Comment Regarding Opinion 16-68 of the Advisory Committee on Judicial Ethics

In April 2016, pursuant to the *Hurrell-Harring* Settlement and Executive Law § 832(3)(c), the Office of Indigent Legal Services (ILS) issued Criteria and Procedures for Determining Assigned Counsel Eligibility (Criteria and Procedures). These Criteria and Procedures, which apply to the 57 counties outside of New York City, guide courts in determining eligibility for assignment of counsel in criminal cases.

Procedure XI of the Criteria and Procedures requires any entity involved in the assigned counsel determination process to preserve the confidentiality of information that applicants disclose. This Procedure states as follows:

> The confidentiality of all information applicants provide during the eligibility determination process shall be maintained.
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> A. The eligibility screening process, whether done by another entity or the court, shall be done in a confidential setting and not in open court.
> B. Any entity involved in screening shall not make any information disclosed by applicants available to the public or other entities (except the court).
> C. Any documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.

This Procedure comes directly from the *Hurrell-Harring* Settlement, which requires that the assigned counsel determination process be confidential. *See Hurrell-Harring* Settlement, § VI, B. It is also derived from professional standards and national guidelines, which emphasize the need to maintain the confidentiality of information provided during the assigned counsel determination process. *See, e.g.*, New York State Bar Ass'n Revised Standards for Providing Mandated Representation, Standard C-4 (2015) ("Rules, regulations, and procedures concerning the determination of initial eligibility and continuing eligibility for mandated representation shall be designed so as to protect the client's privacy and constitutional rights…"); Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, Guideline 6(a).

The professional standards and guidelines recognize that maintaining confidentiality is a constitutional imperative. *See, e.g.*, Brennan Center for Justice, *Guidelines,* at 23 (confidentiality is critical because "defendants must not be forced to choose between their Sixth Amendment right to counsel and their Fifth Amendment right not to incriminate themselves"). It is not unusual for applicants during the assigned counsel determination process to reveal information that implicates their Fifth Amendment right against self-incrimination.[1]

Defendants should not have to abandon one constitutional right to exercise another. *Simmons v. United States,* 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right

[11] Several examples of this have been brought to ILS' attention. In one instance, while applying for counsel in a case alleging that the defendant had passed fraudulent checks, the defendant, in response to the court's question about how he financially supports himself, answered, "I pass bad checks." This comment was made on the record and in open court. In another instance, a defendant completed a written assigned counsel application, stating in the "employment" section that she was a "prostitute."

should be surrendered in order to assert another."); *see also United States v. Pavelko*, 992 F.2d 32, 34 (3rd Cir. 1993). Put simply, confidentiality of the assigned counsel eligibility determination process is necessary to fully protect defendants' Fifth and Sixth Amendment rights.

On June 16, 2016, the Advisory Committee on Judicial Ethics (Advisory Committee) issued Opinion 16-68 regarding Procedure XI of the Criteria and Procedures. In this Opinion, the Advisory Committee noted that judges "must not 'initiate, permit, or consider ex parte communications' unless an exception applies." Opinion 16-68 (citing 22 NYCRR 100.3(B)(6)). The Advisory Committee went on to note that "a judge 'may initiate or consider any ex parte communications when authorized by law to do so.'" *Id.* (citing 22 NYCRR 100.3(B)(6)(e)). Thus, concluded the Advisory Committee, "absent a legal requirement to do so, a judge should not voluntarily comply with the proposed guidelines to the extent they require the judge to engage in impermissible ex parte communications or to close the courtroom or seal the record other than as permitted by law." *Id.* The Advisory Committee, however, stated that it "cannot resolve the underlying legal questions" as to whether the law authorizes *ex parte* communications and the sealing of records in order to maintain the confidentiality of information a defendant discloses during the assigned counsel eligibility determination process. *Id.*

Opinion 16-68 applies to judges; it does not apply to providers. Thus, providers must continue to take steps to maintain the confidentiality of information disclosed during the assigned counsel application process, including screening applicants in a confidential setting and keeping written materials confidential. In most instances, doing so will prevent public disclosure of an applicant's information. However, if an applicant appeals a provider's ineligibility recommendation to the judge, the judge may request that the provider disclose the applicant's financial information, and then make this information part of the court file, which is available to the public. For that reason, ILS has updated its Notice of Right to Review to advise applicants that if they appeal a provider's ineligibility recommendation to the judge, the judge might order the provider to disclose the financial information the applicant gave the provider. Additionally, the judge might question the applicant about his or her finances on the record and in open court.

Providers should, where appropriate, request that judges take steps to maintain the confidentiality of the assigned counsel eligibility determination process. In doing so, providers should inform the court of the constitutional imperative for confidentiality and, where appropriate, cite the *Hurrell-Harring* Settlement and the professional standards and national guidelines referenced in this Comment.