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To: Honorable Kathleen Cardone, Chair
Members of the Ad Hoc Committee to Review the CJA

From: Jeffrey M. Lindy
CJA Panel Representative, PA-E

Date: April 10, 2016

Subject: **Remarks to be Offered on April 12, 2016, Panel 4**

I've reviewed much of the written and videotaped testimony available on this Committee's website that has been offered by CJA Panel attorneys and District Reps at other hearings, and looked at some of the comments and observations offered by the Judiciary and other stakeholders. I think the one comment that I can make that perhaps hasn't been made already is:

Wow, what a great website!

On a more serious note – although the website is incredible – it's very hard for me to think of anything that I can offer to you that you haven't already heard, and, frankly, already heard from folks who are a lot smarter and more accomplished than me.

You've heard about:

- Mega cases – Yes, they're hard to do, and particularly hard for solo and small firm practitioners because of e-discovery and case budgeting that has to be done. Try running your own practice, keeping the rent paid, dealing with IT issues, dealing with irate clients

and irate Judges, battling with aggressive prosecutors who quite literally are the best and the brightest, trying to give your secretary advice about the latest crisis in his or her personal life...and then on top of it all, having to figure out e-discovery and how to make-out a case budget.

- Compensation – Yes, it stinks.
- Delayed payment of vouchers – Yup, that stinks too.
- Cuts in vouchers – Well now, that stinks the most, doesn't it?
- Parity with prosecutors – There isn't any, so why even discuss this? They have an unlimited budget when investigating and prosecuting our clients and they get paid a lot more than most CJA attorneys.

So I don't really see the point in me addressing any of those very important issues. You've heard more than enough about all of them and I can't add any perspective or gloss that will further enlighten you.

Instead, I want to keep my remarks informal, just like this memo, and personal:

Why do I do CJA work?

To understand my answer, you have to know a little bit about me of course. Since 1995, I have practiced alone or with one other colleague. I concentrate my practice in federal and state criminal defense, and I do civil litigation as well, mostly in defense of companies and individuals in business disputes. I'm a former federal and state prosecutor having served as an AUSA in the Eastern District of Pennsylvania and an ADA in Brooklyn, New York under DA Elizabeth Holtzman. I'm a faculty member with NITA and present keynote addresses, lectures, and leads workshops for DSO. For several years, I've been an adjunct professor at Drexel Law teaching Introduction to Trial Advocacy and guest lecturing in Evidence and Criminal

Procedure. I'm active in my local Bar Associations and other community organizations and, since 2006, I've been the CJA Panel Rep for this District. I graduated Temple Law in 1986 (but if you think I wasn't rooting for our local Big Five team, Villanova, in the national championship, then you just don't understand Philly basketball) and Cornell University in 1980. In between college and law school I taught public high school.

I think like all CJA Panel attorneys, I do this kind of work because all of us believe in fundamental fairness and are trying our best to inject just a little bit of equality and humanity into the criminal justice system. The vast majority of our clients have never experienced fairness of any kind – fundamental or otherwise. You don't have to be a Marxist or a Socialist or even a Bernie Sanders fanatic to know that America – a country that I still believe to be the greatest country in the world – has developed a permanent underclass that is disproportionately minority. We all know the statistics about the percentage of people of color who populate our prisons and the likelihood that a young black man will at some point see the inside of a jail cell.

I believe that members of the CJA Panel are motivated to do this kind of work because we feel a sense of outrage that our clients – who are in this permanent underclass – are also the very same people who are most likely to get caught up in our criminal justice system. I think that we're all just trying to balance the scales of justice – level the playing field, if you will – if only just a little bit.

We're trying to assure the promise of *Gideon*.

In 1965, two years after *Gideon* and a year after the CJA was implemented by Congress, an American writer, Claude Brown, wrote about the phenomenon of a permanent minority underclass in the foreword to his acclaimed autobiography, *Manchild in the Promised*

Land. In describing the African American children of parents who migrated from the South to the northern urban centers in the 1930's and '40's in search of the North's fabled freedom and prosperity, he explained,

The children of these disillusioned colored pioneers inherited the total lot of their parents – the disappointments, the anger. To add to their misery, they had little hope of deliverance. For where does one run to when he's already in the promised land?

The crushing poverty and despair experienced by our clients has only gotten worse in the five decades since that was written.

It's against this backdrop then that we do our CJA work. Is it any surprise that the catalogue of miseries that you've been hearing about at your hearings – that CJA attorneys are understaffed, underfinanced, outmanned and outgunned in court, and then, on top of it all, have to worry about a Judge cutting their voucher or delaying payment – exists in our system of indigent criminal defense representation? Honestly, I think the real surprise is that the CJA system works as well as it does considering the obstacles that exist in our nation.

How do we fix this?

Look, we can't change our society's economic realities – the fact that we have, ever more increasingly, a nation of haves and have-nots and our criminal justice system comes down hardest on the have-nots who are least equipped to fight back. CJA Panel attorneys are continually going to be paid at an almost obscenely low rate. They are going to continue to be David walking into court to face Goliath.

But what I think – I hope – we can do try to level the playing field is improve upon the CJA system that is already in place. My biggest suggestion in that regard is to drastically reduce judicial involvement in the CJA system. And trust me, I know that this is much easier said than done.

We are very lucky in the Eastern District of Pennsylvania because we have a forward-thinking Bench. Regardless of a jurist's personal beliefs, our Bench understands the importance of both the prosecution and the defense functions. However, in conferences that I attend around the nation in my capacity as CJA Panel Rep for my District, I hear horror stories from other Districts about CJA Panel attorneys who cannot zealously represent their clients because of judicial interference. And even here in the Eastern District of Pennsylvania we still have problems with some Judges who delay or cut vouchers with no explanation, and who don't approve the funds necessary to hire investigators and experts to mount a vigorous defense.

It seems to me that perhaps the best way to address this is to bring the administration of CJA Panels into Federal Defender Offices.

In our District, we already have a CJA Selection Committee that recommends to the Bench attorneys for admission to the Panel and for renewal. This Committee is comprised of the Federal Defender, the CJA Panel Rep, and senior federal criminal defense practitioners. The Federal Defender functions as the chair of the Committee. The Committee examines all new candidates and looks at the practice history of Panel members who seek renewal at the end of their three year term, and then submits those names to the Bench for approval. The Federal Defender also is already involved in training for CJA Panel attorneys, offering a mandatory introductory program to newly admitted CJA attorneys and putting on half-day CLE programs for the Panel twice a year. I'm not at all sure why all of the other tasks of administering the CJA Panel couldn't be handled in the same way.

Asking Judges to take on the role of CJA case administrators seems to me to be a very bad use of a Judge's time. The Federal Defender already has an administrative infrastructure set up to manage indigent criminal defense representation. For conflict purposes,

the administration of CJA cases would have to be separated from the management of the Defender's cases, but that problem has already been addressed on the state level in different jurisdictions where conflict counsels' offices have been folded into the local Defender for purposes of administering the local court-appointed cases. I know that other Federal Districts have permanent positions for CJA Supervising Attorneys but those positions are still within the judiciary. Prosecutors conduct their investigations and run their offices without oversight from the Bench and I'm not sure why this shouldn't be the case as well for the indigent federal criminal defense bar.

Instead of housing the CJA Supervising Attorney within the judiciary, that Supervising Attorney, and staff, could be located within the Federal Defenders. Panel attorneys would interact with the Supervising Attorney when requesting funds for experts and investigators, when submitting legal fee compensation vouchers, and when questions arise about, for example, e-discovery. The Judge to whom the case is assigned would still have final authority over approving vouchers, but would know that a skilled professional – the CJA Supervising Attorney – had already supervised the process and approved the submission to the Court.

The *Gideon* Court understood 50 years ago that our criminal justice system tells a story of race, class and poverty, and that we cannot possibly dispense justice unless the scales of justice are balanced. Your Committee is truly following in that Court's footsteps and I hope that my comments have at least to some extent helped you in that regard.