UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT
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To: Judge Marcia Crone

From: Joseph L. S. St. Amant

Date: February 12, 2016

Re: The CJA System in the Fifth Circuit

Dear Judge Crone,

Marianne Laine said that in preparation for your appearance before the Committee, you would be willing to look at a memorandum outlining our thoughts about the general operation of the CJA system. I am attaching for reference a copy of the "Scope of CJA Review" posted on the J-Net with the announcement that the Committee had begun work. We feel most able to comment on issues 3, 4 and 5, and, to some extent, on issues 6 and 12.

(3) *Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers.*

In my opinion, providing a defense for indigent defendants has an inherent problem. The beneficiaries of the expenditures are not providing the funds – somebody else is. In order to maintain reasonable limitations on overall expenditures, decisions have to be made about particular expenditures, taking into account the likelihood of diminishing returns on defense efforts. At some point, additional expenditures cannot be justified because they would have no reasonable probability of improving the results.

Defense counsel is the first decision-maker in this respect, and counsel's professional judgment often provides an adequate answer. However, relying solely

on counsel's professional judgment is not always sufficient. As payee, counsel is also a beneficiary, at least in respect of attorney's fees. In addition, I believe defense counsel's obligations to the client can color professional judgment, and make it difficult to resist the desire to leave no stone unturned. This latter qualification is particularly applicable to capital cases, where the stakes are unparalleled, and philosophical considerations may become involved.

Fortunately there is a professionally neutral person thoroughly familiar with the situation who can help ensure that sound decisions are made about the appropriateness of proposed expenditures. That person is the presiding judge.[1]

It is true that judges are paid by the government, and the government is also the source of funding for the defense. It is also true that judges are conscious of the need to limit demands on the public fisc to what is reasonable and necessary. But that consciousness arises out of judges' dedication to public service – not out of the requirements of the job.

Judges are not being paid to restrict the amount spent on indigent criminal defense – that is not part of their job description, and there is no danger that a federal judge would be demoted or fired because of failure to do so. Judges are also conscious of the need to provide a competent defense to every accused person. I see no more conflict of interest in asking judges to make decisions about defense expenditures than in asking them to make decisions about any other aspect of a case.

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[1]It also makes sense for large vouchers to be reviewed at the circuit level. Even though a circuit judge cannot have a trial judge's familiarity with each case, circuit review provides oversight of the general operation of the CJA system, and serves to encourage consistency in the operation of the system circuit-wide.

However, the circuit relies *very* heavily on the views of the trial judge with respect to the amounts to be paid. In 2015, the circuit approved exactly 99.00% of the total amount certified and recommended by district judges. Furthermore, a significant fraction of the small difference was the result of audit errors by district court staff that were caught at the circuit level.

The circuit has a greater role in case budgeting, and we are in the process of filling a new position in our office for a case budgeting attorney to assist with budgeting throughout the circuit.

In addition, there is no reasonable alternative. Giving defense counsel unbridled discretion to spend, with a blank check on the Treasury, would not be an acceptable solution. Introducing a separate decision-maker into the mix, whether associated with the Federal Public Defender or otherwise, would necessarily result in decisions based on a limited familiarity with each case. Even if the decision-maker were given access to information about the case and to defense counsel equivalent to that of the trial judge, the time required to a gain sufficient understanding of each situation would multiply the staffing required to an unsupportable level.

The inevitable result of establishing such a system would be an attempt to pigeonhole cases, so that fixed rules could be applied to limit expenditures in each particular kind of case. Criminal cases, however, do not fit neatly into pigeonholes, and a rule-based system would be a step backwards, and much less satisfactory than the one currently in place.

The other aspects of this issue – appointment of counsel and management of CJA panels – are ones in which other parties, notably Federal Public Defenders, can and do usefully participate. However, judges know what happens at trials, and see attorneys at work. There is no reason why their experience and expertise ought not be engaged in order to help produce optimum results in these areas.

(4) The adequacy of compensation for legal services provided under the CJA, including maximum amounts of compensation and parity of resources in relation to the prosecution.

We regularly hear CJA lawyers express the view that the hourly rates paid are too low – especially the rates for non-capital cases. The work of these attorneys is critical, and I would certainly support any effort to raise the rates, even to increase them substantially. The total amount involved would be a tiny fraction of the discretionary portion of the federal budget, and a smaller one of the overall budget.

However, the CJA panels throughout the Fifth Circuit include some extremely able attorneys. These people appear regularly as defense counsel, and their willingness to do so at the hourly rates currently paid suggests that these rates are not impossibly low, and also that the procedures for obtaining exceptions to

applicable limits are working satisfactorily.[2]

It seems unlikely that there exist in the circuit large numbers of equally qualified and experienced criminal lawyers handling only retained cases who could be induced to accept CJA cases by even a substantial increase in rates.[3] Federal criminal defense is a specialized field, and attorneys practicing in other areas would be unlikely to shift into criminal defense, or to be particularly good at it, at least for a while.

In the long term, a sea change in the level of compensation for appointed criminal work might alter the career choices of people graduating from law school. However, it seems unlikely that rates could be raised enough to be competitive with the more lucrative forms of civil practice, and it may be that people who are motivated to enter a specialty principally by the prospect of financial rewards are perhaps not the best candidates to attract.

The Fifth Circuit is unique in having presumptive limits on attorney compensation in capital cases. The circuit also has procedures for exceeding those limits mirroring those that are by statute applicable to non-capital cases. It is important for the Committee to understand that these circuit "limits" are routinely exceeded, in some cases, by multiple times. They principally serve to trigger early circuit

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[2]An attorney working full time for a year at the current non-capital rate would generate a gross income of approximately $225,000. At the capital rate, the amount would be $325,000. These amounts would be subject to taxes, overheads and other expenses, but the net amount realized should be roughly competitive with the take-home pay of assistant federal public defenders and other lawyers in government employment at similar levels.

It seems likely that financial strain experienced by CJA panel members is more the result of their having insufficient work to be occupied full time than of the rates that are paid. However, it may be that handling a docket composed of a large number of both appointed and retained cases, whose schedules are largely not within counsel's control, makes it impossible regularly to bill eight hours a day, and that the rates ought to be set with this consideration in mind.

[3]Claude Kelly, the FPD for the Eastern District of Louisiana, told me that in New Orleans, appointment to the CJA panel is sought after by members of the criminal defense bar because of its financial benefits.

involvement in cases that have a substantial potential for becoming expensive.

Because there are circuit limits in capital cases, interim payment orders for attorneys fees must be approved at the circuit level, as they are in non-capital cases.[4] The circuit will not approve an interim payment order unless an approved budget is in place. This mechanism has been the most reliable means of introducing case budgeting to the circuit, both in capital and non-capital cases. The budgets thus established typically exceed the circuit limits, and counsel therefore have an assurance that these "limits" will not be applied after the fact to restrict their compensation.

A somewhat similar situation exists with the $7500 limit, imposed in capital cases by statute, on payments to all experts, investigators and other service providers combined. If applied as a *limit* in a federal capital prosecution in which the death penalty is actually sought, it is inadequate by more than an order of magnitude. However, service provider authorizations in excess of this amount can be approved by the circuit, with the result that what amounts to a budget is established for service providers.

In my opinion, the idea that defense resources should be equivalent to those of the prosecution is mistaken. The prosecution is supposed to convict the guilty. Defense counsel is there to make sure that the prosecution has not made a mistake, that its case is sufficient, that it has played by the rules, and if these conditions are satisfied, to help the defendant to obtain the best possible outcome under the circumstances. These are fundamentally different roles, and they require entirely different access to resources.

The prosecution has the burden of proof, and it is a high one. A trial is a test of the prosecution's case, not an *ab initio* factual inquiry to find out who committed a particular crime. It is the government's responsibility to identify and arrest the perpetrator, marshal the proof of guilt, and organize the case for presentation. The defense is a quality control check on this process, which unquestionably can and does go wrong from time to time. A disparity of resources between the two sides should neither surprise nor concern anyone. What is important is that the defense

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[4]Most cases in which approval for interim payments is requested are expected to exceed the applicable presumptive maximum.

have adequate resources for its own job, not that it be able to equal the prosecution.

There is one aspect of the situation, however, in which the defense might have cause for complaint. It is believed among the defense bar that prosecutors are often able to pay expert witnesses at hourly rates substantially greater than what would be approved under the CJA. This ability, the defense attorneys believe, allows the prosecution to choose from a wider field of potential experts, and sometimes results in the prosecution's being able to introduce expert testimony when, at the rates available to it, the defense is unable to locate anybody to provide rebuttal.

Whether this is a serious problem would require investigation beyond anecdotal reports, and whether there could be a solution other than accepting that very high rates might have to be paid occasionally would be an open question.

(5) The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA.

The new eVoucher computerized timekeeping and billing system is functioning as intended, relieving both attorneys and court staff of some of the routine calculations involved in preparing and assessing vouchers. However, the system maintains the previous somewhat detailed time entry system that is intended to provide sufficient information for the court to make a judgment about attorneys' vouchers without making the process unduly burdensome. The system includes various checks to prevent double billing and other fraudulent practices, but no billing arrangement based on self-reporting can prevent a lawyer from working one hour and claiming two.

There is also a weakness in the implicit assumption of all hourly billing systems that each hour worked is of equivalent value to the case or requires equivalent effort on the part of the attorney. Considering the substantial differences that can occur between particular criminal cases, even though their outward indicia of difficulty may be similar, it would probably not be a good idea to abandon hourly billing. Trying to adjust rates to match the experience or skill levels of individual attorneys would also be problematic. However, the system probably could do a better job of

paying somewhat reduced rates to junior lawyers still in the process of gaining experience.[5]

This office is heavily involved in evaluating vouchers, and our views about the fairness of the process might be regarded as biased. However, we do know that the provision to attorneys of notice, reasons and an opportunity to respond when a voucher is proposed to be cut is not a uniform practice throughout the circuit, and cuts made without warning or explanation are an unnecessary source of aggravation that is entirely preventable.[6]

There is no formal mechanism to appeal a reduction imposed by a judge, but I do not think it would be practical to establish one.[7] For one thing, any decision about the "right amount" to pay is a subjective one, and the quantity of information that would have to be considered before deciding to overturn a trial judge's determination would often be very considerable. The amounts of money usually involved in voucher reductions, if disputed in ordinary civil litigation, would make the litigation not cost-effective, and the same considerations would apply here.

Budgeting is an important factor that can contribute much to the fair operation of the CJA system. If an approved budget is in place, and kept up to date by any necessary requests for amendment, the chances that the vouchers eventually

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[5]The CJA hourly rates are nominally maximum rates, but as a practical matter these rates are applied across the board and paid to every appointed attorney regardless of experience. Exceptions do occur, usually when a second or third lawyer is appointed or allowed to assist lead counsel in the case. There have also been instances of attorneys' and experts' being paid less than full rates for travel time.

[6]The Guide says that such notice "should be provided" when cuts are made other than for mathematical or technical errors.

[7]Issues having to do with appointments of counsel and authorizations for experts, rather than amounts to be paid, are appealable, but the difficulty of proving sufficient prejudice to justify a new trial makes this mechanism not very effective except in extreme situations.

submitted will receive significant, unexpected cuts will be minimized. In addition, because a case budget affects the client's rights, there is at least a potential for appellate review of decisions about the amount of funding provided for defense purposes.[8]

(6) The quality of representation under the CJA.

As noted above, there are some excellent lawyers doing CJA work in the Fifth Circuit, and, in general, the quality of briefing and representation at oral argument ranges from good to superior. There are occasional exceptions, and the process of weeding out attorneys whose work is consistently unacceptable is a cumbersome one. This problem may be peculiar to the Court of Appeals, as it does not have a panel, and generally relies on district courts to make appointments for appeals.

(12) The availability of reliable data to evaluate the overall cost and effectiveness of the federal defender program.

The total cost of the CJA system is readily available, but putting together detailed statistical information is far more challenging. The outwardly simple task of providing a list showing the cost of each of the federal capital prosecutions that you tried has proved quite difficult and time-consuming, with necessary information sometimes stored in older databases and indexed in multiple ways. We often encounter these kinds of problems when trying to figure out what was

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[8]The amount that a lawyer is paid on a voucher submitted after the fact has no direct effect on the client, but the amount the lawyer is told he can bill certainly does. Consequently, it is important that budget requests and decisions about budgets be preserved in the record for possible appeal. For the same reasons, district judges ought to base budget decisions on their own analyses, not on what they think the circuit might approve.

Despite the Guide's provisions to the contrary, requests for approval of budgets and authorizations to employ service providers are not uniformly allowed to be submitted ex parte and under seal, and similar questions can arise about the whether the prosecution (or, in habeas cases, the state) has standing to object.

paid in the past in long-running cases, or in trying to obtain a complete history of CJA payments to particular attorneys. However, these problems may be significantly lessened once the eVoucher system has been in operation for a number of years.

Under 18 U.S.C. § 3006A(d)(4) and Chapter 7, Part A, Chapter 5 of the Guide to Judiciary Policy, amounts paid under the Criminal Justice Act become public information after a case is over. However, this information is certainly not readily accessible, *even to court employees administering the CJA system.*

Detailed information about cases in other circuits can be obtained only by special, high-level request, and even then, indicia that might associate particular expenditures with particular cases, courts or circuits is removed.[9] While it is understandable that there might be reasons not to make it too easy for the general public, or the press, to access this ostensibly public information, it would assist greatly in the administration of the CJA system if court employees and judges responsible for making decisions about budgets and payments had better access to this information at the national level.

Finally, much care must be taken in interpreting data because of differences between cases that seem similar, and because CJA payments do not always represent all defense efforts. Evaluating the effectiveness of the CJA system is even more difficult to accomplish through any kind of statistical approach. In particular, trying to use results in cases to evaluate different mechanisms for providing indigent defense has many pitfalls – prospective, randomized trials might work, but after-the-fact analyses may give misleading results because a great many more factors affect results than the amounts spent, and these other factors do not necessarily occur randomly.

Please let me know if you have questions or would like additional information.

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[9]I believe that this reluctance arises not only from concerns about the possibility of adverse publicity, but also out of a desire to avoid dissension within the judiciary about how the CJA system is administered in different courts and circuits.

Scope of CJA Review

Judicial Conference policy supports a periodic, comprehensive, and impartial review of the CJA program. (JCUS-MAR 93, p. 28) Consistent with the first such review completed in 1993, this review should include the following issues:

(1) The impact of judicial involvement in the selection and compensation of federal public defenders and the independence of federal defender organizations (federal public defenders and community defenders);

(2) Equal employment and diversity efforts in the federal defender organizations;

(3) Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers;

(4) The adequacy of compensation for legal services provided under the CJA, including maximum amounts of compensation and parity of resources in relation to the prosecution;

(5) The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA;

(6) The quality of representation under the CJA;

(7) The adequacy of support provided by the Defender Services Office to federal defender organizations and panel attorneys;

(8) The adequacy of representation of panel attorneys on matters stemming from CJA representations, such as contempt, sanctions, ineffective assistance of counsel, and malpractice claims;

(9) The availability of qualified counsel, including for large, multidefendant cases;

(10) The timeliness of appointment of counsel;

(11) The provision of services or funds to financially eligible arrested but unconvicted persons for noncustodial transportation and subsistence expenses, (including food and lodging) prior to, during, and after a judicial proceeding;

(12) The availability of reliable data to evaluate the overall cost and effectiveness of the federal defender program;

(13) An examination of the national structure and administration of the defender services program under the CJA; and

(14) The availability and effectiveness of training services provided to federal defenders and panel attorneys.