

FEDERAL PUBLIC DEFENDER NORTHERN DISTRICT OF WEST VIRGINIA

U.S. COURTHOUSE
1125 CHAPLINE STREET; RM 208
WHEELING, WV 26003
PHONE: (304) 233-1217
FAX: (304) 233-1242

HUNTINGTON BANK BUILDING
230 WEST PIKE STREET; SUITE 360
CLARKSBURG, WV 26301
PHONE: (304) 622-3823
FAX: (304) 622-4631
Visit Our Web Site at: <http://wvn.fd.org>

MVB BANK BUILDING
651 FOXCROFT AVENUE; STE. 202
MARTINSBURG, WV 25401
PHONE: (304) 260-9421
FAX: (304) 260-3716

REPLY TO: CLARKSBURG

March 25, 2016

The Honorable Kathleen Cardone,
Chair, Ad Hoc Committee to Review
the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

**Re: Testimony of Brian J. Kornbrath, Federal Public Defender for the
Northern District of West Virginia**

Dear Judge Cardone:

Thank you for the opportunity to appear before the Committee to Review the Criminal Justice Act Program and provide written comments relating to some of the areas currently under consideration.

By way of background, the Federal Public Defender Office for the Northern District of West Virginia was first created in 2002. As Federal Public Defender, I organized the opening of a headquarters office in Clarksburg and staffed branch offices in Wheeling and Martinsburg. Over the years we have grown to an office of sixteen employees: the Federal Public Defender; a Senior Litigator; four Assistant Federal Public Defenders; three Investigators; a Research and Writing Specialist; an Administrative Officer; a Computer Systems Administrator, a Criminal Justice Act Panel Administrator; a Paralegal; and two Legal Secretaries.

The Northern District of West Virginia covers a large, rural expanse of the state and includes 32 of its 55 counties. Significant case related travel is required to four points of holding court, client meetings and detention centers. Topography, road conditions and weather affect such travel on a regular basis. The criminal case load is comprised mainly of drug and firearms cases generated by local task forces. A significant portion of the criminal case load includes prosecutions at Bureau of Prisons facilities. Here in the district, this includes FCI Gilmer, FCI Morgantown, USP and FCI Hazelton, and SFF (Secure Female Facility) Hazelton. Significant

time is expended with client meetings at federal prison facilities. The penitentiary cases tend to be the most serious, and there have been several death penalty eligible cases over the past year. The Clarksburg Defender Office must deal with extended travel to detention facilities to include: North Central Regional Jail (32 miles); Central Regional Jail (60 miles); Tygart Valley Regional Jail (60 miles) and Washington County Jail located in Marietta, Ohio (82 miles). Detention centers for Martinsburg and Wheeling are more manageable as each jail is 4 miles and 12 miles away from each staffed branch Defender Office respectively.

This Defender Office manages 52 active CJA panel attorneys here in the district and works closely with the United States Attorney and United States Probation to insure attorneys are assigned as the earliest stage of the proceedings. Appointments are coordinated on a rotational basis with proper screening for conflicts of interest.

Defender Office management of the CJA panel includes assigning cases, forwarding appointment orders to the Court and audits of CJA vouchers for mathematical accuracy and compliance with the *Guide to Judiciary Policy* and CJA Guidelines. Thereafter, CJA vouchers are reviewed by the Federal Public Defender for apparent reasonableness before being forwarded to the Court for further review. Vouchers above the statutory maxima must be approved by the Chief Judge of the United States Court of Appeals for the Fourth Circuit with the assistance of a CJA Case Budgeting Attorney. The Defender Office processes CJA vouchers for final payment using eVoucher and Criminal Justice Act Release 6.1.5.

CJA panel attorneys are required to submit an *ex parte*, under seal motion to the Court requesting authority to exceed the statutory maximum before actually reaching that threshold. Justification for full payment is additionally made at the conclusion of the case. This avoids “sticker shock” by keeping the Court updated on the costs of representation as the case progresses. As a result, there are few instances of voucher cutting in this district.

CJA panel attorney use of investigators and expert services has traditionally been somewhat low. Statistics from Defender Services indicate only 11% of the cases in 2013 and 7% of the cases in 2014 utilized such services. As CJA panel attorneys must provide detailed information to the Court to justify these services, the services themselves are seldom refused by the Court if deemed relevant and material to a defense at trial or sentencing mitigation. Rather, the likely explanations for such limited use of CJA 21 vouchers are: 1) federal prosecutors’ use of plea agreements with detailed relevant conduct and Guidelines stipulations so as to avoid uncertainty at sentencing; and 2) reticence on the part of some panel attorneys to employ experts. The latter circumstance continues to be addressed in panel training.

The Federal Public Defender Office continues to operate its website with a CJA Members Only password-protected page that provides access to sample work product. A list-serve is used that allows private interaction between CJA panel attorneys and the Defender Office. Regular electronic updates are provided to the CJA panel, including case updates, administrative and billing issues, and new developments in the areas of federal criminal defense.

Finally, the Federal Public Defender Office provides training and litigation support and assistance to CJA panel attorneys. Each year the panel is offered 12.0 hours of free CLE's during a day and a half seminar. Panel attorneys receive case-specific discussions and advice upon request; use of law libraries; and use of conference space for CJA panel attorney/client meetings and trial and hearing preparation if need be. The Defender Office maintains a wardrobe of civilian clothing for detained defendants who elect a jury trial and lack family support.

As to the 14 areas of inquiry currently under consideration by this Committee, please accept my remarks in regard to the following:

Structure and Administration of Defender Services Program under the CJA:

It is my understanding the primary focus of Committee hearings in Philadelphia, Pennsylvania next month will be the structure and organization of the Criminal Justice Act program. A review of written remarks and live testimony previously provided to the Committee appears to indicate there are at least three schools of thought: 1) no changes to the CJA program are necessary; 2) greater independence should be afforded the CJA program while the program itself remains under the auspices of the Courts and the Administrative Office of U.S. Courts; and 3) complete independence is needed by removing all judicial oversight from the CJA program, along with the establishment of a separate agency/administrative body which would take over such duties.

Based on my knowledge of and participation in the CJA program here in this district, I tend to lean toward the second option. This is based on nearly 14 years experience supervising a Federal Public Defender Office while managing all aspects of the CJA panel. The CJA program operates efficiently and in a cost-effective manner, while at the same time providing excellent legal services to the indigent who face federal criminal charges. The federal CJA program sets the "gold standard" when providing Sixth Amendment protections through the appointment of counsel. Such high standards, coupled with necessary support and funding, should be the norm in state systems as well.

Here in the Northern District of West Virginia, the district court and magistrate judges fully support the CJA program. Direction, assistance and funding provided by the Defender Services Office is extremely helpful, fair and equitable. There are no intractable grievances or gross instances of systemic dysfunction which necessarily warrant a complete break with the Judiciary.

Nonetheless, changes should be considered by this Committee. The effects of sequestration in 2013 to this Defender Office are better explained below and had a devastating impact. It was unfair to Defender Offices across the country to endure staff cuts and unpaid furloughs. CJA panel attorneys saw a cut in the hourly rate and delayed payments. At the same time, Defender Services was demoted from being its own directorate within the Administrative Office to simply a Program Services division. Funding jurisdiction traditionally under the control of the Defender Services Committee was revoked by the Judicial Conference. The political and fiscal pressures of 2013 appeared to generate an "us against them" attitude between

the Judiciary and the Defender Services program. Every dollar provided to indigent defense was purportedly one less dollar for the Court. Hopefully, 2013 was an anomaly.

This Committee is respectfully requested to recommend that: 1) the Defender Services Office be returned to its own directorate with an ability to directly petition the Judiciary and Congress for adequate funding and support for the program; 2) direct representation by Federal Public Defenders and CJA Panel attorneys be afforded at the national level to include input on programming and funding needs; 3) Defender Offices be returned to using an information technology system separate and apart from that used by the Courts; and 4) a multi-tiered system be used for making CJA Panel payments and review, to include the ability to appeal district and circuit decisions to cut compensation and deny expert and investigative services.

Sequestration During Fiscal Year 2013:

Budget cuts and reduced annual funding had an adverse impact on this Defender Office during fiscal year 2013. One position (Investigator) was eliminated and all attorneys and staff were forced to take two weeks furlough without pay. Notably, no other court unit or agency in the district had to endure staff cuts or days without salary. This included both judicial and executive branch employees. Morale was adversely affected and case numbers dropped.

Over the years, annual funding for this Federal Public Defender Office has been sufficient and allowed attorneys and staff to meet their mission goals under the Sixth Amendment. 2013 was clearly not the case.

Billing, Voucher Review. And Approval for Legal Compensation and Experts:

As mentioned above, the practice of cutting attorney vouchers and refusing requests for investigators and experts is almost nonexistent in this district. However, there are pockets of dysfunction across the country and especially in the Fourth Circuit.

In March I attended the CJA Panel District Representative conference held in San Francisco, California as the Federal Public Defender representing the Fourth Circuit. Panel Representatives provided stark and depressing examples of judges regularly cutting CJA vouchers for time already expended in the defense of the case. While the Model CJA Plan found in the Appendix to the *Guide to Judiciary Policy* calls for notice and a right to be heard before a CJA 20 voucher is cut, the practice is either not followed or outright meaningless in some districts. Panel attorneys reported instances of self-auditing to reduce billings submitted and a fear of removal from the CJA panel if complaints were made about vouchers being cut.

There were reports of requests for payment of experts being denied as well. In one instance, a CJA panel attorney hired an expert at a cost of less than \$800.00. As a result, no prior judicial approval was required for this service. Nonetheless, the Court denied the final billing and the panel attorney was obligated to pay the expert himself. Obviously, this results in a chilling effect in future cases. It lessens the quality of the representation provided if expert services are unavailable

This Committee should seriously reconsider whether the Courts alone maintain full control over billing practices, voucher review, and the approval process relating to compensation for legal services, and investigators and experts. Many circuits already have a CJA Case Budgeting Attorney familiar with this process. A similar position might be employed at the district level – either by having the Federal Public Defender involved in the process, or a CJA Panel Supervisor who can work directly with the panel attorneys. If need be, the Defender Services Office might provide some type of administrative appeal process if there is a denial of compensation/use of expert services at the district and/or circuit levels by the Court.

Computer Assisted Legal Research for CJA Panel Attorneys:

Attorneys within Federal Public Defender Offices have unlimited access to computer assisted legal research via Westlaw and Lexis. This is due to a national contract negotiated through the Defender Services Office and/or the Administrative Office of U.S. Courts. This is an extremely important resource and it increases the quality of work product.

It makes no sense to deny this same resource to CJA panel attorneys. Presently, CJA panel attorneys either bill research costs as an additional expense on the CJA 20 voucher, or avoid altogether using Westlaw and Lexis for legal research.

At the very least, CJA panel attorneys should be allowed access to Federal Public Defender workstations for computer assisted legal research under the national contract. As officers of the court, the attorneys would simply attest that such research is related to a pending CJA case. Even better, the national contract should be amended so as to allow CJA panel attorneys the same access to Westlaw and Lexis currently afforded Federal Public Defender attorneys with the understanding that such services are only to be used in the pending federal criminal case.

In conclusion, I thank the Committee for its consideration of these remarks on the state of the CJA program, and look forward to appearing next month at the open hearings scheduled in Philadelphia.

Respectfully submitted,



Brian J. Kornbrath,
Federal Public Defender for the
Northern District of West Virginia