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Hon. Kathleen Cardone, Chair  
Ad Hoc Committee to Review the CJA Program

VIA EMAIL [CJAstudy@ao.uscourts.gov](mailto:CJAstudy@ao.uscourts.gov)

January 20, 2016

Re: Portland, OR, Public Hearing Testimony

Dear Judge Cardone and Honorable Committee Members:

I have served as a CJA panel member doing trial practice in the District of Oregon, since 1989. I started practicing law in 1982 as an assistant state public defender in Florida. I moved to Oregon in 1988 and launched a private practice specializing in criminal defense. I did court-appointed and retained work in the state system, including capital case litigation, until 1998. Since then, I have only taken private-pay cases in the state courts, while doing a mix of private-pay cases and CJA-assigned cases in federal court. It is not uncommon for me to seek state funding for investigators and experts in private-pay cases where the defendant is indigent, and the person paying my fees is without funds for such services.

Currently and for most of my time in private practice, I have operated as a solo attorney with no in-house staff; I contract for support services as needed. I stay actively involved in the criminal defense community, including serving as a current board member and former Vice President of the Oregon Criminal Defense Lawyers Association. For many years I have maintained an "AV" rating in Martindale Hubble, a listing in Best Lawyers in America, and a peer-reviewed

ranking as an Oregon “Super Lawyer.” Thank you for the opportunity to share my thoughts regarding quality of representation and CJA Panel management.

### Quality of Representation

Panel attorneys in Oregon are among the very best criminal defense attorneys in the state; the same is true about the Federal Public Defender staff. With great lawyers doing this work, the quality of representation depends more on (1) the availability of resources necessary to perform the defense function; (2) education and training of counsel to stay up to date with the law and brainstorm new theories of defense; and (3) compensation at a level adequate to retain experienced counsel.

#### 1. Availability of Resources

From attending CJA training programs that draw attorneys from throughout the nation, I have learned how fortunate we in Oregon are to routinely have funds approved for investigators, paralegals and experts. In my experience, these resources are vital to counsel fulfilling the defense function.

Both investigators and paralegals accomplish tasks that the lawyer would otherwise have to perform, as well as some tasks beyond most lawyers’ skills set, at much reduced costs. Investigators in the district are paid \$65 or less per hour; paralegals (including those doing E-discovery management) are paid about \$40 or less per hour. For years I have used a contract paralegal who works primarily with me, as well as for other panel attorneys in non-conflict cases. I have trained him in mitigation investigation, and he has clearance to meet with clients in the attorney rooms at the local jail. He has skills far beyond mine in operating computer software for E-discovery management, database searches, and litigation support services. He has proven invaluable in helping me provide the highest quality defense services in the most cost-efficient manner, to both private and CJA clients.

Experts must be provided in those cases where needed to test the conclusions of the government’s experts. However, experts are often essential in the plea negotiation and sentencing phases of cases to provide quality representation. It is the rare case where I do not start the mitigation investigation contemporaneous with investigating the strength of the

government's case. Certainly, not all mitigation investigations produce information supporting the need for defense experts (most often, forensic psychologists), but in the right case, the expert's report can make years of difference in the sentence imposed. That same information also assists the court in setting conditions of supervision specifically geared to the individual defendant's rehabilitation, and making recommendations to the BOP geared to the same end.

Although being granted these valuable resources has not been a problem for panel attorneys in Oregon, I believe there are areas for improvement. The process for obtaining prior authorization of funds is incredibly slow—generally 30+ days. Delays of 45-60 days may occur if the request must go all the way to the Ninth Circuit for final approval. This requires set-overs of court proceedings, with corresponding hardships to in-custody defendants, and systemic cost increases. In contrast, when I seek funds for investigators or experts from Oregon Public Defender Services (for indigent defendants whose family is able to only pay for counsel), that determination is routinely made within a few days. OPDS does not involve judicial approval of defense funding requests.

This 30- to 60-day delay between request and approval of funds makes quality representation particularly problematic in cases headed for trial or other substantive litigation. In those situations, the investigator and paralegal costs often have reached the cumulative amount that triggers the longer process of getting Ninth Circuit approval. It is difficult to predict when preauthorized funds will run out. And I have yet to encounter a district court judge who would welcome a motion to postpone filed a week before trial was set to start, because defense counsel is waiting on additional funds to be approved for her paralegal or investigator. In those situations, I have instructed that work continue, knowing that I could end up responsible for paying their fees. Fortunately, that has yet to happen.

In addition, preauthorization of up to \$800 per type of service provider, rather than \$800 total, should be re-instituted. As it stands, I invariably use the one-shot, preauthorization for my contract paralegal to begin E-discovery management and mitigation investigation. That information is necessary for me to make an informed assessment about how much additional money will be needed for those tasks, and whether an investigator or other expert is likely to

be required. If the prior practice of permitting up to \$800 of preauthorized work per type of service provider was available, I could get a case review and preliminary assessment from other types of experts to help me determine whether additional services from the expert(s) are necessary, and the scope of those services. For example, in a child pornography case involving the Internet, a preliminary case review by a computer forensics expert is often essential for determining the scope of services and related cost. But with the current system, I must seek funds for a preliminary case review, wait about 30 days to get authorization, then make a second request for funds to provide needed services in an amount that will require Ninth Circuit approval, and probably wait 45-60 days to hear back on that.

## 2. Education and Training.

We are fortunate in Oregon to have a Federal Public Defender's Office dedicated to providing education and training to CJA panel members. In addition to monthly CLEs during much of each year, staff attorneys are always available to answer questions and share motions and briefs. At the same time, because of the very talented pool of panel attorneys, myself and others have shared our motions and briefs from CJA cases with defender staff attorneys.

During my tenure as a panel attorney, I have attended many of the CJA training seminars offered by the Defender Services Office Training Division. Particularly in my younger years of federal practice, those programs were highly intensive learning experiences. It would be beneficial to have advanced training programs geared specifically for panel attorneys who are well beyond the basics in experience level; or perhaps open Federal Defender staff attorney training programs to more experienced panel members?

Over the years I have seen an increase in the complexity of federal prosecutions, particularly in the white-collar arena, other Internet-based crimes, and multi-defendant drug trafficking conspiracies. During that same time, the law has changed dramatically in the sentencing phase, from the guidelines becoming advisory to the interpretation and application of the ACCA and related guideline enhancements. Keeping up with these changes can be time-consuming with resulting increased costs of representation. For example, I still remember how labor-intensive it was for me to defend my first tax fraud case. Greater

efficiency might be achieved by having panel attorneys, at least in larger districts, develop special expertise through regular assignment of same subject matter cases, such as tax fraud, child pornography, ACCA.

### 3. Compensation

With the increase in multi-defendant prosecutions over the years, the panel has expanded. The result is that panel attorneys get far fewer cases each year, because there are many more attorneys on the panel. For example, I used to get about 5-7 cases per year “in the early days,” and in later years have gotten about 2-3. At the same time there are increased administrative burdens on panel attorneys, e.g., E-voucher billing; preparing E-vouchers for experts, etc., and increased detail required to justify vouchers, all of which are time consuming but not reimbursable. I spend far more time doing administrative tasks on CJA cases than I do on private-pay cases (and I do my own billing), while being paid only about half of my usual hourly rate. The compensation becomes dramatically less when one is forced to decline private-pay cases because a complex CJA case demands the lawyer’s full attention. But there will always be less-experienced lawyers willing to serve on the panel in the foreseeable future at the current hourly rate.

Notwithstanding those complaints (which I’ve heard often from many CJA attorneys), I still do panel work. I do so because federal defense is different from state defense, the work is challenging, and serving on the panel is a great way to keep up with federal practice so I can effectively handle those rare private-pay federal cases. Most importantly, I do it because the Federal Defender and district court judges here work together to give panel attorneys the resources and training needed to provide quality representation to indigent defendants. I define “quality representation,” as using my legal skills to truly make a difference in the lives of my clients.

### CJA Panel Management

Oregon judges have delegated most of the panel administration to the Federal Defender, and that system has worked reasonably well. The Committee may consider the wisdom of “if it ain’t broken, don’t fix it,” and recommend that

different districts with different but successful panel management systems be allowed to continue those practices. If there must be a nationwide model, I would advocate for one that has less versus more judicial control. This is based on my belief that the defense function in an adversarial justice system should not be ultimately controlled by judges, any more than the prosecution function is controlled by judges. If judges control the funds for indigent defense, that puts judges in ultimate control. I am also informed by my experience at the state level in Oregon where after many years judicial control was abandoned in favor of an independent public defense services agency. However, I realize that Congress can't be counted on to fund indigent defense as a stand-alone agency. If you want to know why Oregon legislators can be counted on, I can address that in live testimony.

### Conclusion

Public perception of the fairness of our criminal justice system is undermined when persons without financial means lack quality representation. Our adversarial system is grounded on the principle that justice is served when both sides do battle on a level playing field, equipped with equivalent resources. In federal court, the government employs veteran prosecutors who have litigation support staff and almost unlimited access to investigators and expert services through various law enforcement agencies. Few persons charged with federal offenses can afford counsel—far fewer than in state court proceedings. Providing experienced federal defense counsel armed with adequate resources is essential to achieving equal justice, fostering public respect for the law, and safeguarding the fundamental rights of all individuals.

s/Terri Wood

Terri Wood