

MEMORANDUM

To: Ad Hoc Committee to Review the Criminal Justice Act Program
From: Franny Forsman and Dan Albrechts
Date: February 17, 2016
Subject: Comments

Thank you for the invitation to submit comments prior to the March hearing in San Francisco. Regular review of the Criminal Justice Act program is, in our opinion, essential to the continuing vitality of representation of indigent defendants in federal courts. These comments will address two areas: 1) Mega-cases and Case budgeting; 2) Quality of representation by Panel Attorneys.

As Federal Public Defender for the District of Nevada, Franny Forsman oversaw the litigation of voluminous-document cases for both Assistant Federal Defenders and Panel Attorneys in Nevada since the first mega-case was filed. Nevada had a particularly high number of mortgage cases as well as various types of investment, securities and other fraud cases. Most of the cases involved numerous defendants, voluminous electronic discovery and a sharp substantive law learning curve. As a result, in Nevada, some techniques have been developed over the last 7-8 years which have proved effective. Dan Albrechts has served on the CJA Panel in Nevada for many years and is serving his second stint as Panel Representative to Defender Services.

Dan Albrechts and Franny Forsman represented the lead defendant in an unusually complex case involving allegations of a multi-year conspiracy sounding in fraud involving Homeowners Associations and construction companies and millions of seized documents.

MEGA-CASES

Budgeting

The District of Nevada has utilized case budgeting for a number of years. Generally, the Magistrate Judge assigned to the case schedules regular budget meetings on cases in which it has become apparent that management of discovery will be complicated and extended. An ex parte meeting on budgeting is usually scheduled at regular intervals immediately after a status check for all counsel, including government counsel. In that way, issues which arise with

regard to disclosure of discovery, form of discovery or other matters which may impact the budget can be addressed prior to the ex parte meeting. We have found that the budgeting meeting serves several functions: a) the court is kept up to speed on the discovery process and can assist in moving it along; b) the court can be educated on the difficulties being experienced by counsel so that associated costs can be understood; c) all counsel must participate in planning for the litigation of the case and lesser experienced counsel are educated on the steps necessary to properly prepare the case.

Appointed counsel in these cases submit monthly vouchers. The CJA Clerk attends the budgeting meetings in order to assist the Magistrate Judge, to provide information to counsel and to better understand the course of the litigation as it impacts the vouchers.

Outside Counsel to Manage Electronic Discovery

The District of Nevada has employed a number of methods to assist counsel in managing voluminous electronic discovery. Most CJA Panel Attorneys are sole practitioners or practice in very small firms. Sometimes their practices lack sufficient technology or staff to effectively manage even moderately-sized electronic discovery. Russ Aoki's firm in Seattle has been of invaluable assistance to the CJA program over the years and in the most recent case handled by these writers, it would have been impossible to prepare without the assistance of Mr. Aoki, his staff and the database which they built.

The biggest impediments to the most effective use of outside sources for management of electronic discovery is the need to learn a new database program with each case and the lack of qualified local paralegals to assist counsel. New database programs continue to develop and improve so counsel will need to continuously learn new programs. However, many criminal defense attorneys are just not technologically proficient enough. Civil firms employ skilled paralegals to do many of the tasks that CJA counsel are doing. The rate paid to paralegals is far too low to attract quality paralegals for this function. Skills in criminal law are not required for paralegals to assist in these cases. The cases look more like a civil case than criminal cases anyway.

Appointment of Counsel/Organization of Counsel/Role of FPD

With the increased use of computerized CJA voucher and assignment programs, care must be taken that random or rote assignment of cases does not result in the selection of counsel who are simply not experience enough or skilled enough to handle a mega-case. While assignment to a minor player in a multi-defendant case can be a good method for training new Panel Attorneys, often the amount of discovery is so daunting that often the lesser-experienced attorney

is far too dependent on the government's representations as to the state of the evidence against the defendant. Additionally, a Panel Attorney should be recruited to serve as the organizer of co-counsel. This function should probably be carried out by the Federal Public Defender, even if the FPD is not appointed to the case as the FPD should be familiar with the panel and be able to select a managing Panel Attorney for the case as the court should probably have no involvement in such a selection.

Either the FPD or the managing Panel Attorney should schedule regular meetings of all counsel in the case so that matters such as the selection and implementation of the database, common investigative issues, budgeting and other common litigation issues can be discussed. Out of that discussion, where appropriate, investigators for common issues and/or paralegals for common issues can be determined and functions defined. Employment of common support staff obviously should not preclude employment of individual investigators and other staff for those issues which are not common to the group.

The Federal Public Defender should take a leadership role in insuring that qualified Panel Attorneys are assigned to the case, that adequate resources are being provided to the panel, that training is made available to the panel and to assist in educating the court with regard to the resources required for the litigation. That role should be taken by the FPD even when the FPD has a conflict of interest and is not counsel of record in the case.

Role of the Government in Provision of Counsel

The government should have no role in the determination by the court as to which counsel should be appointment or with regard to how many counsel are required. In the recent HOA fraud case which involved millions of documents, complex factual allegations spanning years of conduct, and difficult legal issues, the government successfully opposed a motion by the lead defendant (who was facing in excess of 20 years of imprisonment) for the appointment of second counsel for that defendant. This opposition was lodged despite the fact that at least 5 lawyers appeared for the government, and assistance was provided by agents of the FBI and Metro and an unknown number of paralegals and assistants in the Department of Justice.¹

¹ In that case, after some delay, the court allowed the CJA Attorney (Dan Albregts) to receive the assistance of a non-counsel of record "associate" (his former boss, Franny Forsman).

OTHER CJA ISSUES

Quality of Representation

The quality of representation by Panel Attorneys is impacted by compensation, independence issues in the selection and retention of panel attorneys.

Hourly Rates/Voucher Cutting/Delays in Voucher Processing

While the program continues to involve wonderful lawyers who do appointed work for 25% of their normal hourly rate, the hourly rate (although creeping upward) continues to impede the recruitment and development of attorneys who can effectively practice at the high level required in federal court. The court can do little about the rate, however, when that low rate is combined with arbitrary and unexplained reduction of vouchers and delays in processing, panel attorneys become discouraged. This is especially true in large cases where a sole practitioner may spend an entire month working on a case, to the detriment of the rest of her practice, and then be forced to wait for payment for months.

Selection and Retention Practices

Many District CJA programs suffer from independence issues and violate the first principle of the ABA Ten Principles of a Public Defense Delivery System:

The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense....

ABA Ten Principles of a Public Defense Delivery System, ABA Standing Committee on Legal Aid and Indigent Defendants (2001-2002).

A review of either the Local Plans or of the practices in district courts would reveal that there is excessive judicial involvement in the selection of attorneys for the panel. For example, in the District of Nevada, three of the seven members of the Selection Committee are judges. Consequently, there is excessive judicial involvement in removal of attorneys from the panel. Model

provisions for Local Plans should include methods to avoid judicial involvement in the selection or retention of attorneys by inserting a nonpartisan committee/board as recommended by the ABA.

The lack of plans for evaluation of the performance of panel attorneys also results in retention of attorneys with practice deficits. Model provisions should be developed for evaluation of panel attorneys independent of the judiciary. Those provisions should provide for input of the judiciary, co-counsel and clients.