

Outline of Testimony of Mark Foster

CJA Panel Representative for Western North Carolina (WDNC) for 5 years

Member of Board of Directors of Federal Defenders of Western NC for 6 years

There is a good relationship between the Federal Defenders office (Community Defender) and the CJA panel attorneys in this district. The FD office provides good support and encouragement for panel attorneys.

1. Multi-defendant cases

In multi-defendant cases, the FD office will generally take 1 defendant, usually the one who is perceived to be the most culpable and/or who has the most charges against him. The FD Office farms out the remaining defendants to attorneys on the panel. They appear to do a good job in equally spreading the cases among the attorneys on the list, giving a case to the next attorney in line, except in some cases that are especially complex where more experienced counsel is needed.

There have recently been some very effective cost savings made available in a few multi-defendant cases where there is also massive discovery in various formats. This has resulted from the appointment of a Discovery Coordinating Attorney. This has been very helpful in creating a single searchable database of all discovery in a form that can be easily accessed by each panel attorney.

There have been discussions about fee vouchers being considered for reduction in some of these multi-defendant cases. The time spent by an attorney representing an apparent low-level participant in a conspiracy case is being compared with the time spent by an attorney representing the apparent kingpin in the case; it sometimes appears that some judges believe that in some cases the time spent by an attorney representing a low-level participant is not justified. The panel attorneys' position is that there is no way to determine their clients' true position in an alleged conspiracy without first reviewing all the same discovery that an alleged kingpin's lawyer must review.

2. E-discovery

In WDNC, discovery is usually provided by the government on disks. Unfortunately, it is not uncommon that each page is a separate PDF that must be opened individually, meaning that it greatly multiplies the amount of time needed to review discovery. If the government could be persuaded by the court to always scan their discovery into large PDF's, this would shorten the amount of time needed for CJA attorneys to open and review the discovery. And, despite claims by the government that the discovery disks they provide are searchable, this often does not seem to be the case. If the courts could persuade the government to always make their discovery searchable, this would also reduce the amount of time and expense that CJA attorneys must spend to review discovery.

In those cases where a Discovery Coordinating Attorney has been appointed, the ease with which discovery is accessed and reviewed makes the attorney's job much easier.

3. Extra-territorial discovery

In WDNC, I am not aware that this has been an issue. In those instances where significant events took place in another district and/or witnesses are located in another district, an attorney must either get advance approval to hire a private investigator in that district or else obtain advance approval from the court to travel outside WDNC to that district.

4. The use of experts

It is often said that CJA attorneys under-utilize services of investigators and other experts. However, the accuracy of this is difficult to assess in WDNC without reviewing each individual case to know what the issues are. Some CJA attorneys have reported that in cases where they have filed a motion for appointment of an investigator or other expert, there is sometimes reluctance by the court to approve such services based on the view that the services are not necessary. Unfortunately, this view may stem from attorneys' failure to provide an adequate detailed explanation establishing the need for the investigator/expert.

In multi-defendant cases, the joint use of an investigator/expert by defense attorneys has sometimes been possible and has been a good way to limit expenses while also providing the defense attorneys with the services they need.

5. Attorney fee vouchers

The most common complaint I get as CJA panel representative is regarding the payment of fee vouchers. Issues with delays in payment and in the cutting of fee vouchers have created the belief by some CJA attorneys that the courts do not respect or value their services.

There are two aspects to the fee voucher payments issue. The first is lengthy delays in getting paid after submitting vouchers. This problem has been substantially alleviated by the discovery of, and elimination of, a processing obstacle that existed in the Clerk's Office in this district. However, there are still other delays being reported by attorneys.

The second aspect is the reduction of fee vouchers. This issue presents itself anecdotally—there does not appear to be a widespread across-the-board problem of reduction of fee vouchers in this district. However, there does appear to be a general view from the bench that approval of fee vouchers should be constrained by budgetary concerns.

An example of this is judicial reluctance to approve fee vouchers that are over the statutory case maximum in cases that resulted in a guilty plea as opposed to a trial. To the extent that fee vouchers are being reduced to the statutory maximum based on this principle, it does not appear to be realistic or fair in complex multi-defendant cases with massive discovery and challenging legal issues. If occurring, it also does not take into account the difficult and time-consuming task that it can often be to get a client to not only understand the legal and factual issues in a case but to make the decision to plead guilty. Of course, the onus is on the attorney to provide a detailed

explanation of why it was necessary in a guilty plea case to exceed the statutory case maximum fee.

To the extent that budget constraints are a basis for fee voucher reductions, this seems to conflict with Section 230.33 of the Guidelines for Administering the CJA and Related Statutes (in the Guide to Judiciary Policy, Vol. 7, Defender Services), which states that “Vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.”