Guidance on the Right to Counsel in Legal Financial Obligation Cases

The U.S. Supreme Court has held that (1) the Sixth Amendment to the U.S. Constitution affords an indigent person the right to court-appointed counsel in all criminal cases punishable by death or more than a year in jail or prison, including criminal contempt cases, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and (2) an indigent defendant charged with any offense punishable by less than a year in jail or prison may not be incarcerated as a punishment unless the defendant was appointed or waived counsel, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The right to counsel applies to all "critical stages," which include a lineup or showup after formal charges are brought, preliminary hearing, trial, sentencing, and first appeal. *See United States v. Wade*, 388 U.S. 218 (1967); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Douglas v. California*, 372 U.S. 353 (1963).

Although there is no Sixth Amendment right to counsel in civil cases, the Supreme Court has held that the Due Process Clause may require appointment of counsel for an indigent in some civil proceedings involving non-payment of a court-ordered financial obligation where incarceration is a possible sanction. *Turner v. Rogers*, 564 U.S. 431 (2011). If the judge decides that incarceration will never be imposed as a sanction, the indigent is not entitled to counsel. The judge should be aware, however, that whether or not the indigent is appointed counsel, it can be a Due Process violation to impose incarceration as a sanction for non-payment if the indigent is financially unable to make payment. *See Bearden v. Georgia*, 461 U.S. 660.

Be aware, however, that state constitutions and laws may provide greater protection than the U.S. Constitution. In general, a judge should:

- Appoint counsel for indigent defendants in all criminal cases, probation revocation, and contempt cases involving non-payment of court-ordered financial obligations if the judge intends to consider as a sanction incarceration or a suspended sentence. *See* Argersinger, *supra; Alabama v. Shelton*, 535 U.S. 654 (2002).
- Appoint counsel in a probation revocation proceeding if the defendant appears to lack the capacity to proceed without counsel or the proceeding involves complex legal issues. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

- Ensure that information concerning the process of obtaining court-appointed counsel is accessible to defendants, probationers, and respondents and that there are no financial or other barriers in the application process.

In cases where appointment of counsel is appropriate, a judge should:

- Make a finding in writing or on the record that any waiver of the right to counsel is "knowing and intelligent" and document that the person waiving the right to counsel was advised of the "dangers and disadvantages of self-representation."
- Ensure that the appointment of counsel does not unduly delay the proceedings or result in the extended detention of a defendant, probationer, or respondent.