

**AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT PROGRAM
SAN FRANCISCO PUBLIC HEARING TESTIMONY
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**STATEMENT OF JERRY L. TRITZ
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I would like to begin by thanking the Committee for the important work the Committee has undertaken to review the Criminal Justice Act and for the opportunity to appear before the Committee to discuss the status of the Case-Budgeting Program in the Second Circuit.

My name is Jerry L. Tritz. I am the Case-Budgeting Attorney (CBA) for the Second Circuit. Prior to assuming this position I was a CJA lawyer in the Southern and Eastern Districts of New York for 28 years.

Creation of the Case-Budgeting Pilot Program

In 2007, the Judiciary recognized the need to take steps to control the spiraling costs associated with the defense of capital prosecution and other high expense cases identified as mega-cases. To accomplish this goal, the Committee on Defenders Services of the Judicial Conference of the United States (“JCUS Defenders Committee”) created the Case-Budgeting Attorney Pilot Program and invited circuits to apply for a Case-Budgeting Attorney position. The Second, Sixth and Ninth Circuit were chosen to participate in the Pilot Program. During the last year of the Pilot Program, four years later, the Federal Judicial Center (“FJC”), at the request of the JCUS Defenders Committee, performed an independent review of the Pilot Program. The results of the FJC’s independent review indicated that the Case-Budgeting Pilot Program had achieved its stated goal of controlling costs in selected CJA cases through the implementation of mandatory case-budgeting. In approximately 2011, the JCUS Defenders Committee voted to expand the Case-Budgeting to include six other circuits: the First, Third, Fourth, Seventh, Eighth and Tenth Circuits.

The Case-Budgeting Pilot Program definitively established the value of Case-Budgeting as an excellent tool to assist the judiciary in controlling the costs associated with capital and mega-criminal defense cases. The Case-Budgeting Program promoted the cost containment principles that have become the hallmark of the judiciary--fiscal responsibility, accountability and good governance--in the expenditure of appropriated funds for criminal defense.

In the Second Circuit, the Case-Budgeting Program has helped change the culture of the CJA Panels in the Circuit to accept the principles of cost containment, fiscal responsibility,

accountability and good governance as the future of responsible case management by our CJA Panel Members. Our Case-Budgeting Program also has contained the costs of defending mega-cases and minimized the judicial reduction of CJA voucher reimbursement requests in such cases. Our Panel Members have come to understand that being a CJA lawyer carries greater responsibilities and duties than simply putting their names on a list. Along with the responsibility to provide quality representation comes the obligation to provide that representation in a cost effective and responsible way.

Case-Budgeting was originally envisioned as being appropriate for use with capital and high expense mega cases. A mega case is defined as a case where it is expected that the total cost of the case will exceed \$30,000.00 or at least 300 attorney hours will be required to be expended on the representation. We require budgets to be prepared using “presumptive rates” and “best practices” to arrive at the cost figures. However, just because we don’t require budgets to be prepared in every CJA case, it does not follow that every CJA case could not benefit from the application of case-budgeting principles. Even the everyday case could and does benefit from the techniques listed below, here in the Second Circuit. Sharing expert service providers, shopping for the best price and negotiating a lower CJA price do not require a formal case-budget for the benefit of these techniques to be realized. Here in the Second Circuit we encourage our Panel Members to be conscious of the costs of their representation in all of their case, not only the budgeted ones.

Presumptive Rates for Expert Service Providers

One of the first steps taken by the Second Circuit Committee on CJA and Pro Bono Services was the creation of presumptive rates for expert service providers in CJA cases. Before the establishment of presumptive rates, there was no guidance for CJA Panel Members or, for that matter, for judges, regarding the appropriate rates of compensation to be paid for services of expert service providers such as an investigator, paralegal or a psychiatrist. In a multiple defendant case, this lack of guidance often resulted in an investigator retained by one defendant being paid more than an investigator retained by a co-defendant for no other reason than the first investigator requested a higher fee.

Judges often have little insight into an appropriate rate schedule regarding the rate to be paid by CJA for these expert services. This lack of judges’ knowledge is in part due to the absence of any training in CJA matters while attending “baby” judges’ school. Judges are left to learn about their duties and responsibilities under the CJA Act either from other judges or “on the fly” while on the job. Moreover, very few, if any, lawyers who are appointed to the bench in our Circuit ever served on a CJA Panel and may never have represented a criminal defendant or been involved in a criminal case at any level.

Prior to the arrival of CBA’s, judges had to rely on their colleagues to answer their

questions because there was no one that a judge could call for advice regarding appropriate compensation rates for expert service providers. The implementation of Circuit-wide presumptive rates for expert service providers has “leveled the playing field” in the Second Circuit. The judges know what is a fair compensation rate; the lawyers know an approved rate to request from the court and the providers have appropriate expectations as to the amount of their compensation. Additionally, established presumptive rates give the providers a level of confidence that no one else is being paid a higher rate simply because their CJA Panel Member requested a higher rate. Presumptive rates also make it easier, when reviewing CJA reimbursement vouchers, to identify anyone who requested an excessive rate and take corrective action. Moreover, the appointment of the Case Budgeting Attorney as a central clearinghouse for information about costs has made it possible to negotiate CJA rates with such vendors as appellate printers, and to clarify with local governments the sales-tax-exempt status of services paid directly by the government at the behest of CJA lawyers. Neither individual CJA lawyers (lacking cohesion or shared information) nor judges (lacking expertise in the overall cost issues affecting CJA representation) have been in a position to obtain such savings.

Policy and Procedure Manual

On the theory that you cannot hold the CJA Panel Members to a course of conduct unless the required conduct is expressed in writing, the Second Circuit CJA Committee created a Policy and Procedure Manual which is posted on the Court of Appeals Internet home page. The Policy & Procedure Manual is a resource not only for the CJA Panel Members, but also for our judges as well. The Manual sets forth the CJA Committee’s expectations regarding the level of representation to be provided indigent defendants in the federal courts of our Circuit. For example, if a Panel Member determines that, as part of the representation, it will be necessary to travel outside the district where a case is pending, the Manual explains the procedures for requesting travel authorization from the court, use of the judiciary’s National Travel Service to obtain discounted Government rates and the rules for charging airfare to the Court’s credit card. The Manual also has a number of appendices which set forth information regarding the most current compensation rates for attorneys in capital and non-capital cases as well as the previous rates and periods of applicability, mileage reimbursement rates, case compensation maximums and interpreters’ compensation rates. The Manual has become the “go to” resource for our CJA Panel Members to find answers to their basic CJA questions.

Cost Containment Techniques

As stated above, case-budgeting forces our CJA Panel Members, at an early stage of their representation, to evaluate their case and decide where the case is going and how is it going to

get there. In other words, case-budgeting requires the CJA lawyer to develop a plan of representation, including identifying necessary expert provider services, to bring this case to a successful conclusion. Once these decisions are made, the Second Circuit has established a number of “best practices” which we encourage our CJA Panel Members to use when retaining expert service providers. These are no more than sound business practices which would be part of the foundation of any successful law firm. Here are some examples :

1. **Sharing Where No Conflict Exists:**

In a multi-defendant case, it is possible that each defendant will apply for an investigator and then direct that investigator to investigate the cooperating witness, resulting in multiple investigators investigating the same person. As part of case-budgeting, the Second Circuit asks its Panel Members, in multi-defendant cases, where there is no conflict of interest, to have one investigator look into the cooperator and then share that information among all of the defendants. The obvious benefit is that CJA will not be paying for the investigators to duplicate each other’s work.

Another opportunity for sharing occurs when lawyers’ offices are geographically close together. This is a perfect opportunity to share discovery material and thereby reduce photocopying cost usually born by CJA.

2. **Getting Multiple Bids:**

Where there is a substantial piece of work that requires an outside expert service provider, we ask our CJA Panel Members not to accept the first bid for the job. The Second Circuit asks its CJA Panel Members to “shop around” to attempt to find the most cost effective provider who will perform the required services competently and cost effectively. We also advise our Panel Members that when they do shop around, they should be sure to advise the judge of their efforts in order to provide the court with a “comfort level” regarding the resulting requests for reimbursement. Shopping around also lets the court know that the attorney is performing his or her duties in a cost effective and fiscally responsible way while providing quality representation.

3. **Take A Step-by-Step Approach:**

This technique applies to situations where the work required to be done can be broken into segments and depending on the results of the first segment, a decision as to whether or not to proceed to the next segment can be made. This technique avoids spending money on work which proved unnecessary based upon previous

work. For example, in situations where the Government has alleged that it has captured the CJA attorney's client on tape on four occasions but the client denies it is his voice. The attorney finds an expert service provider who does voice print analysis and is willing to evaluate the voice on each of the four tapes to determine if it is truly the defendant's voice. The expert requests \$7,500.00 per tape for a total fee of \$30,000.00. One approach would be to make an application to the court requesting \$30,000.00 for the expert to review the tapes. A second and preferred approach in our Circuit is to explain the facts to the court, but rather than requesting \$30,000.00, start by asking for only \$7,500.00 or enough to have only one of the tapes analyzed. Depending on the results of this first examination, a second request for an additional \$7,500.00 can be made assuming that the first evaluation was helpful to the defense. By taking this approach and explaining it to the court, the judge is given a level of confidence that he is not being asked to pay \$30,000.00 to conclusively prove the defendant's guilt in a situation where the client is foolishly lying to his lawyer.

4. Negotiate A CJA Rate:

Often, our CJA Panel Members underestimate the value and attraction of doing CJA work and never think to try and negotiate a lower CJA rate. CJA work, when viewed through the eyes of a psychiatrist, may be far more attractive than it might appear at first glance. The CJA Panel is a relatively small and tight-knit community in which it is quick and easy to develop a reputation. Once a service provider has been retained in one case and provided high quality service, it is not unlikely that one Panel Member will tell his or her colleagues about this provider and soon a whole new area of business can appear for this expert. Additionally, working within the criminal justice system is considered interesting and exciting work when compared to the everyday work performed by some experts. With this in mind, we encourage our panel to try and negotiate a lower CJA rate as if we were a not-for-profit entity. Often service providers will be willing to lower their hourly compensation rate for the opportunity to try and grow this new area of business.

5. Making Use of Lower Cost Service Providers:

Early on in the life of the Case-Budgeting Attorney Pilot Program, it was realized that substantial savings could be realized if our CJA Attorneys hired lower cost associates and paralegals to perform tasks appropriate to their level of expertise which might otherwise be performed by the lawyer at the higher CJA rate. Why pay the full CJA rate to the lawyer to put the discover material into binders for trial when a paralegal could perform this task for a third of the cost. Techniques such as this and the others mentioned above bring a benefit to all cases and should not be limited to only cases with budgets. To do so brings many of the benefits of

Case-budgeting to all CJA cases even if they are not capital or mega cases and no formal budget has been prepared.

These are only a few of the techniques which can be used by our CJA Panel Members to contain the costs associated with providing quality representation. The Second Circuit encourages all CJA Panel Members not to be limited by the ideas suggested by the CBA or the Circuit CJA Committee, but to use their own imaginations to come up with new and innovative ideas on how to conserve costs. We stress with our CJA Panels that any such activity should always be brought to the Court's attention. We emphasize that one of the goals for a CJA Panel Member is to develop a reputation as a cost-conservative practitioner so as to increase the comfort level of the court when reviewing your service provider requests. Such a reputation will increase the likelihood of your requests being granted while at the same time improving the quality of the representation you are providing. It is far more advantageous to be seen by the court as part of the solution than being seen as the problem.

Case-Budgeting - A Good Start

Case-Budgeting has been a good start, but it is not all that is needed. It has assisted in changing the culture of the CJA Panel Members so that CJA Panel Members appreciate and understand that with membership comes obligations and responsibilities to their clients and to the overall CJA Program in our Circuit. We have established presumptive rates to take the guesswork out of setting fee. We have established "best practices" to help the panel conserve costs while at the same time providing quality representation. The system has been working extremely well in the Second Circuit, but there remains room for improvement. Whether we like it or not, the judiciary runs the CJA Program as if each Circuit is running an independent law firm called the CJA Panel, without any one in charge.

No law firm of any size exists without a managing partner, and yet the CJA Program has no similar position. Instead, the CJA Panel is administered by committees of judges of each court who meet infrequently and are not familiar with the everyday problems faced by their CJA Panel Members. There is no consistency among the numerous judges who approve vouchers. A few judges routinely reduce vouchers while others never cut a voucher. Some will approve whatever is put before them while others refuse to approve even the most basic of services.

This administration of the CJA Program has created a multi-tiered system where everyone is not treated the same. The prosecutors, federal defenders and clients with privately retained attorneys do not have to ask permission of the court to hire expert service providers, *e.g.*, an investigator, but a CJA Panel Member must apply to the court for permission to hire expert service providers for his or her client. When making these applications, CJA lawyers are forced to reveal information about their case or defense that no other party is forced to reveal during the pendency of the criminal case. Disclosing this information to the judge could come back to haunt a client at a later stage of the case, such as at sentencing. Many of these type of issues could be

avoided if there were someone overseeing the administration of the CJA case other than the judge. Reviewing vouchers and approving service provider requests are a burden on our judges which they would gladly forgo in favor of their other important work. Moreover, this is not work that only a judge can do. As CBA, I review vouchers and make recommendations to the court which are followed in virtually every case. In working with panel members on preparing budgets, I make recommendations on vendors and expert service providers which are almost always followed by our judges. To keep this burden with our judges is an unnecessary duplication of effort.

Another problem area arises when a judge determines that a voucher should be reduced. Our Second Circuit rules provide for the CJA attorney to be given notice and an opportunity to make a written submission. But from the attorneys point of view, this rule gives them no acceptable option. If they accept the reduction, they worry they will appear as if they are admitting that they did something wrong. If they make a submission, they feel they will be perceived as arguing with the judge. Neither option is very attractive. Placing a senior-level court staffer in charge of the CJA Program, and inserting such a staffer as an intermediary or buffer between the Panel Members and the judges who ultimately approve the payments would make the process more transparent, make the application of the rules more consistent and probably serve to improve the relationship between the court and the members of the CJA Panel.

Conclusion

From the beginning of the Case-Budgeting Program, it was realized that the only way case-budgeting could succeed would be if the CJA Panel Members became engaged in the process. The Second Circuit realized very quickly that the culture of our Circuit's CJA Panels needed to be changed from hostility to oversight to one that embraced concepts of cost containment, fiscal responsibility and accountability. The question was how would we accomplish this goal? The answer revealed itself during the early stages of the Pilot Program. The CJA Panel would accept and participate in Case-Budgeting because it was in their best interest to do so. Case-budgeting is another weapon in their arsenal of defense tactics. Using techniques such as those listed above will increase the likelihood of their service provider requests be granted and help to improve the quality of representation being provided. Moreover, case-budgeting, while designed to be used with capital prosecutions and mega cases should not be viewed as limited to only those discrete few cases. The techniques discussed above have value in almost all of the representations handled by our CJA Panels Members. The CJA lawyer's case does not have to be a capital prosecution for the attorney to share an expert with a co-defendant. The CJA Panel Member need not be involved in a mega-case to attempt to negotiate a lower CJA price. Case-budgeting has value across the full spectrum of CJA cases and should not be viewed as of value only in the capital and mega-case arena.

Thank you for inviting me to testify today and share our views. Please let me know if I may be of further assistance to the CJA Review Committee.

