

*Testimony Regarding the Criminal Justice Act:
Implementation and Observations in the Eastern District of Kentucky*

Hon. Karen K. Caldwell, Chief Judge

I. The CJA in the E.D. Ky.

The E.D. Ky. completely rewrote its CJA Plan in 2007. The 2007 Plan replaced the prior version, enacted in 1987. The Court's intent in making the revision was to implement best practices in Panel management, to elevate the status and selectiveness of Panel membership, to assure full compliance with CJA and relevant Guide provisions, and to formalize a mechanism for fair allocation of work across the Panel. Because the District has no public or community defender, the Court focused on securing a Panel large enough to cover the District's full indigent defense needs but small enough to assure an adequate number of annual substantive assignments for each Panel member.

Management

The Court delegates panel management to a CJA Committee made up of two District Judges, one Magistrate Judge, and a Panel representative from each of the three geographic divisions in the District. The Plan reserves to the Court all formal actions (*e.g.*, addition or subtraction of members from the Panel), but the CJA Committee does most of the administration.

The Court and Committee regularly assess Panel and District needs. The 2007 Plan revision hinged, in part, on the strong desire to ensure adequate substantive federal criminal work for each member (with a goal of 6-8 substantive assignments annually, per member). Accordingly, the Committee regularly measures work assignments, defendant population, Panel roster, appointment percentages, appointment type, and other similar metrics. The geographic diversity and size of the District is another factor in Panel management.

When the Court determines to expand Panel membership, the Committee typically publishes notice and then screens and assesses applicants for membership. The Committee ultimately makes recommendations, as to any Panel change(s), to the full Court. The formalization of the Panel management process has greatly sharpened the Panel's mission, made membership a point of attainment, and increased Panel quality.¹

The Court formally evaluates the full Panel every 1-2 years. As part of that process, the Court ensures that it gathers and addresses any specific performance issues, both pro and con. That evaluation process also helps identify Panel-wide areas for emphasis, communication, and training. The Court developed a particular electronic tool for assessment. That tool, circulated to all judges and covering all Panel members, allows the rating judge to efficiently assess the performance of each lawyer before him or her during the evaluation period. The tool also provides a window and opportunity for registering any particular concerns, both related to practice and to, *e.g.*, CJA billing. The data and information generated help guide the Court in

¹ We currently have 82 members spread over the District's three divisions. The 2007 Plan revision intentionally winnowed Panel size to meet the stated revision goals.

making decisions about Panel management. *See* Attachment A (sample page from evaluation tool).

Importantly, the Panel has different tiers of qualification. If an appointing judge deems a matter sufficiently complex (*e.g.*, a Class A felony), the judge can direct selection from a complex-qualified list of members. [The Committee and Court, guided by Plan-stated qualifications, decide what lawyers have the experiential and other qualities and attributes necessary for the most difficult assignments.] Other cases (and this tends to be most) fall into the regular appointment pool. The Court also distinguishes limited appointments (*e.g.*, one for a fixed or finite event, such as representing a grand jury witness or a defendant appearing for a Rule 5 transfer hearing).

The classifications matter, in part, because of how the Court tracks and allocates work.² The Guide requires fair work allocation, and, with the Plan revision, the Court also implemented a local computer program to meet this mandate. The program objectively assigns cases and tracks assignments to Panel members based on a point system driven by the type and frequency of appointments. Panel members know, at any point in time, where they stand in terms of work assigned relative to the full Panel. This system,³ over time, results in each lawyer having a fair chance to receive each type of work he or she is qualified to do. Of course, each appointing judge retains discretion to make a direct, tailored appointment outside the program when case specifics warrant, but that is an exception to the standard, rotational work allocation dictated by the Plan and Guide.

II. *CJA--Observations, Suggestions, Strengths, and Weaknesses*

a. Assuring an evergreen Panel.

One area of concern (or potential weakness) is providing for a Panel that at all times has lawyers of competence but a diversity of experience and tenure. The goal is to build and maintain a Panel that, as years and decades pass, will feature a consistent and predictable blend of experience so that, as attrition and turnover occur, the Panel maintains its ability to serve the full needs of the District and its indigent defendants.

This is a challenge, in part, because a lawyer needs experience to qualify for the Panel, and it is difficult to gain federal experience, at least in this District and as a younger lawyer, through private retention. The Court has experimented with mentoring and considered creating a dedicated developmental panel but has not effectively implemented such a program to this point.

² The Court carefully accounts for whether, when, and why Panel members decline cases. Some declinations are legitimate, of course, but an excessive number of appointment refusals typically leads to replacement of a member. *See* Attachment B (sample assignment data snapshot under CJA Program).

³ The Court is on the verge of launching a replacement computer tracking system being co-developed between the E.D. Ky. and the District of Puerto Rico. That system should be transferrable and a resource for other Districts with similar needs and management goals.

A junior or developmental panel of lawyers the Court would intend to graduate into full Panel membership would provide a guard against a future shortage of experienced counsel.

b. Dealing with authorization delay.

Lawyers express frustration with the delay and lack of transparency in the process for approving experts and other services, per § 3006A(e)(3). The mechanics for securing proper authorization for expert and other services can be confusing and often impact the schedule in a case. The Court is hopeful that electronic voucher progress may create some opportunities for better tracking and status communication on this issue.

c. Some tension in budgeting.

Some judges sense a degree of tension in handling detailed budgeting requests while also overseeing the unfolding litigation process in a case. The assessment and intimate knowledge required for managing and approving a budget could theoretically lead to awkwardness in formal litigation, later voucher review, and even assessment of *Strickland* issues. For example, is approval of budgeting requests equivalent to approval of forecasted litigation tactics? Does the justification presented *ex parte* for a budgeting request in any way erode independent treatment of a later issue assessing the result of that request, *e.g.*, as to intended use of experts? How deeply should the trial judge involve herself in scrutinizing the tactical choices a budget request presents? Two of our judges, in multiple cases, have successfully experimented with severing budgeting approval from substantive case management in the context of Capital Case Budgeting. This severance adds a layer of administration, but also addresses the noted tensions.

d. Voucher approval and lack of metrics / uniformity.

By design, the CJA vests voucher (at least, non-excess) approval in the responsible judge. Our judges approach the task in individual ways. Certainly, the judges often long for good comparative data for use in determining the reasonableness of a fee or expense request in a case. Over time, judges develop their own organic databases or matrices, but having ready and objective data—averages or ranges by District, Region, and / or nationally as to comparable appointments—may create greater confidence in the reviewing judge and the submitting lawyer.

e. Public education.

The public should know more about the quality of and service given by the Panel. In this District, the Court manages the Panel closely and has great confidence in the professionalism and competence of the CJA lawyers. It is not uncommon to see a highly qualified Panel member displaced by a retained lawyer. This, of course, is a Defendant's protected choice. However, better education about the dynamic purposes and successes of the CJA—both as to quality and available resources—could help litigants make more informed choices about a matter so central to case outcome. Further, the benefit to taxpayers in having a vibrant and effective Panel, and thus a sturdy embodiment of Sixth Amendment values, is a message worth touting.

Pikeville Division



Attorney	Any issue(s) warranting inquiry/ counseling	Any problem(s) warranting possible removal/ discipline	Generally reasonable vouchers Yes/No?	Appropriate designation (Complex/ Regular)?	Insufficient info to rate	Comments: <i>e.g. notes, explanation, pros/cons regarding panel member</i>
Coffey, Willis G. Complex	No	No	Yes	Yes	<input type="checkbox"/>	
Craft, James Wiley Regular	No	No	Yes	Yes	<input type="checkbox"/>	
DeRossett, Gerald D. Complex	No	No	Yes	Yes	<input type="checkbox"/>	
Friend, Noah Regular	No	No	Yes	Yes	<input type="checkbox"/>	
Hoskins, David S. Complex	No	No	Yes	Yes	<input type="checkbox"/>	
Lane, Joseph R. Complex	No	No	Yes	Yes	<input type="checkbox"/>	
Nash, Patrick F. Complex	No	No	Yes	Yes	<input type="checkbox"/>	
O'Neill, Patrick Regular	No	No	Yes	Yes	<input type="checkbox"/>	

Attorney	Any issue(s) warranting inquiry/counseling	Any problem(s) warranting possible removal/discipline	Generally reasonable vouchers Yes/No?	Appropriate designation (Complex/Regular)?	Insufficient info to rate	Comments: <i>e.g. notes, explanation, pros/cons regarding panel member</i>
Perlman, Pamela Complex	No	No	Yes	Yes	<input type="checkbox"/>	
Varney, Wesley K. Regular	No	No	Yes	Yes	<input type="checkbox"/>	
Wohlander, Mark A. Complex	No	No	Yes	Yes	<input type="checkbox"/>	

CJA Summary for Division 5, January 2010 through November 2010

Attorney	Accepted	No answer	Refusal	Refusal (medical)	Refusal (personal scheduling)	Refusal (business scheduling)	Case conflict	Judicial appointment	Rescinded appointment	Direct With No Case Points
Abell, Robert L.	5	1	0	0	0	1	1	0	0	0
Baldani, Russell James	5	1	0	0	0	4	10	0	1	0
Blandford, Jaron P.	9	0	0	0	0	0	3	0	0	0
Bradbury, Todd <i>Termed 09/18/2009</i>	0	0	0	0	0	0	0	0	0	0
Bratt, David <i>Termed 04/26/2010</i>	1	0	0	0	0	0	0	0	0	0
Brown, Adele	8	1	0	0	0	0	5	0	2	0
Clendenin, J. Gregg <i>Termed 04/26/2010</i>	0	2	0	0	0	0	0	0	0	0
Cornette, Tanya Robin	11	1	0	0	0	1	0	1	4	0
Darling, Jeffrey A.	5	3	0	0	0	0	1	0	0	0
Despotes, Timothy <i>Termed 00/00/0000</i>	1	0	0	0	0	1	0	0	0	0
Gault, Cullen C. <i>Termed 04/26/2010</i>	1	1	0	0	0	0	0	0	0	0
Gordon, Derek G.	6	0	0	0	0	0	1	4	3	1
Gore, Charles P.	6	1	0	0	0	0	26	1	1	1
Guarnieri, David J.	7	0	0	0	0	0	1	3	3	2
Gunther, Denotra Spruill <i>Termed 00/00/0000</i>	0	3	0	0	0	0	0	0	0	0
Hayworth, George	9	1	0	0	0	0	6	0	3	0