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**Dear Judge Cardone and fellow CJA Committee Members:**

I have spent some time reviewing online the extensive and informative testimony received at the hearings you have already convened. Having done so, it is with true humility that I thank you for inviting me to appear, and I thank you for the impressive and comprehensive approach the Committee has taken to the very important task it has before it. Still, it is my hope to be able to make a contribution to your effort.

**My experience with the CJA**

Please allow me to begin with some personal background. I have practiced indigent criminal defense in the federal courts for almost thirty years. In the 1980's I was a Deputy Federal Public Defender in the Central District of California (Los Angeles). In 1990, I went into private practice and joined the CJA Trial and Appellate Panels. Initially I carried a very heavy docket, both appointed matters as well as retained matters. Around this time, various district judges began asking me to accept CJA appointments as lead counsel in capital habeas matters. This was not a practice area I had intended to enter. After reflection, I elected to do so. This required me to minimize my retained caseload as well as my trial docket generally. My appellate docket grew to fill the space. Today, my docket continues predominately in this manner, with the notable exception of the Coordinating Discovery Attorney work I do, as explained below.

Over the years, it has been my pleasure to be selected to serve my local Court in various ways. For example, I was selected by the District Court to serve as a Ninth Circuit Lawyer Representative, as well as to serve on the Large Case Committee (which drafted the Complex Case Management Order you have received). Presently I am serving a second term on the Capital Habeas Counsel Selection Committee. This is time-intensive pro bono service, but I am pleased to perform the work for the benefit of the Court and for the benefit of the indigent capital petitioners who will need effective counsel.

### **Coordinating Discovery Attorney work**

In recent years the Central District of California has seen an extensive and continuing number of mega-case filings. Although I handled some in the district court, recently I saw them primarily from the vantage point of an appellate lawyer. Cases with an unwieldy number of defendants, massive amounts of discovery and huge records, and jury trials lasting six months and longer. Reading the records as appellate counsel, I found the overall denial of due process palpable, but rarely did the records present issues that could be presented persuasively for appellate review.

In 2009, the Supervising CJA Attorney in the Central District approached me to explore a novel concept. These mega-cases were presenting numerous challenges for the Court, and among them were fiscal and logistical challenges. He wanted to know if I would be willing to accept an appointment in such cases, but in a new capacity. I would not be appointed to represent any individual, but rather I would have an overall responsibility to help all of the CJA defense counsel as a group.

I was and remain intrigued by the prospect, since it seems this might be a means of leveling the playing field in these mega-cases. No longer is the Government the only one capable of mustering significant resources. In cases where I am appointed as the Coordinating Discovery Attorney my role will vary from case to case since the needs of each case are different. But some commonalities do exist.

For example, in the first case in which I was appointed (almost 200 defendants, named in indictments spanning nine dockets and assigned to seven Judges), one of my first tasks was to obtain the discovery. The Government had placed the discovery with an outside vendor and CJA counsel were required to go to the vendor to buy a set of the electronic data. I did so, and the vendor informed me the price for a set of the data was approximately \$10,000. I wrote him a check for the requested amount and left his offices with a set of the discovery materials. I then went to the CJA Unit, and explained how I could duplicate the data for a cost of approximately \$300. That same day the vendor dropped his price to \$800 per set (and graciously returned my own check), but with CJA's approval thereafter I had the discovery produced in-house and distributed

to all CJA counsel free of charge.

The discovery materials I receive from the Government in these cases frequently comes in a multitude of formats that the individual CJA counsel are not prepared to handle, or are somewhat challenged if they have to handle it in the various formats. These materials are rendered to standardized formats and then redistributed to all CJA defense counsel. The materials are made searchable and accessible in many ways.

In one matter, I was brought in after the Government informed the District Judge that it would take a minimum of eighteen (18) months for the Government to redact sensitive information from the data so that it produce the discovery materials to the defense. I was contacted and appointed as CDA.

After conferring with the Government team and reviewing the FBI's equipment, it was easy for me to see the depth of the problem. The anticipated delay was a reality, not exaggeration. But as CDA I was able to go to the open market, and quickly my team had a solution mapped out that allowed me to return to the District Judge with a fully redacted and ready for distribution set of discovery approximately ten (10) days later.

The money CJA allowed me to spend on behalf of all CJA defense counsel was more than any individual counsel would have likely been allowed, but when apportioned across all of the numerous CJA defendants in the case it was a major saving in terms of the cost of the case as whole.

Working with the CJA Panel counsel in this manner has also put me in the position of receiving and reviewing a lot of data and information that as a solo practitioner I would not likely ever have seen. Add this to my years of practice in the District, and I see currently some worrisome issues on the horizon.

It seems that as of the sequestration period, there has been a steady and incessant stream of changes in the requirements that our CJA Panel lawyers face in order to obtain support services as well as when submitting reimbursement requests. Rarely, if ever, do the evolving requirements appear to have the goal of enhancing the quality of representation. I am well aware of my

colleagues' ability to perceive hostility even where it may not exist (it might be said that at least some paranoia is a prerequisite to being a good defense lawyer), but during recent years the changes implemented in the plan do seem to have had a substantial and generally negative effect. I can see how some of the changes may work to the Court's advantage, but it bears observation that the CJA Panel lawyer's goal is not to help the court but rather to help the client.

In preparation for appearing before this Committee, I solicited input from all of the CJA Panel members. I received a number of thoughtful and helpful responses. But far and away - for me at least - what took the day was the number of responses I received from lawyers I have known, and deeply respected, for many years who told me that at this point they no longer trust their own professional judgment. They have found in recent years their decisions about what motions to bring, when to litigate versus when to try to negotiate a solution, and so forth have been questioned (and rejected) by court staff so many times that they no longer find themselves as willing simply to represent their client in the manner their best professional judgment dictates; instead they are preoccupied with how their decisions will affect how their reimbursement claim will be seen in the CJA Unit if they do what they believe they should do. If true, this seems especially sad to me.

I notice that a question that has been frequently discussed before the Committee is whether CJA Panel management should be brought in-house to the FPD. It is my judgment this is not a good approach. When I was a Deputy FPD, the Los Angeles office occupied one-half of one floor at 312 N. Spring. Today the FPD occupies a ten story building, and has a portion of a second building as well as smaller buildings servicing the outlying courts. The small model that I knew had, in my opinion, one overriding strength: our Defender had no policies. Each lawyer was enabled and encouraged to act however he / she believed best served the individual client. And it did not matter if how I was handling a client's case was diametrically opposed to how a different lawyer in the office was handling her client in a similar case. We had no goal of making things easy or predictable for the Government or even the Court. Our role by definition was representation of each individual client.

As the Federal Public Defender Office has grown, I have seen a tendency for policies to flourish, some are thoughtful while others seem less so. Regardless of their merits, I see the net result as a bureaucratic structure. This may promote efficiency, but I fear it is contrary to vigorous effective representation of the individual client. As criminal defense lawyers, whether under the CJA or not, our focus should always be the best representation of the individual client.

In my judgment the CJA Panel should be strong and independent. The FPD can and frequently does deliver effective professional representation. But this is not always the case. And there are many very seasoned and knowledgeable members of the CJA Panel whose experience levels far outstrip those of the lawyers in the FPD. Just like Microsoft benefits from Apple's competition, the vigor and robustness of a district's indigent defense bar will benefit from having both a FPD (or CDO) and a strong CJA panel. The two can always collaborate if they choose, whereas the moment the CJA Panel is under the control (in any way) of the FPD, I suspect you will have instantly lost something that can never be recovered.

A practice currently used in the Central District has acquired the colloquial moniker "claw backs." This occurs when CJA counsel handling a large or complex case properly seeks interim compensation in the case, the request for compensation undergoes what appears to be complete judicial review and the interim payment is authorized. As a working sample let's say the first request for compensation is for \$15,000. A few minor reductions occur, and counsel is compensated \$14,800. A few months later, a second request for interim compensation is submitted in the amount of \$20,000. Again a few minor reductions occur, and compensation in the amount of \$19,500 is authorized. This continues for a year. Counsel has now been compensated - ostensibly after court review and approval - a total of \$90,000. Counsel submits a final request for \$10,000. At this point, the Court determines the prior payments were improvident, and (a) denies the remaining \$10,000 claim and (b) directs counsel to repay \$35,000 of the previously paid funds to the Court.

This development is akin to a death sentence to most small practitioner's offices. The lawyer is likely to be poorly

situated to meaningfully challenge the reduction. And even if the lawyer might want to make the repayment simply to avoid the perceived worse alternative (hostilities with the court), in most cases the lawyer will simply be financially unable to make the repayment. In addition to these already critical concerns: the CJA Panel does not appear to have been given any notice of what standards may apply to trigger such situations, or of what recourse the lawyer may have to seek review of such a development.

I realize one approach the Committee might believe would eliminate or at least minimize the chance of such an unpleasant result would be case budgeting. I have seen case budgeting up close and personal since it first began in capital habeas matters in the district courts. I believe it to be a well-intentioned approach. I do not, however, believe it to be very effective at addressing the core concern: ensuring proper and effective representation without untoward cost expenditures.

With due deference to the hard working individuals who administer the case budgeting, this is in essence another form of bureaucracy. Have we stopped to wonder why we even need such bureaucracy at all? Like many of my colleagues, I am currently again dedicating a significant amount of my working time to screening lawyer applicants for the welfare of my local Court. In my case, I am screening for lawyers who would like to take on perhaps the most onerous and challenging of all criminal defense work: federal capital habeas defense. I know first-hand that I make no money at all on these cases, and that they are draining and exhausting in ways no other litigation I have known can be. (When I have a capital case on my docket my availability for retained work necessarily plummets.)

If the Court screens diligently for ethical and competent counsel to take on CJA work that has scant little professional distinction, is the remaining bureaucracy necessary? Is it of any true value? Could not we make the entire system function better by identifying those counsel who are truly motivated by the constitutional principles in play, and then provide them what they need while encouraging excellence and independence?

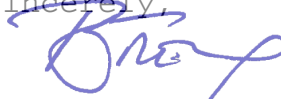
Although I recognize it would require substantial revision, I believe the most improvements possible would be realized if the

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judiciary was removed entirely from the compensation process. The California State court appellate system appears to function quite well with minimal participation by the court in counsels' compensation requests. I wonder if perhaps the Committee has identified other projects that have similarly good results? If so, perhaps a working model could be distilled from the approaches used in those projects?

I look forward to addressing Your Honors in San Francisco, and it will be my pleasure to address any and all questions that you may have to the best of my ability.

Sincerely,

A handwritten signature in blue ink, appearing to read "P. Treviño", written over the word "Sincerely,".

Phillip A. Treviño

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