

*Office of the*  
**FEDERAL PUBLIC DEFENDER**  
**FOR THE DISTRICT OF NEBRASKA**

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David R. Stickman  
Federal Public Defender

Suite 300N  
222 South 15th Street  
Omaha NE 68102

(402) 221-7896  
Fax: (402) 221-7884

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April 29, 2016

Judge Kathleen Cardone  
Judicial Conference of the United States  
Committee to Review the Criminal Justice Act Program  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20544

**RE: Comments of David R. Stickman**

Dear Judge Cardone:

Thank you for requesting my input into your review of the Criminal Justice Act Program. This letter will contain my comments for your Committee.

**Background**

By way of background, I am the Federal Public Defender for the District of Nebraska. I am the first individual to hold this position and I had the privilege of opening the office from scratch in December, 1993. I have been reappointed to my position every four years by the U.S. Court of Appeals for the Eighth Circuit. Prior to being the Federal Defender, I was a CJA Panel attorney for six years.

I have held numerous leadership positions within the Defender program and I have participated in many advisory groups and committees. For example, I was recently the Chair of the Defender Automation Working Group (DAWG) which deals with technology issues within the Federal Public and Community Defender Program. I have previously served on DSAG (the Defender Services Advisory Group) and PMWG (the Performance Measurement Working Group). I have been involved with the electronic voucher development and implementation for the CJA Program from its inception and I am currently on the Resolution Board for eVoucher, the national CJA payment processing program.

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I am a past President of the National Association of Federal Public Defenders and the Nebraska Criminal Defense Attorneys Association. I am also an Adjunct Professor of Law at the Creighton University Law School.

My office currently has ten trial attorneys, a research and writing attorney, three paralegals and three investigators. We have a total of twenty-four employees. Our open caseload is currently about 450 cases. We have three, somewhat remote, Indian reservations in Nebraska which result in many major crimes prosecutions every year. Importantly, my office manages the Nebraska CJA Panel from appointment through voucher review and payment. We are fully implemented on the eVoucher electronic voucher processing system.

### **CJA Panel Performance in Nebraska**

The CJA Panel in Nebraska consists of three tiers, the A Panel, the B Panel and the Training Panel. We have approximately 110 attorneys on the panel. The A attorneys are by definition able to defend any federal criminal case. All other attorneys on the panel are on the B Panel. Attorneys on the Training Panel must handle one case from beginning to end under the mentorship of an Assistant Federal Public Defender or an A Panel lawyer before being placed on the B Panel. Our District has a CJA Panel Selection Committee which meets annually to review the operation of the panel within the District of Nebraska and to consider any additions or removal from the panel. The CJA Panel Selection Committee consists of one district judge, one magistrate judge, the CJA Panel Representative and the Federal Public Defender. We have a Criminal Justice Act Plan which is similar to the model plan in the Guide to Judicial Policy. The CJA Panel is assessed about every four years by the Defender Services Office. From all reports, the process works well and the panel attorneys provide high quality representation to their clients.

The Federal Public Defender's Office sponsors a day and a half seminar on current criminal defense topics every year in Nebraska City, Nebraska. No tuition is charged for this event and the attorneys receive an entire year's required CLE credit for attending. We have 85 to 90 percent of the panel attorneys attend every year. The seminar is a great event for educating and motivating the panel attorneys. The evaluations for the programs have always been very positive.

We would like to see the panel attorneys receive more cases to maintain their proficiency in federal criminal defense. However, the recent reduction in case filings by the U.S. Attorney's Office has made this goal harder to attain. The hourly rates for CJA work, while lower than the median rate charged to non-indigent clients in Nebraska, is sufficient to attract qualified CJA attorneys.

### **Remote Detention Issues**

One of the focus areas for the Minneapolis hearings is the issue of remote detention. In Nebraska we have two court locations: Omaha and Lincoln. Lincoln has no detention facility and our pre-trial clients are housed in Wilber, Wahoo and Lexington, Nebraska. Wilber and Wahoo are a forty-five minute one-way drive from Lincoln. Lexington is about a three-hour one-way drive from Lincoln. Our Omaha clients are housed in Omaha, Wahoo and Plattsmouth, Nebraska and Council Bluffs, Iowa. Wahoo is at least a one-hour drive from downtown Omaha and Lexington is about a four-hour one-way trip.

As one can imagine, visiting detained clients involves a significant time imposition on an attorney's time. If an interpreter or investigator is also needed to accompany the attorney on a client visit, the time commitment is at least doubled. We have obtained leased vehicles from the General Services Administration for our staff use which results in some cost savings. When these vehicles are not available due to use by other staff members, the office incurs mileage reimbursement charges. Rarely do we ever have overnight costs to visit clients.

Our CJA Panel attorneys incur similar travel costs to visit their detained clients. All of these charges are reimbursable at GSA rates on a CJA 21 voucher. We have had judges criticize "windshield time." As a result, the Omaha panel attorneys do not routinely appear in Lincoln and vice versa.

I have met with our local U.S. Marshal to address ways to reduce costs in remote detention cases. We have agreed on several solutions. One is that the Marshal will agree to bring one of our clients from a remote location if we make a request in advance. This has worked well when a request can be made at least several days before the meeting. A drawback to this option is that it requires a client to remain in a small and uncomfortable Marshal's holding cell all day.

A second solution has been to keep our clients closer to Omaha or Lincoln pre-trial or pre-plea, and once a guilty plea has been entered, the Marshal will move certain clients to Lexington. We do this in immigration cases where there is less need to meet with the client after the plea and before sentencing.

We have also worked with the Marshal and other court units to try to have the clients in the court house well before and somewhat after a hearing. This allows additional time for the lawyers to meet with their clients.

Meeting with the various stakeholders can thus save money and improve services provided under the CJA.

### **Tribal Issues**

In Nebraska, we receive federal criminal cases originating on the Omaha, Winnebago and Santee Indian Reservations. The Omaha and Winnebago Reservations are located adjacent to one another. Each is about an hour and a half drive from Omaha. The Santee Indian Reservation is a three and a quarter hours one-way drive from Omaha. We have found that it is essential to personally investigate and locate witnesses in these cases. Thus, significant attorney and investigator time is spent just traveling to these locations.

While our office is appointed to represent the defendants in the vast majority of cases arising on the reservations, CJA panel attorneys need to be assigned where our office has a conflict of interest and in multi-defendant cases. A CJA Attorney is at a disadvantage in such cases for several reasons. First, the FPD investigators are familiar with the area. On these reservations, streets and roads are not well identified. Many roads are dirt or otherwise poorly maintained. These are very rural areas with limited cell phone and wireless service making communications difficult. Many times family members and friends do not reside where they receive mail and they move frequently. It is not unusual for an investigator to spend an entire day trying to locate an individual on the reservation.

Another difficulty with these cases is that many involve violent crime. The persons to be interviewed and investigated can be dangerous. We are fortunate to not have had any serious issues with violence to our staff. But, our staff regularly encounters individuals who are under the influence of alcohol or drugs and who have violent criminal histories. CJA Panel attorneys may be reluctant to travel to the Indian reservations for these reasons.

### **Innovative Defense Structures**

The state of Nebraska is home to one of the first public defender organizations -- the Douglas County, Nebraska Public Defender's Office. Nebraska has a hybrid system of criminal defense representation. Generally, the larger counties have an elected full-time public defender who runs for re-election every four years. The budget is administered on the County level. Smaller counties have a part-time public defender. Some even contract with private attorneys to handle the indigent defense work. This contract system is often criticized as poorly performing and not resulting in high quality legal representation.

Nebraska also has a Commission on Public Advocacy. It is a statewide organization established initially to handle death penalty appeals and habeas matters. The Commission

has expanded to handling the defense of major crimes throughout the state, particularly in areas in need of defense expertise or to defray the costs of defending complicated cases. Nebraska created a rather unique way of funding the Commission with the cost of defense shared by the county where the prosecution is brought and the state both contributing to the defense costs.

### **Voucher Processing and Reductions**

The Federal Public Defender's Office in Nebraska reviews and processes nearly all the CJA vouchers for work performed in the U.S. District Court for the District of Nebraska. In Fiscal Year 2011, my office processed 486 vouchers totaling \$1,835,190.33; in FY 2012 we processed 503 vouchers totaling \$1,639,433.15; in FY 2013 we processed 512 vouchers totaling \$1,611,780.76; in FY 2014 we processed 527 vouchers totaling \$1,436,665.23; and in FY 2015 we processed 453 vouchers totaling \$1,554,478.62. As of April 1, 2015, all vouchers are processed electronically using the eVoucher system. The Federal Defender Office trained the panel attorneys, judges and providers on the eVoucher system.

The practice of some judges reducing a CJA Panel attorney's voucher has been a cause of concern nationally for years. Voucher cutting in the district court in Nebraska occurs, but it is a rare event, and when a voucher is cut, the amounts are relatively small compared to the total voucher. For example, between January 1, 2014 and August 17, 2015 only two vouchers were reduced, one for \$120.00 (presumably for a math error) and one for \$886.50.

Vouchers which exceed the statutory limit for a district judge to approve, must be approved by the Chief Judge of the U.S. Court of Appeals for the Eighth Circuit. These "excess vouchers" are frequently reduced by the Chief Judge. Between January 1, 2014 and August 17, 2015, 53 vouchers originating in Nebraska were presented to the Chief Judge for his approval of an amount exceeding the statutory limit. Fifteen of these vouchers were reduced. These vouchers sought a total of \$711,728.19 in fees and expenses. Each voucher was accompanied by a district judge's certification that the voucher was fair and necessary to provide just compensation to the attorney. Nevertheless, the vouchers were reduced by a total of \$17,977.00 or 2.5%. The largest individual reduction during this period was \$5000 representing 8.88% of the amount requested. The largest percentage reduction amount was 55.24%.

In every case in which a voucher was reduced by the Chief Judge, there was a reference to "See In re Carlyle, 644 F.3d 694, 699-700 (8<sup>th</sup> Cir. 2011)". In re Carlyle is an opinion by Chief Judge Riley in an appeal of a reduction by a district judge of a CJA attorney's voucher for clemency services successfully rendered in a death penalty case.

In the In re Carlyle opinion, Chief Judge Riley quotes with approval a statement from United States v. Smith, 633 F.2d 739 (8<sup>th</sup> Cir. 1980), which observed:

Congress did not intend to provide full compensation and . . . it contemplated appointments of private counsel to supplement the efforts of professional defender organizations. Thus, although the increased maximum rates envisioned greater participation by the private bar, the [CJA] also presupposes recognition by private attorneys of their professional obligation to render services for those unable to pay. The [CJA] is in no way an attorney's full-employment act. Congress merely intended that those attorneys who devote themselves to the time-honored tradition of service should not go entirely without compensation.

The history of the American bar is replete with instances of pro bono service by its members. That service has not been undertaken with regard to monetary enrichment, but has been motivated by the higher objective of obtaining equal justice for all, a goal which enriches and strengthens the commonweal. If our holding today discourages those who look upon the [CJA] as a profit center, so be it. We have not yet reached the day when other members of the bar will not step forward to take their place, dedicated to the principles of equal justice and competent representation for the less fortunate in our society.

In re Carlyle, 644 F.3d at 699-700, quoting Smith, 633 F.2d at 741.

I believe the present day reality is that the federal criminal justice system has evolved past the day when attorneys were expected to provide pro bono services to the indigent. The federal system now employs vast resources in the prosecution of individuals who rarely have the means necessary to afford qualified counsel. Cases are prosecuted by full-time career professional Assistant U.S. Attorneys assisted by a like team of career professional paralegals, litigation support assistants, F.B.I. Special Agents, D.E.A. Special Agents, and other law enforcement specialists. Expecting a CJA panel attorney to defend an individual in these circumstances at an already below-market hourly rate is unrealistic, unfair and intolerable.

### **Independence of the Defense Function**

When I was first appointed as the Federal Public Defender, I was impressed with the resources available to me. I had a sufficient budget to hire the best criminal defense attorneys and support personnel and we could buy state-of-the-art equipment, furniture

and supplies. I was convinced that the Federal Defender Program, including CJA counsel, was well served being within the Judiciary. Certainly, the Judiciary knew the constitutional importance of the defense function and would protect it from political attack from legislators looking to balance the budget by cutting defense budgets. Later, I watched in disbelief as the Judiciary and the Administrative Office looked to sacrifice the program for still unknown reasons.

My first personal observation of the political vulnerability of the program came in 1995 when Congress eliminated funding for the Death Penalty Resource Centers (DPRC). These DPRC's were effective in the representation of their clients. They were also a visible target. It was easy to argue against their existence and funding by pointing to the crimes committed by the DPRC clients. The Federal Defender program and CJA counsel stepped up to fill the void left by the absence of the DPRC. It was not until 2013 that another swipe at the program was made.

In 2014, the Executive Committee of the Judicial Conference and the Administrative Office of the U.S. Courts imposed a 23% cut in the FY 2014 budgets of Federal Public Defenders. Federal Defender Offices nationally were required to furlough and terminate employees in order to operate. While other federal agencies and the courts were affected by the sequester, only the Federal Defender employees suffered unpaid leave. Reductions in CJA Panel attorney compensation were implemented. However, deferral of CJA payments, which had been done routinely in the past, was not allowed by the Executive Committee.

These fiscal actions, as well as the restructuring of the Defender Services Office with the Administrative Office, have led me to the conclusion that the CJA Program should have greater independence from the Judiciary. I personally believe a structure similar to the Federal Judicial Center or the United States Sentencing Commission would be better than the present organization. While the CJA Program can benefit from some of the administrative tasks performed by the Administrative Office, the Defenders have proven to be better advocates for their resources than the Administrative Office.

### **Perception of the Program**

While individuals familiar with the work of CJA Panel attorneys and Federal Public Defenders routinely rate the work performed by these criminal defense specialists as very high to exceptional, their reputation and perception by others is less so. One does not have to look hard to find a decades-old example of a criminal defense attorney sleeping during a trial or having too many cases to properly prepare a defense. Society has referred to public defenders as "public pretenders" and not "real attorneys." The fact is that Federal Public Defenders are highly trained and effective specialists committed to representing their indigent accused clients, despite sometimes insurmountable odds, scarce resources,

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horrific crimes, hostile clients and harsh punishments. The perception is that a rare win occurs not because of a lawyer's skill, but because the client was innocent; a loss is the result of an ineffective attorney. The defense attorney embarks on a mission to assure the client's constitutional rights are protected and enforced despite obstacles at every turn in the criminal justice road.

This Committee can help change the public's opinion of the defense function. Your thorough review of the CJA Program can enlighten the public, judges, and Congress of the worthy goals of our adversary system. Our system works best for everyone when the defense function is properly funded, independent and effective.

Very truly yours,

A handwritten signature in black ink, appearing to read "David R. Stickman". The signature is fluid and cursive, with a prominent initial "D".

David R. Stickman  
Federal Public Defender

DRS/cjh