

**FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED**

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Judicial Conference of the United States
Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, D.C. 20544

RE: Written comments

Dear Committee:

As the co-chair of the Performance Measurement Working Group (PMWG) and as a want to be teacher, I have a great interest in the quality of representation provided by federal defender organizations and panel attorneys. I am most interested in how to improve the representation afforded those who are financially unable to obtain adequate representation when faced with what will probably be the very worst time of their lives. The topics identified by the CJA Study Committee to be studied provide me the perfect soap box from which to preach.¹

¹ Federal Defender Services of Eastern Tennessee is a community defender organization with 3 offices and a capital habeas unit, staffed by 42 employees. The case load in the district is climbing due to the very vigorous prosecution of drugs and gun cases by the USAO. A new district CJA Plan was approved by the 6th Circuit in 2013. As a result of the plan changes, there are 3 panel selection committees which meet regularly to review the panel size so that panel attorneys receive at least 4 appointments per year and quality of representation of the panel.

The Committee has been provided the surveys conducted by Westat for the Defender Services Committee. Since I am as part of the working group responsible for the surveys, I have had the opportunity to become familiar with the results of the surveys. In all of the surveys (2005, 2009 and 2015), the judges have consistently reported a quality gap between the representation provided by the federal defender organizations and that provided by the panel attorneys. A positive is that the gap closed somewhat between 2009 and 2015 with more judges in 2015 rating panel attorneys as excellent or very good in eight competency areas than they had in 2009. However, the gap continues to exist.

In comparing the 2009 and the 2015 surveys, the largest gain by panel lawyers in the eight competency areas was in the use of courtroom technology skills. According to the judges, there was also improvement in sentencing and oral advocacy. The quality of capital representation, also, improved. However, there is a much larger gap between the two groups in the judges' assessment of appellate skills.

Based on my 17 years of experience as a community defender and my work on the PMWG, I have a theory that there are at least three factors which impact the quality gap between panel attorneys and federal defender attorneys, other than the fact that defenders have full time work handling federal criminal cases. They are a lack of parity in resources, the insufficiency of the hourly rate, and training issues. Woven among these factors is also the involvement of the judiciary in the defense function.

Panel members are required to take 3 hours of relevant CLE each year and are required to accept at least 2 appointments each year.

LACK OF RESOURCE PARITY

In 2015, Federal Defender Services of Eastern Tennessee, Inc. was appointed to represent Mr. Doe, age 27, who had been indicted for distribution of child pornography. At first blush, the case appeared to be particularly egregious due to the huge number of images that Mr. Doe had kept. His guidelines were at the 240 month statutory maximum. At the first attorney/client meeting, his attorney decided that there was a need for a psychological evaluation. A request was made the same day to the defender for approval to hire a psychologist with an expertise in child pornography. Approval was given to engage the expert, and a contract was signed for services with a maximum of \$6,000. Mr. Johnson was diagnosed with Autism Spectrum Disorder. People with this disorder have a tendency to collect and hoard because they engage in repetitive behavior. This provided an explanation for why Mr. Doe had kept so many images. Mr. Doe's disorder was the basis of a variance which led to a sentence of 80 months.

If Mr. Doe had been represented by a panel attorney, would there have been the same result? Perhaps, but it would be much more difficult for a panel attorney to gain approval for the expert. In order to hire the same expert, the panel attorney would have had to convince a magistrate judge, a district court judge, and a circuit court judge of her need for the expert. If she were successful in gaining approval, it would have taken much longer than one day for the request to work its way through the system. The system for approval of necessary litigation expenses for panel attorneys has two problems. The caps for expert services are too low, and the involvement of courts in deciding what experts can be engaged by panel lawyers is not proper.

This is certainly not to suggest that panel attorneys or federal defenders should have unlimited funds to hire experts. The hourly rate negotiated in Mr. Doe's case by the defender was lower than the originally quoted rate and lower than the rate charged by experts with similar resumes, but the total cost of services was two and half times the maximum that could be approved by the district court.

That raises the second issue, the gorilla in the courtroom. Any time that a panel attorney makes an independent judgment based on her experience, one of the main participants in the proceeding, the judge (or judges if the request must go to the circuit) has veto power over what the attorney has determined is necessary to provide a competent defense. Neither the United States Attorney's Office nor the federal defender is required to have the acquiescence of the Court in deciding how to represent their clients. Nor must the defender or the United States Attorney's Office reveal their trial strategy to the judicial officer in advance. Even in a district where expert requests are approved as a matter of course, the appearance is unseemly. We know that there are districts where experts are rarely engaged, and we know, anecdotally, that those requests are not made because panel attorneys are weary of being denied the requests.

POSSIBLE SOLUTION: An independent entity or person should be responsible for budgeting the CJA funds, including establishing procedures for panel attorneys to engage experts. Either the entire current structure could be thrown out (a solution which others will address in more detail) or major changes within the current structure could be made to allow for panel attorneys to make case decisions without having to seek the approval of one of the participants in the proceeding.

INSUFFICIENCY OF THE HOURLY RATE

The surveys of panel district representatives and of individual panel attorneys identify the current hourly rate as a factor that affects the quality of representation. The most experienced attorneys are not staying on the panels. In fact, the difference between what a panel attorney “clears” when being paid \$127 per hour versus what that same panel attorney can make on a retained case is more than significant. In the surveys the district judges also identified the low hourly rate as being a factor in the courts’ difficulty in finding attorneys with the necessary qualifications and experience. It was also cited as a reason for the challenge of “identifying, replacing, appointing, or keeping qualified and experienced attorneys.”

The insufficient rate is, perhaps, another indicator of the conflict that occurs when judges are responsible for making budget requests for the panel to Congress. The refusal of the Judicial Conference to ask for funding for the full statutorily approved hourly rate, which has already been approved by Congress, is a problem. It is understandable that the Judicial Conference has many interests to weigh in making their requests. It is suggested that the job of educating Congress as to the needs of the judiciary would be less burdensome if they did not have to deal with the Defender Services budget line.

POSSIBLE SOLUTION: Many different studies are available concerning the different costs of living in the different parts of the country. Perhaps there could be a base hourly rate which would increase depending on the cost of living in the panel attorney’s district with a provision that allows for the rate to be raised as inflation or some similar price index rises.

TRAINING ISSUES

It is overwhelming when one considers the number of changes in just federal sentencing since 1987. We started with mandatory guidelines. There have been almost 800 amendments to the guidelines. Guidelines became advisory. The residual clause was declared unconstitutional. And those are just a few of the very biggest changes. Keeping up is a daunting task, but staying current is absolutely necessary for panel attorneys if they are to provide quality representation for their indigent clients. It is my opinion that without a strong training program where there is participation by the entire CJA panel, the quality of representation will not improve. In order for training to be successful, it must be available, and panel attorneys must attend it.

The Training Division of the Defender Services Office sponsors regional seminars which are highly rated as seen in the panel attorney surveys and as reported by panel attorneys in my district. The website fd.org, likewise, provides helpful information for those who are unable to travel. However, as noted in the surveys, it remains difficult for panel attorneys to be out of their offices for several days, and respondents to the surveys did not seem to know what all was available to them. According to the Training Division, in 2014, 80% of the defender offices provided at least 6 hours of training for their panels, and that training ranged from monthly lunch and learns to multi-day conferences.

SUGGESTED SOLUTION: There should be 100% of the defender offices providing sufficient convenient training for their panels. Also, panel attorneys should be required to attend the seminars. A change could be made to the Model CJA Plan. The language in the CJA Plan for the Eastern District of Tennessee (and in other district) follows:

3. *Mandatory Continuing Legal Education. CJA Panel attorneys shall annually attend at their expense a minimum of three hours of continuing legal education related to federal criminal practice. All seminars presented by Federal Defender Services of Eastern Tennessee or the Office of Defender Services will satisfy this requirement. CJA Panel attorneys must certify their attendance at other federal criminal practice seminars on forms provided by the Federal Community Defender by December 31 of each year. A copy of the agenda must also be attached to the form.*

OTHER MUSINGS

There are so many outstanding things about how the representations of indigent defendants occur under the Criminal Justice Act. In many districts, there are strong positive relationships among all of the players. Defender offices are staffed with zealous, brilliant attorneys. Judges take very seriously their oaths of office. However, there is no system that cannot be improved, and the structure that supports the Criminal Justice Act is no exception. This is the opportunity to build an outstanding criminal justice system for those who are unable to afford adequate representation. We should dream and not settle for anything that recommends less than what we think is the best. In my opinion, the following areas of practice should, also, be carefully reviewed and improved upon:

1. Restoration of the Defender Services Office to a directorate if it remains a part of the Administrative Office of the U.S. Courts.
2. Restoration of the Defender Services Committee's authority over the staffing and budget authority for Defender Services and the CJA Panel, including a review of the staffing formulae which do not recognize the flexibility needed when one has to react to whatever cases that the United States Attorney's Office decides to bring.

3. Review of the governing and advisory structures which included DSAG.
4. Removal of judges from the appointment processes of Federal Public Defenders and Community Defenders, removal of judges from approving expert services, removal of judges from reviewing vouchers, and ending judicial membership on panel selection committees.
5. Attempts to move closer to parity with the Department of Justice's resources and participation in policy making groups such as the Sentencing Commission.

Thank you for agreeing to take on this gargantuan task, and I look forward to discussing these and other issues with you in Birmingham.

Sincerely,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.



By: Elizabeth B. Ford
Federal Community Defender