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VIA REGULAR MAIL

Honorable Kathleen Cardone
United States District Judge
Western District of Texas
525 Magoffin Avenue
El Paso, TX 79901

RE: PADRs' CONSENSUS VIEW ON ISSUES FACING CJA PANEL ATTORNEYS

Dear Judge Cardone:

We are the CJA Panel Attorney District Representatives who serve on the AO's Defender Services Advisory Group (DSAG). We write on behalf of the 94 CJA Panel Attorney District Representatives (PADRs) and the thousands of Panel attorneys they represent.

Thank you for the tremendous amount of time and energy you and the other Committee members have devoted to this study. In particular, thank you for participating in our 21st National Conference of CJA Panel Attorney District Representatives held on March 4-5, 2016, in San Francisco, California. We found the discussion between the PADRs in attendance at the conference and the Committee members to be very useful, and hope that you did as well. Following that plenary session, we held break-out sessions where the PADRs continued to discuss issues and potential solutions, including alternative structures and policies that would improve the Panel attorney aspect of the CJA program. This letter seeks to convey to the Committee the consensus views that emerged from those discussions.¹

To focus our discussions, we obtained feedback for your Committee, including proposed solutions, on five components of the current federal indigent defense system:

1. Judicial involvement in voucher review, including Panel attorney fear of retaliation for zealous advocacy or questioning a Judge's ruling;
2. Voucher review procedures and the impact of unwarranted voucher reductions

¹ The Committee has heard from several PADRs and individual Panel attorneys about positive and negative aspects of the current system. We do not attempt here to summarize that testimony or those viewpoints, of which there are many. Instead, as the DSAG Panel Attorney Representatives, we express the views of the Panel attorney community generally, as developed through organized discussions among the PADRs.

- on quality of CJA representation;
- 3. Expert services requests and approval process;
- 4. Panel administration; and
- 5. Perception of Panel attorney quality.

We address each topic below. Before discussing the substantive topics, however, we provide background information on the Panel Attorney District Representative program, including a description of how the Panel attorney community functions at a national level and the important role that PADR's play in representing the Panel attorneys in their districts.

Background on Panel Attorney District Representative Program

Panel attorneys are a critical component of the federal indigent defense system. The CJA program, which requires a hybrid system, could not function without the participation of experienced and highly-skilled private Panel attorneys. Although Panel attorneys have been a critical part of the CJA program since its founding in 1964, Panel attorneys were not organized on a national scale until the 1990s, when the Defender Services Office developed the Panel Attorney District Representative program.

There are 94 PADR's, one for each federal judicial District. Each PADR is selected from among the members of the CJA Panel to represent the Panel attorneys in their District. Of the 94 PADR's, eight (8) are elected to serve on DSAG. Seven (7) represent specific circuits; the eighth Panel attorney on DSAG is the National Panel Attorney Representative. The seven (7) Circuit-based DSAG Panel attorney representatives are selected by and serve the Panel attorneys in their Circuits.²

The PADR program promotes open dialogue regarding issues and policies that affect the Defender Services program. As liaisons between the Panel attorneys in their Districts and their DSAG Panel representatives, the PADR's facilitate communication between DSAG and the Defender Services Committee, on the one hand, and the thousands of individual Panel attorneys, on the other hand. With more than 10,000 Panel attorneys across the country accepting CJA appointments at any given time, the program provides some means of allowing Panel attorneys to discuss issues and share ideas that improve the quality of representation being provided to CJA clients. It also allows the Administrative Office of the U.S. Courts to communicate more effectively with the Panel attorney community.

Consensus Views from Panel Attorney District Representatives

1. Judicial Involvement

Position: Judges should be removed from the voucher review process.

Consistent with the first of the ABA Ten Principles of a Public Defense Delivery System, control over federal indigent defense services must be insulated from judicial interference. To further this important

² The seven (7) Circuit-based DSAG Panel attorney representatives represent specific Circuits as follows: one (1) representative for the First and Second Circuits; one (1) representative for the Third, Fourth, and D.C. Circuits; one (1) representative for the Fifth Circuit; one (1) representative for the Sixth and Seventh Circuits; one (1) representative for the Eighth and Tenth Circuits; one (1) representative for the Ninth Circuit; and one (1) representative for the Eleventh Circuit.

goal of independence of the defense function, it is the consensus view that Judges should be removed from the voucher review process.

The PADRs recognize that many Judges appreciate and respect the defense function, and believe the reason some Districts work well, while others do not, is because of the benevolence of the Court. Under the current structure, even the most supportive Districts are just one Judge away from becoming a hostile work environment for CJA Panel attorneys.

Fear of retaliation for zealous advocacy is recognized as an occupational hazard, but most PADRs believe this does not have a measurable effect on the quality of representation. CJA Panel lawyers, especially those in Districts with rigorous application and vetting procedures, are dedicated and experienced criminal practitioners who provide highly effective representation despite risks of removal from the Panel or receipt of fewer CJA appointments. Nonetheless, even the risk of retaliation or the appearance of impropriety is sufficient to warrant reform.

2. Review of Panel Attorney and Expert Services Compensation Vouchers

Position: Panel attorney and expert services vouchers should be reviewed and approved by a non-judicial, independent professional with a significant history of criminal defense practice and experience billing under the CJA.

It is the consensus view that CJA Panel attorney and expert services compensation vouchers should not be reviewed or approved by a Judge or Judicial Officer. Instead, CJA payment vouchers should be reviewed by an independent professional with an established working knowledge and demonstrated aptitude for federal criminal law and significant experience practicing and billing under the CJA. This person should be selected by a committee of criminal defense practitioners in consultation with the Defender Services Office and funded by the Defender Services appropriation. The selection committee should include the District's PADR and Federal Defender or Community Defender.

3. Unwarranted Voucher Reductions

Position: A voucher reduction appeal process should be created to provide Panel attorneys with an opportunity to challenge an unwarranted reduction before a voucher review committee or independent reviewer.

Unwarranted voucher reductions conflict with Judicial Conference policy and undermine the Sixth Amendment by making it difficult to attract and retain qualified, competent Panel attorneys and discouraging appointed CJA counsel from requesting funds needed for investigators, experts, and other service providers. The Defender Services Office should create guidance on voucher review, based on the presumption that work performed by Panel attorneys is reasonable. A voucher reduction appeal process should be created to provide Panel attorneys with an opportunity to challenge an unwarranted voucher reduction before a voucher review committee or independent reviewer. In the event of a disagreement with the committee or independent reviewer's determination, the attorney should be able to appeal to a Circuit case-budgeting attorney, who would no longer be housed in the Courts, and would be an employee of the Defender Services program.

4. Requests for Expert and Other Services

Position: Judges should not be involved in the procurement of, or the setting of compensation rates for, expert and other services in CJA cases. Instead, expert service requests should be considered by someone who has no role in deciding the merits of the case, such as a CJA Administrator, Panel Manager or Attorney Supervisor.

At a minimum, presiding Judges should not be involved in the procurement of, or the setting of compensation rates for, expert and other services in CJA cases. The present system conflicts with the role of Judges as detached and neutral arbiters of fact and law, requiring otherwise confidential defense theories and strategies to be prematurely disclosed by Panel attorneys in order to obtain support services needed for an effective defense or mitigation. This judicial intrusion into the attorney-client privilege is not experienced by federal prosecutors or Federal and Community Defender attorneys, placing defendants represented by CJA Panel attorneys at a distinct disadvantage.

The mechanism for requesting the appointment of experts should be revised, and the artificially low case compensation maximums for expert and other service providers should be abolished. A simplified procedure should be implemented that uses a standardized CJA form. The CJA form should have fields for Panel counsel to identify the type of expert needed, the name and hourly rate of the expert, the reason the services are needed, and the projected number of hours to complete the task.

Further, expert service requests should be considered by someone who has no role in deciding the merits of the case, such as a CJA Administrator, Panel Manager or Attorney Supervisor. If the reviewing party has any questions, he or she should contact the requesting attorney for clarification. If the request for services is denied, appointed Panel attorney could then appeal to the CJA Advisory Committee or a Circuit case-budgeting attorney for further review. The Circuit case-budgeting attorney would no longer be housed in the Courts, and would be an employee of the Defender Services program.

5. Panel Administration

Position: Management of the CJA Panel, including the assignment of cases, should be done by an independent CJA Administrator.

Each district's CJA Panel should be administered by an independent CJA Administrator responsible for managing the Panel, and assigning cases to the CJA Panel attorneys. The CJA Administrator should be responsible for reviewing Panel attorney claims for reimbursement and other services for mathematical and technical accuracy, reasonableness under the CJA, and for conformity with CJA policies and procedures. The Administrator should also be expected to develop and administer a Continuing Legal Education training program for the CJA Panel, and provide substantive legal analysis, advice, and assistance on all CJA Panel matters. The CJA Administrator should be selected by a committee of criminal defense practitioners in consultation with the Defender Services Office and funded by the Defender Services appropriation. The selection committee should include the District's PADR and Federal or Community Defender.

6. Perception of Panel Attorney Quality

Position: An experienced and dedicated Panel of criminal defense practitioners should be the standard for all CJA Panels across the nation, and there should be a presumption that

work performed by Panel attorneys is reasonable and necessary for Constitutionally-adequate representation.

A carefully vetted CJA Panel, consisting of experienced and dedicated criminal practitioners should be the norm, and work performed by Panel attorneys presumed reasonable and necessary for quality representation. In evaluating claims of ineffective assistance of counsel under Strickland, the U.S. Supreme Court requires a “strong presumption” that defense counsel’s performance was reasonable and that defense counsel exercised sound professional judgment.³ We can think of no reason why CJA Panel attorneys should not enjoy the same presumption when seeking compensation for work performed for their clients.

Most Panel attorneys are highly skilled and experienced criminal defense practitioners that provide high quality representation. The recent NACDL report on the state of the federal indigent defense system found that “many Panel lawyers in districts across the country are among the best, most committed advocates for indigent clients found anywhere.”⁴ In addition, we have been informed that national surveys administered by Westat in 2015 show an improvement in the quality of Panel attorney performance, with more Judges ranking Panel attorneys as providing high quality representation as compared to prior survey years, and as compared to retained criminal defense counsel. To sustain this level of representation, however, Panel attorneys should be provided with necessary resources, including fair and competitive hourly rates, access to investigators and other service providers, and training, to remain proficient in the increasingly complex area of federal criminal law.

Again, the DSAG panel attorneys extend our appreciation for the Committee’s hard work and dedication to this important and historic study. We hope the views we share will be helpful to your Committee as it completes its work and improves the Sixth Amendment right to counsel for the benefit of CJA clients, panel members, and the entire Defender Services program.

Sincerely,



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/s/ Victoria Bonilla-Argudo
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³ Strickland v. Washington, 466 U.S. 668, 689-90 (1984).

⁴ NACDL, Federal Indigent Defense 2015: The Independence Imperative, at 22 (2015).

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CC: CJA Study Committee
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