

Interim Recommendations of the CJA Review Committee

OCTOBER 2017

The CJA Review Committee unanimously recommends that Congress create an independent Federal Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference. The Commission would have sole authority to set policy and practices related to the provisions of federal defense.

The Committee realizes that the creation of an independent Federal Defender Commission cannot be implemented immediately. While Congress weighs the merits of this recommendation and determines how best to proceed, the judiciary can and should take important steps to give defenders more authority and autonomy. While most of the actions outlined below constitute interim recommendations – and will be moot once a Federal Defender Commission is created – some are useful guidance even to a fully independent entity.

Structural Changes

1. The Defender Services Committee (DSC) should have:
 - ▶ Exclusive control over defender office staffing and compensation.
 - ▶ The ability to request assistance of JRC staff on work measurement formulas.
 - ▶ Control over development and governance of eVoucher in order to collect data and better manage the CJA program.
 - ▶ Management of the eVoucher program and the interface with the payment system.
 - ▶ Exclusive control over the spending plan for the defender services program.
2. For any period during which AO and JCUS continue to have authority over the budget for the CJA program, when either the Budget or Executive Committee disagree with the budget request by the DSC, the matter should be placed on the discussion calendar of the full Judicial Conference.
3. The composition of the DSC should include the co-chairs of the Defender Services Advisory Group, both as voting members.
4. Defender Services Office (DSO) must be restored to a level of independence and authority at least equal to what it possessed prior to the reorganization of the AO. In particular, DSO should be empowered to:
 - ▶ Exclusively control hiring and staffing within DSO.



- ▶ Operate independently from the AO Department of Program Services or any other department that serves the courts.
 - ▶ Retain exclusive control with NITOAD over defender IT programs.
 - ▶ Retain ultimate discretion with DSC in setting the agenda for DSC meetings—no requirement of approval from other AO offices.
5. DSO should be made a member of the AO Legislative Counsel to consult on federal legislation
 6. Representatives from DSO should be involved in the Congressional appropriations process.

Compensation and Staffing for Defenders and CJA Panel Attorneys

7. The annual budget request must reflect the highest statutorily available rate for CJA panel attorneys.
8. To provide consistency and discourage inappropriate voucher cutting, the Judicial Conference should:
 - ▶ Adopt the following standard for voucher review –
vouchers should be considered presumptively reasonable, and voucher cuts should be limited to mathematical errors, instances in which work billed was not compensable, was not undertaken or completed, and instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.
 - ▶ Provide, in consultation with DSC, comprehensive guidance concerning what constitutes a compensable service under the CJA.
9. Every circuit should have available at least one case budgeting attorney and reviewing judges should defer to their recommendations in reviewing vouchers and requests for expert services.
10. To promote the stability of defender offices until an independent Federal Defender Commission is created: Circuit judges should establish a policy that federal defenders shall be reappointed absent cause for non-reappointment.
11. A federal public or community defender should be established in every district which has 200 or more appointments each year. If a district does not have a sufficient number of cases, then a defender office adjacent to the district should be considered for co-designation to provide representation in that district.

12. The Judicial Conference should develop a policy in which judges defer to DSO recommendations and accepted staffing formulas when setting staffing levels.
13. Circuit court judges should implement DSO staffing formulas when approving the number of assistant federal defenders in a district
14. Modify the work measurement formulas to:
 - ▶ Reflect the staff needed for defender offices to provide more training for defenders and panel attorneys.
 - ▶ Support defender offices in hiring attorneys directly out of law school or in their first years of practice, so that the offices may draw from a more diverse pool of candidates.
15. Every district should form a committee, or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, and removal of panel attorneys. The process must incorporate judicial input into panel administration.
16. Every district should have an appeal process for panel attorneys who wish to challenge any non-mathematical voucher reductions.
 - ▶ Every district should designate a CJA Committee that will determine how to process appeals.
 - ▶ Any proposed reasonableness reduction shall be subject to review by the designated CJA review committee that will issue a recommendation to the judge.

Standards of Practice and Training

17. DSO should regularly update and disseminate best practices.
18. DSO should compile and share best practices for recruiting, interviewing, and hiring staff, as well as the selection of panel members, to assist in creating a diversified workforce.
19. All districts must develop, regularly review and update, and adhere to a CJA plan as per JCUS policy. Reference should be made to the most recent model plan and best practices. The plan should include:
 - ▶ Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
 - ▶ A training requirement to be appointed to and then remain on the panel.
 - ▶ A mentoring program to increase the pool of qualified candidates



20. FJC and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.
21. FJC and DSO should provide increased and more hands-on training for CJA attorneys, defenders, and judges on e-discovery. The training should be mandatory for private attorneys who wish to be appointed to and then remain on a CJA panel.
22. While judges retain the authority to approve all vouchers, FJC should provide training to them and their administrative staff on defense best practices, electronic discovery needs, and other relevant issues.
23. Criminal e-Discovery: A Pocket Guide for Judges, which explains how judges can assist in managing e-discovery should be provided to every federal judge.

Capital Representation

24. Remove any local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district representation. Every district should have access to a CHU.
25. Circuit courts should encourage the establishment of CHUs where they do not already exist and make Federal Death Penalty Resource Counsel and other resources as well as training opportunities more widely available to attorneys who take these cases
26. Eliminate any formal or informal non-statutory budgetary caps on capital cases, whether in a death, direct appeal, or collateral appeal matter. All capital cases should be budgeted with the assistance of CBAs and/or resource counsel where appropriate.
27. In appointing counsel in capital cases, judges should defer to recommendations by federal defenders and resource counsel absent compelling reasons to do otherwise.
28. Modify work measurement formulas to:
 - ▶ Dedicate funding—that does not diminish funding otherwise available for capital representation—to create mentorship programs to increase the number of counsel qualified to provide representation in direct capital and habeas cases.
 - ▶ Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.
 - ▶ Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

29. FJC should provide additional judicial training on:

- ▶ The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
- ▶ Best practices on the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General.

Defender Information Technology

30. Adequately fund and staff NITOAD in order to control and protect defender IT client information, operations, contracts, and management.

Resources: Litigation Support and Interpreters

- 31.** Increase staff and funding for the National Litigation Support Team, as well as increased funding for contracts for Coordinating Discovery Attorneys to be made available throughout the United States.
- 32.** Create new litigation support position(s) in *each district* or at the circuit level, as needed, to assist panel attorneys with discovery, evaluation of forensic evidence and other aspects of litigation.
- 33.** Develop a national policy requiring the use of qualified interpreters whenever necessary to ensure defendants' understanding of the process.

Legislative Changes

- 34.** Amend 18 U.S.C. § 4285 to permit courts to order payment of costs in the limited circumstances where the defendant is unable to bear the costs and the court finds that the interests of justice would be served by paying necessary expenses.
- 35.** Congress must amend the Criminal Justice Act to eliminate circuit court review of attorney and expert fees exceeding current statutory caps.