

Testimony of Melanie S. Morgan
Before the Ad Hoc Committee to Review the Criminal Justice Act Program
Public Hearing in Santa Fe, New Mexico
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My name is Melanie Morgan and I am a partner in the law firm of Morgan Pilate LLC in Kansas City, Missouri as well as a member of the Criminal Justice Act panel in the District of Kansas and the Western District of Missouri. I would like to thank the Committee for holding this hearing and giving me the opportunity to testify on behalf of panel lawyers regarding the Criminal Justice Act.

As background, I have been a criminal defense lawyer since my graduation from the University of Kansas School of Law in 1993. I began working on federal criminal cases under the supervision of the lawyer I worked for almost immediately. Sometime in the late 1990's I became a panel member in the District of Kansas (DKan) and in the early 2000s I became a panel member in the Western District of Missouri (WDMO). I began serving as the interim panel representative for the District of Kansas in approximately April 2014 and I became the panel representative for that district in January 2015. The experiences I share in this testimony are my own unless otherwise noted although I believe they are reflective of many of the experiences of my colleagues based on numerous discussions with other attorneys over the years.

Panel Management

Panel membership, structure and management varies greatly by district. In the WDMO, persons willing to take CJA appointments send a letter of interest/application with a curriculum vitae to one or more of the magistrate judges. There are no minimum qualifications for admission to the panel, no continuing education requirements and appointment continues at the pleasure of the Court. Thus, attorneys on the panel range in experience from no federal criminal experience to those having extensive experience. Some lawyers receive a couple of cases every year, some receive enough appointments to make CJA work the mainstay of their practice. Attorneys are appointed by the magistrate judges.

In the DKan, membership on the panel is by committee selection for three year terms, subject to removal during the term at the committee's discretion. The committee is comprised of members of the Court, representative(s) of the Federal Defender Officer, the CJA Administrator, the CJA panel representative and a CJA lawyer. The panel is tiered; there is a second chair program, a training panel, a misdemeanor panel, a general panel and an emeritus panel, each with different qualification requirements and number of cases assigned on an annual basis. The second chair program is a year-long training and mentoring program for attorneys who are interested in panel membership but may lack the necessary experience. The program is led by the Federal Public Defender's Office and includes an intensive six-part orientation to cover all phases of a criminal case as well as sentencing workshops. In addition, each participant is assigned to a more experienced mentor attorney to work on actual cases. The District's Bench-Bar committee provides compensation at a reduced level (\$70/hour for up to 120 hours) for work performed on actual cases. Attorneys who successfully complete the Second Chair program may

apply to be on the training panel. Training panel attorneys typically are assigned less complex cases or in large conspiracy cases, are given (to the extent it is known), a defendant who appears to have lesser alleged culpability. Training panel attorneys are appointed to approximately two cases each year. General panel attorneys are those attorneys who have been practicing for a number of years and who have strong federal criminal defense experience as well as trial experience, in either state or federal criminal cases. Attorneys are required to certify that they have an online legal research account like Westlaw or Lexis, the ability and willingness to accept collect telephone calls, a physical office in which to meet clients, the ability and willingness to regularly visit clients in custody, the ability to receive and utilize discovery in an electronic format and the ability to participate in a trial which lasts for more than ten days. All attorneys, regardless of which panel they are on, are required to attend six hours of continuing education related specifically to federal criminal defense. The size of the panel corresponds with the historical number of criminal filings in the District resulting in panel appointments and each attorney receiving approximately five appointments per year. Appointments to cases are handled by the full-time CJA Administrator and her assistant. Appointments are timely made and in addition, the administrator serves as a resource for CJA news and e-voucher question.

The organization, structure, and management of the panel in the District of Kansas as I've described it is one as a panel lawyer I endorse. Knowing that other lawyers representing codefendants have a certain level of competence and professional interest in federal criminal defense improves the overall quality of the criminal justice system. The assurance that cases are assigned by the administrator (through a computer program which selects the attorney subject to override by notice of conflict or case requiring a particular skill) eliminates any potential bias by a Court in selection and assures that each attorney receives a sufficient number of cases to remain proficient but not so many that the attorney becomes dependant on appointments to make a living which can create a potential conflict of interest when litigating zealously for an unpopular client could influence the Court's willingness to appoint said attorney.

Payment

Both districts and both Circuits (Eighth and Tenth) have gone to E-Voucher but timing of payment is an issue. In the District of Kansas, interim vouchers are authorized by local rule every two months and once the amount of time in a case has reached a threshold amount. Vouchers are reviewed first by the CJA Administrator for completeness and reasonableness and then submitted to the District Court for approval. As a general rule, vouchers are reviewed and approved quickly and time from submission to payment can be as quickly as two weeks. In contrast, in the Western District of Missouri, the turnaround time for payment has been six to eight weeks. With the recent advent of e-vouchers, this may change although it has not yet.

Both districts offered training sessions for panel attorneys and/or their staff when electronic vouchering was implemented. In terms of training on vouchering generally including what is and is not allowable under the Criminal Justice Act, I am only aware of one instance in which that was offered. However, in the District of Kansas, attorneys are provided with information as to how to link to online resources that have that information.

In my opinion, attorney compensation continues to be underfunded at \$127 given the reasonable costs of overhead and the time in a practitioner's day dedicated to professional development - reading of slip opinions, listserv or blog posts, relevant scientific journals and continuing legal education - and office management. A reasonable fee would be closer to \$150 per hour. More problematic are cuts in vouchers for time spent on a case, either because the case exceeded the cap or because the Court differed in opinion about the reasonableness of the service. While in the District of Kansas I am unaware of voucher cuts for travel time, panel representatives from other districts have shared with me that some judges will not compensate lawyers for travel time, notwithstanding it is an authorized expense. In both the DKan and the WDMO, incarcerated clients are sometimes housed in county jails two hours away from the federal courthouse or the attorney's office. Many facilities do not have the ability to have unmonitored legal calls. Lawyers practicing in districts where such cutting occurs are placed in the untenable position of having to choose between making a living and developing and maintaining a working attorney-client relationship which can only occur with regular contact, including face to face contact, with the client. This is an issue that the federal public defenders do not have to address because they do not have judicial oversight.

Resources

Through the CJA, resources such as paralegal services, investigator services, mitigation specialists and expert services are available, though to be obtained, a lawyer has to justify the expense when it is over a threshold amount. There is a cap. This is a significant difference between the federal public defenders office, which often has resources in-house and does not have to justify the expense, and the panel. The panel is subject to the benevolence of the Court and counsel has been in circumstances where the service requested denied. For example, in a case in which I represented an individual with apparent mental health issues, I was denied approval for a psych exam (not a competency examination), because the cost of the examination was almost double the cap. I was unable to locate a provider who was willing to do it for the cap or less. While the magistrate was sympathetic to my situation, he was clear that the then Chief Judge of the Eighth Circuit did not approve expenses above the cap nor would they be approved in advance so I would be responsible for the excess amount. I was not in a position to take on that potential financial responsibility nor do I think I should have to take it on.

In another instance, this time in the District of Kansas, my client, an unsuspecting drug mule, was stopped in the District of Kansas for a traffic violation and drugs were found in a hidden compartment in a fuel tank located in the bed of the truck. Using a specialized device, it took officers over 45 minutes to find the false bottom in the tank so it was not surprising that the defendant had not discovered the tank. My client was a citizen of Canada, lived in a mennonite farming community that migrated regularly between Mexico and Canada during seasons of harvest. Key witnesses were located in Canada but I was denied the use of an investigator to travel to Canada (or attorney travel) to interview these persons and potentially request depositions. Using frequent flyer miles I had acquired, I took the trip because I believed it was necessary to the defense of the individual and ultimately was able to get the prosecutor to agree to have the testimony of the witnesses submitted by affidavit. My client was acquitted. My out-of-pocket expenses and travel time were denied on my voucher. Though I believe the costs were authorized and properly justified, I had no recourse when the Court decided that I should

not incur this expense. Had I not done so, I believe my failure to factually investigate and present evidence which supported my client's claim of innocence would have rendered my legal assistance ineffective.

More recently, the CJA system has implemented case budgeting attorneys to assist with larger, more complex cases. Though the CJA authorizes reimbursement for the attorney time spent budgeting - an apparent reflection that it is also a substantive legal process requiring organizing, planning and case strategy - approval of time spent on case budgets varies between districts. In the DKan, time spent on case budgeting has been compensated. In the WDMO, several colleagues submitted budgets and were required to appear for budgeting meetings. They were advised they could not submit their time for the budgeting process and when the attorneys challenged the magistrate, they were asked if they wanted to continue to receive appointments.

As one final example, my law partner, associate and other CJA panel lawyers in my building represent death penalty clients in various phases of death penalty litigation. Whether death penalty budgets are approved varies greatly from District to District, and rejection of requested funds comes with no explanation. Often it would seem to vary based on the assigned judge's personal or political beliefs in support or in opposition to the death penalty.

Though I have other anecdotal examples, the bottom line is that indigent defendants assigned to panel lawyers may not be able to get the same level of defense as those represented by federal public defenders because of court control over resources and the inability or unwillingness to challenge unfavorable funding decisions because of fear of retribution.

Training

Nationally the training division of the Defender Services Offices provides a number of free CLE opportunities which are excellent. I have personally attended the casemap training and found it to be well worth my time. Locally, CLE is dependent on the Federal Public Defender. Both the District of Kansas and the Western District of Missouri have Federal Public Defenders who are strong supporters of the panel and who provide free CLE. In the District of Kansas, day long CLE is offered twice a year and lunchtime CLE in all divisions at least six times per year. In Kansas, the CJA administrator and panel representative coordinate quarterly FED talks, modeled after TED talks, to encourage collaboration among panel attorneys on new and developing ideas from sentencing ideas, forensic developments or trial strategies. These are not formal CLE opportunities but offer an opportunity for professional development. The DKan has a strong bench bar committee which provides lunch at the formal CLE programs. In addition, the Federal Public Defender generates a blog with posts multiple times per week with practice points based on the latest developments in case law in the Tenth Circuit and beyond.

In the WDMO, free day long CLE is offered twice a year and lunchtime CLE is offered quarterly in alternating divisions. A research and writing attorney provides Eighth Circuit case summaries multiple times each week. After *Johnson v. United States* was decided this summer, the Federal Public Defender hosted a viewing of a Webinar that had limited viewing spots so that as many CJA counsel as possible had an opportunity to learn about the potential impact of that decision.

Independent from what is offered from the local federal public defenders, there are few locally available CLE opportunities for CJA attorneys. Thus, in order to maintain a high level of competence, regular CLE is critical and dependent on the benevolence of the Federal Public Defender and Defender Services Training Division.

In close, while I am fortunate enough to practice in districts which have federal defenders who strongly support the CJA panel attorney community, there are disparities between the quality of representation between the federal public defender system and the CJA panel attorneys that varies in scope and significance from district to district based on judicial influence from the appointment process to funding. I appreciate this committee's efforts to learn more about the CJA process and conduct a thorough review so that quality indigent defense is provided consistently and fairly across the districts. Thank you for your time and consideration of my testimony.