April 1, 2016

Honorable Kathleen Cardone
United States District Judge
Chair, Committee to Review the Criminal Justice Act Program

Re: Testimony of L. Felipe Restrepo
United States Circuit Judge
United States Court of Appeals for the Third Circuit

Dear Judge Cardone:

I would like to thank you and the Committee for inviting me to testify about the Criminal Justice Act. By way of background, I worked as a public defender for six years - three years in the City of Philadelphia and three years in the Eastern District of Pennsylvania. I then practiced in a very small firm for thirteen years, regularly representing indigent defendants in state and federal courts. During the last several years of my practice I was appointed (via the CJA) to represent individuals in three separate federal capital cases. All three cases went to trial. While in private practice three different Chief Judges of the Eastern District of Pennsylvania appointed me as the CJA representative to the Administrative Office of the United States Courts ("AO"). In 2006 I was appointed as a United States Magistrate Judge in the Eastern District of Pennsylvania. Thereafter, I was confirmed as a United States District Judge in June of 2013, and as a Circuit Judge in January of 2016. The Chief Judge of the Third Circuit has designated me as the excess compensation judge for several districts within the Circuit. In short, I have had a long and varied relationship with the CJA and can say with a good bit of confidence that it works well.

In light of the above please accept the following observations and comments with respect to the CJA:

**CJA Training Should be Included in the Curriculum at "New Judge School"**

All new federal judges should be given training as to how indigent defendants are represented in the federal courts, including exposure to the relevant sections of the **Guide to Judiciary Policy**. In my opinion, new federal judges would benefit from hearing from both a federal defender and a CJA attorney about their respective experiences representing indigent defendants.
18 U.S.C. § 3006A(e)

It has been my experience that counsel does not pursue funding for “Services other than counsel” as often as they could or should. This is particularly true for purposes of presenting mitigating evidence that might support counsel’s argument that a departure or variance would be appropriate during the sentencing phase and at revocation hearings. According to statistics, for the Third Circuit, provided by the Legal and Policy Division – Defender Services only 13% of representations accessed investigators, experts and other service providers in non-capital cases in FY 2013. In FY 2104 the number dropped to 12%.

Although not required by the CJA or The Guide to Judiciary Policy, the Third Circuit has established a policy that counsel should seek prior authorization from the “excess voucher judge” before securing services that exceed the $2,500.00 cap noted in 18 U.S.C. § 3006A(e)(3). This policy was put in place in an effort to assure counsel and service providers alike that any such work will be fully compensated.

CJA Work is NOT pro bono Work and Should Not Be Treated as Such by Judges

The AO should make it clear to judges that CJA work is not pro bono work. CJA attorneys take appointments on the understanding that they will be compensated at the applicable rate for their allowable time and expenses. Accordingly, any reduction to their compensation that is purely justified by the desire to “save money,” and is not supported by some other legitimate reason to reduce the voucher is not an acceptable practice. See generally Guide to Judiciary Policy Vol. 7A, Ch. 2, § 230.33. To the best of my knowledge this has not been the practice in the districts that make up the Third Circuit, but my colleagues on the bench and in the practice of law expressed concern that this type of voucher cutting in not unusual in other jurisdictions.

In many jurisdictions throughout the United States the current CJA rate would amount to significantly less than half of what similarly qualified private attorneys would charge their clients on an hourly basis. Accordingly, any unsubstantiated cut to CJA compensation can put further financial pressure on CJA attorneys, jeopardizing the financial stability of their law practices or dissuading qualified and experienced attorneys from taking future appointments.

Voucher Cutting

The controlling language in the Guide to Judiciary Policy states that attorneys should be provided with prior notice of reductions and an opportunity to be heard. See Volume 7A, Ch. 2, § 230.36. Both district and circuit judges should be strongly encouraged by the AO to provide such notice and allow counsel an opportunity to respond before cuts are made to a voucher. When vouchers are referred to their respective circuit for approval, district court judges should also include a memorandum or note to the circuit judge identifying any adjustments that were made to the voucher prior to its submission to the circuit for approval.
It has been the experience of the designated “voucher judges” in the Third Circuit that some input by the district judge as to why the CJA cap was exceeded is extremely helpful in evaluating such vouchers.

The Bench and Bar Are Well Served by a Strong and Independent Federal Defender

Aside for their traditional role of providing services to their clients, federal defender offices provide invaluable services to private counsel and the bench. By way of example, the Federal Community Defender Office for the Eastern District of Pennsylvania: provides CLEs on a regular basis that cover all aspects of representing the accused in federal court; offers moot court preparation sessions for CJA attorneys in anticipation of circuit arguments; coordinates the selection and retention of CJA attorneys; works closely with court administration on the implementation of changes necessitated by Johnson v. United States, 135 S. Ct. 2551 (2015), and the “drugs minus two” project; staffs two reentry courtrooms; and provides advice to private counsel on a regular basis.

Case Budgeting Attorneys

It has been the experience of the Third Circuit that case budgeting is a valuable cost-containment tool. In addition to the savings achieved in individual cases, the case budgeting attorney has a wide view of CJA expenditures and trends in cases across the circuit and has identified opportunities for greater efficiency in the system. As a result, we have adopted circuit-wide policies regarding the appointment and compensation of associate counsel, and to address service provider costs, particularly with regard to travel time. The Third Circuit has found that there are more cases eligible for budgeting than a single case budgeting attorney can effectively manage, and the circuit would benefit from a second case budgeting attorney.

Even with the success of case budgeting so far, more needs to be done to educate district judges about the program and to encourage judges to refer cases where the total cost will exceed approximately $38,000.00. The Third Circuit case budgeting attorney has met with judges on an individual and group basis at their invitation, and will be presenting at the Bench-Bar conference this year. The Judicial Conference should strongly encourage judges to budget their cases, and include the case budgeting program as part of the trainings for both new and experienced judges.

Discovery-Intensive Cases

For years, we have recognized that the increased role of technology in our daily lives has contributed to an enormous increase in the time and resources required to engage in civil discovery. Those same shifts in technology have contributed to a dramatic increase in the amount of discovery in criminal cases as well. This increase requires greater CJA expenditures on attorney review time, and for computer and technical services necessary for panel attorneys to manage the large quantities of material they receive from the government. Government discovery practices can also increase the burden on CJA resources, such as providing materials
in proprietary formats that cannot be reviewed on standard equipment, or providing large quantities of audio or video recordings without pinpointing the sections relevant to the case or particular defendant. CJA attorneys are typically not well-equipped to manage these large quantities of discovery, as many are solo practitioners or work in small practices, without access to paralegals, in-house IT services, or sophisticated and expensive software to help manage and review such voluminous discovery.

One way to address the rising costs to the CJA for discovery management and review is to promote and increase the available training for CJA attorneys on the resources that are available to assist them in large discovery cases, such as the services of the National Litigation Support Team. The NLST provides excellent, cost-effective assistance, but its small staff and resources need to be vastly expanded to meet the CJA system’s needs. The courts should also set the expectation that CJA attorneys will seek competitive bids for computer-aided litigation support services, as many attorneys do not do so now.

Another method to address the rising costs is to increase court involvement in the discovery process. CJA attorneys have been hesitant to seek court assistance when the government’s discovery practices create an undue burden. In several districts, however, the courts have begun to address common discovery issues by convening a committee of judges, CJA attorneys, federal defenders, and representatives of the government to create standard discovery orders for these large volume discovery cases in a way that more fairly distributes the burdens. Collaborative efforts like these should be encouraged on a wider basis.

Your consideration of the above is most appreciated.

Sincerely,

L. Felipe Restrepo

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