

Written Testimony of Mary McNamara, CJA Representative
At the Public Hearing Before the Criminal Justice Act Ad Hoc Committee
San Francisco, California
March 3, 2016

Honorable Kathleen Cardone and Ad Hoc Committee Members:

My name is Mary McNamara. I am the CJA representative for the Northern District of California. I currently am serving my third three-year term as CJA representative in the district. I have practiced criminal defense for more than twenty years, starting in 1994 when I was an Assistant Federal Public Defender under Barry Portman. In 1998, I opened my own criminal defense firm with another former Assistant Federal Public Defender, Ed Swanson. We have been panel members ever since (with the exception of the mandatory one year fallow periods between our three year terms). It is our honor and privilege to be members of our CJA panel.

Overall Effectiveness of the CJA Program in the Northern District

Our CJA program works well. This is because the district judges, under Chief Judge Phyllis Hamilton and Judge Yvonne Gonzalez Rogers, Chief of our CJA Administration Committee, have maintained and enhanced the district's legacy of a distinctive CJA program structure that values the work of the attorneys while maintaining financial responsibility.

The structure, which I believe to be unusual, if not unique, in the United States, features three main elements: 1) the presence of an empowered CJA Supervising Attorney, chosen from the ranks of the panel, who has the trust of both the panel and the judges; 2) panel attorney presence on the CJA Administration Committee with a voice in selection of panel attorneys and 3) a Fee Review Committee comprising seasoned panel attorneys who make recommendations to the judges in the event of a fee dispute. Should the Ad Hoc Committee view this as a potential model, it is easily reproducible – it is laid out in the district CJA plan and in the documents circulated to the panel from time to time.

Our structure ensures that the panel can provide quality representation to indigent clients without fear of arbitrary decision-making on funding requests, it guarantees CJA attorneys a say in the running of the program and it affords due process protections in voucher review, all within the context of a transparent cost-containment system.

The CJA Supervising Attorney and Funding/Case Budgeting

The Committee will hear testimony from our CJA Supervising Attorney, Diana Weiss. Ms. Weiss is a highly effective intermediary between panel and court and her personal gifts of

personality are a significant factor in the smooth operation of our program. But it is fundamentally the attributes of her office, as created by the court, that have guaranteed her success. Those attributes are the process that the court adopted in her selection, the degree of delegation that the court grants her and the expectations of impartiality that the court has of her.

The first attribute -- the selection process -- reflects the way that the court has woven the panel into almost every aspect of the running of the CJA program. The court tasked the CJA Administration Committee, on which panel attorneys, the Federal Defender and the CJA representative serve elbow-to-elbow with the judges, with the work of sorting through applications, performing due diligence and interviewing the finalists to reach a recommendation to make to the Chief Judge and the rest of the court. That degree of panel involvement helped to create a process and ultimately, a candidate that would be credible to the panel. Like her predecessors, Ms. Weiss is a former panel member, with experience in representing complex and difficult CJA cases. In short, the selection process and the repeated choice of the court to hire a CJA panel member for the job, communicated to the panel that their interests were important to the Court.

The second attribute is related to the first -- inculcation of best practices. Because Ms. Weiss is a respected former CJA attorney, she is a trusted messenger to the panel of best practices, i.e., what is reasonable in terms of billing, what requests should be funded, how case budgets should be prepared. It is notable that, although we have a Fee Review Committee in the district (which every panel member agrees on appointment is the recourse for voucher cutting matters), we have not had a single fee review matter in Ms. Weiss's tenure and none that persisted through the Fee Review Committee process in the tenure of her predecessor (one attorney withdraw the dispute in the prior CJA Supervising Attorney's tenure). My own firm has had experience with Ms. Weiss's deft guidance on budgeting and we have conformed case budgets to Ms. Weiss's suggestions before submission to the court. In all such cases, those budgets have been speedily approved by the court. The court's swift action on our budgets is typical of the budgets of those attorneys who work with Ms. Weiss. This creates a feedback loop to the panel: The CJA Supervising Attorney assists the panel in presenting its best case for funding and the court shows its confidence in the process by approving those thought-through budgets/requests. This feedback loop creates better practice on the part of the panel and creates a culture of cooperation with the court. The CJA Supervising Attorney's independence-of-action is a powerful symbol to the panel that the court views the work that the attorneys do as valuable, honest and reasonably billed.

The third attribute is the court's expectation that the CJA Supervising Attorney be available to panel members for guidance. Here again, Ms. Weiss's background as a panel attorney is an advantage. Ms. Weiss has an open door policy, which every panel attorney knows about and appreciates. She is approachable, discreet and wise. She will counsel, guide and listen to the concerns of the panel. This makes her truly invaluable as an intermediary in resolving occasional frictions that arise in criminal defense. In this, she is a particularly valuable asset to

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me in my role as a CJA representative in helping to resolve bench/bar problems before they reach a boiling point.

The fourth and final attribute is the court's expectation that Ms. Weiss be involved in training. At the request of Federal Public Defender Steven Kalar, Ms. Weiss presents on CJA developments at the annual FPD training seminar, which is a high-quality program featuring distinguished panelists and substantive materials. Ms. Weiss is received with warmth, appreciation and trust. She also regularly presides over brown bag lunches where she invites lawyers, probation officers and judges to teach panel members on discrete practice points. She frequently emails the panel on developments in CJA practice and procedure, training opportunities and messages of congratulations to panel attorneys who have obtained good results for their clients. This level of communication also fosters the feedback loop with the panel. Areas of concern are addressed in an informal and effective manner.

Panel Attorney Presence on the CJA Administration Committee

The CJA Administration Committee is an important committee of our court and it is perceived as such. This is because the judges who head it and participate in it place a priority on addressing matters even-handedly and with a view to promoting the overall health of the program. Our most distinguished judges have served or currently serve on this committee. The importance that the court attaches to the committee communicates to the panel that the work of the panel is work that is valued by the court.

Since its formation, the CJA Administration Committee has featured a strong and active defense cohort. Like the judges, the attorney members of the committee are seasoned, well-respected members of the defense bar who serve on a rotational basis. In addition, the Federal Defender and the CJA representative both are *ex officio*, permanent members of the committee. That status ensures a degree of institutional memory and historical continuity. Panel selection occurs after a detailed process of due diligence with all members of the committee – judge and attorney alike -- dividing the investigation of candidates equally, and sharing that due diligence in a frank and open exchange at the selection stage.

The key point about the CJA Administration Committee in terms of the health of the program is that the defense community has a strong voice in the selection of panel attorneys. Thus, the panel understands that selection is the result of a process that involves peer review by attorneys who are strong advocates for the panel. This in turn ensures that, unlike some districts in the country, our panel is viewed by the overall community as comprising high-quality candidates who are chosen through a process of rigorous due diligence and not as a result of judicial patronage.

Equally importantly, our district has in place a due process-based system of removing panel attorneys. If a judge believes cause exists to remove a panel attorney, that attorney is

entitled to a hearing before the CJA Administration Committee to rebut the cited cause. This process is spelled out in the CJA plan and available to the panel.

Finally, the day-to-day administration work done by the CJA Administration Committee often leads to important innovations that advance best practices and conserve CJA funds. For example, Judge Gonzalez Rogers, CJA Administration Committee Chair, has tasked a sub-group to develop a set of standardized criminal protective orders that have the potential for enormous cost savings for the program.

The CJA Fee Review Committee

When an attorney applies to our panel, s/he must consent to the referral of fee disputes (either at the judge's initiative or the panel attorney's initiative) to the court's Fee Review Committee. The Fee Review Committee comprises five seasoned panel attorneys. As the CJA representative, I chair this committee. In the event that a panel attorney believes that a voucher cut is unreasonable, that attorney may submit the dispute to the Fee Review Committee. The Fee Review Committee obtains the court's reasons for the voucher reduction from the CJA Supervising Attorney, reviews relevant documents, meets with the panel attorney and reviews submissions by the CJA attorney. Possible actions as a result of this process are: 1) the Fee Review Committee recommends in a written submission to the court that some or all of the cuts be rescinded; 2) the Fee Review Committee recommends in a written submission that the cuts be maintained and finalized. In practice, there is a third possible outcome: on occasion, a panel attorney may withdraw his or her complaint after going through the process and receiving the benefit of informal counseling from the Fee Review Committee. Where the Fee Review Committee issues a written recommendation, the judges accord that recommendation a high degree of deference.

The Fee Review Committee has had little work in the era of Ms. Weiss. This is a tribute to Ms. Weiss's role as created by the court, and her abilities to counsel and assist CJA lawyers in creating good practices with respect to submission of case budgets, funding requests, and voucher preparation. It is also a tribute to Ms. Weiss's skills in resolving disputes before they escalate to the Fee Review Committee. Nonetheless, the Fee Review Committee performs an important function by its simple existence: It is a mark of respect and a substantive due process guarantee that the court provides to the panel. It is also a feedback mechanism to serve the panel and the court in addressing billing issues. This district has had none of the rancor that has strained panel/bench relations in other districts. Tellingly, I have received more queries from my fellow CJA representatives across the country about this one feature of our CJA program than about any other.

Areas for Improvement

Although we have a high-quality, high-performing panel, there are areas where improvement is necessary and long overdue. Those areas have to do with national policy rather than local policy, but they increasingly pose a problem in terms of the ability of our panel to continue to provide adequate representation.

CJA Hourly Rate

The current rate of \$127 an hour is wholly inadequate in a city like San Francisco, which over the course of the last five or so years has witnessed a population boom fueled by technology startups. Driven by the high wages in the tech sector, the cost of living here is exorbitant. Many lawyers can no longer afford to work in the city -- those with office leases expiring are leaving to set up offices in Oakland, across the San Francisco Bay. Few of our support staff can afford to live in the city. Overhead costs such as rent, staff salaries and health care plans are ballooning. Several highly-experienced lawyers have told me that they have not reapplied for admission to our panel because of the low hourly rate. If there is no possibility for a national rate increase, there should be a geographic rate adjustment allowance for cities such as San Francisco, much as the Department of Justice applies in the case of its employees in major metropolitan areas.

The story is even worse when it comes to compensating necessary experts, particularly mental health experts. To be blunt, the rates for psychiatrists and psychologists are ludicrously low for any major metropolitan area, much less the enormously expensive Bay Area. This results in CJA lawyers being forced to retain experts who are inadequate to the task and who are out-performed by experts that the U.S. Attorney is able to hire (at twice and three times the rates imposed on the CJA panel). The same goes for other forensic experts such as computer experts, accountants and the like. This is unjust. It undermines confidence in the process and leads to unfair results for our clients. The district court should be empowered to permit CJA counsel to retain experts at market rate.

Inadequacy of Representation of CJA Panel Members on Matters Stemming from CJA Representations

This is not adequate. There appears to be no adequate provision for representation of CJA lawyers who face court discipline or reputation-breaking ineffective assistance of counsel claims arising out of their representation of their clients. I have represented a number of lawyers in such circumstances and have done so *pro bono*. Luckily, those matters have been fairly short-lived. But, it is an extremely stressful experience for the involved lawyer to have to face sanctions or IAC claims and it should not be the case that the lawyer has to worry about paying for adequate representation to defend him/herself.

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Thank you for soliciting my input on the CJA program. It is an honor to serve as CJA counsel and as the CJA representative for the Northern District of California. I would be delighted to help in any way to bring about improvement in the areas I outlined above.