

Testimony for the Ad Hoc Committee to Review the Criminal Justice Act Program

Robert Burke

Philadelphia, PA, April 13, 2016

I - BACKGROUND

Thank you for the opportunity to present my views on the administration of the federal Criminal Justice Act. I recently retired from the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts (AO) after having worked for 17 years in its Program and Operations Division, Legal and Policy Division, and Training Division. In the Legal and Policy Division, I staffed the strategic planning effort, including development of, and revisions to, the program's Strategic Plan Outline. For 12 years, I worked in DSO's Training Division, as its Chief for nearly 11 years. In that capacity, I managed both the program's training and its national litigation support efforts, working with defenders, panel attorneys and staff to develop training plans and national litigation support strategies and overseeing their implementation. Prior to my work in the federal system, I was an Assistant Appellate Public Defender in Florida, and worked with the National Legal Aid and Defender Association providing training and technical assistance to state, local and federal defenders around the country.

II - THE INHERENT CONFLICT REALIZED

A - Introduction

The U.S. Supreme Court recognized the absolute need for the independence of the public defense function in *Polk County v. Dodson*, 454 U.S. 312 (1981), saying:

[The provision of indigent defense] is essentially a private function for which state office and authority are not needed. 454 U. S. 317-319. . . . A public defender is not amenable to administrative direction in the same sense as other state employees. And equally important, it is the State's constitutional obligation to respect the professional independence of the public defenders whom it engages. 454 U. S. 320-322.

The placement of the Defender Services Program within the judiciary has always presented an inherent conflict both because federal judges are government actors exercising control in a number of ways over defense counsel's representation of clients, and because the judiciary, with a vested interest in obtaining funding for itself, has also taken upon itself the responsibility to advocate for, and now closely scrutinize and manage, the Defender Services appropriation. For many years after creation of the program, at least with regard to the federal public defenders, the judiciary acted as if it had a fiduciary obligation to ensure adequate funding and quality representation. From the very beginning right up to the present, however, this conflict has worked to the detriment of CJA panel attorneys and their clients in a manner that presents two systems of justice – one with public defender representation, largely adequately resourced – and one with panel representation, where lawyers are always underpaid, often do not receive adequate resources for investigative and expert services, and are subject to having vouchers that are already artificially low reduced by the judiciary so that judges may

preserve funds for the judiciary. *See the testimony of panel attorneys before this Committee, particularly that of Mark Windsor, which demonstrates the denial of equal protection that is resulting from the judiciary's administration of the panel attorney system.*

Also, as noted by Federal Defender Henry Martin in his written testimony to this Committee, there are Circuit Courts refusing to allow the establishment of Capital Habeas Units, aggressively limiting the resources made available to counsel appointed in capital cases, and arbitrarily limiting the number of attorney staff in federal defender offices. Whether this is being done for ideological or financial reasons, it is an affront to the right to counsel and the independence of the defense function.

More recently, the Judicial Conference of the United States, its Executive and Budget Committees, and the AO have abandoned any pretext of a fiduciary obligation to the defense function.

The Committee on Defender Services (DSC), as a body, has, in my experience, generally been open to learning and understanding the defense function and supportive of, and advocated for, its independence and resources sufficient to allow for quality representation. However, the very makeup of the DSC is problematic. While the DSC has allowed defender and panel attorney representatives to attend and participate in its meetings, no criminal defense practitioners are voting members. In my view, to comply with national indigent defense standards, at a minimum, a majority of the voting members should be federal public defenders and CJA panel attorneys.

B – The Judicial Conference of the United States

The Judicial Conference and selected Committees have stripped the Committee on Defender Services (DSC), which on the whole has acted very responsibly in its governance of, and advocacy for, the Defender Services Program, of budget authority and control over federal defender human resources. The change in the human resources area was based on a completely unfounded belief that defender offices were overstaffed. The work measurement study that was forced upon defenders bore out what defenders had been saying all along – that on a national level defender offices were, in fact, understaffed. The failure of the judiciary to give credence to what the knowledgeable and experienced defenders had been saying all along and it forcing the time-consuming and expensive work measurement study upon them is nearly as clear an example of the danger of the conflict in judicial administration of the program as one can find. There are, however, two others stemming from the judiciary's actions during sequestration, which: (1) decimated defender organizations with layoffs and furloughs in order to protect the judiciary as much as possible; and (2) yet again, made panel attorneys, who are always bearing the brunt of the judiciary's and Congress' unwillingness to adequately fund their work, pay for their commitment to the Sixth Amendment by having their CJA payments, already well below market rates, cut and delayed. Simply put, sequestration revealed what many in the federal indigent defense community had whispered for years – that the inherent conflict in the placement of the program within the judiciary could have limited negative impact only for so long as those controlling the program were committed

enough to its independence and quality to preserve them even when doing so might not be in the judiciary's interest.

C – The AO

The AO has repeatedly and consistently, throughout my employment there, failed to appreciate and recognize the unique constitutional role of the public defense function.

Over and over again, AO managers have referred to the Defender Services Program as a “service of the judiciary,” rather than what even the U.S. Supreme Court has recognized it is, an “essentially . . . private function for which state office and authority are not needed,” and “. . . which best serves the public not by acting on the State's [judiciary's] behalf or in concert with it, but rather by advancing the undivided interests of the client.” 454 U. S. 317-319.

This attitude permeates the AO's management which is, of course, much more beholden to judges than to federal defenders or panel attorneys. This mindset leads to: (a) repeated failures to recognize when the professional obligations of defense counsel require that the Defender Services Program be administered differently than the rest of the judiciary, *See, e.g., Steven Kalar's testimony about the program's IT function*; (b) incessant, oppressive efforts by the Office of Finance and Budget, which has acknowledged the competition for funding, to reduce the program's spending and growth, though it was largely the result of the growth of the Department of Justice and increased and more complex workloads; and (c) the failure of AO entities to provide timely and effective services to DSO or the Defenders, thereby interfering with their ability to accomplish their missions. *See Section*

II(D) below. This attitude was also undoubtedly a factor in what was, in effect, a demotion of the Defender Services Office within the AO – done in the name of efficiency and cost savings, none of which are apparent, except perhaps in the inadequate staffing of the AO that has resulted from its reorganization.

D – The IT and Procurement Fiascos

Steven Kalar’s testimony to this Committee artfully and cogently presented the original and continuing problems with the transfer of the Defender Services IT function out of DSO to another part of the AO and needs no further description here. That is an example of AO mismanagement that is directly impacting federal defenders.

Another example impacting DSO, and defender staff and CJA panel attorneys involves the Procurement Management Division and those responsible for it, as well as DSO and other AO entities, in their failure to timely and effectively resolve problems with the procurement of hotel contracts for Defender Services Program training events, which: (a) continues to compromise the Training Division’s ability to accomplish its mission on behalf of defenders and panel attorneys and the ability of defenders and panel attorneys to attend training events, (b) results in increased costs, and (c) places DSO staff in the position of violating their stewardship obligations. This situation has existed for over two years, with Procurement’s proposed efforts to resolve it having failed, and the Director of the AO having rejected a DSO proposal that would likely succeed.

Over two years ago, the Procurement Management Division (PMD) instituted the use of a Blanket Purchase Agreement (BPA) for securing hotel contracts, first in the District of

Columbia and then nationally. PMD did so without consulting with the DSO Training Division, though the Procurement Executive had twice indicated to me that they would do so. The problems with procurement procedures in securing hotels for DSO's numerous training events and conferences quickly reached a point where they were compromising DSO's ability to fulfill the mission of the office.

The problems with the BPA are that (a) very few contract proposals are received (often one, or none, per RFQ)¹; (b) in a large percentage of cases, the process fails to timely result in contracts that meet DSO's requirements within its budget, and without causing likely timing conflicts and/or staffing difficulties²; and (c) the process likely results in the waste of government resources. Examples include:

1. Being offered a contract with no information about the hotel's meeting space, which turned out upon investigation to be too small to accommodate the expected number of participants.
2. Being offered, on at least two occasions, contracts that required a food and beverage minimum thousands of dollars above what had been budgeted.
3. At least 2 programs had to be moved from their initially scheduled times because of the failure to timely procure hotel contracts, creating potential conflicts among similar types of programs; at least one program was cancelled altogether because of PMD's failure to timely obtain hotel contracts, denying federal defender staff and panel attorneys the opportunity to attend.
4. The BPA containing provisions that failed to reasonably limit the AO's liability for sleeping room attrition.
5. Without DSO's knowledge and consent, PMD was committing CJA funds to fixed-price hotel contracts that created liability for all funds budgeted for a

¹ A reason so few proposals are being received is that under the BPA Requests for Quotations (RFQs) are routed through hotel chains' national offices. The local properties they are distributed to have a disincentive to submit proposals because the hotel business model requires them, under those circumstances, to share the revenue with the national office. Before the BPA, when RFQs were advertised locally in the targeted cities, there was greater competition and DSO received much larger numbers of contract proposals.

² In the Spring of 2015, PMD informed DSO for the very first time that it was forwarding only those proposals that were within 10% of the cost of the least expensive proposal, **without regard to whether the proposals met DSO's meeting requirements**. This lack of communication has been a persistent problem, and the failure to provide proposals that satisfy meeting requirements listed in the RFQs is inexplicable.

- particular event, regardless of whether we utilized goods or services in that amount.
6. Another issue of waste arises from the fact that the contracting situation PMD created in using third-party meeting planning companies is that the ultimate hotel contract is between the third-party meeting planner and the hotel, not between the hotel and the AO. Since those companies are private entities, they are not tax exempt, and are likely passing those tax costs on to DSO, which are costs the AO would not have to pay if it contracted directly with the hotels.³
 7. Several of the initial contracts proposed to DSO by the third-party contractors did not include government hotel rates, which was a requirement in the RFQ and is very important to DSO because many panel attorneys are solo practitioners or work in small firms and have low incomes.

DSO staff members – at all levels of the organization – have worked diligently to resolve these ongoing problems. DSO met with PMD, met at least twice with the BPA vendors, and repeatedly changed its RFQs in an effort to obtain timely contract proposals that met DSO’s requirements and were within budget. The Training Division staff in particular worked hard to learn and operate within the BPA, but the results continued to be unacceptable. PMD proposed as a test attempting to procure contracts through the judiciary’s contract with National Travel. That solution would not resolve the issues of loss of control over aspects of training event requirements or the problem with unnecessarily paying taxes, but DSO agreed to try it. My understanding is that it has not resulted in timely contracts meeting DSO’s meeting requirements, and PMD is now going to try another possible solution.

³ It is difficult to determine whether this is taking place because the third-party contractors and the hotels refuse to provide copies of the hotel’s invoice.

Proposed DSO Solution

DSO requested permission to designate and train three staff as contracting officers, as permitted by *28 U.S.C. § 602(d) and the Guide to Judiciary Policy, Vol. 14, §§ 120.10.10, 120.20.30, and 130.20.25(b)*, for the limited purposes of procuring hotel and catering contracts for the thirty or more training events and other meetings and conferences it plans and implements annually. Staff throughout the judiciary, including in defender offices, have this designation and training. DSO has on its staff three Training Specialists, whose working titles are Meeting Planners, all of whom are certified government meeting planners with multiple years of experience planning and managing the logistics of training events and conferences in a timely and cost effective manner. The request to have them designated and trained as contracting officers so that DSO can procure contracts in a timely manner that meet the requirements of any particular event was denied, and the procurement problem continues to persist.

Whether these problems are the result of a bureaucratic “turf” mentality, a lack of understanding of, and concern for, DSO’s needs, ineptitude, or some combination of those, the failure to resolve the problem for such a long period of time is gross mismanagement within the AO that is adversely impacting the ability of the Training Division to effectively deliver training to those providing services under the CJA.

Both the IT and Procurement problems, which persist, demonstrate that an AO with a nearly singular judicial focus seems incapable, as an organization, to recognize the

unique characteristics of the defense function and effectively administer its implementation.

E – The Flawed Administration of the CJA Panel

As noted earlier, other witnesses before this Committee have addressed the myriad of problems with judicial administration of CJA panels, which violates ABA and other national standards on the administration of assigned counsel systems. While there are many deeply committed and talented CJA panel attorneys who do the very best they can for clients under the circumstances, this organization and administration of the Defender Services panel attorney program results in the federal government, through the judiciary, systemically denying equal protection to individual program clients through artificially low pay for panel attorneys, the reduction of already artificially low vouchers, and especially through the failure to provide adequate funding for investigative and expert services. It is my opinion that this administration not only inappropriately interferes with the panel attorneys' professional obligations to their clients, but that it is constitutionally deficient.

Judges who have, or perceive themselves as having, a vested interest in keeping CJA costs down so that judiciary funding may be maximized, have a conflict of interest in administering the program. Moreover, judges, many with little or no criminal defense experience, are often unqualified to make decisions about representational needs in individual cases. As national standards suggest, this function should be performed by persons knowledgeable about, and experienced in, federal criminal defense so that

informed decisions about what is needed in individual cases to secure a constitutionally valid defense may be made.

III – Training and Litigation Support

While I understand that the focus of this hearing is on the administration of the Defender Services Program by the judiciary and the AO, I would like to comment on training, as Training Division staff were not asked to testify at the hearing focusing on that particular issue.

A. Training

What is now the Training Division in the AO's Defender Services Office began first, many years ago in the Federal Defender Organization for the District of Columbia, as the Sentencing Guidelines Group and then, later, the Training Group. It was moved into the AO in about 1999 or 2000. I discuss that change more below.

National defender standards on training call for, among other things:

1. The provision of training to ensure zealous and quality representation;
2. Having a training director and staff who are full-time employees qualified by abilities, experience and attitudes to perform the training function;
3. The regular assessment of training needs;
4. The use of training methodologies consistent with identified learning objectives;
5. The use of materials, media and technology to provide training and helpful information;
6. The evaluation of programs and materials; and
7. The provision of training in specialized areas of practice like the death penalty or others.

NLADA Defender Training and Development Standards

The CJA provides for the use of funding to train CJA practitioners, and the Defender Services Program has had full-time staff committed to training for many years. As the Assistant Chief and Chief of the Training Division, I sought to have it meet the other standards enumerated above. The Training Division: (a) assesses training needs through the use of surveys, discussions with practitioners, and following developments in the law, technology, mental health, and forensic and social sciences; (b) has attorney staff trained in training needs assessment, principles of adult learning, and training design and evaluation, and support staff trained in meeting planning; (c) designs programs with both principles of adult learning and identified learning objectives in mind; (d) uses materials, media and technology, including presentation software, the fd.org website, and webinars, to provide additional training and information; (e) has participants, faculty and others evaluate training programs and materials; and (f) provides specialized training in a variety of areas, including the death penalty, sentencing, immigration, cybercrimes and others. Consistent with principles of adult learning, the Training Division has focused heavily, particularly for skills-based topics, on small group experiential learning – often of the “bring-your-own case” variety. The Training Division has also provided support for local training by federal defender organizations, a hugely important component of the program’s training as many panel attorneys cannot afford to attend training outside their districts or states.

Having read the testimony of other witnesses on the training subject, I agree with them that high quality training is provided in the Defender Services Program. However, to the

extent that their testimony left the impression that the training provided is sufficient, I would hope to dispel that impression. First, many of the programs offered go into a wait list status very quickly and practitioners who wish to attend are unable to do so because the resources are not available to offer any particular program more than once or twice per years. Second, for panel attorney in particular, the cost of attending training, both in travel and in time lost from work, is prohibitive. Third, with more resources, training on additional topics could be provided. Finally, an appropriate comparison for the training provided to CJA practitioners is to that provided to Department of Justice (DOJ) criminal case personnel. DOJ, in addition to having a \$28 million training facility for legal staff, was funded, for FY 2014, for 53 full-time equivalents (FTEs) for legal training, and at an amount of nearly \$32 million; to emphasize, that is for legal training only; those numbers do not include federal law enforcement training staff and resources (FBI, DEA, ATF, ICE and so on). The Defender Services Program now has 15 FTEs and, including funding for those 15 staff, approximately \$5 to \$7 million in funding – for the training of lawyers, paralegals, investigators, computer systems administrators and administrative officers. The DOJ 2016 training calendar identifies approximately 85 events that would be suitable for criminal prosecutorial staff to attend, not including law enforcement personnel. The Defender Services program implements 25 to 32 national programs per year. Any discussion of training parity with DOJ, frankly, laughable.

More resources are needed to provide sufficient training to CJA practitioners, particularly to panel attorneys who may handle a very small number of cases per year and need

training and informational resources to stay current and provide effective representation.

While DSO provides a limited amount of funding to assist a small number of panel attorneys with travel expenses to attend training, more is needed. The Training Division is unable to meet the needs of all who apply, many with annual incomes of under \$30,000 who have children and student loan debt.

Any training and information organization must, particularly in the 21st century, be agile and able to act and respond quickly. It must also be staffed, as national defender standards require, with knowledgeable and experienced staff. After a dozen or more years in the Training Division at DSO, I have concluded that moving it from a defender office to the AO was a mistake. The bureaucratic morass is too slow-moving and inefficient to allow the Training Division to operate efficiently and effectively. The lack of understanding of the defense function within the AO, and the apparent lack of concern for, and commitment to, the defense function among AO managers outside of Defender Services prevents their offices from providing timely and adequate support. Finally, the attorney staff in the Training Division are unable to work on any cases; in a defender office, they could do limited work that would allow them to stay more current on practical substantive and procedural issues of practice, enhancing their knowledge and ability, as well as their credibility as trainers. Whatever happens with the rest of DSO, I believe the Training Division should be moved back into a defender office. It, like the national death penalty, sentencing and litigation support projects, provides substantive, not administrative, support to defenders and other CJA practitioners, and, like those

projects, should be hindered as little as possible by the bureaucratic inefficiency and lack of commitment to the right to counsel that permeate the AO.

B. Litigation Support

Sean Broderick's testimony to this Committee effectively addressed the litigation support issues facing the Defender Services Program. I write briefly here only to emphasize, in the strongest possible terms, that:

- 1) The disparity in resources between DOJ and the Defender Services Program in this area is even greater than in the training area.
- 2) Unlike this program, DOJ does not have to support some 12,000 private practitioners, many of whom are solo practitioners for work in small firms and have limited resources.
- 3) The volume of digital information is growing exponentially, and technology changes at a rapid pace.
- 4) If adequate strategies are not developed, and a much greater amount of resources are not committed to litigation support, defense counsel's management of cases will become more severely hampered than it is now.

IV – Conclusion

The recommendations contained in the text above are that:

1. Consistent with national standards, the judiciary should not be involved in the administration of the CJA panel program; that function should be performed by persons knowledgeable about federal criminal law and practice who have no interest in the funding of the judiciary.
2. More funding should be committed to the training function under the CJA, including funds to support the travel to training of lawyers and others practicing pursuant to the CJA.
3. The Training Division, like other projects providing substantive support to CJA practitioners, should not be located within the AO.
4. More resources need to be committed to litigation support, particularly to support the ability of panel attorneys to present information in the courtroom and manage large volumes of, or technologically complex, discovery.

I look forward to the opportunity to discuss with the Committee other specific recommendations related to improvement of the independence and quality of the federal indigent defense function.