Comments by Juan E. Milanés, Esq.
Committee to Review the CJA Program - Miami, Florida

Honored members of the Committee: my name is Juan Milanés and I am a member of the CJA panel for my home district in the Eastern District of Virginia and also in the District of Puerto Rico, where I was once a federal prosecutor. I have been an active member of the CJA Panel in EDVA since 2008 and a member in Puerto Rico since 2011.

First of all, I want to express my gratitude to the Honorable Judge Cardone and the entire Committee for providing me with the opportunity to address you on this important evaluation of the CJA Program. I also want to express how humbled and grateful I am to be one of the lucky members of my profession to be selected by the judges in these two districts to serve the Court in this critical role. Like most of my brother and sister counsel who serve on CJA panels, I consider it a great honor and privilege to be a member of the panel.

Today, I come before this Committee to provide you with a tale of two panels. It is only appropriate then, that I quote from Dickens: " It was the best of times; it was the worst of times…, it was the spring of hope, it was the winter of despair…" To say the least, there is much that is wrong with our national program for the defense of indigent clients that requires the Courts' immediate attention and yet, there is much to extol and exclaim about what makes the federal CJA program the role model for all other systems.

As an attorney with the U.S. Department of Justice, I had the opportunity to train foreign prosecutors on the adversarial process that we use on a daily basis in the United States. These prosecutors were fascinated by our legal traditions and the protections afforded to our citizens. I believed, at the time, that the U.S. did a pretty good job of protecting its citizens from the overwhelming power of the government and I sold that "magic elixir" everywhere I went.

Then, in 2008, I left DOJ and became a criminal defense attorney. Oh my, how I have been educated about the realities of our system. As we say in Spanish, "los golpes enseñan," which roughly translates to, "the beatings will teach you." No, it turns out that criminal indigent defendants are not really on an even playing field. The field is "even" in appearance only because we - appointed Counsel - are present to guide them through the mine-field that awaits them. Once you have been on the panel a while you learn that you are not on an "even playing field" with the government; you're not even on the same playing field as "retained

counsel." This becomes so obvious to our clients that some openly show disrespect and disdain for their "appointed counsel" and look for the advice of jail-house lawyers or others that are not seen as "part of the system."

In truth, most of the top-tier federal criminal defense attorneys I have ever met serve in the Federal Public Defenders Office or on the CJA panel, but its difficult to convince a client of that fact when they see for themselves how we are treated by some judges. When members of the bench treat appointed counsel as equal to the prosecution and retained counsel, the message that sends the clients is worth a thousand times whatever we can say to them in private. When a judge, however, treats CJA counsel in a manner that shows disrespect for the job they do or places their clients at a comparative disadvantage to clients with "retained counsel," the message that is sent is also unmistakable. It's a sort of an Anti-Miranda Rights Warning: 1) if you wanted "real" legal representation and resources you should have hired a lawyer; 2) if you cannot afford one, that's your problem; 3) the Court will appoint you Counsel to serve as a sort of "hospice-service" for you; and 4) the sooner and cheaper we can dispose of your matter, the better for everyone. That is not the right message, buy if that is indeed the message that our clients receive from the system, then we are not living up to the standards envisioned by the framers of our Constitution. We are supposed to be a nation of laws that ensures equal treatment to all regardless of race, religion, economic or social status.

Over the next few hours, I look forward to answering your questions regarding my experiences on the CJA panels, however, I understand that I can provide specific examples in the following areas being reviewed by the Committee: (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; and (14) The availability and effectiveness of training services provided to federal defenders and panel attorneys.

As to the best of times, I can share with you my experiences that the training programs offered by the Courts and the Federal Defenders in both the Eastern District of Virginia and in Puerto Rico are some of the best CLE programs that I have ever attended. I feel that the FPD's training programs have kept me at the top of my game and that I am up-to-date on all major developments in the area of

federal criminal defense and sentencing. The competency level of the vast majority of CJA attorneys is among the top of the profession. Although, the U.S. District Courts have recently experimented with bringing on some new attorneys from big law firms and civil litigators who are clearly inexperienced and need help, I have found that panel attorneys are generally open to all newcomers and happily serve as mentors or resources for the uninitiated. The criminal defense bar in both my jurisdictions have been exceptionally friendly and inviting to all who are interested in serving indigent clients.

My experience in the Eastern District of Virginia has been filled with mostly positive reinforcement from the bench. Generally speaking, the "rocket docket" as it is better known, is fast in just about everything having to do with the criminal case docket. Not only are defendants promptly assigned to CJA Counsel, the cases move swiftly and the Speedy Trial Act is alive and well in Alexandria where most trials are set well within the 70-day STA limitation. Although most clients usually negotiate a plea deal, the few trials that do occur are usually measured in days or weeks. After a case is concluded, CJA Counsel are occasionally thanked in open court for their service to the Court and then gently reminded to submit their vouchers within 45 days of the case being terminated. Upon submitting a voucher, the same is usually processed within 3-4 weeks if it falls below the statutory maximum compensation and usually within 90 days if the matter must go to the 4th Circuit for approval. The only concern that I have in EDVA is that in the last few years, I have seen a decline in multi-defendant case activity on the Courts' criminal docket. It is difficult to maintain proficiency as a federal criminal litigator with only 3 or 4 appointments a year.

As to the worst of times, some of you may have heard that I recently completed a 17-month trial in the District of Puerto Rico that practically closed my private law office and has wreaked havoc with my overall schedule in both federal districts where I practice. Although I have great personal respect and admiration for the judge who presided over this case, the manner in which the case was handled demonstrates a fundamental lack of understanding about the financial hardship that the Court imposed on all eight CJA appointed counsel in the case. Due to the time and travel restrictions placed on me as a result of this singular trial, I was forced to reschedule all other matters for a running period of 17 months. This situation led to the termination of a legal representation agreement with my single largest corporate client due to my prolonged unavailability. This represented a tremendous loss to my office and it will likely take me a few years before I will be able to make up for it.

In this same case, I was deeply frustrated with the administrative hurdles placed on my ability to obtain necessary resources to represent my client. I was the third CJA attorney appointed to my client during the 5 years that he remained in pretrial detention (before beginning a trial that left him detained for another year and a half). At the beginning of the trial, all defense counsel requested interim voucher payments and trial transcripts to assist in our clients' defense. Initially, the requests for interim vouchers and transcripts were summarily denied. On the United States side, the prosecutors received bi-weekly salary payments throughout the 5 year pre-trial period, which included multiple suppression and dispositive motions and two full-blown multi-day pre-trial motions hearings. The prosecutors also continued to receive their salary during the trial phase of the case. They also had the resources to request daily transcripts for any specific days or examinations that were helpful to their cause. After the first government witness (out of an announced 47 witnesses) had testified for 10 days straight, the Court reconsidered its position on interim vouchers, but did not specify how they were to be prepared. The Court did not grant the Defendants' renewed request for trial transcripts. Our clients were fully aware of the disparate treatment that they were receiving, but there was not much we could do except repeatedly request reconsiderations of the Courts' decision. Eventually, several months later, we were able to convince the Court to grant us access to at least the same transcripts obtained by the U.S.

After most of the appointed trial counsel had worked many hours preparing their first interim voucher to cover the pretrial phase of the case and submitted said interim voucher, the Court issued a new Order wherein all pretrial time was specifically excluded from consideration. Our vouchers were unceremoniously returned to us and we were instructed that pre-trial time was to be incorporated into our Final Voucher to be paid only after the case had been closed. In this case, that translates into a delay of over 7 years from the start of the case before the Court will consider payment with no interest accumulation for work that was done in prior years.

I'm not aware of any other similar situation where government contractors are made to wait a period of years for payment without, at least, the right to bring suit under the Tucker Act. CJA attorneys have no ability to delay payments to the Internal Revenue Services without suffering the consequences of paying late fees and interest. Yet, the federal government can delay its payment for services to CJA attorneys with no consequence whatsoever; even when the damaging consequences to the defense attorneys and their law practices may be irreversible.

Later in the trial, after CJA counsel had submitted monthly interim vouchers over a period of six months (without receiving payment), the Court decided to issue another Order. This time, all of our vouchers were being returned with the exception of the first month (August, 2014) because the Court felt that it was being over-burdened in its review of the various defense attorneys' out-of-court time and expenses. I suspect this decision was based in part on a Court practice in the District of Puerto Rico known as "voucher-averaging." Accordingly, beginning with the September, 2014 voucher, all trial-phase monthly interim vouchers would be limited to in-court time only. All out-of-court time and expenses were again relegated to Counsel's Final voucher.

To add insult to injury, the Court also applied a1st Circuit policy of withholding 20% on interim vouchers. The result was that we were paid on 80% of the in-court time that was certified by the clerk and the remaining 20% would be reserved until the Final Voucher was submitted and reviewed. This scenario means that the Final Voucher (which represents both pre-trial and post-trial phase) is being purposefully inflated by the Court's decision not to pay out-of-court time or expenses during the trial phase and another 20% of the in-court time.

After eight months in trial without payment, we finally began to receive our in-court-time-only voucher payments. Some of these payments reflected 80% of only 2 or 3 days worth of in-court work. Then, we received another Court Order regarding vouchers. The Court Clerk was instructed to start separating the time kept for the morning and afternoon trial sessions so that the Court could also remove lunch time from Counsel's voucher payment, even though CJA Counsel generally remained at the Court during that time discussing matters related to the trial and trial strategy. The result is to inflate the Final Voucher with yet more out-of-court time that should have been paid during the trial phase of the case.

One final area of concern in obtaining resources for indigent defendants has to do with the repeated summary denial of CJA funding for expert services by the Court. One month prior to commencing what I knew was to be an extended trial, I requested funding to obtain an expert in Forensic Chemistry to review the work of the government's expert chemists and provide consultation services for cross-examination purposes. Not being a chemist, I sought approval from the Court to appoint an expert to advise me regarding the significance of discrepancies I had identified in the lab reports. I conducted a search for an expert; discussed the matter with him; obtained his CV; negotiated a reduced expert fee; and prepared an Ex Parte Motion for an expert to provide consultation services. The Court summarily denied the motion, stating that trial would begin in another month and

that it might delay the trial. I informed the proposed chemist, who agreed to work with me at no cost to the Court.

During the trial I again requested the assistance of the expert and this time, sought to appoint the chemist as a potential defense expert witness. I was informed that I first needed to explain to the Court how an expert in forensic chemistry could assist the jury pursuant to Rule 702 before it would authorize CJA funding. I explained that I could not tell the Court what the expert would say until he was first hired to analyze the material to inform me whether there was any significance to the discrepancies. The Court again denied my request for funding.

I provided the materials that I had obtained from the United States to the expert, who agreed to review over 2000 pages of documentation for free and provide me with an initial analysis. Unfortunately, the full analysis could not be performed without additional documentation, but he provided enough of a report for me to submit an offer of proof to the Court for preservation of the appeal issue. Only after the Court received the expert's partial report did it *sua sponte* reconsider my Ex Parte motion for CJA funding to appoint an expert. The Court admonished me that if I had only provided the expert's information (information I did not have when I made the first or second request), then it could have considered the appointment of the expert earlier. Sadly, if the expert chemist had not been willing to work for free to provide an initial analysis and report, I would not have been able to submit an offer of proof and the Court would not have reconsidered its position. CJA Counsel cannot be placed in a situation where they cannot obtain needed services until they first know whether the services will result in a positive result. In this case, the expert may well have found that there was no significance to the lab discrepancies and yet it would have still required him to work 50 hours to provide that conclusion. In my experience, most experts are unwilling to work for free. One solution may be a national federal contract that is administered by the FPDs offices with various vendors around the United States for services such as forensic chemists, investigators, fingerprint analysts, firearms experts, etc.

As I explained above, it is the best of times and it is the worst of times. It is my sincere hope that my experiences will assist this Committee to help bring about consistency in the system and certain changes to ensure superb criminal defense services to indigent clients who deserve the promise that is our American Criminal Justice System.