

Via email only

March 28, 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 the Honorable Leo T. Sorokin  
United States District Judge  
District of Massachusetts

Dear Judge Cardone:

Thank you for this opportunity to testify on a matter of great importance. By way of background, I have been a United States District Judge for the District of Massachusetts since June, 2014. I have also served as a United States Magistrate Judge in this District (2005-2014), an Assistant Federal Public Defender in this District (1997 to 2005), an Assistant Attorney General for the Commonwealth of Massachusetts (1994 to 1997), an associate attorney for the law firm of Mintz Levin in Boston (1992 to 1994) and a law clerk to the Honorable Rya W. Zobel (1991 to 1992).

Your Committee performs important work in determining how best to improve one of the central guarantees of our Constitution and one of the cornerstones of our free society – the provision of effective zealous representation to those persons charged with crimes by our government, but unable to afford a defense. Based upon the experiences we have had in our district, I have the following five comments each of which bears on one or more of the issues you identified in the attachment to your invitation letter.

First, our district's highly successful Criminal Justice Act (CJA) panel illustrates approaches to some of the problems you are examining. To avoid judicial bias or clerk favoritism in the appointment of individual attorneys, we devised the following system. Each day, one Assistant Federal Public Defender (AFPD) and one CJA attorney are on duty. Ordinarily the CJA attorney will take at least one case, with the AFPD taking all other cases subject to capacity and conflicts. When the Court requires additional attorneys, a computer system provides names of panel members for the clerk to call until an available attorney is found.<sup>1</sup> With this system we have (1) provided defendants a lawyer before he/she goes to the

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<sup>1</sup> The Clerk's office is able to keep track of the number of appointments CJA attorneys have received so that this "random assignment" system is fair to all Panel attorneys

Courtroom for the initial appearance and before the bail interview; (2) spread the appointments fairly and equally across the panel; and (3) created valuable tracking data that our Board uses during the reappointment process. Our Court has followed this approach smoothly and successfully for many years.

Overall, we enjoy a highly qualified CJA panel. Like any large panel (we have about 100 members) the caliber of lawyers does vary across the panel. We have been able to remove lawyers when necessary and to bring in new ones. We have a CJA Board, appointed by the Court, that reviews applications for appointment to the Panel. The Board takes a very active role in both seeking out qualified candidates, and in screening applications, and then makes recommendations to the Court regarding appointments. For many years, we have required all new members of the panel to attend an orientation session designed by the Board Chair. Recently, we began requiring all members to attend some training each year. We have been fortunate that our FDO assists substantially in providing training to our panel on an ongoing and regular basis.

Second, we are seeing a substantial rise in electronic discovery even in everyday federal criminal cases which may pose a particular challenge for individual CJA counsel many of whom are solo criminal practitioners and, in contrast to AFPDs, visit the detention facilities less frequently. This rise increases the importance of improving access to electronic discovery for detained defendants, an issue of concern to both CJA and FDO clients. I bring these issues to your attention because they bear on Issues 6, 7, 13 and 14 which you are examining. Although we have had some preliminary informal discussions in our district regarding these various issues, we have no particular solutions or approaches to offer now. I do have one observation though. Responding to these issues requires the investment of time likely not chargeable to an individual case as the various participants in the system, including local detention facilities and the Marshals, for example, develop procedures for detainees to access electronic evidence in custody.

Third, regarding Issue 3, while the approval of vouchers has generally operated smoothly in this district where defendants receive robust defenses provided by capable criminal counsel, nonetheless, whether to approve the retention of experts, the scope of such activity or the proper rates for such work as well as the fact of reviewing attorney fee requests in criminal cases are decisions that occasionally have raised concerns regarding conflicts of interest between our role as trial judge and as reviewer of vouchers or requests for experts. In this respect, the CJA voucher system contrasts with the defender system where the defenders, within the context of their own budget, render their own independent decisions regarding the proper amount of attorney time or expert services to allocate to a specific case.

Fourth, regarding Issues 7, 13 and 14, the caliber of representation in our district provided by the lawyers in the FPD is uniformly excellent arising in part from the resources, supervision and training provided to each attorney. As already noted, there is more variation in the caliber of representation provided by CJA attorneys. Training is of critical importance - federal criminal defense is a complicated serious process often substantially different than the

local state court system. In our district, the CJA Board, supported actively by our FPD, provides regular local training for CJA attorneys. Given the increasing complexity of federal cases and the rise in medicine, aviation and many private sector entities of best practices checklists, quality improvement through standardization, or the leveraging of previously acquired knowledge through sophisticated electric resources, we have had some tentative initial discussions regarding how we might implement some of these practices within the CJA. One challenge, of course, is that we can ask only so much of our volunteer CJA Board.

Fifth, regarding Issue 1, our Federal Public Defender Miriam Conrad has suggested that the budget for both the FDO and CJA track, based upon a presumably complicated algorithmic relationship, the resources devoted to federal criminal prosecution. While Ms. Conrad's suggestion presents substantial complexity to implement, it seems worthy of serious consideration for it offers an objective neutral principle to govern resource allocation for federal criminal defense services.

Thank you for the opportunity to submit these written comments. I look forward to providing you any further information that would assist you with your important work.

Very truly yours,

Leo T. Sorokin  
United States District Judge