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PARALEGAL:
SHELLEY HOOVESTAL

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

**Re: Portland Public Hearing Testimony for the Criminal Justice Act
Review.**

Dear Judge Cardone and Committee Members:

I am an attorney admitted to practice law in the states of Idaho, Washington, and Montana. My practice consists of civil and criminal litigation in state and federal courts. I have also been admitted to practice *pro hac vice* in state and federal trial courts in the states of Alabama, Arizona, California, Maryland, New Mexico, Texas, Utah, and Virginia. I have been practicing law for twenty-five years and have argued before the Ninth Circuit Court of Appeals approximately 29 times. I am a former President of the Montana Association of Criminal Defense Lawyers (MtACDL). I received the Trial Lawyer of the Year award from MtACDL in 2011. I was also the 1998 recipient of the Trial Lawyer of the Year award by the Montana Trial Lawyers Association. I have been on the CJA panel in Helena, Montana, since 1991 and I continue to regularly take cases when called upon by the courts or the Federal Defenders office to do so. I am where the "rubber meets the road" when it comes to application of the Criminal Justice Act and the effective assistance of counsel. The problematic areas affecting the quality of representation that I see at the present time are as follows:

- 1. The statutory maximum is consistently exceeded due to CJA counsel's increased time requirements caused by the difficulty of attorney-client communications from: (1) inaccessibility; (2) local rule; and (3) detention facility policy.**

The vast majority of my CJA clients are detained. Montana is a large state and federal detainees are typically held by the U.S. Marshal's Service in locations that

seemingly cannot be more remote and distant from their attorneys. The primary locations where federal detainees are held are either in Basin, Wyoming, or Billings, Great Falls, Missoula and Shelby, Montana. Basin is 504 miles away from my office in Helena. It takes me two days, round trip, to drive 1,008 miles to see a client housed there. Billings is 240 miles away from Helena and it also takes two days to see a client. Shelby is 170 miles away. An attorney-client meeting to Shelby takes a full day. Missoula is 115 miles away. This time of the year it is not uncommon for me to drive on bad roads in a snow storm, which also slows progress, just to see an incarcerated client.

The large distances aside, it is also difficult to even schedule a face-to-face meeting with an incarcerated client because of the internal policies of the detention facilities. For example, Shelby only has one room for attorney-client meetings and it has to be booked in advance. If it has already been booked by another lawyer, then a meeting is not going to occur no matter the plea agreement deadline or the urgency of the necessity to speak with a client.

Once scheduled, attorney-client communications are also hampered by the inability to have face-to-face meetings. The jail in Great Falls, for example, requires attorney-client meetings to occur with a plastic barrier between the attorney and the client, with only a little slit through which documents might be passed. This hampers intelligent and meaningful review of discovery and other matters important to the case. Internal jail policies also oftentimes limit the ability of an attorney to bring a laptop into the facility so a client can review the video of a stop or a confession, for example.

In Montana we have a local rule which provides that if a document is designated "Sensitive Material" by a prosecutor, then that document "shall not be left in the defendant's possession without defense counsel present." Prosecutors now tend to mark a high number of documents as "Sensitive Material," FD-302's and witness statements in particular. This rule severely hampers the ability of a federal defendant to have intelligent and informed discussions with his or her attorney about the weight of the evidence due to the fact that sensitive material requires the attorney's presence before the discovery can be shown to a defendant. This, combined with the difficulty in holding attorney-client meetings because the clients are held at opposite ends of the state, makes meaningful review of discovery exceedingly difficult.

The point is that these difficulties require more time to overcome which in turn cause nearly every case to exceed the case compensation statutory maximums. When that happens, CJA counsel must request that the case be designated complex or extended, which requires the filing of a motion, which also takes time to do. The motion then requires the approval of not only the district judge, but by the chief judge of the circuit as well. In short, the difficulties of attorney-client communications alone contribute substantially to high hours. Simple travel time and the additional time it takes to review

“Sensitive Material” cause cases to exceed the statutory maximum, require a motion and the approval of the chief judge of the circuit, and contributes significantly to delay in the final payment of counsel.

2. eVouchers.

The eVoucher system works extremely well. The out-of-court service category needs two additional entries: Preparation and Correspondence. These activities don't fit into any of the other service categories and tend to be activities that I regularly perform.

3. The impact of judicial involvement in the appointment, compensation, and management of panel attorneys, investigators, experts, and other service providers.

A. Appointment of Counsel.

There is very little judicial involvement in the District of Montana relative to the appointment of counsel. Aside from the function of signing the order appointing counsel and then notification from the clerk's office that an eVoucher has been created, there seems to be very little judicial involvement in this process in Montana. The Federal Defenders Office selects and contacts counsel by asking if they will accept appointment if no conflicts exist. When there is a difficult defendant who tends to go through court-appointed lawyers for one reason or another, the district judge will locate counsel on their own. That seems to be the extent of judicial involvement in the appointment process and this system appears to work well.

B. Voucher Review and Compensation – *Policing* Counsel's Vouchers.

Judicial involvement in the compensation approval process can be problematic because judges seem to regard the approval process as one that requires them to “spend time and resources *policing* counsel's vouchers.” Many times this “policing” process has the appearance of nickle and diming. The example that I provided shows a district judge cutting my voucher because I spent time translating some critical documents that were written in English into Spanish for a non-English speaking client. I did it because I could do it more quickly and efficiently than calling upon a translator who could do it more cheaply, but with substantial delay. Judicial involvement therefore appears to be one of cutting costs and managing a budget as opposed to ensuring that people accused of crimes receive the effective assistance of counsel.

CJA counsel's job, on the other hand, is to provide the effective assistance of counsel. It is to assure the fair access to justice of all people regardless of economic status. On many occasions, CJA counsel is one of the few normal people with whom a

criminally accused person has contact. Good CJA counsel are compassionate, willing to put in the work and hold their client's in very frightening, stressful, and unpleasant circumstances. CJA counsel is somebody who can make a difference in the lives of people who find themselves on the criminal side of the system of justice. The example that I give is bailing my client's dog out of the dog pound – work for which I was not compensated. The dog was with the client when he was arrested and law enforcement took it to the animal shelter. It had been there for three or four months and was going to be euthanized. The client went to prison for 270 months and the dog now lives with us. While the court considered that work to be outside the boundaries of the CJA, it was important to the client and even more so for the dog. Much of the work that I perform is done because I think that it's necessary and part of my obligation to provide the effective assistance of counsel to my clients beyond what's going to happen at the next hearing.

In my opinion the judicial “policing” of CJA counsel's work – work that is well within the bounds of the Sixth Amendment – followed by the court's refusal to pay for that work, chills the effective assistance of counsel. We have to make the house payment, the car payment, pay the office lease, and put our kids through college. The Sixth Amendment is jeopardized when voucher cutting tempts CJA counsel to wonder why waste time doing work for which we are going to get stiffed. The voucher review process should not be performed by the district judge sitting on the case (or more accurately, the judge's law clerk who has never practiced law, had a client, or been faced with the decision to allow the client's dog to be put down or be bailed out.) It should be performed by somebody who actually has.

C. Investigative, expert, and paralegal services.

The process for obtaining investigators, experts, and paralegals is unwieldy, inefficient, and insufficient. First, it requires the filing of a motion, affidavit, brief, and proposed order, which requires time and effort to accomplish which in an of itself contributes toward the statutory compensation maximum. Second, the statutory maximum for experts and investigators is not enough to accomplish anything meaningful. \$2,500 for a DNA expert or a fiber expert in a first degree murder case will barely pay for her to fly to Helena, much less analysis of the evidence and writing the Rule 16 expert report containing her opinions and the bases for her opinions. That must be produced to the Government. And then it's necessary to file another motion asking for more money. That takes time and most experts don't like the uncertainty and delay in payment before performing any substantive work. I used to ask for approval of a paralegal, but that request was consistently summarily denied, so I don't even do it anymore.

D. My recommendation.

We clearly need to explain why money is spent, why it's necessary, and to make

certain that it is spent wisely. My recommendation is to have full-time staff attached to Federal Defenders Office dedicated to the CJA panel. Their duties would include investigative, expert, and paralegal support, and voucher review. The judiciary should be removed entirely from the CJA administration. Until that happens, like the Prompt Payment Act for federal contractors, there should be a time limitation for the review, approval, and payment of CJA vouchers. There should also be a review process when vouchers are cut.

Very truly yours,

Palmer Hoovestal