March 25, 2016

Hon. Kathleen Cardone and
Members of the Ad Hoc Committee to Review the Criminal Justice Act Program

Dear Judge Cardone and Members of the Committee:

Thank you for the opportunity to present my comments to the Committee.

The Sixth Amendment right to counsel is well-established. Although courts have given some delineation to the parameters of that right, how this right must be effectuated in practice remains an open question. The law is clear that a criminal defendant has the right to the effective assistance of counsel, but in an age of budget cuts and lean economic times, the contours of what truly effective assistance of counsel entails remains undefined.

How the legal community, and the judiciary in particular, conceive of the right to counsel is at the heart of the questions the Commission is tasked with considering during this series of hearings. For example, the question of who determines what amount of work is “necessary” for an attorney’s preparation of a case, and therefore, compensable, is fundamentally a question about what constitutes sufficient or zealous advocacy on behalf of that particular client. What standards should be required for someone to be appointed in a federal criminal case likewise is a question aimed at ensuring this Sixth Amendment right. Questions of how much independence from the judiciary the Defender Services Office, an individual defender office, or a panel attorney should have, particularly when determining budgets or making hiring decisions, also center around the effectuation of this right.

As with other esteemed presenters before me, my remarks will be focused on several of the recommendations made in the National Association of Criminal Defense Lawyers’ report, Federal Indigent Defense 2015: The Independence Imperative, as the feedback I received tends to naturally fall within the scope of the seven fundamentals discussed in the report. Specifically, my remarks will focus on the voucher system, the need for greater transparency in the appointment and qualification process, and independence from the judiciary.

In preparation for my testimony and written remarks, I have spoken with district judges, attorneys in federal defender and community defender offices, panel attorneys and other individuals working within the system. The individuals with whom I have spoken are located and practice or sit in various jurisdictions. In addition, I occasionally bring in my own observations from almost ten years as a public defender, first at the Public Defender Service for the District of Columbia and then, as an assistant federal defender in the Northern District of Georgia.
Voucher Decisions

Some of the panel attorneys with whom I spoke expressed concerns regarding what they felt were unrealistic expectations of defense counsel by the judges reviewing vouchers. Particularly, these attorneys felt many judges did not fully appreciate the legal and ethical obligations a competent and zealous advocate owes to her client.

These unrealistic expectations manifest themselves in various ways. Sometimes, judges “nickel and dime” defense attorneys regarding their preparation in a case. A judge will not want to pay for the research the attorney did in preparation for sentencing, taking the view that if the defendant pled guilty, the attorney does not need to review the discovery in preparation for sentencing. Often in federal cases, however, most of the attorney’s time is spent preparing for sentencing.¹ As the Committee members undoubtedly know, the United States Sentencing Guidelines are lengthy and complex to apply, and an attorney must be familiar with all of the underlying facts of her client’s case in order to know which adjustments may apply, and to be able to argue one way or the other about the application of a particular guideline.

Another commonly expressed frustration involves judicial reluctance to pay for an attorney to review the entirety of the discovery in a given case. The view expressed by some judges is that, in preparation for trial or sentencing in a multi-defendant case, the attorney should only review the discovery pertaining to her own client, or only the discovery to which the prosecutor directs defense counsel’s attention. At least one attorney felt they would be providing ineffective assistance of counsel if they neglected to review the entirety of the discovery.

Multi-defendant cases also lead some judges to compare the vouchers submitted by each attorney, and if one attorney spends more time on some aspect of the case, some judges will deny compensation for the additional work because it is more time spent than co-defendants’ counsel reported. This system ignores several realities of defense work. In multi-defendant cases, some defendants are alleged to have been far more involved than other defendants, requiring additional investigation, meetings with clients, meetings with potential witnesses, meetings with family members, and more. More time would be required, for example, with a cooperating defendant than a non-cooperating defendant. Additionally, each client is different, and even when allegations may be similar from defendant to defendant, one defendant’s case simply may require more time and effort than another defendant who appears similarly situated.

The frustration regarding vouchers also comes up in the context of paying expert witnesses. Even when experts are willing to reduce rates, recognizing the financial limits of appointed counsel, judges sometimes will refuse to pay the amount requested for an evaluation of the client or the evidence.

Although the extent of voucher issues varies by jurisdiction, in most jurisdictions, judges remain the ultimate arbiter of whether the panel attorney gets paid the full amount of what she billed and the work she did. Nationwide, very few federal judges have experience as defense attorneys, and as a result, many judges seem to not fully appreciate the differences in workload from case to case. Apparently, many judges also feel pressure to cut costs, especially since sequestration. As a result, some panel attorneys are told to be frugal and conserve, to not bill for all the work they have done in order to assist with the budget limitations. Very few defense attorneys feel comfortable pushing back against a judge who consistently makes determinations about whether, and how much, the attorney gets paid. It seems an obvious point, but neither prosecutors nor defense counsel in institutional federal or community defender offices are subject to the same limitations. Neither is paid based on the amount of time spent on a particular case, nor is the time spent preparing any individual case subject to this degree of scrutiny. The concern about falsification of vouchers, while legitimate, seems limited to a few rare instances, and according to those with whom I spoke, tends to be fairly obvious if someone reviews billing records with a careful eye.

The general consensus that emerged during my conversations is the voucher system needs to be changed and the authority to determine payment located somewhere other than with the judiciary. Several jurisdictions have explored the possibility of creating a position where an attorney, with relevant qualifications and specific responsibility to review vouchers, would be tasked with making recommendations to the court. Ultimately, however, those jurisdictions still leave the compensation decision up to the judge. Some attorneys expressed additional concerns that in a system with a panel attorney reviewing the vouchers, how well the system worked would likely depend on the person in that position. If the person hired to review vouchers was respected by and had a good relationship with the court, vouchers would likely be approved. But if not, things could get worse for panel attorneys. Additionally, some expressed concerns that if the person reviewing the vouchers is not compensated, she might be a little less diligent than if she were paid to do that work.

An alternative might be to have a funded position in each district, sub-district, circuit or region. The person selected for the position of reviewing voucher requests would need to have relevant experience as a criminal defense attorney, preferably a panel attorney, and rather than reporting to the judges to review the vouchers, the person could report to the director of the Administrative Office of the Courts. The AO would then make a final determination of payment. This system parallels the ones some jurisdictions currently have, but removes district judges from directly determining whether and how much a lawyer should get paid.

**Transparency, especially in the appointments process**

Some districts seem to have problems with the assignment of counsel process. Sometimes the issue is a lack of transparency about how the appointment process works. Other times the issue relates to how someone gets on the panel or removed from it.
With regard to the appointment process, the lack of transparency can have tremendous implications. On a basic level, when the distribution of appointments seems unequal, with some attorneys appointed regularly and others rarely so, the lack of transparency can be frustrating and can lead people to leave the panel.

A larger issue arises, however, in jurisdictions with significant problems in transparency during the appointment processes. For example, in one large district that has numerous distinct divisions, no two divisions are identical in how they go about appointing counsel, and each division seems fairly uninformed about how the other divisions approach the process. In and of itself, this could be fairly unproblematic. However, in at least one of those divisions, the judge has ensured that every member of the local federal bar is on the CJA panel—whether that attorney has any experience in criminal law or not. The result is that a bankruptcy attorney or a patent attorney may be appointed to represent an indigent defendant charged in a complex criminal case. And despite ethical and malpractice concerns, because that attorney appears in front of the court in other matters, the attorney will be reluctant to complain for fear of negative rulings when her paying clients appear in front of that judge. This issue is not unique to a particular district, but it represents an extreme example of what can happen with the appointment process is not transparent.

Despite the existence of a model plan for how district courts could, or even perhaps should, go about the appointment process, the existence of a plan (model or otherwise) can be fairly meaningless, even if a court has adopted it. One attorney with whom I spoke emphasized the importance of looking beyond a jurisdiction’s written plan, if the jurisdiction even has a written plan in place. The fact that a jurisdiction has adopted an official approach, perhaps locatable in writing, regarding the appointment process, does not ensure courts follow this process. Some jurisdictions deviate substantially from the plan, others only slightly. But in many jurisdictions, odds are good that what is happening on the ground is very different than what is written down or asserted.

The significant concern is that when a judge or jurisdiction does not follow an open and transparent method of appointing defense counsel, no recourse is available. In a district where an Article III judge is appointing any member of the local federal bar, the appointed bankruptcy or patent attorney can do little but accept appointment and do their best to litigate a criminal case.

Some have proposed delegating the appointment process to the institutional defender in jurisdictions with a federal or community defender, but that raises a potential conflict of interest, especially in co-defendant cases. Others have suggested having the jurisdiction’s panel attorney representative make the appointments, but this may create similar concerns.

In some jurisdictions, there is also a lack of transparency as to how someone gets selected to be on the panel or why someone was removed, in addition to greater concerns about the qualification process more broadly. As Chief Judge Karen Caldwell from the Eastern District of Kentucky noted in her written remarks to this Committee prior to the
Birmingham hearings, building a panel that features “a consistent and predictable blend of experience so that, as attrition and turnover occur, the Panel maintains its ability to serve the full needs of the District and its indigent defendants” is a challenge given the requirement that a lawyer needs federal experience to qualify for the panel. This concern about the “greying” of the panel is widespread. If federal criminal experience is required to get on the panel, how does a young lawyer go about getting that experience without being on the panel, or working beside an experienced panel lawyer for no pay?

Short of removing the appointment process from the judiciary altogether, requiring that judges have an open and transparent appointment process and that panel attorneys meet certain threshold qualifications\(^2\) may be a possible solution. Both judges and attorneys should be held to these requirements. In other words, the U.S. Judicial Conference would need to be committed to ensuring a reliable and consistent enforcement mechanism. For example, if this change were implemented and a judge was found to be consistently appointing bankruptcy attorneys to try criminal cases, the Conference would need to be willing to insist that the judge change her practice or have some other mechanism for ensuring compliance. Additionally, Judge Caldwell’s suggestion of a junior or development panel of lawyers desiring to represent criminal defendants in federal cases seems a good one for allowing those who truly are interested in doing that work have a way to enter the practice.

**Defender Services Independence**

The common thread among all the comments I received from defense attorneys, both those in federal defender or community defender offices, and those who are panel attorneys, involved the need for defender services to be more independent from the judiciary. Generally, those I spoke with believed the compensation process and the quality of representation would improve with greater independence.

The quality of panel representation came up during many of my conversations, and most — including panel attorneys themselves — felt it could be improved. The general consensus is that quality of representation goes up across the board in jurisdictions with strong, independent federal or community defender offices. Although the data is limited, both common sense and the limited available data support this view. On a common sense level, if a jurisdiction has an office with zealous advocates who provide high quality representation and do not have to appeal to the judiciary for funding, judges grow accustomed to a certain higher standard of representation. As a result, judges push other attorneys — panel attorneys and the private bar — to increase the quality of their representation, and the level of representation continues to improve across the board. Additionally, in jurisdictions with an institutional defender, panel attorneys can easily consult with defense counsel in the defender office, which also helps improve the quality of representation.

\(^2\) Although what the threshold qualifications for federal criminal appointment should be would certainly be open to debate, only appointing lawyers with some criminal experience — whether state or federal, perhaps — might be one worth serious consideration.
Evidence supports common sense. According to documentation I was able to locate, as of 1995, only 71 of 94 federal judicial districts had federal defender organizations.\(^3\) Six years later, as of 2001, all but eleven districts had institutional defender offices.\(^4\) Now, twenty-one years later, all but three districts – the Eastern District of Kentucky, Southern District of Georgia, and the Mariana Islands – have federal defender organizations. Undoubtedly, the increased presence of institutional defender offices in the vast majority of jurisdictions is linked to the quality of the representation these offices provide. A 2007 study published by the National Bureau of Economic Research found that federal public defenders “outperform CJA panel attorneys in all outcomes that were considered.”\(^5\) Defendants with panel attorneys as counsel were more likely to be found guilty and to receive, on average, a sentence eight months greater in length than if the defendant had a federal defender.\(^6\)

Similarly, in both her written and spoken remarks before this Committee in Birmingham, Elizabeth Ford, the Federal Community Defender for Eastern Tennessee, provided information regarding evaluations obtained by the Performance Measurement Working Group. These surveys document the perception of judges regarding the quality of representation provided by various types of defense counsel. These studies again indicate a consistent quality gap in the representation provided by federal defender organizations and that provided by panel attorneys over the past ten years.

Notably, that gap narrowed significantly in the past six years, accompanying the rise in the number of jurisdictions with federal defender offices. Although the data is lacking to make a causal link between these two trends, certainly there appears to be a correlation.

The gap in representation that remains appears linked to a lack of resource parity between federal defenders and panel attorneys, as well as need for more regular and conveniently located trainings for panel attorneys, as Ms. Ford lays out in her written remarks. Ms. Iyengar’s 2007 National Bureau of Economic Research study confirmed that differences in training and experience account for some of the gap. However, the lack of independence also plays a role, for the reasons noted in the voucher section above and in Ms. Ford’s comments.

Ultimately, each jurisdiction needs an institutional defender office with the ability to hire the staff it needs, determine appropriate compensation, and advocate for the resources it needs. Although the Eastern District of Kentucky has a well-functioning and robust panel attorney system, most of those I spoke with seem to attribute that to the person who is,

\(^3\) John Cleary, Federal Defender Services: Serving the System or the Client, 58 L. & CONTEMPORARY PROBLEMS 65, 68 (1995).
\(^5\) Id. at 28.
\(^6\) Id. at 3.
and has been, appointed as the panel representative in the district. In other words, it seems quite possible that the system is largely person-dependent. It is less clear how well the system would continue to work if a different person were in that position. Certainly some problems with independence and the quality of representation have plagued the Southern District of Georgia, the other state-side jurisdiction without an institutional defender office.

Kentucky, in particular, could also use a federal capital habeas unit (CHU). As Deborah Hunt, the clerk for the United States Court of Appeals for the Sixth Circuit, notes in her written remarks to the Committee prior to the Birmingham hearing, in Kentucky, the state public defender agency provides representation in most state capital cases at the federal level. Kentucky has between 30 and 60 eligible capital cases each year. Of the 78 people sentenced to death in Kentucky, 47 have had a death sentence overturned on appeal by Kentucky or federal courts. That is an error rate of more than 60%. Although Kentucky Department of Public Advocacy (DPA) attorneys do a commendable job, the quality of representation is inevitably affected by annual budget cuts and renegotiations that occur in the state legislature. My understanding is that the Western District of Kentucky Federal Community Defender Office would be willing to work with DPA to establish a CHU with state-wide coverage that would better ensure representation at the capital post-conviction level and better provide the necessary comprehensive system of review for each capital post-conviction case under *Martinez v. Ryan*. But again, this decision remains one located in the judiciary rather than with the DPA and the Western District office.

Likewise, the Western District of North Carolina recently modified its plan for providing legal representation and defense services, calling for the creation of a federal public defender office (a federal entity) to replace the non-profit, community defender office organized under its previous plan, without much notice and with limited input from the attorneys and investigators in that office. Although the Fourth Circuit is tasked with reviewing the district judges’ recommendations for this change of office model, no standard of review is set forth as to when such a change should be permitted, what justifications should suffice, or what threshold criteria must be satisfied in order to make such a change. At the very least, identifiable and written out criteria should be established for a scenario such as this.

The ultimate concern in each of these scenarios is that the judiciary remains the sole authority when determining whether a defender office or unit should exist, how many attorneys and investigators can be hired to staff that office, and what the budget should be, among other critical decisions. When budget cuts hit, such as they did during sequestration, the defense budget and staffing are among the first to go, when the judiciary controls the defense budget. Ideally, the defender system should operate with the type of independence that the U.S. Sentencing Commission or even the Public Defender Service for the District of Columbia enjoy. A clear conflict of interest seems to exist in permitting judges to continue to have the ultimate ability to control what happens with one party in the adversarial system, but not the other.

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The judiciary’s obligation is to fulfill its duty to ensure the Sixth Amendment right to counsel is protected. Thoughtful consideration must be given to the goal of providing defenders with real independence to ensure that the Sixth Amendment right to counsel is truly protected. This Committee undoubtedly is familiar with several different methods of accomplishing this task, and attorneys with whom I spoke were decidedly split on which method would be most effective. I’m happy to provide more details regarding the various proposals during my testimony, should the Committee so desire. Yet everyone agreed that the ultimate goal should continue to be independence from the judiciary, whether in the immediate or longer-term future.

Thank you again for your consideration and for the opportunity to testify before the Committee.

Respectfully,

[Signature]

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