



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

HONORABLE THOMAS F. HOGAN
Director

WASHINGTON, D.C. 20544

May 3, 2013

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrate Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts of Appeals
Clerks, United States District Courts
Senior Staff Attorneys

From: Judge Thomas F. Hogan *Thomas F. Hogan*

RE: FEDERAL DEFENDER EXPERT SERVICES

It has come to my attention that, with the onset of the funding cuts due to sequestration, some federal defender organizations (FDOs) are seeking orders from district court judges that would require the Administrative Office (AO) to pay expert fees for their clients either from (1) the AO's general budget, or (2) the AO's centrally held Criminal Justice Act (CJA) funds used to pay experts pursuant to 18 U.S.C. § 3006A(e). By law, FDOs are required to pay for expert services from an allotment provided to each organization pursuant to § 3006A(g)(2)(A) [Federal Public Defender Organizations] and (g)(2)(B)(ii) [Community Defender Organizations receiving periodic sustaining grants from the Federal Judiciary]. As explained below, this practice must continue.

At the outset, it is important to recognize that, in cases where representation is furnished by an FDO (or a panel attorney), the AO has no authority to pay expert fees from any account other than the Defender Services appropriation. Charging such fees to another account would constitute an improper augmentation of Defender Services funds, which is prohibited by law.

In addition, the AO is not authorized to use centrally held CJA subsection (e) funds to pay for defense expenses associated with representations provided solely by FDOs. The language set forth in the CJA provision authorizing the establishment of FDOs, § 3006A(g)(2)(A) and (B), recognizes that payments made to FDOs by means of budgets and grants approved by the Judicial Conference shall be "in lieu of payments under subsection (d) and (e)." The payment of centrally

held subsection (e) funds for FDO expert services contravenes the plain language of the statute.¹ Therefore, payments from the CJA funds in these circumstances also would be deemed improper.

Consequently, I must strongly caution against using either method (charging an account other than the Defender Services account, or charging the CJA fund) to pay for expert fees provided to FDO clients as it raises personal liability issues for any unit executive who certifies an improper payment.

In addition to the legal issues, requesting these orders raises serious policy implications. In essence, individual judges are being asked to increase the funds provided to individual FDO offices, in contravention of Judicial Conference policy. These orders would undercut the authority of the Judicial Conference and, by extension the AO Director, to devise and manage the budget and spending plan.

As you know, the Executive Committee of the Judicial Conference approves spending plans for the Judiciary's enacted appropriations. When the Executive Committee approved fiscal year (FY) 2013 financial plans on April 16, 2013, it specifically considered the sufficiency of funds of the FDOs when it finalized the plan for the Defender Services account. Faced with difficult choices in this climate of severe fiscal austerity, the Executive Committee set forth its decision in its Memorandum of Action as follows:

In approving the final financial plan for the Defender Services Account, the Executive Committee considered the impact on that account of prolonged sequestration and other budget cuts, including the potential for lengthy furloughs of federal defender organization staff and deferrals of panel attorney payments. Following an exhaustive review of the available funds, sufficient funding was identified to enable each federal defender organization to limit staff furloughs to no more than 15 days for the remainder of FY 2013, and to limit to 15 the number of days on which payments to panel attorneys might be deferred to the next fiscal year. The Executive Committee directed that those funds be allocated accordingly, and also agreed that the judiciary should seek from Congress a supplemental appropriation to reduce further the potential funding shortfalls in the Defender Services and other accounts.

If an FDO needs additional funds, the appropriate action is for the FDO to request supplemental funding from the AO Office of Defender Services. Ultimately, the request may be

¹ It would likewise be improper to pay FDO attorneys with centrally held funds used to pay panel attorneys under CJA subsection (d).

considered by the Judicial Conference Committee on Defender Services, to which the Judicial Conference has delegated approval of FDO budgets and grants. Further, authorizing subsection (e) expert funding for federal defender clients from moneys held centrally to support payments for panel attorney representations would deplete those funds and distort the financial plan allocation set by the Executive Committee.

I recognize that the sequestration cuts have placed unprecedented fiscal pressures on the Federal Judiciary and, further, that the funding crisis experienced by the FDOs has resulted in layoffs as well as furlough days for their employees. As a result, the FDOs face increasingly difficult challenges as they balance their constitutional obligation to their clients against the diminishing resources available to them. CJA panel attorneys are not immune to the impact of the sequestration cuts – they face deferral of voucher payments as the funds will not be sufficient to meet the anticipated needs.

The AO will continue to impress upon Congress that the federal courts, the FDOs, and the CJA panel attorneys cannot continue to operate at sequestration funding levels without severely compromising the Constitutional mission of our federal court system.