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Evaluating Court Processes for Determining Indigency

Elizabeth Neeley and Alan Tomkins*

The Sixth Amendment to the Constitution guarantees all people accused of a crime the right to legal counsel. In the landmark 1963 decision *Gideon v. Wainright*,[1] the United States Supreme Court affirmed the right of indigent defendants to have counsel provided. But *Gideon* did not end the Supreme Court's discussion of the circumstances in which the state is required to provide defendants with an attorney when they claim not to have the means to pay for one.[2] Nor did it end the states' examination of the requirement of any legal assistance paid for by taxpayers.[3] Moreover, it is not mandated by constitutional law, congressional statute, or U.S. Supreme Court interpretation how states will fund these programs (will it be a state or local, *e.g.*, county, responsibility?) or the procedures by which a defendant will be deemed indigent. States and counties have developed a range of programs designed to provide counsel to indigent defendants (the most well known is the public defender model; other examples are the appointment from a roster of practicing attorneys and contracts with willing practitioners).

States and counties have also developed a range of procedures to assess whether a defendant is unable to afford an attorney without assistance.[4] A 2002 report by the Spangenberg Group documents the variability across states with regard to various aspects of indigency determinations, including how presumptions of indigency are determined (*i.e.*, what factors are taken into consideration, such as the defendant's income in relation to federal poverty guidelines, assets, complexity of the case, resources of relatives and friends, whether the defendant can afford to pay bail, etc.), whether or not formal guidelines are in place, who makes the determination (the public defender's office or the court), whether the court utilizes a financial questionnaire or affidavit, whether the client's claim is investigated, and so on.[5]

The specific purpose of this article is to report on an evalu-

Footnotes

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1. 372 U.S. 335 (1963).
2. *E.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979); Glover v. United States, 531 U.S. 198 (2001); Alabama v. Shelton, 535 U.S. 654 (2002).
3. *E.g.,* Alexander v. State, 527 S.W. 2d 927 (Ark. 1975); Carey v. Zayre of Beverly, Inc., 324 N. E. 2d 619 (Mass. 1975); Brown v. Multnomah County Dist. Court, 570 P. 2d 52 (Or. 1977); State v. Ponce, 611 P. 2d 407 (Wash. 1980); State v. Jones, 404 So. 2d 1192 (La. 1981); State v. Novak, 318 N.W. 2d 364 (Wis. 1982); Canaday v. State, 687 P.2d 897 (Wyo. 1984); State v. Buchholz, 462 N. E. 2d 1222 (Ohio 1984); State v. Orr, 375 N.W. 2d 171 (N.D. 1985); Commonwealth v. Thomas, 507 A.2d 57 (PA 1986); State v. Lynch, 796 P. 2d 1150 (Okla. 1990); Hlad v. State, 585 So. 2d 928 (Fla. 1991); *In re* Advisory Opinion to the Governor, 666 A. 2d 813 (R.I. 1995); Peeler v. Hughes & Luce, 909 S. W. 2d 494 (Tex, 1995); People v. Monge, 941 P.2d 1121 (Cal. 1997); Russell v. Armitage, 697 A.2d 630 (Vt. 1997); State v. Woodruff, 951 P. 2d 605 (N.M. 1997); El Pueblo de Puerto Rico v. Amparo Concepcion, 98 TSPR 93 (PR 1998); State v. Stott, 586 N.W. 2d 436 (Neb. 1998); Johnson v. State, 735 A. 2d 1003 (MD.1999); *Ex parte* Lareed Shelton, 851 So. 2d 96 (Ala. 2000); *In re* Welfare of G.L.H., 614 N.W. 2d 718 (Minn. 2000); Barnes v. State, 570 S.E. 2d 277 (Ga. 2002); City of Urbana v. Andrew N.B., 813 N.E. 2d 132 (Ill. 2004); People v. Russell, 684 N. W. 2d 745 (Mich. 2004); Lucero v. Kennard, 125 P.3d 917 (Utah, 2005).
4. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States,* 58 LAW & CONTEMP. PROBS. 31 (1995)[hereinafter Spangenberg & Beeman, *Indigent Defense Systems*]; Spangenberg Group, *Indigent Defense Services in the State of Nevada: Findings and Recommendations* (Dec. 13, 2000) (*available at* http://www.spangenberggroup.com/reports/report_121301.pdf); Spangenberg Group, *Determination of Eligibility for Public Defense* (2002) [hereinafter Spangenberg Group, *Determination of Eligibility*] (*available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/determinationofeligibility.pdf#search=%22Determination%20of%20Eligibility%20for%20Public%20Defense%22).
5. Spangenberg Group, *Determination of Eligibility, supra* note 4.

ation of a pilot program implemented in Lancaster County (Lincoln), Nebraska, designed to change the way in which a defendant's claim of indigence is assessed by the legal system. Regardless of whether a jurisdiction uses public defenders or another form of retaining defense counsel for indigent defendants, a determination must be made regarding a defendant's indigency status. Given the increasing caseloads for court systems and public defender offices[6] and given the interest in ensuring that governmental procedures are optimized for efficiency and fairness, specific counties or even statewide judicial systems may choose to assess, reform, or implement new systems for determining indigence. There are a myriad of interests in assessing indigency determination programs. For instance, these programs have the potential to increase fairness and consistency in indigency appointments, increase the efficiency of the system, and defray costs of the justice system. Thus, the general purpose of this article is to provide courts with evaluation input into this important public function.

LANCASTER COUNTY INDIGENT DEFENSE PILOT PROJECT

Prior to the implementation of an experimental, pilot project in Lancaster County, there were no set guidelines in Nebraska for determining indigence.[7] Judges relied on their own philosophies and definitions of indigence, thereby creating variability in indigency appointments across judges. Similarly, it was left to a judge's discretion to determine whether the defendant was eligible for a court-appointed attorney. Not surprisingly, there was great variability across judges, ranging from those who employed a rigorous line of questioning, to those who based their decisions on a few questions and an assessment of the defendant's appearance.[8] As is typical in most jurisdictions, assertions made by defendants regarding claims of indigency were not verified by the court. From time to time, cases occurred in which defendants with great wealth were subsequently found to have been given an attorney at taxpayer expense, thereby creating a maelstrom of news coverage and the popular perception that there are defendants "free-loading" off the system.[9]

In January 2001, a three-year pilot project was initiated in Lancaster County for the purposes of assessing three aspects of the indigency determination system, each of which were initiated at the same time.

1) A *uniform rule* was developed to guide defendant eligibility for court-appointed counsel that judges were required to follow.
2) A *standardized form* for documenting eligibility for appointed counsel was introduced that judges were required to complete.
3) A position was created and a function for the position was determined, meaning there were would be *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 a claim of indigency.

The program was limited to adults charged with a felony or misdemeanor. The cost for the Screener was estimated to be approximately $50,000 per year (changing the rule and creating a standardized form did not create annual costs). The *impacts* were expected to be increased rejection of defendants' requests for a court-appointed attorney for those not eligible for one and an increase in court-appointed attorneys for those eligible who might have been refused an attorney under previous practices. A preliminary evaluation of the pilot project was conducted in 2002 by the authors.

Indigency Rule and Financial Eligibility Form[10]

Lancaster County's Indigency Eligibility Rule[11] contains

6. Spangenberg Group, Office of Justice Programs, U.S. Department of Justice, The Bureau of Justice Assistance NCJ pub. no. 185632, *Keeping Defender Workloads Manageable* (2001) (*available at* http://www. ncjrs.org/pdffiles1/bja/185632.pdf).
7. Research by the Spangenberg Group indicates that there are several states with no formal standards or guidelines including Texas and Connecticut. Spangenberg Group, *Determination of Eligibility, supra* note 4.
8. *See generally,* State v. Lafler, 399 N.W.2d 808 (Neb.1987); State v. Richter, 408 N.W.2d 717 (Neb. 1987); State v. Eichelberger, 418 N.W.2d 580 (Neb. 1988).
9. Nebraska is not unique in any of this. *See generally,* Spangenberg & Beeman, *Indigent Defense Systems, supra* note 4; Spangenberg Group, Office of Justice Programs, U.S. Department of Justice, The Bureau of Justice Assistance NCJ pub. no. 181160, *Contracting for Indigent Defense Services* (2000) [hereinafter Spangenberg, *Contracting*] (*available at* http://www.ncjrs.org/pdffiles1/bja/181160.pdf); Spangenberg, *Defender Workloads, supra* note 6; Joshua S. Stambaugh, *Alabama v. Shelton*: *One Small Step for Man, One Very Small Step for the Sixth Amendment's Right to Counsel,* 31 PEPP. L. REV. 609 (2004).
10. Technical and additional information is provided in footnotes for interested readers.
11. Lancaster County's Indigent Eligibility Rule (NEB. 3RD JUD. DIST. COUNTY CT. R. I (2000) [hereinafter *Rule I*] (*available at* http://court.nol.org/trialcourt/county/LanCo.htm#1) 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. *Id.* at Comment. 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) (Reissue 1995). 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). *See also* State v. Masilko, 409 N.W.2d 322 (Neb.1987). 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.

three provisions, or "tiers."[12] Financial information relevant to these tiers is documented on a standardized form (the "Indigency Information Form") and then given to the judge as part of the defendant's file.

The Indigency Information Form provides information relevant to deciding indigency under each tier. Under Tier 1 of the Rule,[13] if a defendant is receiving any type of federal, state, or local poverty assistance, he or she automatically qualifies for court-appointed counsel unless the offense will not result in imprisonment.[14] 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. A defendant is considered indigent under Tier 2 of the Rule if he or she earns less than 125% of the federal poverty guidelines. (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.

The judge is to consider 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 interfere with the defendant's ability to provide for the "economic necessities" of the defendant or his or her family.[15] The judge must make "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."[16]

In summary, under the first two tiers of the 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 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% of the cases before the courts would be determined under the first two tiers.[17]

Defense Eligibility Technician.

The position of Defense Eligibility Technician/Screener was created as a central part of the project. The Screener was designated 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. The information obtained by the Screener is recorded on the Indigency Information Form. 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, reporting any discrepancies to the judge.

ASSESSMENT AND METHODS

Research questions were determined in consultation with a Project Oversight Committee, which included Lancaster County judges, prosecutors, public defenders, court administrators, county commissioners, and court staff. The evaluation was primarily based on information obtained from interviews with key stakeholders. Information also was obtained from basic screener program data (statistical information), an analysis of screener verification efforts (truthfulness inquiry), and courtroom observations. The evaluation design was largely a function of the data available. Although quantitative designs are often preferred in situations such as these for their objectivity and ability to definitively show patterns, trends, and changes overtime, the prior system left no quantitative data available to compare. The best means to make comparisons before and after implementation of the pilot project was to qualitatively explore the opinions and experiences of those involved in the system. Quantitative data available since implementation of the project were combined with stakeholders' qualitative assessments of the project.

Interviews

Interviews were conducted with 25 stakeholders, including judges (county, district, and juvenile court; *n*=10), lawyers (from the county and city attorneys' offices and the office of the public defender; *n*=4), screener staff, judicial administration staff, and criminal justice administration staff (*n*=6), and defendants (*n*=5). Interviews were undertaken to obtain stakeholder insights into how the project was 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.

Screener Program Data

Prior to the project's implementation, no records of requests for court-appointed counsel were kept. Upon implementation of the project, a database was created that recorded the infor-

12. *Rule I, supra* note 11.
13. According to the first tier of the Rule, 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." *Rule I*, *id.*
14. State v. Dean, *supra* note 11.
15. 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) (Reissue 1995)
16. *Rule I*, *supra* note 12.
17. Dennis Keefe, *Test of New Indigency Rules and Procedures: Three Year Pilot Project in Lancaster County*, 4 NEB. JUD. NEWS 17 (2000) (full, unpublished report available from Lancaster County Public Defender's Office, 555 S 10th St, Room 202, Lincoln, Nebraska 68508).

mation provided on the form. In order to produce a reliable and current sample, cases for a one-year span (Fiscal Year 2001-2002) were selected for review. Screenings in over 5,000 cases (*N*=5,232) were examined.

Truthfulness Inquiry

An issue of interest is the accuracy of the information defendants provide to the Screener. Since the truthfulness and accuracy of a defendant's statements have no pre-established data points, 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.

Courtroom Observations

Research staff observed 10 arraignment sessions to determine the approximate time taken by the judge to determine indigence (a stopwatch was used to time how long the process took, but because a conversation might return to the question of the defendant's finances, we believe the assessments are approximate, not precise), and to document the content and extent of judges' questioning under this process. Three of the county court judges were observed in these sessions. During these sessions, 115 cases were heard, and the public defender was appointed in 33 of these cases, not appointed in two, and refused by the defendant in three.

RESULTS AND DISCUSSION

As previously noted, there are a myriad of interests in assessing indigent-defense-screening programs. Programs such as this have the potential to increase fairness and consistency in indigency appointments, increase the efficiency of the system, and reduce the costs of the criminal justice system by appropriately denying those not entitled to legal aid. Of course, it is also the case that a more fair and consistent procedure might result in a court-appointed attorney in instances where an attorney was previously denied, thus increasing costs. Nonetheless, it was hypothesized that oversight of eligibility would decrease costs overall.

Indigency Rule and Financial Eligibility Form

Fairness and Consistency. One way to assess the fairness of the Indigency Rule is to determine if appropriate appointments are made. More specifically, 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?

As indicated previously, there were 5,232 cases screened during FY 2001-2002 (*see* Table 1). The data reveal that approximately 25% of those who receive some type of public assistance (Tier 1 eligibility) were not appointed public defender services. Additionally, almost 20% of those whose income is below that of the federal poverty guidelines (Tier 2 eligibility) were not appointed public defender services. It is not possible to know whether eligible defendants were "erroneously being denied court-appointed counsel" in these instances as there are many reasons why defendants may not be appointed counsel: no potential jail time, a plea of guilty, or the judge believed they had 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 was higher than might be expected. The issue could be further investigated if judges regularly were to indicate their reason on the Form for not appointing counsel in each case.[18]

Overall, it seems that the majority, but not all, defendants who were eligible under the Rule to receive counsel appropriately received a court-appointed attorney. It is likely that some defendants who were ineligible to receive counsel *were* erroneously receiving a court-appointed attorney. Given that so many defendants are, in fact, eligible, however, we believe the cost of an additional $50,000 to employ a Screener to find the comparatively few ineligible defendants is less beneficial than the error of simply providing them with a public defender. Of course, this depends in part on the success rate of identifying ineligible defendants (if most ineligibles will be detected, it is a different matter than if a small percentage of ineligibles will be detected). In any event, fairness and consistency are

TABLE 1: DEFENDANTS PRESUMPTIVELY QUALIFYING FOR INDIGENCY APPOINTMENT OF COUNSEL (FY 2001-02)

	Number of Cases	Percentage of Cases	Judge Appointed Atty.	Judge Did Not Appoint Atty.
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%
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.

18. This suggestion is consistent with the Rule already. "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." (*Rule I*, *supra* note 12). However, our review of the Forms indicates that judges do not tend to regularly record their findings.

enhanced by providing more defendants with a public defender even if the county would not have to do so if all the facts were verified.

Judges and other court personnel indicate their confidence that the Indigency Rule and Form have 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 than was obtained before review by the Screener.

Efficiency. When judges were asked about time savings, several responded that before the pilot project, determinations (including questioning) could take anywhere between three and five minutes. They estimated that determinations now take under one minute (courtroom observations confirm that determinations generally take less than 30 seconds). It appears that the information on the Form was adequate in that judges did not ask additional questions. In short, judges found the financial information included on the Form to be useful, allowing them to streamline their time and effort related to determining indigency.

Cost Savings. A cost savings via the introduction of the Rule and Form would be realized if these components resulted in more ineligible defendants appropriately being denied services. This does not appear to be the case. On the whole, interviews indicate 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 behavior. Overall, then, it seems that the rule and form do not appear to have a significant impact on cost savings.

Defense Eligibility Technician

Fairness and Consistency. Using a defense eligibility technician to obtain a defendant's financial information appears to increase fairness and consistency by providing a more uniform and accurate assessment of the defendant's financial information. The judges uniformly reported that they did not obtain nearly as much financial data as the screeners provide. Additionally, the screener can provide accurate calculations to the judges. 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. They indicated they believed they were being treated fairly. Thus it seems a screener contributes to the efficiency of the court and the dignity and privacy of the defendant by collecting financial 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.

Efficiency. According to those involved in the process, when the defendant's financial information is obtained by the Defense Eligibility Technician prior to, rather than during, a court appearance, there is a decrease in the amount of time that judges, prosecutors, public defenders, and other criminal justice system personnel spend on the issue of determining indigence. 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. We spoke to six defendants about screening issues. Defendants who had been screened in the previous and current way commented the new pilot procedure created a time savings and the overall appearance of a more efficient courtroom.

Cost Savings. Interviews indicate that the Screener does provide a time savings. 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 prescreened. 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. On the other hand, several interviewees 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.

Verification

Fairness and Consistency. The impetus for reforming current processes for determining indigence typically stem from the

occasional case in which defendants with great wealth are found to have been given an attorney at taxpayer expense, thereby creating a maelstrom of news coverage and the perception that there are defendants "freeloading" off the system.[19] Verification may add a sense of fairness to the system by allowing numerous court personnel, administrators, and taxpayers to feel that defendants are not "getting away" with access to governmental services (*i.e.*, a public defender) to which they are not entitled. Verification provides the sense that some deterrence exists, reducing the likelihood that a defendant will get away with giving false information to the court.

Efficiency. In its current configuration, verification efforts do not appear to impact efficiency. In virtually no cases have there been any additional legal actions taken in instances in which the Screener has found that false financial information has been provided. Even if a falsehood is detected, the majority of judges indicated they were unwilling to stop a case to remove the public defender once the case has started. They offered a range of reasons. Some judges state that even if a defendant lies, it is typically the case that the defendant does not have a lot of resources anyway. Other judges said 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.

Cost Savings. If the screening process is successful in "weeding out" those who do not qualify for counsel it would represent a cost-savings for the court system.[20] In order to successfully identify "freeloaders," the accuracy of financial information being provided to the court and the Screener's verification efforts must be considered.

At our request, the Screener gave us information regarding inaccurate or false information for a one-month period. Of the 460 cases screened in the month, the Screener said she learned that 25 individuals (5.4%) 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:

When asked about their employment, four 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 two 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.

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.

Ten defendants provided a fraudulent Social Security number.

These findings indicate that in a typical month, 5% of defendants provided inaccurate or false information to the court. Of those providing inaccurate information, however, only one person in 25 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 lie to make themselves seem more financially secure than the facts would indicate. 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 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. 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 support the view that either (a) not much lying takes place, or (b) the pilot project was not much better at catching liars than was the system in place beforehand.

CONCLUSION

Overall, the project clearly increased consistency in indigency appointments by ensuring that the same financial information was collected for each defendant and that each judge was provided with the same information regarding each defendant. Collecting financial information from defendants in a

19. Spangenberg & Beeman, *Indigent Defense Systems*, *supra* note 4; Spangenberg, *Contracting, supra* note 9; Spangenberg, *Defender Workloads*; *supra* note 6; Stambaugh, *supra* note 9.
20. 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.
21. SPANGENBERG GROUP, CONTAINING THE COSTS OF INDIGENT DEFENSE

more private setting prior to the hearing also was advantageous. Not only did it increase the efficiency of the process by reducing in-court time for judges, attorneys, and defendants, but collecting financial information in a more private setting than in the open courtroom also seemed comforting to defendants.

Data are less conclusive with regards to the extent by which the project improved fairness in indigency appointments. The rate of non-appointments for defendants who otherwise seemed eligible (based on Tier I and Tier II eligibility criteria) for a court-appointed attorney was higher than might be expected. Interviews with judges, however, indicated that they prefer to err on the side of providing counsel, rather than denying someone in need of counsel. This issue could be more fully examined if judges provided the rationale for denying counsel on the form.

The project's verification component in its current configuration does not seem effective in uncovering financial information that results in a denial of public defender appointments that, but for verification, otherwise would have occurred. Findings suggest that the percentage of defendants who are caught providing inaccurate information about their financial status is minimal; defendants who were caught lying were more likely to have tried to make themselves look more financially secure than impoverished enough to have been more readily eligible for court-appointed counsel.

Implications for Courts Beyond Lancaster County

For jurisdictions interested in assessing, reforming, or implementing new systems of determining indigence, the results of this evaluation strongly support the adoption of a uniform rule and form for determining indigence. 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 considered beneficial because it helps direct the collection of useful financial information judges need to know in order make the decision whether to appoint counsel.

Although screening staff appear to create a time savings for judges and attorneys, and provide defendants with a semiprivate environment to provide financial information, the benefits of their *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 who denies employment actually has a job or to find a savings account when the defendant does not list 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 either to stop judicial proceedings or to prosecute defendants in those rare instances in which inaccurate or false information is uncovered.

Alternative Verification Strategies

There are several options that would make verification efforts more cost-effective. 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.[21] There may be some preference to implement up-front user or application fees as opposed to after-the-fact recoupment costs.[22] 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 annual cost of a Screener. 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. Or a slighter higher base fee could be established with a sliding scale, with the goal of generating the average amount of $10 per defendant.

Another alternative is to staff the Screener position differently. Might there be others who already have investigative skills who could conduct the verification for the court? If pretrial 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 pretrial services were to verify, who would screen? Again, pretrial 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 respon-

PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES (National Institute of Justice 1986); Spangenberg Group, *An Assessment of the Pierce County Washington Indigency Screening and Cost Recovery Program* (Dec. 1998)(unpublished manuscript, available from Spangenberg Group, 1001 Watertown Street, West Newton, MA 02465); Spangenberg, *Contracting, supra* note 9; David Carroll & Robert Spangenberg, *Assessment of Indigent Defense Cost Recovery in Fayette and Jefferson County, Kentucky* (October, 2001) (*available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ky-costrecovery.pdf).

22. 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., ORDINANCE 99-31 (May 25, 1999) (*available at* http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/appendix%201%20-%205.pdf); *see also* Public Defense Cost Recovery Task Force, *Recommendations to Implement Change in Indigent Defense Screening and Cost Recovery* (1999) (*available at* http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/appendix%201%20-%205.pdf).

sibilities could be vested solely with pretrial service staff, and pretrial staff could be responsible for checking the financial data obtained by the court administrator's staff.

Postscript

In 2005, the Lancaster County Indigency Screener Project was cut from the county budget. During the four years the screening project took place there was no indication that the program was impacting (reducing) the number of defendants receiving court-appointed attorneys, and there was no indication of a cost savings from verification. Consequently the decision was made to terminate the project, and the money for the project was used to fund an additional attorney in the Public Defender's office. Administrators decided that for the program to be successful, the screening needed to take place days before the arraignment, which was not the way Lancaster County had organized its program.

As detailed in this article, there are clear benefits to a uniform rule and form for determining indigence. Jurisdictions interested in including a screening or verification component should consider the alternative screening/verification strategies discussed in here: establishing a mechanism to recoup costs, pairing the screening position with existing court staff, or pairing verification efforts with existing pretrial services.

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