

WENDY HOLTON
Attorney at Law
211 5th Avenue, Helena, MT 59601

Telephone: (406) 442-9349
Facsimile: (406) 443-4829 (call first)

Direct line (406) 443-4829
E-mail: wholton@mt.net

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Judge Kathleen Cardone, Chair
Ad Hoc Committee to Review the CJA Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C. 20544

RE: CJA Panel Attorney Testimony

Dear Judge Cardone and Committee Members:

Thank you for the opportunity to appear and present testimony at the Committee's public hearing regarding the structure and function of the Criminal Justice Act and the quality of representation and CJA panel administration.

I have practiced criminal defense for more than 30 years, first as a Prettyman Fellow at the Georgetown University Law Center and then in private practice as a solo practitioner. I began accepting appointments in Montana's Federal Courts in 1991 – prior to the establishment of our Federal Defender's Office in 1993. Since then I have continued to accept appointments pursuant to the Criminal Justice Act. I currently serve on the CJA Panel Selection Committee for Montana. In 2005, I was appointed by then Governor Schweitzer to serve on the Public Defender Commission charged with establishing a statewide public defender system in Montana. I served on that Commission until 2008. Currently, pursuant to an appointment by Governor Bullock, I serve on the Public Defender Task Force to study the operations of the Office of the State Public Defender. From 2010 - 2011, I served as President of the Montana Association of Criminal Defense Lawyers.

Suffice it to say that the provision of quality indigent defense is near to my heart. I believe that the CJA program is the gold standard of indigent defense and feel blessed to practice in Montana where our federal judiciary is supportive of the program and the attorneys who participate in it. My suggestions are intended not to be critical but to help make a good program even better.

Montana is a large state based on land mass and a small state based on population. There are five divisions: the Billings Division, the Helena Division, the Missoula Division, the Great Falls Division and the Butte Division. Montana's federal courts deal not only with matters that are commonly thought of as "federal cases" – i.e. large scale drug cases, child pornography, and fraud cases; but also with a large "Indian Country" case load, meaning that our Courts handle many cases that are "major crimes" under federal law.

The success and effectiveness of the CJA program is directly dependent upon the participation of a well-qualified panel of attorneys who are familiar with federal laws, procedures, and personnel. As I will discuss in more detail in subsequent sections we have a talented and dedicated panel of CJA lawyers. However, the hourly rate, voucher cutting, and delays in payment serve as a disincentive to service by the "best and the brightest" who can often command far greater fees in their privately retained cases.

Selection and Retention of CJA Panel Members in Montana

Pursuant to the Criminal Justice Act Plan for Montana – which was implemented in 2014 – an optimum number of panel members was determined based on the case load of each division. The goal is to ensure that each panel member receive, and accept, enough appointments each year (between four and five) to ensure that he or she keeps abreast of developments in federal criminal law and procedure and maintains a familiarity with the personnel in the system.

All panel members are to be reviewed at least every five years by the CJA selection committee. New panel members are added by the Committee as there are vacancies based on a merit selection process. New members without substantial federal experience participate in a Mentor Program, at a reduced hourly rate, prior to receiving their own appointments. Recently, an emeritus panel has been implemented to allow established attorneys who don't want to be on the regular rotation to be available for appointments in special circumstances. Panel members serve at the pleasure of the Article III judges of the court.

TRAINING

Federal criminal defense is a specialized area of practice that requires ongoing training and collaboration with other practitioners. As a panel attorney, I am grateful for the close working relationship that we have with our Federal Defender Office. The attorneys in that office, in particular our Chief Federal Defender, Tony Gallagher, are available for consultation when we encounter difficult situations or simply need to bounce ideas off of a respected attorney. More formally, each spring in conjunction with the Montana Association of Criminal Defense Lawyers, the Federal Defenders sponsor a two day seminar at Chico Hot Springs. Both state and federal topics are covered by both in and out-of-state speakers. In addition to continuing legal education, the conference provides an invaluable networking opportunity. The Federal Defenders also present at least four lunch hour seminars in each division annually. These shorter programs cover new developments and other timely topics.

Additionally, low cost or tuition free high caliber multi-tiered seminars and specialized training programs are available to panel attorneys from the Defender Services Office Training Branch. Sadly, I don't believe that many of our panel attorneys take advantage of these seminars (although I am attending two of them this spring). My speculation is Montana attorneys don't take full advantage of these programs because even though they are tuition free, it is still expensive to attend as round trip airfares out of Montana tend to cost more than \$ 400.00 and lodging expenses are often more than a hundred dollars a night. Thus, attendance can easily cost between \$800.00 and \$1,000.00, not accounting for time out of the office. I remember fondly the regional "Only the Strong Survive" seminar sponsored by the Administrative Office of the United States Courts in 1993. All expenses were paid, the speakers were fabulous, and it was a career altering experience. I still have the materials and even refer to them on occasion. Although it is probably not feasible to sponsor such programs on an annual basis, I encourage the Committee to consider holding such regional training programs every few years.

All in all, I believe that adequate training opportunities are available for those panel members who are willing and financially able to take advantage of them.

COMPENSATION

Although it is difficult to argue that \$129.00 per hour is not a substantial sum it is about half of what respected attorneys in private practice in Montana charge. Further, I don't know anyone who bills 8 hours a day. Personally, I am at my desk, in court, or on the road, 10 or more hours a day and rarely bill over 5 hours. As alluded to above, there are many necessary activities, including continuing education, that require an attorney's time but are not billable. Although most criminal defense attorneys believe that the work is also a calling, the hourly rate discourages some fine attorneys from taking CJA cases.

In my opinion, more concerning than the hourly rate are delays in payment and voucher cutting. Especially for newer practitioners waiting to bill until a case is completed causes financial stress – most cases stretch out over months during which the attorney must wait for compensation while absorbing not only general office overhead but also case specific expenses. Although it is no longer a problem for me, I remember earlier in my career scrounging to pay my quarterly estimated taxes at the same time that I was owed, and awaiting payment, on thousands of dollars of CJA bills. Similarly, I have been fortunate in not having any of my CJA bills cut for a number of years. However, I am aware of other panel members whose vouchers have been cut for seemingly arbitrary reasons. Clearly oversight of billing is necessary and all of us are responsible for billing reasonably and responsibly, but the CJA should not be seen as a place where the budget can be balanced at the expense of the panel attorneys.

Another area of concern is that all experts and investigative services must be pre-approved by the presiding judge. In many circumstances it is difficult to obtain the services of top tier investigators and other experts due to the low rates and caps. Of greater consequence is the fact that the justification and pre-approval process discloses certain aspects of defense preparation to the court that otherwise would occur in private. In particular, I am referring to evaluations done in sex offender cases. If I obtain funding for such an expert and don't later utilize the report in sentencing, the clear inference is that the result was unfavorable. This has the potential of prejudicing my client.

OTHER FACTORS IMPACTING THE QUALITY OF REPRESENTATION

Montana's size and extreme weather impact our ability to meet face to face with our clients. Even though panel assignments are made within divisions (outside division assignments are made in large multi-defendant cases or where there are other conflicts)

that doesn't mean our clients are in our same community. Most federal prisoners are held in Shelby, Montana which is remote for almost everyone. For example, I am currently handling a Helena Division case where my client is housed in Shelby – a four hour drive one way – eight hours round trip. During the winter months it is nearly impossible for me to make the trip in a day due to light and road conditions. At \$129.00 an hour that is more than a thousand dollars in “windshield” time for one trip, not to mention mileage and other travel expenses. I would much prefer to accomplish substantive legal work during that time and, thus, don't visit as often as I believe would be optimum for the attorney/client relationship. Finding ways to house our clients nearer to us would cut CJA bills dramatically and would help engender more effective representation.

Further, on many occasions clients are required to travel or are transported, in custody, over long distances for their court appearances. The client either incurs significant travel costs to travel to and from the courthouse or, if in custody and then released, is required to find a way home. Subsidies for lodging and reimbursement for travel expenses should be considered in such circumstances. I am reminded of a client who was transported from Missouri on a child pornography case. We were able to get pretrial release but his, very poor, family had to purchase a bus ticket for him to return to Missouri pending trial. I bought him winter clothes and gave him money for food while en-route. When it came time for him to return to court I had to request that his pre-trial release be revoked in Missouri so that his family wouldn't have to bear the travel expenses again. Clearly this wasn't optimum for anyone.

In closing, I believe that the CJA system is a strong and good program but that there are areas that can be improved. I appreciate this Committee's efforts to learn about how the system really works and what can be done to improve it so that indigent defendants are provided the best possible representation. Thank you for your consideration of my testimony.

Respectfully submitted,


Wendy Holton