FEDERAL DEFENDER PROGRAM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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The Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

By email: cjastudy@ao.uscourts.gov

Dear Judge Cardone and Members of the CJA Review Committee:

I am lucky. I have worked for the Federal Defender Program for the Northern District of Illinois (FDP) since my graduation from law school in 1976. I started as what would now be called a Research and Writing Attorney, but back then I was mostly referred to as "the lawyer Terry hired to write briefs." Although my "office" was a cubby hole with no door and only a waist-high partition separating me from the copy machine, I was thrilled to be there.

I still am.

It didn't occur to me at the time, but the Federal Defender Program in Chicago was just 11 years old when I was hired. We had six lawyers, one investigator, one administrator and one secretary/receptionist. Now we employ 41 persons, including four in our Branch office in Rockford, Illinois, which opened in 2003. During that time, I have served as the office's Chief Appellate Attorney, Student Intern Supervisor, Training Director, Deputy Director, and since 2009, Executive Director. I have had the privilege of serving on numerous national defender committees, including the sentencing guidelines committee, the legislative subcommittee, the work measurement committee, the diversity committee, and the community defender organization working group. I began teaching defenders nationally when we still fit into one room in the Dolly Madison House and have continued to speak to defenders across the country even as we have grown to require ballrooms to fit us all in.

As a member of the defense community, I have been an active member of the ABA's Criminal Justice Section, a long-time board member of the Chicago Chapter of the Federal Bar Association, past-president and long-time board member of the National Association of Federal Defenders and the Illinois Association of Criminal Defense Lawyers, and a current member of the Federal Judicial Conference's Advisory Committee on Criminal Rules.

Looking back, I see that I have not only had the extraordinary opportunity to watch history unfold, but amazingly, I have actually had the opportunity to be a part of history.

This Committee's invitation to testify before it has given me a chance to try to synthesize what I have learned over the past 40 years. I am honored to be asked and I thank the Committee both for giving me this opportunity and for its willingness to consider my thoughts and the thoughts of so many others.

As this Committee well (!) knows, the Minneapolis hearing will be its last. After listening to and reading much of the insightful and eloquent testimony already presented to this Committee, I have struggled to figure out what exactly I can add. On the one hand, I do not want to be repetitive, and on the other, I want to be clear about what I believe are the most important issues facing defenders today.[1]

To resolve this dilemma, I have decided to focus on two main points: (1) The advantages of the community defender organization (CDO) model; and (2) The serious problems created by the lack of parity between defender Staff and CJA Panel Attorneys.

I agree with many of the other points that have already been presented to this Committee, including the pressing need for the Defender Services Office to be allowed to make decisions independently and that – at a minimum – it be restored to a directorate if it remains within the AO; and that the Defender Services Committee be given full control of overseeing the defender budget, staffing, and IT programs.

Advantages of the Community Defender Model

1. *Independence*

Our office was the first federal defender office in the country (although some say San Diego was tied with us). Through the vision and determination of our then-Chief Judge, William J. Campbell, funding by the Ford Foundation under the direction of General Charles Decker and The Defender Project, and the support of such legal luminaries as Chief Justice Earl Warren, Supreme Court Justice Tom Clark, and Seventh Circuit Chief Judge William Hastings, our office officially came into being on August 26, 1965. It was created as a private, not-for-profit Illinois corporation, a model that was later highly recommended in Professor Dallin Oaks' comprehensive report written at the joint request of the Department of Justice and the Judicial Conference to review the Criminal Justice Act. When the report, completed in late 1967, was submitted to Congress in 1969, Senator Roman Hruska described it as "an exhaustive review of the [CJA's] . . . operation" and "a treasury of information and recommendations on the operation of the Criminal Justice Act." Dallin H. Oaks, *The Criminal Justice Act in the Federal*

[1] Keeping in mind that this Committee's job is to review how the Criminal Justice Act is working, I will refrain from the temptation to discuss the many obstacles unrelated to the CJA that make it difficult for us to fairly defend our clients.

District Courts, Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 90th Cong., 2d Sess. (1969) at III-IV (Oaks Report).

The by-laws of our office make clear that our office was created not just to ensure that all persons unable to afford counsel in federal criminal cases be provided with qualified counsel, but, as the Oaks Report also recommended, it was created to work with and train a panel of private attorneys willing to accept a substantial number of appointed cases, and, to work with and train law students, something that had never been done before. In my view, it is the combination of those three goals, together with the premium placed on independence, that make the CDO model worthy of this Committee's consideration.

When the FDP's first director, Ray Berg, left to become a state court judge shortly after the office opened, Judge Campbell asked his Law Clerk, Terence F. MacCarthy, to head up the office. Terry agreed, on the now well-known condition that Judge Campbell abide by all the American Bar Association guidelines. Following the Chief Judge's agreement to that condition, Terry announced that all of the judges on the FDP Board (which consisted of the ten judges sitting in the Northern District and Chief Judge Campbell, the Board's chair), would have to resign. Despite his surprise at the demand, the Chief Judge nonetheless followed through on his promise and no judge has served on our Board since.

That moment was a turning point in the development of our office. It set us on a course and created a culture of independence that has come to be the accepted and the preferred way for a defender office to function effectively.

What distinguishes CDOs from federal public defender offices is not the dedication and talent of their staff or the degree of support they receive from their judges. It is indisputable that the defender community is composed of extraordinarily dedicated and talented people in both federal public defender (FPDO) and community defender offices. One has only to listen to or read the testimony given to this Committee or speak with almost any member of our community for even a short period of time to understand this fact. And there can be no question that the great majority of judges are strongly supportive of the defender offices in their districts.

Rather, what distinguishes CDOs from FPDOs is their independence from the Court. In our District, for example, beginning with the Court's initial decision in 1970 to create a community defender office rather than a federal public defender office,[2] followed by its decision to remove all judges from the FDP Board, and then by its decision to place the responsibility for the final

[2] Prior to the 1970 amendments, the Criminal Justice Act of 1964 only provided for the appointment of individual counsel on a case by case basis. The Act originally provided no compensation for counsel, relying solely on funding by bar associations or legal aid agencies. *See* John S. Hastings, The Criminal Justice Act of 1964, 57 J. Crim. L., Crimin. & Police Sci. 426, 426 (1966). For that reason, the Ford Foundation funded The Defender Project, run by General Decker, which in turn funded the first four federal defender offices, Chicago being the first.

selection and assignment of the CJA Panel Attorneys solely in the hands of the FDP, the Court in this District has not only talked the talk of independence, but has also walked the walk.

In some ways, nothing could make the point more clearly than the recent discussion I had with our Chief Judge, Judge Ruben Castillo, after he called to tell me he would be unavailable to testify before this Committee and to ask me if I would testify for the District on his behalf. During that discussion, I said I would be happy to do so, but wanted to be sure he understood that I would be criticizing the way the CJA affects how the Panel is able to represent clients in this and every other district in the country. He was unfazed. And so, my testimony today is not only on behalf of our office, but also on behalf of the Chief Judge of the Northern District of Illinois.

a. Independent Board of Directors

Although over the years, judicial selection of federal public defenders has resulted in an extraordinary group of defenders, there remains both the appearance – and the real possibility – that how a defender or his or her attorneys defend their clients or manage the defender office may impact the selection of the defender in ways that may or may not be obvious.[3] A Board of Directors composed of members of the community without judges avoids even the appearance of a possible conflict of interest.

A board of directors also provides an opportunity for the community to contribute to the defense of those unable to afford private counsel. As one example, our By-Laws state in part: "The Board of Directors . . . shall be composed of persons interested in furthering the due administration of criminal justice in federal court. The Board shall strive to create a board diverse in skills, experience and backgrounds." There are obviously many ways to meet this requirement. Our Board of Directors consists of partners at big and small law firms, law professors, state and federal criminal defense lawyers, a real estate broker, experts in human resources, experts in corporation law, and the heads of a prominent public interest organization, a prison watchdog group, and a diversity firm.

b. Independent Decision-Making Authority

Just as I am opposed to judges being included on a defender office's board, I am also opposed to judges being given the authority to decide how many lawyers (or employees in general) a defender office needs to effectively represent its clients. Unlike federal public defenders, community defenders do not need Circuit approval to hire additional lawyers. The decision as

[3] I note that we live in a time when the issue of implicit bias is being recognized and discussed at legal seminars throughout the country, including at the Seventh Circuit Judicial Conference's opening plenary earlier this week. Implicit bias may take many forms, and those forms are, by definition, not apparent. We cannot know whether or how any decision on who to appoint to a defender position may be affected by implicit bias considerations. Removing the judiciary from these decisions eliminates that possibility altogether.

to how to provide the best possible representation for their clients is left, as it should be, to the person the Board selects to run the office.[4]

c. Independence in negotiating contracts and leases

CDOs also have a greater ability to negotiate contracts such as office leases. Because CDOs are private entities, we are able to work with real estate brokers who specialize in finding office space in the local community. When we moved out of the federal courthouse in Chicago, I was surprised to learn that private rental rates were lower than the government rates we had been paying and that in addition, working with a private real estate broker provided us with more options and more flexibility in lease negotiations.

d. Independence in the eyes of our clients

Finally, but importantly, it is comforting to our clients to hear that we are not federal employees and is one small step in building a trusting relationship with our clients. Just saying we are not federal employees, of course, does not immediately alleviate the concern that we are not "real" lawyers or that we work for the government, only our work on their behalf can do that, but being able to say that upfront does help.

2. *Partnership with the community*

CDOs are not called "community" defenders by accident; they are called community defenders because they were intended to partner with and be a part of the community. One way to do that -- including various segments of the community on the CDO Board -- has already been discussed. Another way, recognized at the time the Criminal Justice Act was passed, is to divide the responsibility of representing those unable to afford counsel with the private bar. Although it is certainly true that federal public defenders have similar opportunities to do this, judicial involvement may limit or even eliminate those opportunities.

As was pointed out many years ago in the Oaks Report, the combination of institutional defense and private defense has many advantages. It keeps the institution from getting stale, a risk every institution faces. It provides opportunities to include a more diverse group of attorneys in terms of age, race, ethnicity, gender, and styles of advocacy. As the Staff and Panel Attorneys work together over time, they are able to learn from each other and support each other. Working with private attorneys affords opportunities to more effectively implement other initiatives as well, ranging from joint meetings with the court over issues such as jury selection procedures, the handling of mass arrests, and the handling of cases involving issues common to both staff and Panel such as selective prosecution.

[4] Under the current system, however, the decision whether to fund that new position remains with the Defender Services Office and the Administrative Office.

Training is another important aspect of working together. I agree with Elizabeth Ford, the federal defender in Knoxville, TN, who suggested in her testimony that every federal defender office should be mandated, and funded, to provide training for its Panel Attorneys. This training can and should utilize both Staff and Panel Attorneys as speakers, providing the perfect opportunity for them to increase their understanding of each other, build support for each other, and improve their skills as defense lawyers.

Training is also an effective way to teach lawyers how and when to use experts. The more often lawyers are exposed to the variety of experts that exist and to the possible ways those experts may be used, the more likely it is that the lawyers will use them. We have seen that using experts from the local community and from defender offices and national committees as presenters at training events increases the use of experts by the Panel. Keeping expert lists for Staff and Panel Attorneys is another way to encourage the use of experts.

Lack of Parity Between Federal Defender Staff and CJA Panel Attorneys

I know this point has been made by many who have already testified before this Committee. Nonetheless, I feel the need to make it again because, in my opinion, the requirement that judges determine how much to pay the CJA Panel Attorneys they appoint, along with the requirement that they determine whether to appoint experts in their cases and how much to pay the experts, create the most glaring disparities between how federal defender staff attorneys and CJA Panel Attorneys are able to defend their clients.

1. *Selection of Panel Attorneys Should Be Independent of the Judiciary*

These disparities are exacerbated in districts where judges have a say and perhaps even a veto in determining who is allowed to serve on the CJA Panel or in determining which particular CJA Panel Attorney will be appointed on a particular day or to a particular case. Although defenders in many if not most districts are supportive of having a judge or judges on their panel attorney selection committees, and judges in those districts work hard to ensure only the most qualified attorneys are appointed to the Panel, like the problems that may arise when judges appoint defenders, here too there is both the appearance of conflict and the possibility of actual conflict. Even where judges do not serve on Panel committees, in some districts they have veto power over the final selection of Panel Attorneys. Judges should not be put in the position of having to select or veto a Panel applicant. Eliminating the courts' role in the selection of CJA Panel Attorneys can be accomplished by amending the Criminal Justice Act, or more easily, but less effectively, by including the prohibition in the Model Criminal Justice Act Plan.

2. *Payment of Panel Attorneys Should Be Independent of the Judiciary*

When judges are required to determine how much to pay the lawyers who appear before them, it creates both the appearance of conflict and the possibility of actual conflict. Can we be certain that the lawyers do not worry about being too aggressive or making motions the judge may dislike? This concern should not exist, even in a small minority of cases. Instead, I suggest

that each district create and pay an independent panel of persons familiar with and expert in the practice of federal criminal defense who would be responsible for reviewing attorney vouchers and that an appeal process be created in each district to review any voucher cuts.

In addition, the payment schedule for Panel Attorneys should adequately cover their expenses, overhead, and work done in the defense of their clients. At a minimum, the Panel Attorney rate should be raised to the maximum amount anticipated for 2016. Panel work is not supposed to be and should not be pro bono work.

3. *Appointment and Payment of Experts Should Be Independent of the Judiciary*

Every time a Panel Attorney requests an expert, that attorney is telling the court there is a potential issue. The more information the court requests from the attorney to determine whether the expert is "necessary" as the CJA requires, the more the attorney must disclose of his or her client's defense to the court. Every time the Panel Attorney decides not to use that expert, the Panel Attorney is telling the court that the issue did not pan out for a reason or reasons unknown. Even for judges, who are trained to ignore what is deemed irrelevant, there is the appearance of injustice to consider. On its own, does this process appear fair to our clients? To the public?

What about mental state experts? Although we can raise mental state defenses without using experts, is it possible that a question might arise in a judge's mind – unconsciously or not – when a Panel Attorney requests authorization to hire a mental state expert, later decides not to use that expert, but still raises a mental state defense at trial or at sentencing? We of course, do not know. And that not knowing - just the appearance of unfairness - is significant.

I believe that appearance of unfairness is made more significant when combined with the fact that these clients have no ability to choose their lawyers and, solely because of a random decision as to who happened to be assigned to their case, find themselves in the position of not only needing judicial authorization to hire an expert, but also needing to disclose part of their defense to the court, and then having to rely on the court to determine how much they can spend on the expert. Yet, these are the same people who are left to speculate as to whether the judge will hold it against them if they do not use the expert's report. How can a Panel Attorney convince a client that the judge will not consider that fact? No one in the U.S. Attorney's Office needs to disclose any similar information to the court. The defense bar should not have to either.

Nor are the Staff Attorneys who work in federal defender offices required to disclose that information to the court. There, the authorization request would go to the head of the office, not the court, and if it was later decided not to use the report, neither the judge nor the prosecutor would learn about it.[5] The head of the office would have knowledge of the type of

[5] I add in the prosecutor here because some judges do not keep these motions under seal or off the electronic filing system indefinitely or even at all.

case in which the expert was being requested and the need for the particular type of expert being requested. The head of the office would also be working with a budget intended to reasonably estimate how much money should be allocated to experts during the particular fiscal year.

And what of the difficulty in some districts of obtaining authorization to hire experts in what many would consider "mine run" cases, to use Justice Breyer's phrase in *Rita v. United States*, 551 U.S. 338, 351 (2007)? Horrific physical and sexual abuse exist in many of our client's lives. The complexity of the case rarely correlates with the "horrificness" of the client's background; indeed, the correlation is more likely to be the other way round. In these cases, we need to know what the psychological impact of the abuse has been and, importantly, whether there are treatments or programs that can help our clients recover from the debilitating effects of the abuse. Two and occasionally even three experts may be needed in some of these cases. It is unlikely that every client represented by a Panel Attorney will receive authorization to hire the same number and quality of experts as one who is represented by a Staff Attorney. This is not a reflection on individual judges; it is a systemic problem. It is built into the system created by the current language of the CJA and in my opinion can only, be remedied by amending the CJA.

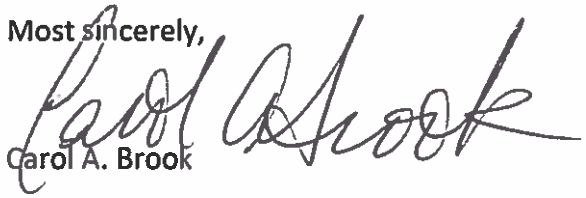
4. *Expert caps must be raised*

Because of the increasing complexity of the cases we see and the importance of presenting a complete picture of our clients to the courts, I anticipate that in the future we will need to hire ever more sophisticated experts (neuropsychologists, computer analysts, etc.) if we are to provide our clients with high quality representation. In addition, because it is not good practice to hire the same experts over and over, expert costs in our cases will inevitably continue to rise, leading to the need for higher expert caps and for increases in the amount Panel Attorneys may spend without first obtaining prior approval.

Conclusion

In the end, we need Criminal Justice Act reform to ensure the current high quality of representation and dedication provided by those who work under the Act can continue. We need change to ensure that those appointed under the Act are given the resources and the independence they need to do their best work for those who need it most. In recent years, we seem to have taken some steps backward instead of forward in that regard. This Committee's efforts to understand what works and what doesn't, and the amount of time and energy this Committee has devoted to getting it right, is a great step forward and gives me hope that those who follow me will be able to say, as I have, "they are lucky."

Most sincerely,



Carol A. Brook