

**Testimony of U.S. Attorney Damon P. Martinez for the District of  
New Mexico before the Judicial Conference of the United States’  
Ad Hoc Committee to Review the Criminal Justice Act Program**

Santa Fe, N.M. – November 16, 2015

Good afternoon Judge Cardone and members of the Ad Hoc Committee to Review the Criminal Justice Act Program. Thank you for the opportunity to comment on the administration and operation of the Criminal Justice Act (CJA) Program.

The U.S. Attorney’s Office for the District of New Mexico appreciates the work the Committee is doing to ensure that the CJA Program provides financially eligible federal criminal defendants with effective representation. Given the specific characteristics and circumstances of each judicial district, district courts need flexibility in the way that they administer the CJA Program and address specific issues in their districts. To that end, we appreciate the Committee’s efforts to engage in an open dialogue with the U.S. Attorneys on the effectiveness of the programs in their districts by inviting us to testify at field hearings such as this.

After canvassing prosecutors at the U.S. Attorney’s Office here in New Mexico, we offer the following thoughts three issues: (1) the vetting process for the appointment of attorneys; (2) the process by which retained counsel may later receive court appointment; and (3) e-Discovery. We recognize, of course, that the courts have responsibility for and control over the CJA program and make these suggestions in a spirit of cooperation and collaboration.

The Vetting Process

As the Committee is well aware, the continued vitality of the CJA program is directly dependent upon a selection process that ensures both a diverse and well-qualified panel of attorneys. This is particularly true in the New Mexico where the federal judiciary is called upon to hear a wide and unique range of criminal cases. The docket in the District of New Mexico includes not only those matters that form the core of a federal criminal practice – white collar, public corruption, and national security, to name just three – but also includes a robust immigration, Indian country, and narcotics practice. This far-reaching mission mandates that the CJA panel be well-versed in divergent areas of law the sum total of which is *sui generis* to New Mexico.

It is not just the cases that make this district unique. New Mexico is a land with a diverse, multi-cultural population all of whom celebrate firmly-rooted traditions steeped in a rich history. The CJA panel can, and should, reflect the demographics of the people it was created to represent.

To accomplish these intertwined goals, the U.S. Attorney’s Office recommends that the vetting process should include input from all parts of the court family, including the U.S. Attorney’s Office, the Office of the Federal Defender, the U.S. Marshals Service, and the U.S. Probation Office, in order to give the court a well-rounded assessment of a candidate-attorney’s qualifications. The qualifications the court should focus on should include, but not necessarily be limited to, the candidate’s federal court experience, trial experience in general, ethics, integrity, and client service.

Similarly, rigorous review processes are critical for the periodic reassessment of CJA attorneys' performance and continued participation on the panel. The Committee may wish to consider a system of tiered levels of renewal where, for example, attorneys with the highest rating are renewed for three years, attorneys with an average rating are renewed for two years, and the attorneys with the lowest rating are renewed for a year.

#### Court Appointment of Previously Retained Attorneys

The U.S. Attorney's Office recommends that the Committee examine how a retained attorney may later, when appropriate, receive a CJA appointment in a particular case. In some cases in the District of New Mexico and around the country, private defense attorneys have requested an initial retainer from a defendant, exhausted those funds quickly, and then sought appointment under the Criminal Justice Act on the grounds that the client was now indigent. This scenario can serve to erode public confidence in the criminal justice system. Poor optics aside, this can be problematic if it allows a retained attorney to "jump the line" and receive a court appointment in a specific case, in more cases than other similarly-qualified CJA attorneys, or in a case where the attorney is not on the CJA panel. Moreover, depending on the size of the initial retainer, this practice may also lead to compensation that significantly exceeds the CJA rates over a life of a case.

#### E-Discovery

The evolution of federal litigation has witnessed an exponential increase in the volume of discovery in many cases. This, in turn, has fed the need for U.S. Attorney's Offices to turn to e-Discovery to help manage the sometimes overwhelming quantity of discovery associated with some cases. On top of that, the Department of Justice has recently enacted new encryption protocols that dictate how electronic discovery can be distributed to defense attorneys.

With that in mind, a practice the Committee may want to share with the courts is the use of a court-appointed discovery coordinator in cases with a high volume of discovery. Such a coordinator can assist the CJA attorneys in handling discovery, especially e-Discovery; reduce the need for CJA attorneys to rely on the government for technical assistance; and, most importantly, provide the defense with a central line of communication with respect to discovery in large cases. Any such coordinator should be skilled in using discovery software and processing various media for viewing, downloading, and duplicating electronic files.

#### Conclusion

I very much appreciate the opportunity to share my office's thoughts and suggestions on the CJA Program and issues that significantly impact a defendant's right to effective representation in our criminal justice system. This concludes my prepared statement, and I would be pleased to answer any questions the Committee may have.

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