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Preliminary Evaluation of the Lancaster County Indigency Screener Project

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Preliminary Evaluation of the Lancaster County Indigency Screener Project

January 2003

Submitted To
Lancaster County Board of Commissioners
and
Nebraska State Court Administrator's Office

Report By
University of Nebraska Public Policy Center

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EXECUTIVE SUMMARY

In January 2001, a three-year Indigency Screener pilot project was initiated in Lancaster County for the purposes of assessing:

1) The advisability of a *uniform rule* developed to clarify defendant eligibility for court-appointed counsel.

2) A *standardized form* for documenting eligibility for appointed counsel.

3) The use of *dedicated county court staff* to *obtain* financial information from a defendant and *verify* the information submitted by a defendant in support of his/her claim of indigency.

This report is a Preliminary Evaluation of the project. The Preliminary Evaluation is based primarily on information obtained from *interviews* with key stakeholders, courtroom observations of indigency determinations, and examinations of *basic screener program data* (statistical information and archival records) relevant to indigency determinations.

The interviews revealed that those involved in the court system are virtually all positive about the *uniform rule*, primarily because it is believed the rule has resulted in greater uniformity and consistency in indigency appointments. The *standardized form* is useful, although some minor modifications regarding what data should be collected are recommended. The primary benefit of the form is that it helps direct the collection of useful financial information judges need to know in order make the decision whether to appoint counsel. Overall, there were mostly positive reactions to the *screening staff and their activities*. Judges and attorneys like having the Screener obtain financial information prior to the court hearing. There appears to be significant savings of time for judges and attorneys.

The benefits of *verification* are less clear. On the one hand, verification allows people to feel that defendants will not receive benefits (court-appointments) at taxpayer expense to which the defendants are not entitled. On the other hand, verification does not appear to fulfill its promise. It is our opinion that defendants are not more honest simply because there is a court employee who will verify financial information. It is not clear that verification efforts succeed in uncovering financial information that results in a denial of public defender appointments that, but for verification, would have otherwise occurred. We do not believe verification detects very much false or inaccurate information. Part of the problem is it is hard to uncover the negative; thus, it is quite difficult for the verification process to find that a defendant is employed when s/he claims not be working or to find a savings account when the defendant does not indicate s/he has one. Even when verification uncovers dishonesty, the dishonesty can be so minimal that it does not actually affect the defendant's indigency status. Finally, in most instances, it does not seem to be good practice or policy to either stop judicial proceedings or prosecute defendants in those rare instances in which inaccurate or false information is uncovered.

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I. BACKGROUND

In January 2001, a three-year pilot project (Project) was initiated in Lancaster County for the purposes of assessing:

1) The advisability of a *uniform rule* developed to clarify defendant eligibility for court-appointed counsel (Indigency Rule).

2) A *standardized form* for documenting eligibility for appointed counsel (Form).

3) The use of *dedicated county court staff* ("Defense Eligibility Technician" or Screener) to *obtain* financial information from a defendant and *verify* the information submitted by a defendant in support of his/her claim of indigency.

This pilot Project was created in response to a call from the Nebraska Indigent Task Force, which in 1993 recommended, "establish[ing] a uniform, statewide process for determination and verification of indigency" for the purposes of providing "uniformity, consistency, and assurance that only those [defendants] who qualify receive court appointed counsel."[1] The Project's Oversight Committee,[2] through the Lancaster County Board of Commissioners, contracted with the University of Nebraska Public Policy Center (PPC) to conduct an initial assessment of the Lancaster County Indigency Screener Project as well as to suggest an evaluation plan for the remainder of the Project.[3] Because of limited funds and limited time, it was agreed that a *Preliminary* Evaluation would be conducted. This report constitutes the Preliminary Evaluation.

A. Indigency Rule and Financial Eligibility Form

Lancaster County's Indigency Eligibility Rule[4] contains three provisions, or "tiers" (see

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[1] Dennis Keefe, *Test of New Indigency Rules and Procedures: Three Year Pilot Project in Lancaster County*, 4 NEB. JUD. NEWS, Oct.-Dec. 2000, at 17. This article provides an excellent overview of the history leading to the Project that was implemented in Lancaster County and is being evaluated here.

[2] The Project's Steering Committee currently includes: District Court Judge Steven Burns, Lancaster County Chief Administrative Officer Kerry Eagan, County Court Judge James Foster (Chair), Lancaster County Court Judicial Administrator Peggy Gentles, Lancaster County Public Defender Dennis Keefe, Lancaster County Attorney Gary Lacey, Lancaster County Defense Eligibility Technician Catherine Rech, Juvenile Court Judge Toni Thorson, Director of Lancaster County Corrections Mike Thurber, and State Court Deputy Administrator Janice Walker.

[3] During the course of this Preliminary Evaluation, it became apparent that no future evaluations will be conducted prior to the completion of the current Project. Therefore, we only briefly discuss ideas related to future evaluations (*see* §VI, *infra*).

[4] *Rule I: Appointment Of Counsel; Indigent Parties; Standards And Procedures*, RULES OF THE COUNTY COURT OF THE THIRD JUDICIAL DISTRICT (Lancaster County, NE) (November 15, 2000) (available on-line from http://court.nol.org/trialcourt/county/LanCo.htm#1) (*hereinafter* Lancaster County Indigent Eligibility Rule). *See also* NEBRASKA SUPREME COURT, *Rules of The District Court of the Third Judicial District* Rule 3-15 (Indigent Screener Pilot Project) (December 20, 2000) (available on-line from http://court.nol.org/trialcourt/district/dist3.htm#appendix).

Lancaster County's Indigent Eligibility Rule is intended to clarify the state's indigency provisions, which are not as specific as to the financial circumstances under which a defendant is entitled to a court-appointed attorney.

Appendix A). Financial information relevant to these tiers is documented on a standardized form, "Request for Court Appointed Lawyer: Statement of Financial Status and Authorization for Release of Information" (hereinafter "Indigency Information Form;" see Appendix B for a copy of the Indigency Information Form) and then given to the judge as part of the defendant's file. As of March 2002, judges also have an additional two-part form ("Waiver of Right to Counsel" and "Certificate Regarding Right to Counsel and Notice of Assignment") that is used as part of the paperwork maintained relevant to indigency determinations. In this Report, we focus only on the Indigency Information Form and the information obtained therein.

The Indigency Information Form provides information relevant to deciding indigency under each tier. Under Tier 1 of the Rule, [5] if a defendant is receiving any type of federal, state, or local poverty assistance, s/he automatically qualifies for court-appointed counsel unless the offense will not result in imprisonment.[6] If the accused is not currently receiving any type of federal, state, or local poverty assistance, the total annual income and the number of dependents must be considered. Defendants are considered indigent under Tier 2 of the rule if s/he earns less than 125% of the federal poverty guidelines.[7] (Each spring, the amount of money reflected by 125% of the federal poverty guidelines is updated). If the individual earns more than 125% of the federal poverty guidelines, then the judge's discretion becomes relevant under Tier 3.[8] The judge is to consider the sources of additional income (interest and dividends, profits off rental property, cash earnings, etc.), assets, and debts in order to determine whether the projected cost of hiring private counsel will not interfere with the defendant's ability to provide for his/her own "economic necessities" or the defendant's family's economic necessities.[9] The judge is to record

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Under the state's indigency eligibility rule, indigency "mean[s] the inability retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."). NEB. REV. STAT. § 29-3901(3). Functionally, this means the judge must undertake "a reasonable inquiry to determine the defendant's financial condition," considering such factors as "the seriousness of the offense; the defendant's income; the availability of resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents," *State v. Eichelberger*, 418 N.W.2d 580, 587-88 (Neb. 1988), as well as considering whether the defendant is at risk for incarceration if convicted, as opposed to having to pay a fine, *State v. Dean*, 510 N.W.2d 87 (Neb.App. 1993).

Lancaster County's Indigent Eligibility Rule preserves § 29-301(3)'s discretionary provision and adds two additional provisions that are intended to be presumptive for establishing indigency. *See infra* notes 5-11 and accompanying text. *See also* Comment to Lancaster County Indigent Eligibility Rule, *supra*. A complete copy of the Lancaster County Indigent Eligibility Rule, including the Comment, is provided in Appendix A.

[5] Lancaster County Indigent Eligibility Rule, *supra* note 4, at § 2(3)(a)(i) (Indigent means "[a] party who is [r]eceiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), poverty related veteran's benefits, food stamps, refugee resettlement benefits, medicaid, Supplemental Security Income (SSI), or County General Assistance Funds").

[6] *See State v. Dean*, 510 N.W.2d 87 (Neb.App. 1993).

[7] Lancaster County Indigent Eligibility Rule, *supra* note 4, at § 2(3)(a)(ii) (Indigent means "[a] party who is [r]eceiving an annual gross income of 125% or less of the current federally established poverty level").

[8] *Id.* at § 2(3)(b). The provision is the same as § 29-301(3)'s discretionary provision. *See supra* note 4.

[9] This provision contained in Tier 3 of Lancaster County's Rule is intended to operate in the same manner as Nebraska's current indigency eligibility statute, NEB. REV. STAT. § 29-3901(3). *See* Comment to Lancaster County Indigent Eligibility Rule, Section 2 ("The definitions of "anticipated cost of counsel," "available funds," and "liquid assets" are consistent with considerations currently taken into account by Nebraska courts meant to guide the court's determination of indigency when the party does not meet the objective standard, replacing the categories formerly

his/her "findings, including [a] comparison of the party's anticipated cost of counsel and available funds when applicable, on a form… filed with the papers in the case."[10]

In summary, under the first two tiers (i.e., under § 2(3)(a) of the Lancaster County Indigent Eligibility Rule), eligibility is presumptively determined. If the defendant qualifies under the criteria and is in jeopardy of being incarcerated if convicted, then the defendant is eligible for a court-appointed attorney. If the defendant does not qualify under the first two tiers, the judge proceeds to the Tier 3 (i.e., § 2(3)(b) of the Lancaster County Indigent Eligibility Rule) in order to make the traditional determination of what funds are available to retain private counsel so that the judge can balance the defendant's assets against the anticipated cost of counsel. It was initially expected "that more than 75 percent of the cases" before the courts would be determined under the first two tiers.[11]

B. Defense Eligibility Technician

The position of Defense Eligibility Technician (hereinafter referred to as "Screener") was created as a central part of the Project. The Screener was created as a paraprofessional position. The Screener collects and verifies information from defendants about their financial status. The Screener briefly interviews defendants to collect financial data, obtaining information about income, debts, resources, and other financial information pursuant to the Rule. The information obtained by the Screener is recorded on standardized financial eligibility form (see Appendix B). The information is then provided to the judge for an indigency eligibility determination. Thereafter, the Screener maintains a computerized record of the form and verifies the accuracy of parts of the defendant's financial information.

II. ISSUES ADDRESSED IN THE EVALUATION

The purpose of the Preliminary Evaluation is to acquire information and provide input, including recommendations relevant to three general issues involved in the Lancaster County Indigency Screener Project: 1) the Indigency Rule; 2) the Form used to collect indigency financial data; and 3) the Screener who collects the data entered on the form and verifies the defendant's financial information. The following issues and questions are addressed in the evaluation:

A. General Questions

Indigency Rule
Has uniformity and fairness in indigency determinations increased since adoption of the rule?

Form

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used.) (citing *State v. Masilko*, 409 N.W.2d 322 (1987)). The *Masilko* criteria are the same as the *Eichelberger* criteria presented *supra* note 4. *See also State v. Richter*, 408 N.W.2d 717 (Neb. 1987); *State v. Lafler*, 399 N.W.2d 808 (1987).

[10] Lancaster County Indigent Eligibility Rule, *supra* note 4, at § 6. *See generally* Keefe, *supra* note 1, at 18.

[11] Keefe, *supra* note 1, at 18.

Is it advantageous to use the form to obtain indigency-relevant information for the judge before the defendant's appearance in the courtroom, as opposed to the practice of having the judge obtain the same information from the defendant in the courtroom?

Screener
Is it advantageous for there to be a Defense Eligibility Technician (Screener), employed by the county, involved in obtaining and evaluating indigency-relevant information rather than relying on the judge to obtain and evaluate the same information?

B. Specific Questions

1. Is accurate financial information being provided to the Court? Has this changed since implementation of the Project?
2. Are defendants who are eligible under the Rule to receive counsel appropriately receiving a court-appointed attorney? Are eligible defendants erroneously being denied court-appointed counsel? Are defendants who are ineligible to receive counsel erroneously receiving a court-appointed attorney? Are ineligible defendants appropriately being denied a court-appointed attorney? Have there been changes since implementation of the Project?
3. Is there increased consistency (or decreased consistency) in appointments since implementation of the Project? Are defendants of similar economic means given counsel or refused counsel?
4. According to those involved in the process, has there been an increase or decrease in the amount of time that judges, prosecutors, public defenders, and other criminal justice system personnel spend on the issue of determining indigency?
5. Do Judges routinely follow the eligibility criteria established by the Rule? If not, under what circumstances are these criteria not followed? How do Judges feel about the Rule as a general matter?
6. Is the use of a Screener an optimal use of resources to screen-in eligible defendants and screen-out ineligible defendants? What added-value is the Screener beyond what could be obtained by simply relying on the defendant's completed Form?
7. Are there other benefits from employing a Screener in addition to obtaining eligibility information? What else does the Screener do besides assess eligibility that is of benefit to the criminal justice system?
8. What do defendants know about the Screener? Does this knowledge make a difference in how defendants represent their financial status and information?
9. Have defendants changed in the extent to which they truthfully answer financial information since the inception of the Project? How many defendants and what proportion of defendants have been found to be untruthful? How are the falsehoods detected?
10. Have the number of defendants requesting appointed counsel in felony (and perhaps certain misdemeanor, such as DUI) cases increased or decreased since the inception of the Project? What values to the criminal justice system (e.g., consistency, equity) do the Form and/or the Screener add, if any, even if the numbers of appointments are not altered?
11. Are there modifications in the actual implementation of the Project that are inconsistent with the Rule as it is written?

12. Would counties other than Lancaster benefit from using the Project's Form and/or a Screener?
13. What are the general perceptions of the Project (and its components) by the judicial personnel involved?

C. Other Issues and Questions *Not* Addressed in the Evaluation

There are other issues and questions of importance beyond the scope of the Preliminary Evaluation. For example, the following questions are among those that are not answered by the present evaluation:

A. Has the Project had an actual impact, either negative or positive, on the indigency rate (percentage of cases requiring appointed counsel from the universe of eligible cases)?
B. Has the Project *actually* increased or decreased the amount of time that judges, county attorneys, public defenders, and other criminal justice system personnel spend on the issue of determining indigency (i.e., as shown by quantitative data)?
C. Is the use of a Technician Screener cost-effective for determining indigency?
D. Is the classification of the Screener position as a Technician an accurate one?
E. If the County decides to develop a Pre-Trial Services Agency, should the Screener functions be transferred to that agency?
F. Are there documented instances in which a defendant is found to be indigent but does not receive an appointment of defense counsel because the judge determines that the offense in not one that would result in jail time?

III. INFORMATION SOURCES FOR THE EVALUATION (METHODS)

Because of limited funds available for the Preliminary Evaluation and limited time available to conduct the inquiry, it was agreed that the evaluation should be based primarily on information obtained from interviews with key stakeholders. The purpose of the interviews was to obtain stakeholders' opinions and perspectives about the three components of the Indigency Project (Rule, Form, Screener). In addition, information obtained from basic screener program data (statistical information and archival records) relevant to indigency appointments was examined.

A. Interviews

Interviews were conducted with 25 stakeholders, including judges (county, district, and juvenile court), lawyers (from the county and city attorneys offices and the office of the public defender), screener staff, judicial administration staff, criminal justice administration staff, and defendants. Interviews were undertaken to obtain stakeholder insights into how the Project is operating, along with other stakeholder information such as estimates of time spent on indigency determinations, proportion of cases in which erroneous information is given by defendants, and so on. Interviews were semi-structured, thus providing consistency of information across the respondents, while still allowing for flexibility with each interviewee. Both quantitative data (e.g., estimates of amounts of time spent determining indigence) as well as qualitative data (e.g.,

perceptions of the system created by the Project) were obtained.

Selection criteria for interviews were based on contact/knowledge of the Screener Project and on the recommendations of the Project Steering Committee.[12] Most of the Committee members (or a representative from their unit/office) were interviewed, along with others in the system whose work brings them into contact with the Screener. In total, we talked to 20 people affiliated with Lancaster Courts. There was 100% response rate to the request for an interview. Although it is the case that participation was not completely voluntary, in that it was *encouraged* and *expected* by the Project Oversight Committee, interviewees retained control of the content and extent of their interviews.

Defendants were selected for input in order to learn their perceptions of screening. Among the questions we hoped to learn from defendants were: How do they feel about talking to a screener about their financial information as opposed to discussing the issue with a judge in open court, and do they believe they would be influenced in their honesty if their financial information were to be verified?

Defendants were selected from two pools. The first group was one that was randomly selected from a sample of DUI defendants screened by Lancaster County between May and July of 2002. The Project Oversight Committee members recommended talking to DUI defendants because they are not presumptively appointed counsel nor not appointed counsel, unlike defendants in many other kinds of cases: The offense is serious, but there is not necessarily exposure to jail time depending on the facts of the case.[13]

Of the 30 letters sent to invite defendants to participate, five letters were returned because of incorrect address information.[14] Three defendants agreed to be interviewed, and another submitted a letter concerning views regarding the Project.[15] Because of the need to change the time that the interviews were conducted, one defendant ultimately was unable to participate in the interview. Thus, input was received from three (12%) of the DUI defendants contacted.

The second group was randomly selected from a list of defendants who, during the month of September, the Screener found gave inaccurate or false information during a screening. Of the 16 letters sent soliciting participation in the Evaluation, six were returned because of incorrect address information. Three defendants from this group were interviewed. Thus, input was received from 30% of those contacted.

All defendant interviewees and court employee interviewees were presented with an information

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[12] *See supra* note 2.

[13] The Steering Committee also noted an advantage to studying DUI's is that there are DUI data available from the Prosecutor's and Public Defender's offices that could be compared. However, for this Preliminary Evaluation data from DUI cases were not examined.

[14] Either the defendant provided a bad address or the defendant no longer is residing at the address to which the letter was sent.

[15] The content of this letter has also been included for analysis.

sheet explaining the project, its benefits, risks, future use, and so on. Court employees were not asked to do anything further, but defendants were asked to sign a copy of the information (informed consent) sheet.[16]

Interviews with court staff and defendants lasted approximately one hour. Judicial staff were interviewed individually. Four of the defendants were interviewed as a group (i.e., focus group), one was interviewed in jail, and, as previously noted, one defendant sent a letter with observations and reactions about screening.

B. Screener Program Data

SAMPLE

The Indigency Screener Project was implemented in January of 2001. Early data, however, are not believed to be reliable, as the Lancaster Courts were just beginning to transition into the Project.

In order to produce a reliable and current sample, cases for a one-year span were selected for review. Screenings in over five thousand cases (*N*=5,232) were examined. The Lancaster County's Indigency Screener's database was obtained by the Public Policy Center and secured on a restricted network for analysis.[17] The time period examined included cases was from July 1, 2001 to June 30, 2002 (Fiscal Year 2001-2002).

In the one-year sample, 75% of defendants were male and 25% were female. Most (66.9%) of the defendants[18] were white (*n*= 3,501), 18.6% were black (*n*=975), 8.3% were Hispanic (*n*= 434), 1.9% were Native American (*n*=97), 3.3% identified themselves as "other" (*n*=174), and 1% of the respondents' race was unknown (*n*=51).[19]

TRUTHFULNESS INQUIRY

An issue of interest is the accuracy of the information defendants provide to the Screener. Since the truthfulness/accuracy of a defendant is not a pre-established data point, this information cannot easily be gleaned from the Screener's data files. Therefore, a data sample was collected during the month of September 2002. The Screener maintained a record of when inaccuracies in a defendant's report were identified pursuant to the Screener's verification activities. These data were collected to provide some insight into the proportion of defendants who provide inaccurate or false information to the courts.

C. Courtroom Observations

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[16] Except for the individual who submitted a letter, the defendants each received $20 in compensation for participating in the interviews.

[17] The database was converted to SPSS (Statistical Package for the Social Sciences), a program allowing various analyses.

[18] Race/ethnicity classifications are pursuant to the charge information provided to the Screener.

[19] No Asians were identified in the sample.

Staff from the Public Policy Center observed 10 arraignment sessions. During these sessions, 115 cases were heard, and the public defender was appointed in 33 of these cases, not appointed in 2 and refused by the defendant in 3. The majority of appointments were made in the custody courtroom (Courtroom 10).

Three of the county court judges were observed in these sessions. These observations were made to determine the approximate time taken to determine indigence, and to document the content and extent of judges' questioning under this process.

IV. WHAT WAS LEARNED (RESULTS)

A. Descriptive and Process Information

THE COURTS SERVED BY THE SCREENER
The Screener primarily serves the County Court. Occasionally, the Screener's services are requested directly by a District Court judge in instances of a revocation of probation or a change of counsel where screening has not occurred previously. District Court judges are able to make use of screening information that comes as part of a defendant's County Court file.

Initially, the Juvenile Court was considered to be another court that would benefit from the screening Project, but the Juvenile Court judges decided not to participate. There is no principled opposition to using a screener in the Juvenile Court, according to the Presiding Juvenile Court Judge. However, the juvenile court judges do not currently see any benefit because the philosophy of the Juvenile Court judges is to provide counsel for those who are involved in juvenile court proceedings, in light of the fact that virtually all the minors are "indigent" and there could be a conflict of interest (and undesired parental pressure) should parents be asked to contribute to attorney costs for minors. Moreover, since most of the adults involved in juvenile justice proceedings are indigent, the Juvenile Court judges do not believe a screening process would be worth the administrative costs. Despite current reservations, the Juvenile Court judges are willing to reconsider their position should it be decided there is value from the screening process for the Juvenile Court system.

It was suggested that the Screener might be useful for child support cases. Counsel is appointed in these civil cases to represent the non-custodial parent. Consequently, we interviewed the Child Support Referee. The Referee, however, reported that the high indigent rates of the child support population makes her uncertain whether a screener would add any benefit to her courtroom. Moreover, the difficulty of the form would make it impractical for the non-custodial parents to complete the form themselves.

COURTROOMS
On most days, County Court arraignment sessions start at 9:00 a.m. in Courtroom 24 and in Courtroom 10[20] at 9:30 a.m. Afternoon sessions in Courtroom 24 begin at 1:30 and Courtroom

[20] Courtroom 10 is located in the Lancaster County jail. In order to increase the efficiency of the Project, the screener

10 begins at 2:00. The Screeners cover both of these courtrooms during both the morning and afternoon sessions. On Wednesday mornings the Screener's services are also required in District Court at 9:00 a.m. Occasionally, the District Court and County Court Courtrooms 10, 21, 22, 23, 24, 25, 26 require the screeners' services at other points during the day.

THE SCREENING PROCESS

Defendants in County Court are first informed of their opportunity to receive a court-appointed attorney (i.e., a public defender) at no cost to them by a general announcement made by the Screener in each courtroom prior to arraignment. The screening process is reserved for felonies and misdemeanors in which defendants face possible jail time. The Screener takes defendants into a room nearby each courtroom and begins the screening process. Defendants are interviewed, in a semi-private setting,[21] about their income, debts, resources, and other financial information. The Screener records each defendant's financial information on the Indigency Information Form (see Appendix B) at a desk inside the room, with unscreened defendants waiting nearby for their turn to speak to the Screener.

Because of the Form's complexity[22] and to encourage honesty in responding, the Screener rather than the defendant completes the form. After providing information to the Screener, the defendant signs the Form attesting, "under penalty of perjury, that the information listed above is true and accurate," and the Screener notarizes the signature.

Technically, data collection could stop once a defendant qualifies for a public defender under Tier 1 of the Rule. Similarly, data collection could stop once a defendant qualifies under Tier 2 of the Rule. However, because some of the judges request *all* the financial information on the Form (i.e., the information contained in Tiers 1, 2, *and* 3), the Screener asks the defendant all financial questions on the Form.

After completion of the interview, defendants return to the courtroom until their cases are called. The Form is given to the bailiff who passes it along to the judge at the outset of the case. After a brief review of the financial information (taking no more than a matter of seconds, in most instances) and sometimes a discussion with the defendant about financial information and/or a discussion with the prosecutor about the charges and requested penalty (taking up to a few minutes, but usually completed within a few more seconds), the judge announces his/her decision and indicates on the form whether an attorney is appointed. The form is placed in the defendant's file and the clerk's office returns a copy of the form to the screener.

It is often the case that there will be defendants who, for various reasons (e.g., the defendants do not realize they might want a public defender, the defendants arrive in the courtroom after the announcement is made, the defendants do not understand what the announcement is conveying because of distracted attention or limited cognitive abilities, etc.), may not have been screened prior to their court appearance. In most of these instances, the judge will refer the defendant to

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has been trained by the Department of Corrections in order to have full access to the jail facility.

[21] Because Courtroom 10 is located in the Jail, it is considerably less private.

[22] Part of the complexity is simply transforming wages into annual rates so that indigency can be determined.

the screener *at the moment* the judge learns of the need to obtain the defendant's financial information. At other times, because of the unavailability of the screener (for example, the screener may be on break, on vacation, screening for another courtroom, etc.) or the preference of a judge, the judge will solicit the relevant eligibility information in court.

According to the two screeners we interviewed, it takes approximately five minutes per person for the Screener to collect the financial information to complete the Form. In contrast, the judges indicated that before the Screener Project they would spend approximately two to three minutes per defendant to collect financial information. The judges uniformly reported they did not obtain nearly as much financial data as the Screeners provide.

VERIFICATION

Once the judge has made the decision to appoint or not appoint counsel and the Form has been returned to the Screener, the Screener enters the data from the form into a computerized database.[23] Although this database currently serves no formal court functions, the data are collected for Evaluations such as this or other administrative uses. The Screener only verifies information for those defendants who are appointed a public defender by the judge.

The Screener verifies information contained on the form by calling employers, looking up assets in the public record,[24] verifying social security numbers and public assistance benefits, and so on, relying on information from entities such as the local County Assessor, the Registrar of Deeds, Health and Human Services, Veteran's Disability and Pension, Workers Compensation, Social Security, and Unemployment Benefits. The Screener reports that data are randomly verified from each form.[25] Although the area of verification is not selected uniformly across cases, the chosen field is largely a function of what information has been provided on the form (for example, one cannot verify employment if none is reported).

When the Screener finds information that is inconsistent with what was reported by the defendant, the Screener notes that information on the Form and directly informs the judge. Some judges refer falsehoods to the County Attorney's office, but others do not. Some judges in some cases apparently rescind the appointment of counsel, whereas others do not.

In virtually no cases have there been any additional legal action taken in instances in which the Screener has found that false financial information has been provided. The County Attorney's office reports it is not a priority to prosecute these cases unless the falsehood is substantial.[26]

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[23] At the outset of the Project, the senior Screener designed the database.

[24] For defendants in custody, the Screener sometimes checks assets prior to screening.

[25] "Random" here refers to information not selected uniformly (i.e., always selecting employment information), but it does not mean random in the statistical sense.

[26] The County can prosecute if it chooses. *See* Lancaster County Indigent Eligibility Rule, *supra* note 4, at § 10 (allowing for "prosecution for perjury or contempt committed in providing [financial] information [or] enforc[ing] an obligation to reimburse the state for the cost of counsel" when it is learned that the initial appointment of counsel was incorrect or the defendant is no longer indigent as provided in NEB. REV. STAT. § 29-3908).

What do judges do when they learn a defendant has been untruthful about financial information? For some judges, this is cause to withdraw the appointment. This is not the majority response, however. Several of the judges we interviewed said they are unwilling to stop a case to remove the public defender once the case has started. They offered a range of reasons. Some judges indicate that even if a defendant lies, it is typically the case that the defendant does not have a lot of resources anyway. Other judges indicated that it would be more expensive to the system to stop proceedings midstream and require the defendant to find private counsel. A few judges believe there should be prosecutions, but other judges say it does not seem to be a good use of scarce resources to prosecute these cases.

Most judges, as well as the prosecutor's office, told us the inaccurate or false information tends to be *de minimus* and not worth the time, effort, or expense to pursue. When misinformation is dramatic, judges and attorneys are not opposed to prosecution. We were told on several occasions about a highly publicized case in which a defendant hid a considerable amount of assets. When his lie was discovered, he was prosecuted.[27] The defendant ultimately was ordered to reimburse the costs of his representation by the Public Defender's Office.

Since the inception of the Screener Project, there have not been notable efforts to pursue other reimbursements. Despite documentation by the Screener of apparently significant false or inaccurate information on numerous occasions, and despite several referrals by the Screener to Judges and/or by Judges to the Prosecutor's office, we learned there is hardly any, if any, prosecutorial action taken against the defendants based on the verification findings.

When we started the Project, we learned that the Screener informed other agencies of falsehoods. Specifically, the U.S. Immigration and Naturalization Service (INS) and the Lincoln Police Department were informed about defendants without valid social security numbers. Information also is provided to other agencies in indirect ways; for example, when the screener verifies information with the Nebraska Department of Health and Human Services officials about public assistance, HHS learns about defendants who live with girl/boyfriends in violation of welfare benefit rules, and so on.

B. Statistical and Other Data

NUMBER OF CASES SCREENED

There were 5,232 cases screened during FY01-02 (see Table 1). Of these cases, the vast majority of cases were approved for indigent counsel (3,946 or 75.4%) and about one-quarter were not appointed counsel (1,286 or 24.6%) (see Table 1).

Table 1: Defendants Presumptively Qualifying for Indigency Appointment of Counsel, FY 2001-02

	Number of Cases	Percentage of Cases	Judge Appointed	Judge Did Not Appoint
Tier 1	1,112	21.2%	75.5%	24.5%
Tier 2	2,819	53.9%	81.3%	18.7%
Tier 3	1,301	24.9%	62.6%	37.4%

[27] It is noteworthy that this was not an instance in which a Screener detected false claims.

Total	5,232	100.0%	75.4%	24.6%

Note: Some defendants presumptively qualified under both Tier 1 and Tier 2. The number of cases presented in Tier 2 does not include those who previously qualified under Tier 1.

COSTS

The actual amount spent on the Screening Project for FY01-02 was $49,143.[28] Most of the screening/verification costs were for personnel (salary and benefits). One full-time and one part-time (15 hours per week) FTE are budgeted to fill the Screener positions. They are compensated somewhere between $12.50 and $17.00 an hour, plus benefits. Office supplies cost $520, and there is an additional $1,887 in costs for data processing, printing, advertising, notary bond, and so on. Currently the Project is not charged rent for its occupancy.

In order to arrive at an approximate per case cost estimate, we divided the amount spent in FY2001-2002 by the number of cases screened. This yields a cost of between $9 and $10 (i.e., $9.39) per case for screening and verification.[29] The per case cost estimate would increase if the value of rent was included in the Screener Project budget.[30] Because it is possible that the salaries budgeted for Screeners could be somewhat less than they presently are and because existing space could be used with no extra cost-burden borne by the Screener Project (i.e., the court space, security, etc. are basically fixed costs), we will use the more conservative $9 per case as the cost estimate throughout the remainder of the Report.

PATTERN OF APPOINTMENTS

The 5,232 screened cases were examined to determine whether the defendants presumptively qualified for indigency status under Tier 1 or Tier 2 of the Rule (see Table 1).

Tier 1 Cases

Of the 5,232 cases, approximately 20.0% (1,112) of the defendants reported that they receive one or more of the following types of public assistance: Aid to Families with Dependent Children; Emergency Aid to Elderly, Disabled & Children; Poverty Related Veteran's Benefits; Food Stamps; Medicaid; Supplemental Security Income; Refugee Resettlement Benefits; and/or County General Assistance. According to Lancaster County Indigent Eligibility Rule § 2(3)(a)(i) (i.e., Tier 1),[31] these defendants were eligible for a court appointed attorney (absent disqualifying conditions such as a non-jail offense). Of these 1,112 defendants approximately 75% (840) were appointed counsel.

In nearly 25% (272) of Tier 1 cases, there was not an appointment of counsel. Was the lack of

[28] This figure includes 2.5 months where the project was without a part-time screener.

[29] Ideally, the cost savings of the cases where defendants were not appointed public defender services could also be calculated. However, these savings cannot be accurately calculated in this Evaluation because there is no way of knowing whether judges reach the same decisions with the information collected by the screener as they would if they "screened" defendants themselves.

[30] On the assumption that space would be made available for 2.0 FTE, and that the Project would be subject to rent, parking, and security charges, the additional charges to the Project would be an additional $45,648 a year, resulting in costs of approximately $18.12 per case.

[31] *See supra* note 5 and accompanying text.

appointments reflective of judges not following the rules?

From what we learned in the interviews, it is appropriate for a judge not to appoint under certain circumstances even if the defendant is otherwise eligible under Tier 1. Our interviews with the judges revealed that they paid close attention to the possibility of incarceration. In instances in which the judge decides – sometimes without consultation, at other times in consultation with the prosecutor – that no jail time is forthcoming, no appointment is made. Even for more serious charges, no jail time will occur if it is a first offense. Some of the judges said that no public defender is appointed when a defendant decides to plead guilty. In some cases, judges told us, defendants refuse the appointment of counsel.

There are controversies surrounding the lack of appointments in another circumstance. Specifically, some judges indicated they would not appoint if the defendant had other assets from which s/he could pay despite otherwise being eligible under Tier 1 of the Rule. For example, some judges told us, if the defendant had a spouse, partner, or parent with adequate income for legal services, then they would not provide counsel to the defendant at the County's expense. These third-party resources are taken into account despite the fact that the Comment to the Rule explicitly precludes it.[32]

In our examination of the cases, we did not have the information that would reveal why a defendant did not receive a court-appointed attorney.

Tier 2 Cases

According to Lancaster County Indigent Eligibility Rule § 2(3)(a)(ii), defendants who receive an annual gross income of 125% or less of the current federally established poverty level automatically qualify as indigent absent disqualifying circumstances.[33] According to the data we examined, excluding those who previously qualified under Tier 1, slightly over half of the remaining defendants (2,819 out of the 4,120 remaining cases) automatically qualified for appointed counsel under Tier 2.

Of the 2,819 defendants who provided financial information indicating they earned less than 125% of the federal poverty guidelines, slightly more than 80% were appointed counsel. As was the case with Tier 1 cases, it is not clear why nearly 20% of the defendants were not appointed counsel. The lack of appointments may have been warranted, or not.[34]

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[32] "'Available funds' under subsection (2) include only resources presently assessable to the party even if third parties owe duties of support to the party. Thus a juvenile's 'available funds' are determined on the basis of the juvenile's financial assets, not those of his or her parent or guardian." Comment to Lancaster County Indigent Eligibility Rule, *supra* note 4, at Section 2. Thus, the Comment makes clear the Lancaster County Indigent Eligibility Rule changes the position taken by the Nebraska Supreme Court in *York v. Johnson*, 292 N.W.2d 31, 33 (Neb. 1980), in which the Court held, quoting a Maryland opinion, that "legal services provided to a minor may, in some circumstances, be deemed 'necessaries' for which a parent may be required to pay, e.g., where they are reasonable and necessary for the protection… of the minor['s] liberty…." *Serabian v. Alpern*, 399 A.2d 267, 271 (Md. 1979).

[33] *See supra* note 7 and accompanying text.

[34] *See supra* note 32 and accompanying text.

Tier 3 Cases
Tier 3 is the most difficult to examine because of the high level of judicial discretion provided under the Rule. Under Tier 3, "indigent" is defined as "a party who the court determines is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family based on a comparison of the party's available funds and anticipated cost of counsel."[35]

This section of the form requests defendants' monthly income, monthly basic living costs, and value of liquid assets. A summary total is then established by subtracting the defendant's total expenses from total income, plus liquid assets, and minus any bail obligations. Of the total 5,232 cases, 1,301 cases presumably should have been reviewed under the third tier because there was not a presumptive qualification as indigent under Tiers 1 or 2.

Results reveal that over 60% of the defendants reviewed under Tier 3 were appointed counsel and almost 40% were not appointed counsel. As expected under the Rule, Tier 3 determinations result in a higher non-appointment rate (37.4%) than either Tier 1 (24.5%) or Tier 2 (18.7%).

C. Arraignment Observations

Three different county court judges were observed in their courtrooms during 10 arraignment sessions. Table 2 reveals there is virtually no difference across county court judges in their practices of appointments. The observations also did not reveal any difference in time spent making the appointment determination. Most of the cases were decided in a matter of seconds, with few determinations taking more than 30 seconds.

Table 2: Cases, Public Defender Appointments, and Refusals

	Number of Cases	Number Requesting Public Defender	Counsel Appointed	Counsel Not Appointed	Refused By Defendant
Judge A	38	17	15	2	0
Judge B	32	4	4	0	0
Judge C	45	17	14	0	3

D. Screener Verification Study

At our request, the Screener gave us information regarding inaccurate or false information for a one-month period.[36] Of the 460 cases screened in the month, the Screener said she learned 25 (5.4%) individuals lied about financial information. The Screener reported the month was not atypical in numbers of defendants, kinds of cases, and so on.

There were basically three categories of inaccurate or false information.

[35] *See supra* notes 4, 8, and 9, and accompanying text.
[36] The month of September 2002 was selected.

1. When asked about their employment, 4 defendants provided false information as to when they were *last employed*. Three said they were unemployed recently, but records showed that they were unemployed from 2 months to two years longer than they had reported. It is useful to note that this false information would lead a judge to believe the defendants had *more* financial assets than they actually had. The fourth defendant lied in the expected direction, stating that he had been unemployed longer than he really had been.

2. Eleven defendants reported that they were *currently employed* when they were not, at least by the employer with which they said they were employed. This falsehood could have made these defendants ineligible for a public defender when in reality they might have been eligible.

3. Ten defendants provided a fraudulent social security number.

These findings indicate that in a typical month, 5% of defendants provide inaccurate or false information to the courts. *Only one person in 25, however, gave information that could have conceivably increased the chances of receiving free, public defender services. This person said he had not worked since December, and records revealed he had worked through January. In fact, the erroneous information – the lie – was probably not even been such that it would have made a difference in eligibility.*

Our findings for September are consistent with what several interviewees (including a Screener and a defendant) told us: Defendants are as likely to provide false information to make themselves seem more financially resourced than they actually are. The reason for wanting to seem better off financially, our interviewees speculated, include such factors as wanting to appear worthy of a lesser bond or not wanting to appear destitute in front of other defendants.[37] Or, as one judge told us, many defendants simply do not know how much they make from work. Consequently, their "false" information will as likely be *overestimating* their wages as *underestimating* them.

The Screener detects falsehoods through "random"[38] checks. It should be noted that the Screener is somewhat limited to detecting falsehoods based on information provided by the defendant. In other words, if a defendant does not provide critical information (e.g., a modest savings account), it may be difficult – or virtually improbable – to find out this omission. It may be possible that information about employment could be obtained from the state's Child Support Agency, but for the most part the detection of falsehoods would require more of a law enforcement-like investigation rather than a simple verification procedure.

V. WHAT THE INQUIRY MEANS (DISCUSSION & RECOMMENDATIONS)

A. Interests Implicated By Screener Program

[37] Defendants may be especially likely to inflate their financial information when providing it to the judge in open court.
[38] *See supra* note 25.

The interviews we conducted, along with our reviews of optimal court practices[39] and studies of indigency screeners and verification practices,[40] reveal that the screener and verification process implicates a myriad of interests. We turn first to these interests and assess them in light of our findings.

Access to Justice

According to the National Center for State Court's *Trial Court Performance Standards*, litigants should have effective access to the court, without financial barriers to such access.[41] A system that preserves access to justice should be preferred over one that interferes with access to justice.

Based on what we learned from our interviews, access to an attorney has been improved to some degree by the Project. The improvement is due to the clarification of the circumstances under which defendants are eligible for attorney appointments. The reason it seems to be only a slight improvement is because most of the people we interviewed indicted defendants regularly received appointments in Lancaster County prior to the Rule. It is the perception that there were few defendants eligible under the Rule who did not receive counsel in the past. We, of course, cannot verify this. What we can state is that most of the judges and attorneys we talked to expressed their support for an indigency determination that errs on the side of ensuring a defendant's access to an attorney. There was strong support for the Rule change because it clarifies – and potentially broadens – the circumstances under which defendants are eligible for a court-appointed attorney.

Fairness and Efficiency

According to the *Trial Court Performance Standards*, integrity of a trial court is diminished and fairness is compromised if a defendant's right to legal representation is inhibited.[42] Lack of legal representation may not only disadvantage a particular defendant, it can undermine the public's trust and confidence in the judiciary.[43] Thus, if defendants are not afforded access to counsel as a cost savings measure, it undermines the efficacy of the criminal justice system.[44]

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[39] Commission on Trial Court Performance Standards, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY (National Center for State Courts & The Bureau of Justice Assistance, United States Department of Justice 1990).

[40] *See*, *e.g.*, David J. Carroll & Robert J. Spangenberg, *Assessment of Indigent Defense Cost Recovery in Fayette and Jefferson County, Kentucky* (October 30, 2001); David J. Carroll et al., *Indigent Defense Services In the State of Nevada: Findings & Recommendations* (December 13, 2000) (available on-line at http://www.spangenberggroup.com/reports/report_121301.pdf); Robert L. Spangenberg et al., *An Assessment of the Pierce County, Washington Indigency Screening & Cost Recovery Program* (September 1998); Robert L. Spangenberg et al., *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (1986).

[41] Commission on Trial Court Performance Standards, *supra* note 39, at 7-10.

[42] *Id*. at 13-14.

[43] *See id.* at 20-22.

[44] *See, e.g.,* Carroll et al., *supra* note 40, arguing that the adjudicative component of the criminal justice system is dependent on all three functions (defense, prosecution, and judicial) being funded appropriately. If any one of the three should be underfunded, it puts the rest of the system at risk.

Not providing counsel to defendants also may undermine the opportunity for expeditious resolution of a case. If the defendant must search for private counsel in order to show the court that counsel cannot be arranged with the funds available to the defendant, it delays justice, regardless of the ultimate outcome of the case. If denial of a public defender leads a defendant to represent him/herself *pro se*, the *pro se* defendant can interfere with the efficient, and perhaps the fair, resolution of the case. For example, the denial of a court-appointed defender may lead a defendant to plead guilty to the alleged offense in circumstances in which defense counsel (private or public) would have been able to secure a different outcome.[45]

Based on what we learned from our interviews and from what we gleaned from our studies, there seems to be at least a slight increase in fairness as a result of the Rule change. This increase in fairness stems from the likelihood that similarly situated defendants are being treated similarly because of the clarity of the Rule. While discretion is important in the judiciary, it is not optimal to have defendants receive different outcomes as a result of which courtroom they happen to land. The fact that the vast majority of defendants who qualified under Tier 1 and Tier 2 criteria were deemed eligible for an appointment whereas there was a marked drop-off for Tier 3 defendants provides some evidence that the goal of providing great uniformity of outcome for defendants is being realized under the Rule. Although we cannot, as a matter of social science, say with confidence that the finding is because of the Rule, the interviews support the belief that the Rule makes a difference.

There seems to be a marked increase in efficiency and fairness by using the Form. Virtually everybody with whom we spoke who has any knowledge of the time it takes for the determination of eligibility for a court-appointed attorney believes the form expedites the process and ensures the same kind of information is being provided to judges. In particular, there appear to be considerable savings in time for the judges. While not everybody believes judges need to save this time, few disagree that time is saved. Even assuming, conservatively, one minute per defendant is saved, the time savings would have been 87 hours last fiscal year in Lancaster County.[46] Thus, in larger jurisdictions with large caseloads, there is likely to be significant savings of time for judges and for prosecuting attorneys who must stand in the courtroom while judges collect financial information from defendants.

Finally, our interviews with defendants indicated they perceive the process to be fairer when the eligibility rules are clear (and understandable). The defendants with multiple court contacts believe this to be a fairer and more efficient way to ask for the services of the Public Defender. They also indicated a slight preference for telling their financial information to the Screener rather than stating it to the judge in open court.

Costs

According to the *Trial Court Performance Standards*, trial courts needs to be responsible in its

[45] Take the case where evidence of guilt is such that a savvy defense attorney would be able to obtain an acquittal for the defendant or the plea of guilt might be to a lesser charge rather than to the prosecutor's original charge.

[46] This figure is based on an estimate of one minute savings for each of the 5,232 defendants who were reviewed for eligibility in Lancaster County in 2001-02 (see Table 1).

expenditures of its resources.[47] Where possible, courts should seek to be cost-efficient in order to serve as many people as possible without sacrificing the quality of justice for those being served.

Although indigency services are a public responsibility as well as a constitutionally protected right, Lancaster County – like other counties across Nebraska – also has an interest in not spending more on indigency services than it needs to. Our interviewees differed on whether they thought too many, too few, or the appropriate persons were receiving public support for their representation. They also differed on whether it is worth the cost of employing a Screener to collect financial information from defendants prior to the court hearing. They also differed on whether it is worthwhile to ask the Screener to also verify financial information.

Recommendations in Light of Interests
In light of the probable increase in access to justice, the increase in fairness and efficiency, *we recommend amending the current Nebraska statute in order to adopt the Lancaster County Indigent Eligibility Rule in order to enhance access, and increase fairness and consistency in determinations of eligibility for court-appointments in Nebraska*. The Standardized Form that has been created for the Screener Project also furthers these interests: *We recommend retaining the use of the Standardized Form*.

Is it worth $9 per case to collect and verify financial information? Should the County pay only for someone who collects financial information but not for someone who verifies the information? We believe in an ideal world, collection and verification would be desirable. If we had to cut, the first thing we would cut is verification because we do not believe there is firm evidence to indicate it is cost-effective. In our opinion, the pay-offs are too few.

One possible way to address the cost issue is to consider additional changes to the Rule that would allow recoupment of costs incurred to provide indigent services. Spangenberg and his colleagues are advocates of efforts to offset costs. [48] There may be some preference to implement up-front user or application fees as opposed to after-the-fact recoupment costs.[49]
Fees or recoupment efforts could offset the expenses of screener and/or verification staffing. With as slight a charge as $10 application or use fee per defendant, there would be $50,000 in revenue generated, enough to virtually support the Screener Project.[50] Or a slighter higher base fee could be establish with a sliding scale, with the goal of generating the average amount of $10 per defendant. *We recommend that if a Screener is to be permanently added, there should be consideration of offsetting the costs by imposing fees*.

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[47] Commission on Trial Court Performance Standards, *supra* note 39, at 19.
[48] *See* citations at *supra* note 40.
[49] In Pierce County, Washington, for example, a county ordinance was passed allowing the assessment of a $25 application fee for those requesting indigent services. Pierce County, Wa., An Ordinance of the Pierce County Council Adopting a New Chapter 9.50 of the Pierce County Code, "Indigent Defense Services Application Fee"; and Establishing a $25.00 Application Fee for Appointment of Counsel at Public Expense (Ordinance 99-31) (May 25, 1999) (available on-line at http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/appendix%201%20-%205.pdf).
[50] For example, in FY 2001-02, there were 5,232 cases considered for court appointment. If each defendant were charged $10, the revenue would be over $50,000.

B. Responses to the Specific Questions Addressed in the Preliminary Evaluation

1. *Is accurate financial information being provided to the Court? Has this changed since implementation of the Project?*

On the one hand, the Screener may help the Court obtain accurate information, through clerical efforts, by making correct calculations on the Form. The Screener asks questions in a semi-private environment. Some of the defendants we interviewed said they did not feel as bad about giving financial information to the Screener in a room outside the courtroom as they did giving the judge financial information in front of everyone else in the courtroom.

On the other hand, it is difficult to know whether lying by defendants about their financial status is, in fact, occurring in the courts. The best we can surmise from defendant interviews and the Screener Verification Study we conducted is that if lying has been taking place, the Screener Project has not stopped it. However, data are not available that would allow for comparisons of false information from defendants before the implementation of the Project versus after.

The findings from our Screener Verification Study indicate that in a typical month, 5% of defendants provide inaccurate or false information to the court. Only one person in 25, however, gave information that could have possibly increased their chances of receiving public defender services. In fact, the inaccurate information may have not even been such that it would have made a difference in eligibility. These findings are consistent with what several interviewees (including the Screener and a defendant) told us: Defendants are as likely to like to make themselves seem more financially secure than the facts would indicated. The reason for wanting to seem better off financially may include such factors as wanting to appear worthy of lesser bond, not wanting to appear destitute in front of other defendants (even when financial information is provided to the Screener, other defendants are around to overhear the conversation, especially in the jail setting), or as one Judge told us, they simply do not know how much compensation they receive from work.

The perception by some in the County Court system is that the presence of the Screener and the fact of verification both promote honesty. However, conversations with defendants suggest that they are not especially motivated to honesty, or deterred from dishonesty, by the presence of the Screener or the existence of a verification program. Defendants are quite ambivalent about public defenders: On the one hand, there was virtual unanimity that if a defendant had sufficient financial resources, s/he would not rely on a public defender for representation. On the other hand, several defendants said a public defender would be desirable. Defendants seem more likely to indicate a Public Defender is desirable if they had previous public defense representation that resulted in a not guilty verdict or dismissal of the charges. Reading between the lines, defendants appear to have an understanding that they benefit from legal representation, but that they would prefer to have *control* over who that representative is (by having the financial resources to pick and choose their attorney).

Thus, while the Project focuses on honesty and dishonesty as behaviors being affected by a

Screener and the Screener Project, defendants and several of the court personnel we interviewed do not believe it has any impact. We agree: At least at this point, the Screener's contribution does not appear to inspire honest financial information. In this respect, the Screener neither improves nor reduces accuracy.

2. *Are defendants who are eligible under the Rule to receive counsel appropriately receiving a court-appointed attorney? Are eligible defendants erroneously being denied court-appointed counsel? Are defendants who are ineligible to receive counsel erroneously receiving a court-appointed attorney? Are ineligible defendants appropriately being denied a court-appointed attorney? Have there been changes since implementation of the Project?*

Limitations of the scope of the Preliminary Evaluation did not allow us to collect the kind of data to determine whether a change has occurred since implementation of the Project. But it does seem that the Rule is not operating quite as efficiently as it might if the purpose of the Rule is to obviate discretion for certain categories of defendants.

The data we collected suggest that approximately 25% of those who receive some type of public assistance (Tier 1 eligibility) are not appointed public defender services. Additionally, almost 20% of those whose income is below that of the federal poverty guidelines (Tier 2 eligibility) are not appointed public defender services (see Table 1). It is not possible to know whether eligible defendants are "erroneously being denied court-appointed counsel" in these instances as there are many reasons why defendants may not be appointed counsel: no jail time, a plea of guilty, or the judge believes they have the means to hire counsel. It is not possible to know whether certain judges provide almost 100% of Tier 1 and Tier 2 defendants with a public defender while other judges find fewer defendants eligible despite the intent of the Rule. In any event, the rate of non-appointments for defendants who otherwise seem eligible for a court appointed attorney is higher than might be expected.

In interviews, several judges were quite candid that they were not inclined to appoint when jail was not truly an option or if a defendant indicated s/he wanted to plead guilty. What we do not know is whether a defendant, after consultation with counsel (i.e., if an attorney would have been appointed), might have decided not to plead guilty or have decided to fight an allegation not because of the possibility of a jail sentence for the *present* offense, but rather because of the possibility of more severe penalties should the defendant be charged with an offense in the future.

On the whole, the interviews indicated that the majority of Lancaster County judges believe that, considering all interests at stake, it is better to err on the side of providing a public defender than it is to deny someone in need of a public defender. Several of the judges to whom we spoke commented that when jail time is a possibility, even if the prosecutor might not be asking for jail time, they are very likely to appoint an attorney. Our courtroom observations documented this orientation: Even defendants who refused the public defender services that judges offered them were urged to think seriously about refusing.

We commend the practice of these judges. Court appointment of an attorney ensures the defendant will have access to legal advice. Legal advice may help defendants to avoid unnecessarily pleading guilty to an offense in circumstances in which representation may result in conviction for, or pleading guilty to, a less serious offense, or even help secure a defendant acquittal. In addition, court appointment helps to promote efficient administration of justice by avoiding *pro se* litigation or by ensuring that legal issues are raised and legally relevant facts are presented. As was noted by several of the attorneys and judges we interviewed, the criminal charge is more efficiently resolved when a knowledgeable attorney is representing the defendant. However, it appears not to be simply a matter of case resolution that prompts the judges to encourage (and appoint) public defense counsel, it is a matter of the interest in justice that appears to inspire their behaviors.

Overall, then it seems that the majority, but not all, defendants who are eligible under the Rule to receive counsel appropriately receive a court-appointed attorney. It is likely that defendants who are ineligible to receive counsel *are* erroneously receiving a court-appointed attorney, but the sense we have is that investing in additional resources given that so many defendants are, in fact, eligible, that the cost of weeding out ineligible defendants is less beneficial than the error of simply providing them with a public defender.

3. *Is there increased consistency (or decreased consistency) in appointments since implementation of the Project? Are defendants of similar economic means given counsel or refused counsel?*

Judges and other court personnel indicated their confidence that the implementation of the Project has increased the consistency in determining indigence. First, judges are provided with the same information for each defendant; therefore, defendants have a more equal assessment of their financial situation. Second, it provides for somewhat more consistency across judges in that all judges are provided with the same information. This finding of uniformity does not obviate the concern noted previously, that is the fact of variability across judges; however, the impression we obtained from a variety of interviewees is that most of the legal professionals in the Lancaster Court system believe that uniformity is enhanced both by the Rule and by the standardized information sought by the Form that is obtained before arraignment by the Screener. The issue of uniformity could be further investigated if judges regularly were to indicate their reason on the Form for not appointing counsel in each case.[51]

4. *According to those involved in the process, has there been an increase or decrease in the amount of time that judges, prosecutors, public defenders, and other criminal justice system personnel spend on the issue of determining indigence?*

[51] This suggestion is consistent with the Rule already. *See* Lancaster County Indigent Eligibility Rule, *supra* note 4, at § 6: ("If the court finds that a party is not indigent under § 2(3)(a) the court shall next determine whether the party is indigent under § 2(3)(b). The court shall record its findings, including its comparison of the party's anticipated cost of counsel and available funds when applicable, on a form…."). Our review of Forms indicates that judges do not tend to regularly record their findings.

Courtroom observations confirmed that the decision to appoint takes approximately 5 seconds or less. In the majority of the cases, it appears that the information on the form was adequate in that judges did not ask defendants additional questions.

When judges were asked about timesavings, several responded that determinations (including questioning) could take anywhere between 3 and 5 minutes before the Rule change and the introduction of the Screener. They estimated that determinations now take under one minute. They noted that additional questions are hardly ever needed, a perception echoed by the attorneys and others in court with whom we spoke.

Even defendants, who had been screened in the previous and current way, commented on how the current system creates a timesavings and the overall appearance of a more efficient courtroom. The defendants did not seem as concerned as we expected with the privacy implications of having to disclose financial information in court; nonetheless, defendants, too, seemed to appreciate the personalized attention given to them by the Screener and valued the efficiency of the financial examination procedure.

5. *Do Judges routinely follow the eligibility criteria established by the Rule? If not, under what circumstances are these criteria not followed? How do Judges feel about the Rule as a general matter?*

It seemed that most of the judges were supportive of the rule. Most indicated they followed it. Some judges confided that they thought some defendants actually had the financial resources for a private attorney even if they otherwise seemed eligible for a public defender under Tier 1 and/or Tier 2. The large number of appointments for Tier 1 and Tier 2 eligible defendants underscores the judges' support. However, if Tier 1 and Tier 2 criteria were strictly followed, there might be an even higher proportion of appointments for Tier 1 and Tier 2 qualifiers.

6. *Is the use of a Screener an optimal use of resources to screen-in eligible defendants and screen-out ineligible defendants? What added value is the Screener beyond what could be obtained by simply relying on the defendant's completed Form?*

AND

7. *Are there other benefits from employing a Screener in addition to obtaining eligibility information? What else does the Screener do besides assess eligibility that is of benefit to the criminal justice system?*

As previously noted, a cost-benefit analysis is beyond the scope of this inquiry. Several insights were obtained, however.

There are clearly savings in time for those in the courtroom – especially judges and prosecutors – for a defendant's financial information to be obtained prior to, rather than during, a court appearance. A Screener saves judges time that they would otherwise spend obtaining the defendant's financial information, and it saves attorneys time they otherwise have to spend

listening to the judge obtain the information. Defendants appear to like having the opportunity to provide the information to a court employee who is responsible for collecting this information but not for making indigency determinations. A Screener contributes to the efficiency of the court and the dignity and privacy of the defendant.

These savings in time could add up to a substantial cost savings if more cases could be processed or if judges and prosecutors were able to conduct other business with the time they saved from having to be involved in collecting or listening to financial information. However, as some interviewees pointed out, since court officials are paid whether they are in court or not, there are probably no measurable savings by having defendants pre-screened. Although a time savings may not necessarily translate into a cost savings for the county, there may be value in freeing up the time of court staff (bailiffs, sheriffs, etc.) so that they can better use their time. This savings in time is also relevant for the public, who likely wait less time to be arraigned.

An advantage that several court interviewees identified is the consistency of information. The Screeners not only ensure that the same array of financial information is obtained for each defendant, they also ensure that the defendant is given an opportunity to figure out the information in a more private setting than in the open courtroom, without the pressures and anxieties of providing such information in court as part of a public, and perhaps confusing, process. When the Screener process works optimally, financial information is gathered quickly, (relatively) privately, and thoroughly.

An additional advantage in collecting and maintaining this information is that it allows for assessments such as the present Evaluation. This record of information lends itself to several empirical questions should the county ever decide to examine them. For instance, in the future the county could examine how the number of defendants applying for indigent defense increases or decreases overtime, look for consistency in appointments across racial and ethnic groups, gender, and so on.

But at what cost does the Screener Project contribute to the judicial process? We found that it costs approximately $9 per defendant for the Screener Project to operate in its current configuration.[52] There is little evidence of any offsetting financial savings based on verification efforts.[53]

Nonetheless, verification addresses interests that are important. Verification allows numerous court personnel, administrators, and tax payers to feel that defendants are not "getting away" with access to governmental services (i.e., public defender) to which they are not entitled. Verification provides the sense that some deterrence exists, reducing the likelihood that a

[52] The cost would increase if the Project were charged rent and other overhead costs. The cost then would increase to about approximately $18.12 per case.

[53] The Court Administrator in Oregon claims that their program, which is a statewide – not a single court's – effort using a centralized screening process, saves $2 for every $1 it spends on verification. Personal Communications from Carol R. Flango, Director, Knowledge and Information Services, National Center for State Courts, October 3 and October 8, 2002. We do not know the accuracy of Oregon's claim.

defendant will get away with giving false information to the court. These are not trivial interests. Finally, verification can allow falsehoods to be detected, and (in rare instances) for defendants undeserving of public defense services to be denied such services.

It is a policy and political question – not an empirical one – whether a cost of $9 to screen a defendant is worth the expenditure. There are potential reductions in costs by reclassifying the Screener's position more in line with a clerical position, thus providing some savings on personnel costs.[54] However, we probably are not talking about a significant reduction.

If Screening has some benefits and assuming that verification is a politically and psychologically useful thing to do, but given that screening and verification do not seem to be cost-effective, are there other options to the present system? We believe there are.

First, if there were to be a recoupment system – if a defendant could contribute to defense costs, even *in some small part* – then verification might not have to be a zero-sum game (Is the defendant eligible or not?). If it were not a "yes" or "no" answer, if it were a question of "to what extent can the defendant contribute to his/her defense costs, then it is possible that a verification process could help determine the defendant's contribution. Screening and verification would then provide some offsets to the costs of running the Screener Program.

Second, it is possible to have some lesser-skilled person conduct the screening. Screening does not seem to take the level of skill that the present Screener has.

Third, perhaps staff the position differently. Might there be others who already have investigative skills who could conduct the verification for the court? We wonder whether it is worthwhile to assess the feasibility of including verification as part of the pre-trial services that are being developed in Lancaster County. If pre-trial service officers were conducting verification activities along with their other activities, it might be possible to reduce the costs incurred when a position is designed solely to screen and verify financial information.

If pre-trial services were to verify, who would screen? Again, pre-trial service staff could collect financial information for the jail population. Clerk staff might be considered for undertaking the responsibility of screening cases for defendants not in jail. Again, you would have staff members who are working on financial matters (in this case, screening) along with other responsibilities throughout their workday. Verification responsibilities could be vested solely with pre-trial service staff, and pre-trial staff could be responsible for checking the financial data obtained by the court administrator's staff.

We do not recommend one of these options over the others. All seem viable.

8. *What do defendants know about the Screener? Does this knowledge make a difference in how defendants represent their financial status and information?*

[54] A clerical classification might make sense if the Screener were not asked to undertake verification efforts.

According to defendants, there is an overall perception that the information they provide to the screener is not verified. Defendants thought the Screener was courteous.

Although some of the defendants we interviewed did not seem especially concerned about giving financial information in open court, they all liked giving the information more in private. The multiple offenders reflected the perceptions of court personnel; they felt that the Project saved on court time.

Several defendants expressed the belief that everyone has the right to a public defender and that one should not have to be eligible to get one. Based on this belief, several defendants thought that the guidelines to receive a public defender should be accessible public information.[55] When asked whether this would encourage defendants to lie about their financial status, they believed that it would.

9. *Have defendants changed in the extent to which they truthfully answer financial information since the inception of the Project? How many defendants and what proportion of defendants have been found to be untruthful? How were the falsehoods detected?*

The defendants we interviewed who had previously been screened under the former process, by a judge, suggested that there is no more or less deterrence from lying with the implementation of the screener. No defendant believed financial information was verified – they did not think there would be time to do so between the time they provided the Screener with information and the time of their court appearance. Apparently the prospect of future verification was not a salient concept, nor did they indicate it was a deterrent. Similarly, judges stated their belief that if the defendant was going to lie, the defendant would lie to the screener as well. The data we obtained from the Screener supports the view that either a) not much lying takes place, or b) the Project is not much better at catching liars than was the system in place beforehand.

10. *Have the number of defendants requesting appointed counsel in felony (and perhaps certain misdemeanor, such as DUI) cases increased or decreased since the inception of the Project? What values to the criminal justice system (e.g., consistency, equity) do the Form and/or the Screener add, if any, even if the numbers of appointments are not altered?*

Unfortunately there is no way to assess whether the number of defendants requesting appointed counsel in cases has increased or decreased since the inception of the Project because data concerning the number of requests were not documented prior to the Project.

Even if the number of public defender appointments is not altered, the Form and the Screener offer other values to the criminal justice system. As previously stated (in answer to questions

[55] Although the criteria may be public, not one of the defendants had any idea of what the specific criteria might be.

3,4,6 and 7) the Form and Screener appear to create timesavings for judges, attorneys, certain court staff (e.g., bailiffs, stenographers), and defendants. Additionally, interview data suggest that the Form and Screener work to provide a uniform assessment of each defendant there by enhancing the consistency of information, in a semi-private and courteous atmosphere.

11. Are there modifications in the actual implementation of the Project that are inconsistent with the Rule as it is written?

The Screeners currently complete the assets section of the form (see Appendix B). This information is needed for Tier 3 considerations, but the information is not needed to make decisions regarding defendants who are eligible for appointments under Tier 1 or Tier 2. The Screeners collect assets information because certain judges request that the Screeners do so. However this seems to be a poor use of time. We believe the practice ought to be changed; however, in order to be able to stop taking all the financial information on the form from the defendant, the Screeners need to know that the judges will not be expecting the information. Thus, the judges must initiate the change in practice.

Previously, the Screeners reported information they learned, such as the fact that non-citizens without proper documentation (i.e., work and/or other visa), to offices and agencies outside the court system. While there is nothing in the Rule that provides for such referrals, there also is nothing in the Rule that prevents such referrals. Lancaster County apparently has stopped this practice. We recommend that any jurisdictions that utilize a screener or verification program follow Lancaster County's lead and make explicit policy against providing information to those outside the court system.[56]

Our interviews revealed that the Screener reports spousal and partner income to some judges and that some judges are, in turn, using this income information as a factor in indigency determinations. This practice is clearly in violation of the Rule as currently constituted.[57] Either the Rule should be changed to reflect the philosophy of those judges using this information (i.e., it is a reasonable policy choice to consider the resources of third-parties when deciding whether a defendant has access to funds to hire a private attorney) or those judges who are using this information should abide by the Rule in its present iteration.

12. Would counties other than Lancaster benefit from using the Project's Form and/or a Technician/Screener?

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[56] It is possible – even likely – that such referrals will undermine certain ethnic minority group's trust and confidence in the *judicial* system when court officials make such referrals. For example, public hearings in Nebraska as part of the state's Minority and Justice Task Force revealed that there are those in the Hispanic community who perceive the courts as part of the police in the state. Consequently, there appears to be some lack of willingness to bring legitimate complaints to the courts (e.g., domestic violence) because the perception is to do so results in deportation possibilities that are deemed worse than the crime. For a discussion of the importance of the public's trust and confidence in the courts, see Commission on Trial Court Performance Standards, *supra* note 39, at 20-22.

[57] *See supra* note 32 and accompanying text.

Our court interviewees were effectively uniform in counseling that smaller jurisdictions not use a Screener. There would be no way to justify the expense. Overall, it would be worthwhile to provide a public defender to all those that requested it rather than hire a Screener in most of Nebraska's courthouses.

Would it be worthwhile to employ a Screener in jurisdictions like Douglas County, where judges are conducting indigency determinations in court? This Preliminary Evaluation is not conclusive either way, but it does provide some evidence to support the value of a Screener. There is not sufficient evidence we uncovered to warrant a verification process: It does not seem to provide the benefits to offset the costs in time and money.

Some of the problems faced in Lancaster County are instructive for other jurisdictions considering a Screener. Especially critical is the problem of adequate staffing. If there is not sufficient staffing, it undermines part of the purpose of the Screener Project in the first place. Thus, on busy days it was difficult for the Screener in Lancaster County (and it is even difficult when there are 1.3 FTE) to handle requests beyond one courtroom. There are many occasions when the Screener starts with obtaining information from defendants in the jail, leaving the forms for the jail arraignment judge before going to cover another court. At this point the Screener is no longer available to handle new (or missed) jail arraignment cases because s/he is screening in another court or on the phone or computer verifying information. Should the arraignment judge simply screen new cases without using the Screener? Should an arraignment be delayed because the Screener is unavailable? If there is inadequate staffing, such issues arise regularly. But staffing adequate to meet this need may be greater than what is needed on most days. If Screeners serve no other function other than screening, it makes for a challenging problem of avoiding over-staffing versus under-staffing. In Lancaster County, there appears to be some degree of understaffing for purposes of having all defendants screened prior to court appearance.[58]

13. What are the general perceptions of the Project (and its components) by the judicial personnel involved?

Overall, judicial personnel were primarily positive about the Project. The people we interviewed tended to like and respect the Screeners. Judges found the financial information the screener provided to be useful, allowing them to streamline their time and effort related to determining indigency.

There were concerns about the costs of the Project. It was noted that the Screeners receive more compensation than do other court employees, although it also was pointed out that these additional costs are warranted because of the kinds of conditions faced by Screeners when they

[58] The full time screener estimates that 50% of the day is dedicated to screening, between 20% and 25% is dedicated to entering interview data into the database, 20% is spent verifying data, and between 5% and 10% is spent on pre-screening research and memos to judges. The previous part-time screener estimated that 75% of his day was devoted to screening, and the remaining 25% of the time was devoted to verifying.

collect information from defendants in custody.[59] There also were concerns by others who questioned the expenditure of additional funds on a task that could be done by a judge, who already is receiving a salary from the public. Still others wondered whether verification truly amounted to anything as a practical matter since there did not seem to be much difference in appointments for some judges regardless of what the Screeners learned. There also were those who argued the verification data were more useful for law enforcement (e.g., INS) or other branches of government (e.g., state HHS or SSA) than for the judicial system. Thus, there were practical, ideological and workplace concerns about the Screener Project.

FUTURE EVALUATION

As we noted at the outset, the resources available to conduct this Preliminary Evaluation did not allow for the kind of detailed evaluation that would be desirable. For example, the present evaluation did not attempt to answer several questions that would be helpful to know in order to definitively decide whether to retain, modify, or terminate the Screener program in Lancaster County and/or implement a program elsewhere in Nebraska. We were not able to conduct the kind of economic analysis that would indicate the comparison of screener and/or a verification process costs to their savings.

Nor were we able to examine other counties in Nebraska. Indigence determinations in Douglas and Sarpy counties do not rely on a uniform rule, a standardized form, or a screener. Rather the judge makes the inquiry into financial status and the determination. Unfortunately, this means that a paper trail for public defender appointments is not readily available. Future evaluations should consider interviewing Douglas and Sarpy county professionals concerning their current process, and data collection efforts should be made to determine to what extent the number of defendants requesting counsel has increased or decreased in these counties. Comparing Lancaster to other counties would provide a better opportunity to definitively assess the degree of success of the Lancaster County Screening Project.

The costs for a more thorough evaluation will not be inexpensive. It is very expensive to conduct thorough evaluations, and it would not be surprising to find the cost of a full evaluation would cost half as much as the entire Lancaster County Screening Project itself.

It is possible a full evaluation could be conducted for considerably less costs as part of a larger project. For example, in the past the Spangenberg Group has examined indigency systems across the U.S. as part of a U.S. Department of Justice and American Bar Association jointly-funded project.[60] It is possible that further evaluation assistance could be accessed as part of this type of

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[59] In addition to the tasks being deemed paraprofessional within the Lancaster County system, the rationale for providing greater compensation is the Screeners face defendants in jail settings, thus exposing them to situations not usually encountered by employees in the typical courtroom setting.

[60] *See http://www.spangenberggroup.com/work_indig.html*. The joint project assisted states that do not currently have statewide oversight of indigent defense services through gathering data on and making recommendations for the improvement of indigent defense services. The aim of the joint Bureau of Justice Assistance/Bar Information Program State Commissions Project was to assist state task forces in addressing such issues as: indigent defense

larger initiative. Another possibility is that a full evaluation could be organized as part of another Nebraska-related effort, such as the implementation activities of the Nebraska Minority and Justice Task Force project or one of the inquiries conducted under the auspices of the Crime Commission.

To conclude: The Rule, the Form, and the Screener appear to add value to the indigency determination system. It seems evident the Rule and the Form add a significant amount to interests such as fairness and efficiency. The Screener aids in these contributions by obtaining financial information prior to court hearings. However, it is not clear at this point whether the Screener's verification efforts add as much value.

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system funding; standards for assigned counsel, public defenders and contract counsel; uniformity of data collection; and access to justice. These are similar issues implicated in Lancaster County's Indigent Project.

VII. ACKNOWLEDGEMENTS

We appreciate the assistance we received in visioning, collecting, and assessing the information reported in this Preliminary Evaluation. We are especially grateful to the help and guidance we received from the Project Oversight Committee, beginning with their ideas for what needed to be evaluated and concluding with comments and corrections to a draft of the Preliminary Evaluation Report. The Lancaster County Indigent Project Oversight Committee includes: **Steven Burns** (Lancaster County District Court Judge), **Kerry Eagan** (Lancaster County Chief Administrative Officer), **James Foster** (Committee Chair & Lancaster County Court Judge), **Peggy Gentles** (Lancaster County Court Judicial Administrator), **Dennis Keefe** (Lancaster County Public Defender), **Gary Lacey** (Lancaster County Attorney), **Catherine Rech** (Lancaster County Court Screener), **Toni Thorson** (Lancaster County Juvenile Court Judge), **Mike Thurber** (Lancaster County Corrections Director), and **Janice Walker** (Nebraska State Court Deputy Administrator).

We also would like to acknowledge the following for their assistance:

Lancaster Court Interviewees
Steven Burns (District Judge), Jeffre Cheuvrant (District Judge), Mary Doyle (County Judge), James Foster (County Judge), Susan Gillen (Child Support Referee), Dennis Keefe (Public Defender's Office), Joe Kelly (County Attrorney), Carla Kuehn (Stenographer), Jack Lindner (County Judge), Jean Lovell (County Judge), John McQuinn (City Attorney), Gale Pokorny (County Judge), Linda Porter (Juvenile Court Judge), Catherine Rech (Indigent Defense Technician), Bonnie Sanford (Assistant Clerk), Wayne Smith (Bailiff), Doug Sullivan (Indigent Defense Technician), Suzi Tast (Public Defender's Office), Mike Thurber (Corrections), and LaurieYardley (County Judge).

Lancaster County Defendant Interviewees
Five anonymous defendants screened in Lancaster County.

Others
Pamela Casey (National Center for State Courts), Ian Christensen (University of Nebraska Public Policy Center), Jenn Elliott (University of Nebraska Public Policy Center), Carol Flango (National Center for State Courts), Roger Hanson (Independent Law and Society Researcher, Williamsburg, VA), David Rottman (National Center for State Courts), Nancy Shank (University of Nebraska Public Policy Center), and Ann Skove (National Center for State Courts).

Appendix A

Indigency Rule and Comment

APPOINTMENT OF COUNSEL; INDIGENT PARTIES; STANDARDS AND PROCEDURES

SECTION 1

Applicability. These rules shall apply in every criminal proceeding in which the laws of the United States or the laws of the State of Nebraska establish a right to be represented by counsel. All parties who have a right to be represented by an attorney, including juveniles, shall have their eligibility for appointment of an attorney at public expense determined in conformance with these rules.

SECTION 2

Definition of Terms. The following definitions shall be applied in connection with these rules:

1) "Anticipated Cost of Counsel" shall mean the cost of retaining private counsel for representation on the matter before the court, as estimated by the court with reference, when applicable, to actual fees and retainers quoted for representation in the case by attorneys who practice in the area.

2) "Available Funds" shall mean a party's "liquid assets" and "disposable net monthly income" calculated after provision is made for the party's bail obligations. For the purpose of determining "available funds," the following definitions shall apply:

a) "Basic Living Costs" shall mean the average amount of money spent each month for reasonable payments, including loan payments, toward living costs such as shelter, food, utilities, health care, transportation, clothing, education and child support, alimony, or other support payments.

(b) "Disposable Net Monthly Income" shall mean the income remaining each month after deducting amounts paid for income taxes, Social Security taxes, contributory retirement, union dues, and basic living costs.

(c) "Income" shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, Social Security, and public assistance programs, and child support, alimony, and other support payments.

(d) "Liquid Assets" shall mean all real and personal property that is cash or that can be reasonably converted into cash, including pensions, deferred compensation plans, and individual retirement plans, cash on hand, funds provided by friends and relation for the purpose of providing legal services, savings accounts, stocks, bonds, certificates of deposit, and equity in any real or personal property. Any motor vehicle necessary to maintain employment shall not be

considered a liquid asset.

(3) "Indigent" for purposes of this rule shall mean:

(a) A party who is:

(i) Receiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), poverty related veteran's benefits, food stamps, refugee resettlement benefits, medicaid, Supplemental Security Income (SSI), or County General Assistance Funds; or

(ii) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

(iii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the Judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these Rules; or

(iv) Serving a sentence in a correctional institution and has no available funds; or

(v) Held in custody in jail and has no available funds; or,

(b) A party who the court determines is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family based on a comparison of the party's available funds and anticipated cost of counsel.

(4) "Party" shall mean a defendant, including a juvenile, in a criminal proceeding, in which a person has a right to counsel.

SECTION 3

Judicial Advisement of the Right to Counsel. Whenever a party initially appears before the court without an attorney in any criminal proceeding where the right to counsel attaches, the judge shall advise the party, or if the party is a juvenile or is under guardianship, the party and a parent or legal guardian, where appropriate, that:

(1) The party has a right to be represented by an attorney in the proceeding and that

(2) If the court determines that the party, or the party's parent or guardian where appropriate, wants but cannot afford the services of an attorney, that an attorney will be provided at public expense.

SECTION 4

Waiver of the Right to Counsel. If the court determines that a party has knowingly, intelligently, and voluntarily decided to waive the right to be represented by an attorney in the proceeding, the

party shall be asked to sign a written waiver of that right, and the judge shall sign a certificate that states that the party effectively waived that right. If the party refuses to sign the waiver, the judge shall note that fact on the certificate. The waiver, if applicable, and the certificate shall be executed on forms consistent with Appendix A and Appendix B of these Rules and shall be filed with the papers in the case.

SECTION 5

Affidavit of Indigency. A party who desires to proceed as an indigent with an attorney appointed by the court shall complete an affidavit under oath concerning his or her financial resources on a form consistent with Appendix C of these Rules. The affidavit shall require the party to list all financial resources relevant to a determination of indigency. The party shall be advised of the penalties for perjury.

SECTION 6

Determination of Indigency. If the court finds that the party has not effectively waived his or her right to counsel, and the party has not arranged to obtain counsel, the court shall receive the affidavit of indigency and may question the party under oath. After reviewing the information contained in the affidavit and, if applicable, the party's testimony, the court shall determine whether the party is indigent based on § 2(3)(a), indigent based on § 2(3)(b), or not indigent. The court first shall determine whether a party is indigent based on § 2(3)(a). If the court finds that a party is not indigent under § 2(3)(a), the court shall next determine whether the party is indigent under § 2(3)(b). The court shall record its findings, including its comparison of the party's anticipated cost of counsel and available funds when applicable, on a form consistent with Appendix B of this Rule, that is filed with the papers in the case.

SECTION 7

Assignment of Counsel/Notice of Assignment. If the court finds that a party is indigent, the court shall appoint an attorney to provide representation for the party. The Clerk of the Court shall promptly complete and transmit a notice of assignment of counsel form consistent with Appendix B of this Rule and shall file a copy in the case file. That form shall include the name of the attorney assigned to represent the party or shall note that the office of the public defender was appointed.

SECTION 8

Review of Indigency Determination.

(1) A party's indigency status may be reviewed in a formal hearing at any stage of a court proceeding if additional information regarding financial circumstances becomes available to the court.

(2) A party has a right to reconsideration in a formal hearing of the findings and conclusions regarding the party's indigency.

SECTION 9

Payment of Cost of Counsel. While determined to be indigent, a party may not be ordered, required, or solicited to make any payment toward the cost of counsel.

SECTION 10

Inadmissibility of Information Obtained From a Party. No information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against the party except:

(1) in a prosecution for perjury or contempt committed in providing such information;

or

(2) in an attempt to enforce an obligation to reimburse the state for the cost of counsel.

COMMENT

The intent of this rule is to create uniform standards and procedures for the determination of when a party is "indigent" and thus entitled to be represented by court-appointed counsel in criminal cases where the right to counsel applies.

Section 1. This section emphasizes that the rule is intended to cover the determination of indigency in all criminal cases where a party has a right to be represented by an attorney. That approach will enhance uniform indigency determinations regardless of the form of the action.

Section 2. Formerly, the only definition of indigency was the statutory standard that indigency " shall mean the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities to one's self or one's family." Neb. Rev. Stat. § 29-3901(3) (Reissue 1995). In addition to the statutory standard, which is retained in § 2(3)(b), § 2(3)(a) adds several specific objective standards by which a party can be found to be "indigent." Those standards are meant to reduce the need for the court to conduct a more detailed analysis of the financial circumstances of the party in cases where the party clearly cannot afford to hire counsel. If the party is not indigent under § 2(3)(a), the court should consider possible indigency under § 2(3)(b). The definitions of "anticipated cost of counsel," "available funds," and "liquid assets" are consistent with considerations currently taken into account by Nebraska courts meant to guide the court's determination of indigency when the party does not meet the objective standard, replacing the categories formerly used. E.g., *State v. Masilko*, 226 Neb. 45, 403 N.W.2d 322 (1987) (trial court must consider seriousness of offense, defendant's income, availability to defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits, normal living expenses, outstanding debts, and number and age of dependents).

"Available funds" under subsection (2) include only resources presently assessable to the party even if third parties owe duties of support to the party. Thus a juvenile's "available funds" are determined on the basis of the juvenile's financial assets, not those of his or her parent or guardian.

Section 3. This section reflects the notice provisions in Neb. Rev. Stat. §§ 29-3902 and 29-3903 (Reissue 1995) and 43-272 (Reissue 1998), and extends to the use of the process to all cases where a right to counsel exists. Subsection (2) recognizes a right to counsel at public expense for juvenile parties or their parents or guardians who cannot afford to pay for counsel. The section should not be read to suggest that counsel will not be appointed if juvenile parties desire counsel and are themselves indigent and their parents or guardians are able to pay for counsel but refuse to do so. In such cases, the decision to appoint counsel is made on the basis of the juvenile's financial resources, not those of the parent or guardian. See Sections 5 and 6, *infra*. Reimbursement actions against financially able parents or guardians can be maintained to recover the costs of counsel appointed to represent the juvenile.

Section 4. This section addresses whether a defendant has waived his right to counsel. The section requires a written waiver by the party and certification of the process by the judge.

Section 5. This section requires those seeking indigency status to prepare an affidavit of indigency. The affidavit details information concerning the party's finances. The completed affidavit may be filed with the papers in the case. The determination of indigency is to be made entirely from the party's finances without regard for potential third-party obligors.

Section 6. This section modifies former Nebraska practice concerning the court's formal determination of a party's indigency status. As an initial matter, this section stresses that the court is now required to find that a party is indigent if the party fits within any of the categories defined in § 2(3)(a) of this rule. Additionally, the language directing the court, when necessary, to base its indigency inquiry on a comparison of the party's "available funds" and "anticipated cost of counsel" modifies the formerly applicable structure of the court's inquiry into the party's financial circumstances. E.g., *State v. Masilko*, 226 Neb. 45, 409 N.W.2d 322 (1987). One further requirement is that the court is required to fill out a form stating the basis of its indigency determination, including findings concerning its comparison of the party's "available funds" and "anticipated cost of counsel" when the indigency determination is made under § 2(3)(b). That requirement is designed to ensure complete and accurate recording of the basis of the court's decision.

The decision whether or not to appoint counsel is for the court without input from the prosecution or defense counsel.

Section 7. This section is meant to ensure accessible and uniform records of appointed counsel.

Section 8. This section formalizes review of a party's indigency status.

Section 9. This section articulates the consequences of indigency status.

Section 10. This section is intended to protect the party's right against self-incrimination and to ensure that the information contained in the affidavit is as accurate and complete as possible.

Appendix B

Financial Eligibility Form

REQUEST FOR COURT APPOINTED LAWYER, STATEMENT OF FINANCIAL STATUS, AND AUTHORIZATION FOR RELEASE OF INFORMATION

Court: _____ Case No. _____

I hereby request that the Court appoint a lawyer to represent me because I cannot afford to hire a private attorney. I hereby authorize the court or its representative to have access to any of my financial information including employment status, income records, bank account records, and records of any debts in order to verify the information provided herein.

I.

A. Full Name: _____

B. Current Address: _____
_____

C. Phone: _____

D. Date of Birth: _____

E. Social Security No. _____

II.

I currently receive the following forms of public assistance.

A.	Aid to Families With Dependent Children (AFDC)	Yes ___ No ___
B.	Emergency Aid to Elderly, Disabled & Children	Yes ___ No ___
C.	Poverty Related Veteran's Benefits	Yes ___ No ___
D.	Food Stamps	Yes ___ No ___
E.	Medicaid	Yes ___ No ___
F.	Supplemental Security Income	Yes ___ No ___
G.	Refugee Resettlement Benefits	Yes ___ No ___
H.	County General Assistance	Yes ___ No ___

<u>If You Have Answered Yes to Any of the Above, Stop Here and Sign the Back of this Form. If You Answered No to All Questions, Go on to Section III.</u>

III.

I work at _____. I earn $ _____ per _____hr/wk/mo/yr

Number of Family Members

A.	_1_	Self
B.	___	Write "1" if married and spouse lives with you.
C.	___	Write the number of your children that live with you.
D.	___	Total (add A, B & C)

___ If Line "D" is 1 and your annual income is $9,863 or less, check here.
___ If Line "D" is 2 and your annual income is $13,263 or less, check here.
___ If Line "D" is 3 and your annual income is $16,663 or less, check here.
___ If Line "D" is 4 or more and your annual income is $20,063 or less, check here.

<u>If you have checked any of the above, stop here and sign the back of this form. Otherwise go on to Sections IV., V., & VI.</u>

IV.

My monthly income is as follows:

A.	Monthly Take Home Pay From My Job	$ _____
B.	Interest and Dividends	$ _____
C.	Rental Income	$ _____
D.	Unemployment Comp. & Workers' Comp.	$ _____
E.	Pensions, Annuities, Social Security	$ _____
F.	Other Cash Payments	$ _____
G.	Total of A Through F (Total Income)	$ _____

V. My share of monthly basic living costs is as follows:

A.	Rent, House Payment, or Other Shelter Costs	$ _____
B.	Utilities	$ _____
C.	Food	$ _____
D.	Clothing	$ _____
E.	Health Care	$ _____
F.	Transportation	$ _____
G.	Education	$ _____
H.	Child Support, Alimony, and Other Support	$ _____
I.	Total of A Through H (Total Expenses)	$ _____

VI. The value of my liquid assets is as follows:

A.	Cash, Savings, Bank Accounts	$ _____
B.	Stocks, Bonds, Certificates of Deposit	$ _____
C.	Real Estate (Assessed Value Less Mortgage Balance	$ _____
D.	Other Personal Property Reasonably Convertible to Cash	$ _____
E.	Pensions, Deferred Compensation , IRAs	$ _____
F.	Total Liquid Assets (Add Lines A,B,C, D)	$ _____

STATE OF NEBRASKA)
)ss.
COUNTY OF _____)

I swear or affirm, under penalty of perjury, that the information listed above is true and accurate.

_____
Your signature

Signed and sworn to before me on _____.

_____
Judge/Notary Public

Summary:

Total Income (from Line IV. G.)	$ _____
Minus Total Expense (From Line V. J.)	$ _____
= Disposable Net Monthly Income	$ _____
Plus Liquid Assets (From Line VI. F.)	$ _____
= Total	$ _____
Minus Bail Obligations	$ _____
Equals Available Funds	$ _____