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Judicial Conference of the United States  
Ad Hoc Committee to Review  
The Criminal Justice Act Program  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle N.E.  
Washington, D.C. 20544

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Dear Committee Members:

I am the CJA District Representative for the Eastern District of Kentucky, one of the few Districts that does not have a Federal Public Defender or Community Defender. All indigent defendants in our District are represented by panel attorneys. I have been a panel attorney for 23 years and the District Representative for 11 years. Although I am concerned about all of the issues that the Committee is considering (the 14 topics listed in the “Scope of CJA Review”), I plan to focus my comments on three areas: training of CJA panel attorneys, panel attorney access to necessary experts, and panel attorney hourly rates.

My comments on these three topics are based on a few propositions that I hope are not controversial: indigent defendants should receive vigorous and competent representation; attorneys representing indigent defendants should be, to the greatest extent possible, equivalent in skill to the prosecuting attorneys; and, attorneys representing indigent defendants should, to the greatest extent possible, have resources equivalent to the prosecuting attorneys.

I. Training:

I submit that the training provided to federal prosecutors is vastly superior to that made available to CJA panel attorneys. Federal prosecutors have the National Advocacy Center (the NAC), a state-of-the-art training facility in Columbia, South Carolina. Prosecutors in our District typically spend one to two weeks per year attending training at the NAC. They are paid for the time they spend there and all of their expenses are covered (travel, lodging, food etc.). In fact, the

NAC facility includes an on-site hotel and what has been described as a “fantastic” dining facility. While staying at the NAC, federal prosecutors are given access to the University of South Carolina’s workout facilities and are provided trolley service to dining locations in Columbia. The instructors at the NAC include, not only experienced litigators and experts, but also sitting federal district judges. Prosecutors’ support staff are also provided training at the NAC. And, there are other specialized training facilities and opportunities for federal prosecutors.

By comparison, CJA panel attorneys are offered training opportunities at various locations across the United States. We are not paid for our time attending these training sessions. Sometimes, some or all of our travel expenses are paid, but for this to happen we must apply for and be granted “scholarships”. Often CJA panel attorneys can attend these training sessions only if the cost of doing so is paid out of our own pocket.

The Defender Services Training Branch, for the most part, seems to do very well with what I perceive to be limited resources. Certainly, the substance of the training is often excellent, although I do not recall sitting federal district judges ever taking a hands-on approach to train panel attorneys in things like trial advocacy, which occurs at the NAC for new federal prosecutors. Simply put, the training of prosecutors and CJA panel attorneys is not equivalent.

Given the fact that there are in excess of 10,000 CJA panel attorneys who are called upon to provide representation for indigent defendants, I suggest that a defense training facility, equivalent to the NAC, is necessary to level the playing field between prosecutors and defense lawyers. At a minimum, significant training should be provided to CJA panel attorneys at no cost and panel attorneys should be compensated for their time and fully reimbursed for their expenses in attending training. As is done with federal prosecutors, the judiciary should take an active role in training CJA panel attorneys.

## II. Experts:

Many experts are provided to federal prosecutors as a matter of course (computer analysts, drug analysts, ballistics experts, trace evidence analysts, latent print analysts, pathologists, firearms experts, etc.). In fact, the case agents often arrange for these experts. If additional expert testimony is necessary, federal prosecutors have in-house staff (in the Eastern District of Kentucky a staff person in charge of budgetary issues) to locate and arrange for experts. And, federal prosecutors have a full complement of in-house experts: computer and technical experts, paralegals, in-house investigators, law enforcement coordinators, witness coordinators, data analysts, law clerks, etc.

By contrast, many CJA panel attorneys have nothing more in their offices than a secretary. Any other experts and/or support staff can only be obtained by locating a qualified expert, and then convincing that expert to work under the provisions of the Criminal Justice Act. Convincing a qualified expert to work on a CJA case is often extremely difficult. A CJA panel

attorney must explain to a potential expert that a payment of \$800 can be guaranteed, but that any additional payment is contingent upon various layers of judicial approval. A CJA panel attorney must warn potential experts that if they bill in excess of \$800 and if the judiciary later deems some services non-compensable, then the expert simply will not be paid. It can be extraordinarily difficult to find competent experts willing to work under these conditions.

The current statutory authorization for experts – \$800 – is woefully inadequate. Even the statutory maximum of \$2400 is substantially inadequate for any sort of in-depth expert analysis. These statutory limitations give the prosecutor a significant, and in my opinion unfair advantage. A concerted effort should be made to increase the expert compensation levels in the Criminal Justice Act so that qualified experts will be available and willing to assist in the defense of indigent clients.

### III. Hourly rate:

The most fundamental prerequisite, it seems to me, to providing vigorous and competent representation to indigent defendants is to ensure that the attorneys representing them are of equivalent quality and skill as the attorneys prosecuting them. It is hard to envision an adversarial system that functions appropriately where the prosecutor is almost always far superior to the defense attorney. In order to recruit competent lawyers to the CJA panel and retain them, it is necessary defense lawyers to be adequately compensated. If CJA panel lawyers are paid an hourly rate that is far below the market rate and only minimally above their hourly overhead, then the logical result will be that attorneys of inferior quality will often be the individuals attracted to CJA panel attorney work.

There will always be a handful of highly skilled defense attorneys who are willing to accept CJA work because of a personal commitment to the cause. However, it is submitted that our system cannot be built on the idea that highly skilled attorneys will always be willing to work for minimal pay. The current system often pushes into service two types of criminal defense attorneys: 1. skilled “volunteers” who are able to do the work either because of a personal commitment or because other aspects of their practice are profitable enough to allow them to work on CJA cases; and, 2. attorneys who have little other work coming in the door because they are either too inexperienced or not substantially skilled. Instead of relying on these two groups, the system should strive to obtain the services of the best and most experienced criminal defense practitioners of each local bar. The representation of indigent defendants in the Federal Court system, where the complexities of the criminal code and the sentencing guidelines require expertise and where the prosecutors are highly trained, highly paid and well-supported, demand the use of experienced defense attorneys. The most obvious way to convince qualified attorneys to set aside their private pay cases and devote some of their practice to CJA panel work is to incentivize that work by paying the highest hourly rate possible.

The current panel attorney hourly rate is below the hourly rate that Congress has authorized for panel attorneys. This seems unconscionable. At the very least, panel attorneys should be paid the amount that Congress has authorized. Even this rate (which the undersigned has been advised is less than \$150 per hour) is far below the market rate for any experienced criminal defense lawyer. The value of this rate is further diminished by the ever-present threat of voucher cuts and the fact that panel attorneys must usually complete all work on a case (and pre-pay expenses out of pocket) before ever submitting a voucher. Increases to the hourly rate, whenever possible and whenever authorized by Congress should be made in order to make the best effort to attract the experienced criminal defense lawyers to CJA panel attorney work.

I appreciate the Committee considering my written comments and look forward to the opportunity to speak with the Committee in person.

Respectfully submitted,

s/Patrick F. Nash  
Patrick F. Nash