

December 23, 2015

Honorable Kathleen Cardone,
Chair Ad Hoc Committee to Review
the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Suite 4-200
Washington, DC 20544

Re: Testimony of David Oscar Markus, former CJA representative for the
Southern District of Florida

Dear Judge Cardone:

My name is David Markus. I am the former CJA Representative for the Southern District of Florida (2003-12). I am also a former Assistant Federal Defender (1999-02). My current practice focuses primarily on federal criminal defense and I have represented CJA clients throughout my career in private practice. I would like to thank all the Committee members for your work on this project.

I gave a great deal of thought as to what topics to address in my testimony. There are so many fundamental issues that deserve the committee's time and attention. For example, there could be lengthy discussion about the caps for expert witnesses and investigators, which are currently at levels that made sense about 30 years ago (\$800 without prior approval or \$2,400 with approval). Or we could discuss the hourly rates for these experts and investigators, which are absurdly low. (\$40/hour).

Another example of a topic that really needs to be addressed is the time spent getting into and out of prisons to see our clients. CJA lawyers sometimes wait an hour to get into or out of the prison, which costs everyone unnecessarily. Or we could discuss how our clients are sometimes housed so far away that it either discourages the lawyers from going to see clients (it can be an all day affair) or leads to judges cutting invoices because they can't understand why what should be a 30-minute meeting takes over 5 hours with travel time and wait time (this is no exaggeration).

And there are other topics like this that I am sure my colleagues are raising with the committee.

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I would like to focus on a topic that affects all CJA lawyers in every large, multi-defendant case – discovery. Generally in these large multi-defendant cases, there is an enormous amount of discovery involved, which presents a number of challenges for CJA lawyers:

- Production of discovery

Perhaps the most difficult problem facing CJA lawyers in cases with lots of documents is that there is simply too much discovery to review efficiently (both in terms of time and resources), and the government typically provides almost no guidance as to what is in the discovery or how it can be efficiently navigated. Historically, the defense complained because the government would not provide discovery materials that the defense believed it was entitled to. Now, the government has taken the opposite tack – it is providing every possible piece of paper, burying the proverbial needle in the haystack. Especially for CJA counsel, it is extremely difficult to effectively represent clients in the face of this deluge because CJA counsel typically does not employ the kind of staff necessary to review a huge volume of documents, and the CJA guidelines do not permit the appropriate level of staffing (or billing) to accomplish such a review. Although the government is producing an enormous amount of data, which makes it appear as though it is complying with its discovery obligations, that appearance couldn't be further from the truth.

The government very rarely provides an index to the discovery, does not point out which documents it intends to use in its case-in-chief or even generally list its “hot documents,” does not identify *Brady/Giglio* materials in the discovery, and still does not provide *Jencks* material even though the new U.S. Attorney's policy is to provide it.

So that leaves the CJA lawyer with the daunting task of trying to go through hundreds of thousands (oftentimes, millions) of documents, trying to identify what is really relevant. Many judges will not approve the expense to hire a qualified paralegal or investigator to help out. And so what happens is that either a defendant will plead guilty without ever having seen the real evidence against him or a lawyer will spend so many hours reviewing the mountains of discovery that the final CJA bill will well exceed the cap. Often both.

In stark contrast, in civil cases, where it's just money at stake and not liberty, both sides are entitled to very detailed and specific discovery. When the average citizen or even a civil lawyer hears what it is like to practice in federal criminal court, mouths drop in astonishment at the disparity.

- Format of discovery

Another major problem facing the CJA lawyer is that there is no standard format in which the government produces discovery. Each case is different, which oftentimes requires the CJA lawyer to recreate the wheel in terms of getting set up to review the evidence in the case. Many times, the discovery is not searchable. This lack of uniformity and searchability greatly increases

costs and greatly reduces efficiency and efficacy. Selecting and requiring a standard, searchable format for discovery production in CJA cases would be a prudent and highly beneficial measure.

- Reviewing discovery with incarcerated defendants

Because so many defendants are now held without bond, the CJA lawyer must review voluminous discovery with clients in custody. Most prisons, however, do not permit lawyers to bring in storage devices to connect to the prison computers. So CJA lawyers must load the discovery onto a laptop and obtain approval to bring the laptop into the prison. This takes time and resources, and judges should be sensitive to the limitations on such a review process.

- Having sufficient time to review the discovery

There has been a recent trend of judges to push these large multi-defendant cases to trial very quickly. But the above-listed issues make it nearly impossible to prepare quickly for trial in these cases, especially if the judge is not prepared to order a prosecutor to identify key documents or disclose an exhibit list and so on. The CJA lawyer is left with terabytes of data to review with an in-custody defendant without the aid of a paralegal. Although most of the statute of limitations for fraud cases are 10 years (or at the least 5 years), leaving the prosecutor and her agents years and years to investigate and prepare for an indictment, many judges are requiring CJA lawyers to be ready within months of the indictment, which is just unrealistic and forces innocent people to plead guilty. The pretrial preparation period in these cases should be extended to allow defendants a reasonable period of time to prepare for the fight of their lives.

To put these issues in perspective, it is important to remember that in these large multi-defendant fraud cases, our clients are generally looking at *decades* in prison. The playing field will never be level, but at least give us a shot!

Sincerely,

A handwritten signature in black ink, appearing to read 'DOM', with a long horizontal line extending to the right.

David Oscar Markus

DOM:cca