

# Law Office of Andrew Parnes

Andrew Parnes, Member of Idaho and California Bar  
Lori Nakaoka, Member of Idaho Bar

January 20, 2016

Judge Kathleen Cardone, Chair  
Ad Hoc Committee to Review the CJA Program  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle  
Washington, D.C. 20544

Re: CJA Panel Attorney Testimony

Dear Judge Cardone and Honorable Committee Members:

My name is Lori Nakaoka. I have lived in Idaho since 1996 and worked for the Law Office of Andrew Parnes for the duration of this time. Both Andrew Parnes and I are CJA panel attorneys for the Southern Division of the District of Idaho. We have been panel attorneys on and off since approximately 1999-2000, and have been appointed to handle cases at the trial level, on direct appeal and on federal habeas. We would like to address the following areas of concern from the perspective of the average Idaho CJA panel attorney:

- ▶ Judicial involvement in the appointment, compensation and management of panel attorneys, investigator, experts and other service providers;
- ▶ The adequacy of compensation for legal services provided under the CJA, including the maximum amounts of compensation for legal and expert services provided under the CJA;
- ▶ The quality of representation under the CJA;
- ▶ The adequacy of support provided by the Defender Services Office to the panel attorneys and the availability and effectiveness of training services provided to panel attorneys.

## 1. **Judicial Involvement and Adequacy of Compensation**

Unnecessary judicial involvement in the appointment, compensation and management of panel attorneys and the inadequacy of the CJA compensation rates and preauthorized caps represent two issues that go hand and hand to form the primary weakness in the CJA program.

### A. **Judicial involvement:**

There is an obvious tension that results when the judiciary becomes involved in attorney compensation and the management of defense attorneys' use of investigative and expert service providers. Because the court is not directly involved in the case, it can only guess at what services are reasonable and necessary for the defense. Given the high settlement rate of federal prosecutions, too often the court concludes that the requested services are unnecessary. The denial of defense requests for funds happens most often in the sentencing arena, and can result in the attorney's inability to present legitimate mitigating evidence which in turn means a higher sentence for the client. The court should have no input on an attorney's decision to retain investigators, experts and other services which the attorney feels are necessary to the defense. The requirement that CJA attorneys obtain court permission to spend funds (in excess of \$800) prior to retaining a service provider is cumbersome and problematic. This rule essentially takes the decision making away from the CJA attorney and places it squarely in the hands of the judge who will ultimately be trying the case, imposing the sentence, or both. Too often the judge acts as if the case and/or the money being spent is his or her own, and the defense request is denied. The attorney is then faced with the prospect of paying for the needed service out of his or her own pocket, or going without. The attorney is in the best position to know what services are needed to fully defend a client, and the attorney should be given the autonomy to make these decisions without judicial oversight.

### B. **Compensation:**

CJA compensation, in every aspect, is capped. Caps create the same kind of unreasonable bar to CJA attorneys' use of expert services as judicial involvement. Caps in Idaho are governed by a general order which sets limits on the maximum hourly rate for expert, investigative and other services. Often, some of the most well-qualified people for the particular job at hand charge fees that exceed the CJA rate of compensation. The likelihood that a request for expert funds will be denied goes up when the expert's hourly rate exceeds that set by the general order. The likelihood of receiving a denial may cause an attorney to hire a less qualified expert, or to forego hiring an expert at all. Additionally, while many service providers agree to reduce their rates out of professional courtesy to the CJA attorney, the attorney should not be placed in position of

asking the service provider to go uncompensated for that portion of his or her fee that would otherwise be paid if retained by a private party, the Federal Defender, or the United State's Attorney's Office.

Most Idaho CJA attorneys are solo practitioners or members of small, two or three attorney firms. These attorneys do not have the "in-house" support personnel that the Federal Defender Services and U.S. Attorney's Office enjoy, such as full-time legal secretaries and paralegals, research and writing attorneys, investigators, sentence mitigation specialists, clerical staff and the like. CJA attorneys must apply for funds for all of these services. The preauthorized \$800 cap is too low. A service provider such as a mental health expert, investigator, or other defense expert, will likely exhaust the entire preauthorized \$800 just getting through the discovery, thereby requiring the CJA attorney to apply for funds to the actual investigation completed. This is particularly problematic if the court denies the request for additional funds. The attorney time spent in filling out CJA 21 forms and writing motions for expert funds (only to have the requests denied) consumes attorney time that goes toward the statutory maximum. This time should be exempt from the cap.

Both the hourly rate and the statutory case maximum are too low. Private attorneys in Idaho charge anywhere from \$150 to \$300 an hour. A deputy federal defender with approximately ten years experience may earn up to \$145,000 a year. In addition to this salary, deputy federal defenders (and AUSAs) receive additional compensation in the form of benefits, such as sick leave, paid vacation, medical insurance, retirement contributions, disability insurance, etc. The 2016 CJA rate of \$129 is below market rate. Thus, attorneys participating in the CJA program do so at a reduced rate and, in effect, incur a financial loss. This loss is exacerbated by the fact that many Idaho CJA attorneys find themselves, at one time or another, coming up against the statutory maximum and having one of two experiences – their fees are docked by the court, or they cut their own hours in order not to exceed that limit.

An unfortunate reality is that the simple act of cutting one's own hours may be far more efficient than going to the trouble to file a CJA 26 and a motion for payment in excess of the statutory maximum, because the attorney time preparing the voucher is not compensated under the Criminal Justice Act, and there is no guarantee of payment. Additionally, in polling Idaho CJA attorneys, there is a generalized belief that newer attorneys with less experience tend to under bill their cases because they fear that they will be cut from the panel if they exceed the statutory maximum. This does not serve the interests of the client or the attorneys comprising the CJA panel.

## **2. Quality of Representation**

While the overall sentiment from the criminal bar (both prosecution and defense) is that the quality of CJA representation is “adequate,” most agree that the quality of representation is not on par with that provided by the Idaho Federal Defender Services. Unfortunately, the cumbersome procedures currently in place for securing investigative and expert funds (touched on above), as well as fee caps, dissuade attorneys from regularly requesting such services. It appears that when courts deny funding requests for services, attorneys stop asking for them. Without question, a defense attorney working with unencumbered access to the regular assistance of an investigator, research and writing specialist, mitigation specialist and other support personnel, has more time and is more likely to stay abreast of current law, emerging legal issues, and to attend training. Judicial intervention, inadequate compensation and caps work together to impair the quality of CJA representation. An indigent defendant should not be penalized for having the bad luck of being appointed CJA conflict counsel.

## **3. National Resources and Training**

One of the genuine perks of being CJA counsel is the free training offered annually by the Defender Services and Administrative Offices. These seminars are typically of very high quality, and their frequency and availability nationally make them widely available to CJA attorneys. Likewise, the Defender Services Hotline is a great resource for CJA attorneys. These services should continue and CJA attorneys should be encouraged to make use of them. One manner which might promote greater attendance is to increase the number of travel scholarships or to lower the bar to attorney eligibility for travel scholarships.

## **4. Conclusion**

Thank you for the opportunity to participate in this important discussion. I commend the Committee for its efforts to look critically at the CJA program. I hope that positive change results from this inquiry. Change that improves level of representation provided to all indigent individuals accused of federal crimes, not just those who have the luck of being appointed the Federal Defender. I look forward to speaking with the Committee further about these important issues.

Very truly yours,

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Lori Nakaoka  
Law Office of Andrew Parnes