specify the nature of the problem. _____

11. How often do defendants refuse to answer questions? _____

a) Frequently _____

b) Infrequently _____

a) If frequently, which questions are they most likely not to answer? Comment.

b) Would your answer be the same regarding the old indigency form? _____

12. If crucial information is withheld or unknown by the defendant, do the screeners inform the judge that the information is either unknown or withheld by the defendant? _____

a) Do you inform the judge that the information is either withheld or unknown by the defendant if the screeners do not? _____

13. If the defendant gives conflicting (i.e. financial) information, do you notify the judge in writing? _____

14. Both questionnaires request basically the same information from the defendant. Have you perceived any change in the attitude of the defendant to the questions? _____

a) If Yes, in what respect was their attitude different? _____

15. Do you believe that the defendants assume an attempt will be made to verify the eligibility questionnaire? _____

16. If the problems that you encountered during the experimental period can be remedied, do you believe that the "Guidelines" are a viable means of determining financial eligibility? _____

17. How often do you feel the judges use the PTSA form to make bail determinations? _____

- a) Frequently _____
- b) Infrequently _____
- c) Never _____

18. How often do you feel the judges use the questionnaire to make an eligibility determination? _____

- a) Frequently _____
- b) Infrequently _____
- c) Never _____

19. If you indicated that the judges do not use either form, what do you think can be done to change this attitude? _____

(Signature)

APPENDIX J

SCREENERS: EVALUATION OF EXPERIMENTAL USE OF
"GUIDELINES FOR DETERMINING ELIGIBILITY FOR ASSIGNMENT OF COUNSEL
Brooklyn, New York
1977

EVALUATION OF EXPERIMENTAL USE OF
"GUIDELINES FOR DETERMINING ELIGIBILITY FOR ASSIGNMENT OF COUNSEL"

1. How many ROR interviews did you conduct during the experiment? _____

2. How many questionnaires did you complete for that period? _____

3. When the guidelines were explained and demonstrated to you, did you understand the principle?

YES NO

a) Did you agree with the principle? _____

b) If no, what were your objections? Comment: _____

4. After the demonstration did you feel that the form would be difficult to use? _____

5. Did you believe the experiment to be worthwhile? _____

6. Did the time lapse between the demonstration and the experiment hinder your ability to complete the form initially? _____

7. By the end of the experiment did the actual time for an interview decline? _____

a) If Yes, was this due to: (check where applicable)

- _____ Familiarity with the form.
- _____ Familiarity with the questions asked by the defendants.
- _____ Calculations were easier to make.
- _____ Other (Specify)

b) If No, does the present indigency form take:

- _____ The same to complete as the old form?
- _____ Longer to complete than the old form?
- _____ Not as long to complete as the old form?

c) If longer, has it significantly increased the time? _____

8. Approximately how long did it take you to interview a defendant?

- At the beginning of the experiment? _____
- At the end of the first month? _____
- At the end of the experiment? _____

9. The format of the questionnaire can be changed. Is the print now too small for your use? _____

a) If Yes, what specifically would you like to see larger or bolder? _____

In Section(s) A: _____

B: _____

C: _____

10. Is there sufficient space for you to write? _____

a) If No, in what Section(s) would you like more space? _____
Comment: _____

11. If you had problems with the form, would improving the format help you work more quickly? _____

12. During the course of the experiment, the Chart "Estimated Monthly Expenditures for the Necessities of Life" was converted to make the arithmetic calculations easier for you. Is the Chart now easier to use? _____

a) If Yes, did this speed-up your computations? _____

b) If No, what are the major problems you are still having with the Chart? Comment: _____

13. Were the arithmetic computations difficult to calculate? _____

At the beginning of the experiment? _____

At the end of the first month? _____

At the end of the experiment? _____

a) If Yes, by the end of the experiment was it due to: _____

Format problems _____

Time pressure _____

Other (Please Specify) _____

14. Aside from the "Estimated Monthly Expenditures" Chart, were there any specific sections that caused problems?

- a) If Yes, in which section(s): A, B, or C

Please state briefly what the problem was and what you think could be done to improve it. Comment:

15. Did the defendants have difficulty answering any of the questions?

- a) If Yes, did the defendants have the same problems with similar questions on the previous questionnaire?
b) If Yes, which section(s) of the form present difficulties? A, B, or C
c) Specify the nature of the problem. Comment:

16. How often do defendants refuse to answer questions?

Frequently _____ Infrequently _____

- a) If frequently, which questions are they most likely not to answer? Comment:
b) Would your answer be the same regarding the old indigency form?

17. If crucial information is withheld or unknown by the defendant, do you inform the judge that the information is either unknown or withheld by the defendant?

18. Both questionnaires request basically the same information from the defendant. Have you perceived any change in the attitude of the defendant to the questions?

- a) If Yes, in what respect was their attitude different? Comment:

19. Do you believe that the defendants assume an attempt will be made to verify the eligibility questionnaire?

20. Now that the eligibility interview is so closely tied to the ROR interview, do you believe that defendants are responding more honestly to the questions asked? Comment: _____

21. If the problems that you encountered during the experimental period can be remedied, do you believe that the new questionnaire should replace the old form? Comment: _____

22. How often do you feel the Judges use the questionnaire to make an eligibility determination?

- a) Frequently _____
- b) Infrequently _____
- c) Never _____

23. How often do you feel the judges use the PTSA form to make bail determination?

- a) Frequently _____
- b) Infrequently _____
- c) Never _____

(i) If you indicated that the judges do not use either form, what do you think can be done to change this attitude?

(Signature)

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Survey of Eligibility Guidelines For Assignment of Counsel
Randomly Selected Urban Jurisdictions

Berkeley Neighborhood Legal Services
2229 Fourth Street
Berkeley, California 94710

Community Legal Assistance Center
Loyola University School of Law
1709 West 8th Street, Suite 1114
Los Angeles, California 90014

Federal Public Defender
Central District California
U. S. Court House
Los Angeles, California 90012

Legal Aid Foundation of Los Angeles County
1819 West Sixth Street
Los Angeles, California 90057

Office of the Public Defender
County of Los Angeles
311 South Spring Street
Los Angeles, California 90013

Public Defender of City and County of San Francisco
850 Bryant Street, Room 205
San Francisco, California 94103

San Francisco Neighborhood Legal Assistance Foundation
1095 Market Street, Room 312
San Francisco, California 94103

Legal Services Organization
Yale Law School
New Haven, Connecticut 06520

New Haven Legal Assistance Association
Legal Aid and Defender Office
265 Church Street
New Haven, Connecticut

The Boston Legal Aid Society
14 Somerset Street
Boston, Massachusetts 02108

Boston Legal Assistance Project
84 State Street
Boston, Massachusetts 02109

Massachusetts Defenders Committee
120 Boylston Street
Boston, Massachusetts

Harvard Legal Aid Bureau
1511 Massachusetts Avenue
Cambridge, Massachusetts 02108

Harvard Voluntary Defenders
Harvard Law School
Austin Hall
Cambridge, Massachusetts 02138

Legal Aid and Defender Association of Detroit, Inc.
600 Woodward Building
Detroit, Michigan 48226

Essex County Legal Aid Association
235 Hall of Records
Newark, New Jersey 07102

The Newark Legal Services Project
449 Central Avenue
Newark, New Jersey 07107

Legal Aid Society of Mercer County
440 East State Street
Trenton, New Jersey

Public Defender, County of Cortland
45 Main Street
Cortland, New York 13045

The Legal Aid Society
Criminal Defense Division
15 Park Row
New York, New York 10038

Legal Aid Society of Philadelphia
311 South Juniper Street
Philadelphia, Pennsylvania 19109

Standing Committee on Legal Work and Indigent Defendants
of the American Bar Association
William Klaus, Chairman
2001 Fidelity Building
Philadelphia, Pennsylvania 19109

Public Defender Service for the District of Columbia
601 Indiana Avenue, Northwest
Washington, D. C. 20004

END