

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, Suite 4-200
Washington, DC 20544

Re: Testimony of Jessica Hedges, CJA Attorney and CJA Board Chair, District of
Massachusetts

Dear Judge Cardone:

Thank you for the meaningful work that you and the CJA Committee have been doing on important issues of indigent criminal defense, and for the opportunity to appear and present testimony. I have been a criminal defense attorney for over fifteen years, and I firmly believe that the quality of our national indigent defense system reflects upon the strength of our collective commitment to fundamental democratic principles. I am inspired every day that I continue to do this work. I strive to serve my clients – often some of the poorest and most marginalized members of society – in a manner that is zealous, humanizing, and consistent with the spirit and promise of the 6th Amendment.

I am a partner in a small Boston firm composed of four attorneys. In addition to criminal defense, we also do civil rights work. I have been a CJA attorney for approximately 9 years, and devote a significant part of my practice to criminal defense. Last year I was appointed as Chair of the CJA Board in Massachusetts. This Board consists of ten private attorneys who agree to serve without compensation, and the Federal Public Defender (“FPD”), who serves *ex officio*. A District Judge, a Magistrate Judge, and the Clerk of the District Court, or the Clerk's designee, are appointed as liaisons with the CJA Board. The Board engages in a wide variety of tasks, including the following:

- 1) Annually evaluating applications to the Panel and making recommendations to the District Court regarding reappointments and new appointments to the CJA Panel;
- 2) Working with the FPD, the Court, and other institutional leaders to address systemic issues that create barriers to good representation;

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3) Working with the FPD to provide training programs for CJA Panel attorneys and other members of the criminal defense bar;

4) Receiving, reviewing and making recommendations to the District Court regarding any concerns about: (a) the performance of CJA Panel attorneys, (b) the fairness or functioning of the CJA Panel appointment process, or (c) the processing of CJA Panel payment vouchers; and

5) Annually reporting to the District Court on the performance of the CJA Plan and, if appropriate, recommending revisions to it.

As Chair of the Board, I often have the opportunity to speak with CJA attorneys, Judges, the Federal Defender, and others about what is working well in our District, and what needs improvement. As a result of the efforts of years of work by committed lawyers, our CJA Boards, the Federal Defender, and many of our Judges, we have a very strong indigent defense system in Massachusetts. Generally, the Court as whole is very supportive of the CJA Panel. We have a highly skilled panel, we are able to appoint lawyers before the initial appearance in all cases, and there is good communication between the Court and the CJA Board. In addition, through the Board's involvement in the selection of Panel members, and a duty day system to ensure that appointments are handed out in a random and equitable manner, we are able to reduce risk of bias or favoritism in how attorneys are selected for the Panel or how case assignments are made. Finally, we are fortunate to have the support of a Federal Defenders office that provides excellent training on a regular basis. As a result of all of these factors, the quality of representation is generally very high.¹

However, there is room for improvement, both on the local and national level. I categorize these issues into three broad areas - independence, resources, and training - and offer my suggestions below.

Independence

High quality representation begins with the careful screening and selection of skilled attorneys who are deeply motivated by constitutional principles. These attorneys must be neither naive to, nor daunted by, the overwhelming gravity of the task presented by giving life to the 6th Amendment in complex cases. This balance requires the wisdom and skill that can only come with experience. Accordingly, I believe that CJA Panel selection should be done by a Board of experienced attorneys who are knowledgeable about the challenges presented by federal indigent criminal defense. Where appropriate this selection process could be done in conjunction with a CJA Case Management attorney, and with input by the Court and the Federal Defender.

In addition, I strongly believe that Judges should not be involved in the review or approval of vouchers or expert funding for CJA cases. A system that requires Judges to do so creates the potential for ethical pitfalls. Criminal defense lawyers often represent clients who are

¹ While it is perhaps not entirely relevant, I also feel fortunate to be working in a District where the Court has developed and supports three separate innovative programs for criminal defendants with specific needs in an effort to improve lives, prevent recidivism and further public safety – the RISE program (a front-end program for individuals on pre-trial release), the C.A.R.E program (a post-release program for individuals on supervision who suffer from drug addiction) and the R.E.S.T.A.R.T Program (a post-release program for high risk offenders on supervision).

accused of doing very unlikeable things, and a zealous defense sometimes requires that they take unpopular and/or provocative positions. In addition, they must do much of their work alone and behind closed doors, as they are bound by a strict duty of confidentiality to their clients. While they generally have no interest in alienating members of the Court, defense attorneys often must take positions that challenge Judges' approaches and rulings in high pressure, high stakes situations. It is their duty to do so. While in an ideal world, a CJA lawyer would never feel inhibited by the fear of a Judge taking these challenges personally - this is simply not realistic. CJA lawyers should not ever have to consider the implications of their zealous representation on their pocketbooks. Nor should they risk breaching confidentiality to justify hours billed to the very person who is presiding over, and possibly sentencing their client.²

Someone who is removed from the case and the client, and intimately familiar with the realities of complex criminal defense, should be helping to make decisions about what experts to hire, what are appropriate and cost-effective rates to pay these experts, how to manage costs in "mega-cases" and related issues regarding the scope of defense. Similarly, deciding questions of what work is necessary or reasonable should be done by someone who is removed from the case, to avoid the conflicts and ethical issues that now arise. This work could be done by an independent CJA managing attorney, perhaps in conjunction with a case budgeting attorney. It is my sense that many Judges in my District are very uncomfortable reviewing vouchers, recognize the potential pitfalls discussed above, and would be relieved to be removed from this process.

Training and Evaluation

The trainings offered by the Defender Services Office Training Division are incredibly useful, and often inspiring. I have attended several such trainings, but not very many attorneys from my District have been able to do so. I happen to like training, and love travel, so I am willing and motivated to self-fund these trips throughout the country. However, this is not realistic or desirable to most attorneys on the Panel, who in order to attend, must not only take time off (which translates into lost billable hours) but who must also fund their own travel and lodging. I strongly believe that more resources should be put into training, and that trainings should be more frequent and perhaps more localized. Training is one area where CJA attorneys are at a significant disadvantage relative to all other professionals in the system. Judges, Defenders, AUSAs, and Probation Officers regularly attend trainings beneficial to their continuing professional development. They are not expected to fund the necessary related travel. I also expect that greater emphasis on, and support for, continuing education for the CJA Panel would ultimately translate into cost savings. I know that each time I attend one of these trainings, I save countless hours in research time based upon what I learn from lectures and materials.

I propose the development and implementation of a standardized continuing-education training curriculum for CJA attorneys across the country. This training program would have a mandatory component covering core competencies and critical developments in the law, as well an optional component allowing for in-depth focus on areas relevant to particular cases. At least

² How to explain, for instance, the tenth visit to jail to persuade an incredibly difficult client to plea to a reasonable plea offer, after this client ultimately goes to trial despite this effort, and loses, without fearing that this will somehow factor into the Judge's assessment of the client at sentencing?

six hours of training should be required, and at least six additional hours of optional training should be available, at no cost, for each CJA attorney.

In addition, I suggest a requirement that each district develop a “Best Practices Guide” for CJA attorneys, as well as a standardized method of evaluating attorneys every three years to ensure that they are following these baseline practices. This Best Practices Guide, as well as the evaluative tool, should be developed with the input of experienced criminal defense attorneys. Evaluations should be done by the same Board that does the screening and selection of attorneys and/or a Case Management attorney.

Resources

The overall principle guiding resource allocation for the defense should be parity with the prosecution. One wouldn’t expect a fair race if one put a low-cost economy car on a track with the latest model Lamborghini, no matter how talented the driver. Our adversary system breaks down if it is not a fair race. Right now, sadly it is not.

First, as discussed above, Judges should not be involved in determining what experts are hired, or what rates are appropriate.³ Attorneys should be trusted to locate qualified experts, and questions of cost and need should be discussed with an independent CJA Managing attorney.

Second, CJA hourly rates are significantly out of line with the rates paid to private attorneys of similar experience. When adjusted for the overhead costs, the rate paid to CJA attorneys likely makes them the lowest paid attorneys in the federal criminal system -- including AUSAs and Federal Defenders. This fact disadvantages CJA attorneys and criminal defendants, as it makes the work unsustainable for many experienced attorneys who would bring a great deal of professionalism to the panel.

Those working in major metropolitan areas where the cost of doing business and living is high, particularly suffer. A comparative review of office space rents in different regions tells much of the story. For the sake of comparison, I compared the cost of leasing of office space in West Virginia (where I am originally from) and Boston (where I now practice). In West Virginia, even in the most expensive area – Charleston (the Capital) leasing rates for offices range from 14 to 22 dollars per square foot. In more rural areas, the rates range from 8 to 15 dollars per square foot. In stark contrast, in Boston, a modest downtown office begins at 38 to 40 dollars per square foot. As a result, in Boston, many firms that devote a substantial part of their practice to CJA work are forced to have lawyers share office space, eliminate support staff, or even ask lawyers to work from home permanently. And sometimes, sadly, talented lawyers stop doing CJA altogether, in favor of higher paying work. The cost of office space is just one aspect of the cost disparity between regions. Comparing the cost of living in West Virginia and the cost of living in Boston, for instance, it becomes abundantly clear that 129 dollars an hour in

³ In Massachusetts the CJA Guidelines, established in 2013, currently articulate “presumptive” expert rates to match the rates established in the state indigent defense system. These rates are woefully out of line with market-rates for the types of expertise called for in complex federal cases. This makes it impossible in many cases to find experts who can enter into an “fair race” with the highly skilled, and properly paid experts retained by federal prosecutors. As Chair of the CJA Board, I am hoping to work with the Court to revise this guideline. Many Judges appear to recognize that these rates are unrealistic and unfair, and regularly depart from the “presumption.”

one place does not equal 129 dollars an hour in another. First, I would advocate for an increase in the base CJA rate. Beyond that, the rate should be adjusted upward to reflect cost of living differences by region. I believe that Federal Defenders, AUSA's, and Probation's budgets and salaries reflect regional differences – there is no reason for CJA attorneys to be treated differently.

Conclusion

Many of the logistical details of how to administer the CJA program can be best addressed by putting in place institutional structures that reflect both high expectations and robust support for attorneys who do the difficult work of providing indigent defense. This “high expectation/high support” model will honor the constitutional ideals of first rate representation for all, allow the Court to involve itself less in the day to day management of the CJA system, and result in cost savings.

Thank you again for the opportunity to offer my input into these issues. I am optimistic that the work of this committee will support the efforts of attorneys all over the country who strive to do this hard but deeply meaningful work well, and in so doing, honor one of the most basic guarantees of our democracy – a zealous defense for every member of society.

Sincerely,

/s/Jessica Hedges

Jessica Hedges