April 27, 2016

The Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
The Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Suite 4-200
Washington, DC 20544

Re: Testimony of Attorney Robert LeBell
CJA Panel Representative
Eastern District of Wisconsin

Dear Judge Cardone:

I would like to thank the Committee for affording me the opportunity to express my thoughts regarding issues which impact on the administration of criminal defense in this country. I have been the Panel representative for my district for many years and have been counsel to citizens/accused in federal court for decades. Recently, I joined DSAG on behalf of the Sixth and Seventh Circuits. My practice is almost exclusively dedicated to the representation of individuals charged with criminal offenses.

In theory, those representing individuals appearing before a court should be free from actual conflicts or circumstances in which the appearance creates the specter of impropriety. It has been my experience that members of the judiciary make a concerted effort to honor that principle. However, there is, within the system, as it now is formulated, an inherent conflict. Judges must give their imprimatur to request for CJA services and for CJA compensation vouchers. Notably, no court is ever called upon to approve any financial pre-trial expenditures of the prosecution or to authorize the compensation of AUSAs at the conclusion of the litigation.

Under the current system, when ex parte requests are presented for experts, mitigation specialists, investigators, paralegals, or other essential pre-trial litigation tools, judges must determine the appropriateness of the request. By necessity, the process requires consideration of several variables: the nature and complexity of the issues; the need proffered by defense counsel; the reputation of the lawyer; and

perceived budgetary constraints. Into this inexact methodology is infused great subjectivity: By what means is the need for the service determined? To what degree does the lawyer's reputation affect the consideration? Must the court be advised of the client's defense and relevance of each request to the theory of the case? What is a reasonable amount when considering market rates, qualifications of the service provider, and parallel expenditures of such costs by the prosecution.

Clearly, as the present system is now configured, the court must be apprised, through counsel's request, of otherwise privileged information, work product, and investigative and trial strategy. In the absence of this requirement, such information could and would never be disclosed. The court's consideration may take into account the attorney's past performance in CJA and other matters and any opinions which have been formulated about counsel's ability and judgment. Some members of the bench also pay undue consideration to perceived budgetary constraints. When called upon to justify CJA services requests, trial counsel cannot possibly explain the full panoply of issues which give rise to the requested services. The enormity of the issues and moment by moment strategic decisions involving the defense itself prevent a complete recitation of the factors which justify the submission. It is also impossible for an attorney to predict the potential success or results of many of the requested expert and other payment proposals.

When the case is concluded, and the CJA voucher is submitted, the court is again required to assess, post hoc, the quality, adequacy, and necessity of counsel's efforts. Just as in the case of pre-trial requests, this process infuses subjectivity into the determination of whether or not an attorney will be compensated after having performed legal services. For those courts who reduce voucher submissions, for reasons other than mathematical errors, there is no standardized measure by which such reductions may occur.[1] In some jurisdictions, there is no recourse for unexplained reductions. For those courts in which there may be routine reductions, attorneys may resort to self-auditing or self-reduction of requests of compensation.

Unwarranted reductions make it difficult to attract qualified, competent counsel, as well as maintaining those who are already panel members. Similarly, it is a clear deterrent for prospective panel members when courts fail to remunerate attorneys for services performed, in conjunction with a recognition that the statutorily authorized rate

[1] This is not a common practice in my district.

is significantly below market rate. Unwarranted reductions create a chilling atmosphere in which attorneys feel that their work is not worthy and that their decisions and efforts in representing criminal clients are of questionable value. Unwarranted reductions have a direct and significant adverse impact on the attorney's ability to support his practice and family. Lastly, and more importantly, unwarranted reductions send a clear message to counsel that their work will not be compensated appropriately and therefore serve as a clear disincentive to perform necessary work on behalf of their client. This process could diminish the zealousness of advocacy which we have all been taught to uphold.

Judges participation in the approval process of CJA pre-trial requests and post-trial voucher submission create the appearance of impropriety and a clear conflict of interest. I cannot envision a single CJA client who would not be concerned with the dual roles that their CJA counsel plays under the current system, as both their advocate and the petitioner for funds to drive their defense. The same judge who will preside over the trial and possible sentence determines the funding for his or her defense.

I would therefore propose that an independent individual be appointed in each district to review and approve CJA pre-trial requests, as well as voucher submissions. Furthermore, the default position of the review process should be that the request is appropriate and reasonable. The reviewing individual should be well versed in defense of indigent citizens charged in federal court, as well as in the private practice of criminal defense.

Sincerely,

Attorney Robert G. LeBell