

Department of Legislative Services  
Maryland General Assembly  
2016 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

Senate Bill 1156

(Senators Zirkin and Miller)

Judicial Proceedings

Judiciary

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Criminal Procedure - Determination of Eligibility for Services - Office of the  
Public Defender

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This bill requires a District Court commissioner to determine whether an individual qualifies as indigent when the individual waives the right to an attorney at an initial appearance but expresses an intent to apply for services of the Office of the Public Defender (OPD) for subsequent proceedings in the matter. There is a presumption that an individual who was qualified as indigent by a District Court commissioner at an initial appearance qualifies for the services of OPD.

The bill takes effect October 1, 2017.

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Fiscal Summary

**State Effect:** The bill is not expected to materially affect State finances, as discussed below.

**Local Effect:** Assuming that implementation of the bill does not affect local pretrial detention times, the bill is not expected to materially affect local finances.

**Small Business Effect:** None.

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Analysis

**Current Law:** An individual may apply for OPD services as an indigent individual if the individual states in writing under oath or affirmation that the individual, without undue financial hardship, cannot provide the full payment of an attorney and all other necessary expenses of representation in specified proceedings.

For an individual whose assets and net annual income are less than 100% of the federal poverty guidelines, eligibility for OPD services may be determined without an assessment regarding the need of the applicant. For an individual whose assets and net annual income equal or exceed 100% of the federal poverty guidelines, eligibility for OPD services must be determined by the need of the applicant. Need must be measured according to the financial ability of the applicant to engage and compensate a competent private attorney and to provide all other necessary expenses of representation in the proceedings specified above.

An applicant's financial ability must be determined by (1) the nature, extent, and liquidity of assets; (2) the disposable net income of the applicant; (3) the nature of the offense; (4) the length and complexity of the proceedings; (5) the effort and skill required to gather pertinent information; and (6) any other foreseeable expense. If eligibility cannot be determined before OPD or a panel attorney begins representation, OPD may represent an applicant provisionally. If OPD subsequently determines that an applicant is ineligible, OPD must inform the applicant of his/her ineligibility, and the applicant must be required to engage the applicant's own attorney and reimburse OPD for the cost of the representation provided. OPD must investigate the financial status of an applicant when the circumstances warrant.

OPD may (1) require an applicant to execute and deliver written requests or authorizations that are necessary under law to provide OPD with access to confidential records of public or private sources that are needed to evaluate eligibility and (2) on request, obtain information without charge from a public record office or other unit of the State, county, or municipal corporation.

OPD may submit requests to the Department of Labor, Licensing, and Regulation (DLLR) and the Comptroller for information regarding the employment status and income of applicants. Each of these requests must be accompanied by an authorization for release of information that is signed by the applicant and in a form acceptable to the agency to which the request is submitted.

DLLR and the Comptroller must comply with requests for information made by OPD. Information may be exchanged by facsimile transmission.

**Background:** Exhibit 1 contains information on who determines indigency for the purposes of state-funded legal representation in the states.

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**Exhibit 1**  
**Indigency Determinations in the States**

<u>Decision Maker</u>	<u>States</u>
Judge	Alabama, Alaska, Arizona, Arkansas, California, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming
Public Defender	Colorado, Connecticut, Georgia, Hawaii, Maryland, Missouri, Montana, Nebraska, Ohio, Oregon, Rhode Island, West Virginia, and Wisconsin
Hybrid	Delaware, Louisiana, and Vermont
Other	Florida, Massachusetts, New Hampshire, and South Carolina

Source: *Oklahoma's Indigency Determination Scheme: A Call for Uniformity*, 66 Okla. L. Rev. 655 (Spring 2014)

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**State Expenditures:** The bill is not expected to materially affect State expenditures, as discussed below. This estimate assumes that (1) the Judiciary can implement the bill using its current indigency determination process; (2) OPD and the Judiciary can develop a process to communicate the eligibility of individuals determined to be indigent by a commissioner with existing budgeted resources; (3) the bill does not materially affect demand and/or use of OPD services; (4) implementation of the bill does not affect turnaround times for initial appearances and pretrial detention times in Baltimore City; and (5) the waiver rate for legal representation at initial appearances remains constant.

### *Judiciary*

Assuming that the Judiciary can implement the bill using its current three-minute indigency determination process at initial appearances, the Judiciary can implement the bill's requirements with existing personnel.

District Court commissioners conducted 146,489 initial appearances in calendar 2015. During calendar 2015, 33% (48,341) of defendants requested/received counsel at their

initial appearances. Approximately 98,148 defendants (67%) waived their right to counsel at their initial appearances.

Currently, District Court commissioners do not conduct eligibility determinations for defendants who waive their right to counsel at initial appearances and conduct a 3-minute eligibility determination for individuals who request counsel and state that they cannot afford their own legal representation. OPD advises that its eligibility determinations take 10 minutes to process. While the District Court uses a different eligibility form than OPD, the forms ask for substantially similar information.

The bill does not specifically require a District Court commissioner to conduct an OPD-level eligibility determination at an initial appearance, and the language of the bill stating that an individual determined to be indigent by a District Court commissioner is presumed to be qualified for OPD services appears to imply that District Court commissioners are not required to implement OPD's eligibility determination process. The Judiciary advises that (1) it will continue to use its current three-minute indigency determination (which is done by affidavit) and (2) cannot determine whether it needs additional personnel to implement the bill at this time.

Data is not readily available on the number of individuals who appear before a District Court commissioner at an initial appearance who eventually apply for OPD services. Some criminal defendants do not appear before a District Court commissioner for an initial appearance (*e.g.*, defendants who receive criminal citations).

*For illustrative purposes only*, based on calendar 2015 data, should District Court commissioners be required to conduct three-minute indigency determinations for 60% of the individuals who waive their right to counsel at initial appearances because these individuals express an intent to apply for OPD services in subsequent proceedings, commissioners must spend an additional 2,944 hours on indigency determinations, which translates to 1.5 additional commissioner positions based on a 2,000-hour work year. In 2014, there were approximately 271 full-time equivalent District Court commissioner positions in the Judiciary. Given the number of existing commissioners and the low number of commissioner positions associated with this potential additional workload, the Judiciary can likely implement the bill's requirements with existing personnel.

#### *Office of the Public Defender*

OPD processed an estimated 241,949 intake applications in calendar 2015. The bill reduces the number of eligibility determinations OPD has to conduct. As previously stated, (1) data is not available on the number of OPD applications received from individuals who appeared before a District Court commissioner and (2) the bill's impact depends on the number of individuals who waive an attorney at an initial appearance but express an interest

in OPD representation in the future, which can only be determined with actual experience under the bill.

*For illustrative purposes only*, if all of the individuals who request/receive counsel at their initial appearances and 60% of the individuals who waive counsel receive an indigency determination from a District Court commissioner, OPD has to conduct 107,230 fewer eligibility determinations per year, based on calendar 2015 data. Based on OPD's 10-minute eligibility determination process, this results in a reduction of 17,872 intake work hours, which equates to 9 intake positions based on a 2,000-hour work year.

However, the Department of Legislative Services advises that, given that intake employees are distributed across the State and spend the majority of their time on noneligibility determination duties, it may be difficult to identify specific positions associated with any reduction in OPD workloads experienced under the bill. Also, OPD may be able to mitigate existing staffing constraints by retaining existing intake personnel and reallocating time associated with the reduction in eligibility determinations to other intake responsibilities, which may result in a reduced need for nonintake personnel (including attorneys) to conduct eligibility determinations, allowing these employees to focus on their case-related responsibilities.

OPD advises that it has 111 intake workers who spend 10% to 15% of their time on eligibility determinations, which represents approximately 11 to 17 intake positions. The remainder of their time is spent obtaining client criminal history; entering information into a case management system; obtaining charging documents, citations, or violation of probation petitions; filing appearances and/or various motions; creating the physical client file; issuing witness subpoenas; preparing dockets; and performing other various case support functions. OPD further notes that in all jurisdictions, secretaries, paralegals, investigators, and attorneys also perform intake duties due to understaffing. In jurisdictions where there are no intake positions, all of the intake duties fall on nonintake personnel. Approximately 42 employees in other classifications spend 5% of their time (representing approximately 2 positions) on eligibility determinations. The remainder of their time is spent on duties within their classification and/or other intake-related duties. OPD attorneys often conduct eligibility determinations for clients at judicial bail review hearings.

OPD advises that despite the decrease in duties for intake personnel, current and projected needs of the office warrant retention of existing personnel. As part of the fiscal 2017 budget, OPD advises that it absorbed the elimination of 14.5 intake positions. Since 2007, OPD has lost 44% of its intake staff due to downsizing. OPD anticipates that time spent on noneligibility duties is expected to increase once the Maryland Electronic Courts system is implemented statewide and that the transfer of eligibility determination responsibilities under the bill should result in more manageable workloads for intake staff.

OPD advises that it can develop a process to confirm whether a particular person has been deemed eligible for OPD services by a commissioner with existing budgeted resources.

**Local Expenditures:** Assuming that implementation of the bill does not materially affect local pretrial detention times, the bill is not expected to materially affect local expenditures.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Comptroller's Office; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Labor, Licensing, and Regulation; Department of Public Safety and Correctional Services; *Oklahoma Law Review*; Department of Legislative Services

**Fiscal Note History:** First Reader - March 16, 2016  
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