

Federal Public Defender District of Utah

Kathryn N. Nester
Federal Public Defender

Scott Keith Wilson
First Assistant

Carlos A. Garcia
Wendy M. Lewis
Kristen R. Angelos
Robert K. Hunt
Jamie Zenger
Vanessa M. Ramos
Audrey K. James
Benjamin C. McMurray
L. Clark Donaldson
Robert L. Steele

American Towers Plaza
46 West Broadway, Suite 110
Salt Lake City, UT 84101
Phone: (801) 524-4010
Fax: (801) 524-4060

Kent R. Hart
Benjamin A. Hamilton
Daphne A. Oberg
Bretta Pirie
Spencer W. Rice
Natalie A. Benson
Adam G. Bridge
Jessica Stengel
Tamara Theiss
Alexander Enrique Ramos

November 2, 2015

Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the
Criminal Justice Act Program
VIA ELECTRONIC MAIL TO: CJASstudy@ao.uscourts.gov

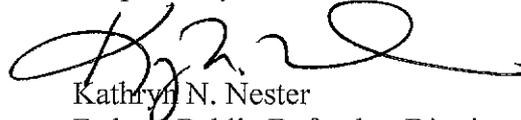
Re: Committee Hearing in Santa Fe, New Mexico

Dear Judge Cardone:

It is my understanding that representatives from the Federal Public Defenders and the CJA Panel Representatives for the Tenth Circuit will be appearing before the Committee, at your invitation, to testify at the end of this month. I have been in contact with Ms. Grady and Mr. McCue to see if there was any information I could provide from the District of Utah to be of assistance to them or to the Committee. Because they have a limited time to speak, I thought it might be helpful to the Committee if I submitted a separate written report from the District of Utah on the topics the Committee will be exploring. My report is attached. I hope you will find this information helpful. I am confident that Ms. Grady and Mr. McCue will be excellent resources for the Committee; however, I am at your service should you require any additional information from my District.

I wish you and the entire Committee the best and thank you all for taking on this very important task.

Respectfully,



Kathryn N. Nester
Federal Public Defender, District of Utah

KNN:s

Encls.

Cc: Honorable David Nuffer, Chief District Judge
G. Fred Metos, CJA Representative
Virginia Grady, Federal Public Defender, Districts of Colorado and Wyoming
Stephen McCue, Federal Public Defender, District of New Mexico

REPORT TO CARDONE COMMITTEE FROM DISTRICT OF UTAH

This report was prepared by Federal Public Defender, Kathryn N. Nester, with the assistance and input of CJA Panel Representative G. Fred Metos, Esq. We appreciate the opportunity to address the Committee and we fully support your mission to conduct a comprehensive review of the CJA program. We have attempted to tailor this report around the particular issues the Committee is considering.

The District of Utah has one Federal Public Defender office (hereinafter "FPD") located in Salt Lake City, which covers the entire state. The number of FTE on board at the FPD as of the end of September was 46.15. The CJA Panel consists of 44 attorneys in Salt Lake City (10 of whom are only called in on extremely complex cases) and 8 attorneys in St. George (the southernmost part of our state). We have a local CJA plan which provides that the Federal Public Defender will handle 75% of the appointed cases and the CJA attorneys will be appointed to handle the remaining 25%.

Our District has an active Panel Management Committee consisting of the Magistrate Judges, the Federal Public Defender, the CJA Panel Representative and the District Court Clerk. The Committee is responsible for the appointment and removal of Panel Attorneys. The Panel Management Committee meets semiannually to review panel membership and compliance with CLE requirements, caseload, and new Panel applications. The same group also meets quarterly in a Criminal Case Coordinating Meeting to discuss matters relevant to criminal case management.

Diversity is important to the Committee, although difficult to achieve in our state where the African-American population is around 1% and the Latino population is around 15%. We currently have 3 minority members on the Panel and 9 women. The Committee also implements tri-annual reviews of the Panel Attorneys by the District Judges to assure that the quality of representation is monitored and encouraged.

The Magistrate Judges are responsible for managing the appointment of Panel Attorneys to cases. The Federal Public Defender is responsible for training the Panel Attorneys by holding monthly brown-bag trainings, sponsoring speakers on trending topics, hosting webinars, disseminating topical emails and research materials, and conducting an annual day-long seminar. The Federal Public Defender is occasionally called upon to review complex vouchers for "reasonableness," but the majority of the voucher review is conducted by the Magistrate Judges, who then make recommendations to the District Judges regarding final approval. The Federal Public Defender, in conjunction with the recently hired Case Budget Attorney in the Tenth Circuit, also assists Panel Attorneys with preparing budgets for cases where the fees are expected to exceed \$30,000.00.

Our Magistrate Judges require pre-approval for third-party services exceeding the statutory maximum and several of our Magistrate Judges also request pre-approval when an attorney expects their fees will exceed the statutory maximum. Our District is currently in the process of updating and revising our protocols with the goals of eliminating the requirement of pre-approval of fees exceeding statutory maximum, except in cases subject to budgeting requirements; creating a more consistent approach to when pre-approval of third party services is required and establishing a procedure whereby

Panel Attorneys may seek *de novo* review from the District Judge if a Magistrate Judge determines Panel Attorneys' requests for excess compensation-approval or their final vouchers are unreasonable. We are hopeful that these new procedures will address and ameliorate as much as possible the difficulties some of our Panel Attorneys have experienced when requests for services and fees are denied.

We do have some unique challenges in the District of Utah that play an important role in the compensation of our Panel Attorneys and the funding of the FPD. For example, we cover cases arising from many Native American reservations, which are geographically very distant from Salt Lake City. The additional travel and difficulty with access to our clients significantly increases the resources needed to defend these cases. Also, the need for the provision of funds to transport our clients from the reservations to Salt Lake City for Court is particularly high due to the extremely impoverished conditions the defendants from those regions are experiencing. Obtaining these funds can often be very challenging and time consuming. Also, our detention facilities are all state-owned and geographically distant from Salt Lake City (some are hours away) and the design of our new courthouse and limited availability of US Marshal staff make it all but impossible to schedule lengthy client meetings at our courthouse. This results in many hours spent travelling to and from visits with clients. Additionally, we have a large fraud docket, and many of our Panel Attorneys are facing significant challenges in managing the millions of documents disclosed in the discovery process. The Panel Attorneys are struggling with access to affordable case-management software, difficulty in getting approval for needed financial experts, and just the general management of such complex cases. The Panel Attorneys would like to see the Court consider appointing two Panel Attorneys per defendant on large fraud cases, simply to deal with the overwhelming workload.

The Panel Attorneys were especially pleased to see that the Committee will be considering issues of the independence of the defense function and how funding issues affect the Panel Attorneys' ability to present their defense. The struggle to balance efficiency and good stewardship of government funds with the need to provide effective representation continues to present many challenges in our District as well as throughout the Circuit. The perception that Panel Attorneys are being asked to reveal more and more about their confidential strategies and justifications for requests for services in order to get funding pre-approved is a real concern. Many judges are uncomfortable with the management responsibilities of CJA appointments and expenses, and the relative lack of national guidelines and training .

Similarly, the Court's natural desire to compare the expenses of co-defendants on cases is resulting in perceived inequities due to the fact that the relative level of culpability of defendants does not typically drive the amount of resources spent. For example, the guiltiest of the co-defendants may decide relatively quickly to enter a plea of guilty, whereas a lower-level co-defendant may insist on her day in court, requiring a much higher use of resources. There is a worry that the new e-Voucher system will not take things like that into account when making it easier for the Court to run comparative reports. The Panel Attorneys have also encountered difficulties justifying expenses on activities that the Government has already undertaken. An example would be the denial of a request for an interpreter to review taped phone calls when the Government has already had their own interpreter translate them. A key function of the defense is the independent investigation of the evidence disclosed by the

Government. Should a key phrase in the transcription be wrong, the entire defense could be compromised. While common sense would seem to suggest it is duplicative work for the defense to conduct their own investigation, it actually is a dereliction of our duty to do any less.

Overall, we believe that our CJA Panel and our FPD provide quality and cost-effective representation to the defendants in our District. Our Court encourages collaboration and communication among all the parties, respects and appreciates the services our FPD and Panel Attorneys provide and makes a sincere effort to ensure fair compensation under the CJA Act. However, we encourage the Committee to carefully consider the impact that increasing limitations on funding and time-consuming and costly administrative burdens can have on the ability to meet the constitutional requirement of effective representation. We look forward to the Committee's report and recommendations.