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The Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
The Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington D.C. 20544

Dear Judge Cardone and members of the Committee:

Thank you for inviting me to present testimony to the Committee. The quality of representation provided by CJA panel attorneys and panel management are integral parts of the 6th Amendment guarantee to effective assistance of counsel.

I. THE CJA PANEL ATTORNEY MUST BE INDEPENDENT OF THE DISTRICT JUDGES BEFORE WHOM THEY PRACTICE

As the decision maker between two adversaries in a criminal case, the district judge cannot be involved in the management of the defense function. Federal defenders are not directly supervised by the district judges before whom they appear. Defenders are appointed at the circuit level or by independent boards of directors.

CJA panel attorneys are controlled by the district judges who: Determine who is on the panel; which panel member should be appointed to a particular case; determine the resources that will be available to the defendant (investigators, experts, budgeting, etc.); and, determine how much the panel attorney and third party services providers should be paid.

This system provides no due process rights. The system requires only that the district judge and the chief circuit judge certify what to them seems to be amounts reasonably expended as fair compensation under the CJA. Judges "should" give notice and an opportunity to be heard when they reduce a voucher. See CJA Guideline § 230.36. However, "should" is merely an expectation. It is not mandatory.

As to the CJA requirements, "Congress established this process by statute and it is akin to an administrative decision, providing no right of formal appeal to the United States courts of appeals." *In Re Smith,* 586 F.3d 1169, 1173 (9th Cir. 2009) (Tallman, J., writing as the chief judge delegate) citing *In Re Baker,* 693 F.2d 925, 927 (9th Cir. 1982) (The certification of the amount to be paid the CJA panel attorney is an administrative act and not a final decision that maybe appealed under 28 U.S.C. § 1291).

There is no requirement for any notice whatsoever before compensation to a panel attorney or third party provider is authorized (by budget or under the CJA, see 18 U.S.C. § 3006A(d) and (e)) or cut at the time of making certification for payment.

"For decades, the administration of the CJA has been a source of tension between CJA attorneys and the judges tasked with overseeing the CJA program." *United States v. Tillman,* 756 F.3d 1144, 1153 (9th Cir. 2014) (citation omitted). This tension is rife with issues of conflict of interest and issues regarding the appearance of fairness. This tension is further explored below.

District judges must be taken out of making decisions for defendants in the management of their defense. No one can imagine the court making resource and strategy decisions for the prosecution. It is no more appropriate for the court to make the same decisions for the defendant.

A. THIRD PARTY SERVICES PROVIDERS

One of the most troubling areas of the present system is method of going to the trial judge to obtain authorization for experts and investigators. Often, it becomes necessary for the CJA panel attorney to disclose defense theories of the case and confidential information to establish that the services and the amounts to be paid for them are "necessary to provide fair compensation for services of an unusual character or duration." 18 U.C.S. § 3006(A)(e)(3).

For example, if a panel attorney seeks and obtains authorization for the defendant to have a polygraph examination and results are never disclosed, a negative inference is natural. The same negative inference can arise whenever an expert is not presented in some fashion. Examples would include a forensic accountant, pathologist, neurologist, psychologist or any other expert not presented in some fashion at trial or sentencing.

The ex parte motion to obtain funding for third party service providers can also be used as a platform for the panel attorney to attempt to influence the district judge to defense theories.

Another common problem is the rates and budgets authorized by the district judge for third party service providers. The defense should be on a level playing field with the government but, that is not reality. Recently, the now discontinued Ninth Circuit CJA Oversight Committee, of which I was a member, researched the rates experts were paid when used by the USAO's, FDO's and panel attorneys. The evidence gathered demonstrated to me that USAO's paid the highest rates for a broad spectrum of expert categories. Next, came the rates paid by federal defenders. Rates paid in cases handled by panel members were the lowest. Presumptive expert rates used in the Ninth Circuit are too low.

Another problem occurs when the presiding judge decides you cannot use the expert or investigator the panel attorney requests. Instead, the presiding judge picks the expert or investigator that will be authorized. This can result in disaster for the defense.

Simply, the district judge has no place to make these strategy decisions for the defense. Instead, the district judge should be completely independent as the ultimate arbiter in our criminal adversary system.

B. PANEL ATTORNEY VOUCHER CUTS

Voucher cuts are real. Last year Defender Services conducted surveys of judges, defenders and panel attorneys. 94.0% of all judges surveyed reported that vouchers are reduced in their districts or circuits for reasons other than mathematical or administrative inaccuracies. 39.4% of panel attorneys (this excludes panel representatives) reported that they had a voucher cut in the last two years for reasons other than mathematical or administrative reasons. Panel attorneys reported their vouchers were cut "always" or "often" 16.2% of the time at the district court level and 13.5% at the circuit level.

This demonstrates widespread voucher cutting by district judges. It is inappropriate for a judge to make these decisions when cases are ongoing or where the panel attorney will be appointed in future cases before the same judge.

II. QUALITY OF REPRESENTATION

Panel attorneys, as a general rule, are hardworking, take seriously the best interests of their clients and are under paid. The panel attorneys that present testimony to this Committee are volunteers. The other witnesses, such as defenders, judges and other court personnel are all being paid their regular wage to testify.

Panel attorneys should receive a sufficient number of appointments each year to be proficient in federal criminal defense. It is hard to be proficient if you are only appointed to one or two cases per year.

Panel attorneys should receive mandatory training. FDO's and courts, in many instances, are already providing fine training opportunities.

Panel attorneys should receive adequate pay. The current $129.00 per hour panel attorney rate is too low. The 2015 survey shows that the average hourly overhead for panel attorneys is $85.00 per hour and for panel representatives is $94.00 per hour. This makes the effective hourly rate to be $44.00 and $35.00 per hour, respectively. Congress has authorized a rate of $148.00 per hour with COLA's added. The panel attorneys have advocated for full funding, however, the judiciary has refused to request full funding from Congress.

Adequate pay rates for panel attorneys are vital to the quality of representation. 39.5% of judges in the 2015 survey reported their court is currently experiencing difficulty (to "some" "moderate" or "great" extent) "appointing attorneys with the necessary qualifications and experience required given the complexity of the case." 54.0% of judges reported the "hourly rate not sufficient" is causing difficulty identifying, replacing, appointing or keeping qualified and experienced attorneys for the CJA panel.

III. RECOMMENDATION OF INDEPENDENCE

The defense function should be independent of the judiciary, much like prosecutors are independent of the judiciary.

The Defender Services Office lost the independence it had in the recent reorganization of the Administrative Office of the Courts. It went from a degree of independence to having no independence. Now, DSO is just another program or service supervised by that department in the AO. DSO records, some with client confidences, are now part of and intermingled with other judiciary records, available to members of the judiciary.

Instead, DSO should be an independent organization with its own governing board. Congressional budget requests should be presented by DSO representatives and not by general judicial budget committee, whose zeal in obtaining defense resources is tepid.

The panel attorney program should obtain independence as well. It could be governed by the same independent board. Programs of administration can be developed to suit the individual needs of districts across the country. Many exist today: Panels administered by FDO or by a supervising attorney employed by the district court. A mandatory appeal process when a voucher is cut, an expert authorization is denied, or a budget is cut should be developed. District judges

could still make recommendations but, ultimate decisions should be independent of the judge presiding over the case.

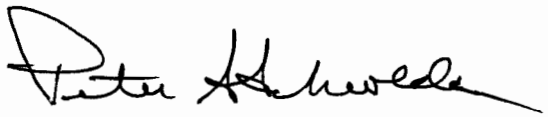
IV. CONCLUSION

The work of this Committee is very important. It is my hope that the result of your work will be a more independent defender and panel attorney program.

I look forward to appearing before you.

Very truly yours,

WALDO, SCHWEDA
& MONTGOMERY, P.S.



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