

# Evaluation of the Interim Recommendations from the Cardone Report

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# Executive Summary

## Background

In 2015, the Chief Justice of the United States appointed an ad hoc committee to study “the current quality of public defense in federal courts nationwide provided under the auspices of the Criminal Justice Act (CJA).”<sup>1</sup> That committee, known as the “Cardone Committee” after its chair Judge Kathleen Cardone, initially published a report of its findings in November 2017.<sup>2</sup>

Included in the committee’s report (hereinafter “the Cardone Report”) were thirty-five interim recommendations intended to provide “more authority and autonomy”<sup>3</sup> for the defense function while Congress weighed the merits of the ultimate recommendation of the Cardone Committee—the creation of an independent Federal Defender Commission—and determined how best to proceed.<sup>4</sup>

In 2019, at the end of the Executive Committee’s review of the Cardone Report, the chair sent a letter to the Defender Services Committee (DSC) chair discussing what next steps to take regarding the Cardone Report recommendations.

Now that the Conference has completed its work on the interim recommendations, the Executive Committee has concluded that the next logical step is to undertake an assessment of how the judiciary has implemented the adopted interim recommendations and of the degree to which those actions have addressed the concerns identified by the Cardone Committee.<sup>5</sup>

The letter proposed that the DSC, with the assistance of the FJC, undertake the assessment.

To complete this assessment, the FJC research team executed a three-year mixed methods study focused on changes in CJA administration between October 1, 2016, and September 30, 2021 (FY 2017 to FY 2021).

## Data

For three years the FJC research team gathered information from public and private sources, including

- Criminal Justice Act (CJA) plans for all district and appeals courts in effect in FY 2017 and FY 2021
- Interviews with 215 judiciary stakeholders
- A survey of 4,262 CJA panel attorneys randomly sampled from CJA appointments with a final payment since the start of FY 2017

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1. The 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (2017), (hereinafter “the “Cardone Report”), p. xiii.

2. The final report of the Cardone Committee was “delivered to Director James C. Duff, Administrative Office of the U.S. Courts, on November 2, 2017,” and a revised version was made public in April 2018. See [cjastudy.fd.org](https://www.cjastudy.fd.org), last accessed Feb. 21, 2023.

3. Cardone Report, p. xxxvi.

4. *Id.*, p. xxxvi.

5. Letter from Hon. Merrick Garland, chair of the Executive Committee of the Judicial Conference of the United States, to Hon. Raymond J. Lohier, chair of the Defender Services Committee, re: Next Step Regarding the Cardone Committee Recommendations, Sep. 19, 2019. On file with FJC.

- eVoucher data on 391,516 CJA appointments with a final payment between FY 2017 and FY 2022<sup>6</sup>
- Budgets, staffing requests, and other program data provided by the Defender Services Office (DSO)
- Reports of the Judicial Conference of the United States and its committees

## Results

This report describes the evaluative activities of the FJC research team and their results, divided into eight chapters by recommendation theme.

The recommendations in the Cardone Report cover a wide spectrum of aspects of the defense function, many of which are related to one another, prompting courts to change policies and practices in light of the Cardone Report recommendations and JCUS action. Because of the related nature of the Cardone Report recommendations, and the changes courts made in response to the report's findings, evaluating implementation and impact means discussing all the recommendations, including those on which no action was taken. Detailed below is a summary of the findings with respect to each recommendation.

### Recommendation 1 (see subparts)

The Defender Services Committee (DSC) should have:

- 1a. Exclusive control over defender office compensation and classification and qualification standards. (approved as modified)<sup>7</sup>
- 1b. The ability to request assistance of Judicial Resources Committee staff on work-measurement formulas. (declared moot)<sup>8</sup>
- 1c. Control over development and governance of eVoucher in order to collect data and better manage the CJA program. (approved)<sup>9</sup>
- 1d. Management of the eVoucher program and the interface with the payment system. (approved as modified)<sup>10</sup>
- 1e. Exclusive control over the spending plan for the defender services program. (deferred)<sup>11</sup>

(Chapter 2) The JCUS Executive, Budget, Judicial Resources, and Defender Services Committees play the same roles under the same rules to determine defender program resources as before the Cardone

6. An additional year of data was added to the eVoucher analysis because of a change made in the eVoucher data collection process in mid-FY 2020.

7. JCUS-SEP 18, p. 8.

8. Declared moot by the Executive Committee after its modification of Recommendation 1a (see Chapter 2 Implementation Section). JCUS-SEP 18, p.8.

9. JCUS-SEP 18, p. 8. The DSC jurisdictional statement now reads "Make policy recommendations on initiatives related to the development of any voucher processing system, including the eVoucher program, that affect the provision of legal representation under the Criminal Justice Act." *Supra* note 3.

10. *Id.* Initially, the Executive Committee revised the jurisdictional statement of the DSC in toto to give it primary jurisdiction over the eVoucher program and officially recognize its role in overseeing policy development for the program. In 2019, however, the AO director reported that "AO staff working on day-to-day support of the e-Voucher program should remain in CMSO [the Case Management Services Office within the Department of Administrative Services] because of e-Voucher's interaction with the judiciary's broader payment system and its unique interrelationship with non-DSO stakeholders (including judges and clerks' offices) in addition to defenders and CJA panel attorneys." JCUS-MAR 19, p. 7. See also the AO Organization Chart at Attachment 1.

11. The Executive Committee deferred consideration until the final recommendation of independence is considered. See JCUS-SEP 18, pp. 8-9.

Report issued its recommendations. Problems, identified by the report, resulting from the process of placing program resourcing decisions in the hands of those whose commitment is to the larger goals of the federal judiciary rather than to the Defender Services program have not been resolved.

The DSC jurisdictional statement was changed in 2018 to implement recommendations 1c and 1d but had no effect on shifting management of the eVoucher system to the program it supports, because neither the DSC nor DSO was given operational control, due to a proviso added by the AO director when implementing the recommendation. The national reporting features championed by the Cardone Committee were not given priority, and the inefficiencies resulting from shared DSO-CMSO responsibilities identified in the Cardone Report persist.

## Recommendation 2 (declined to adopt)<sup>12</sup>

For any period during which the Administrative Office and Judicial Conference 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 Defender Services Committee, the matter should be placed on the discussion calendar of the full Judicial Conference.

(Chapter 2) The Executive Committee declined to adopt Recommendation 2. The same mechanisms exist for JCUS members to place items on the discussion calendar for its meetings, and the defender budget request was not moved to the discussion calendar during this period of study, to address ongoing disagreements over the use of carryforward and how to meet budget shortfalls.

## Recommendation 3 (declined to adopt)<sup>13</sup>

The composition of the Defender Services Committee should include the co-chairs of the Defender Services Advisory Group, both as voting members.

(Chapter 2) Defender Services Advisory Group (DSAG) co-chairs have not been added to the committee. The DSAG co-chairs continue to participate in DSC meetings as non-voting guests of the committee chair.

## Recommendation 4 (see subparts)<sup>14</sup>

The 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:

- a. Exclusively control hiring and staffing within DSO. (no action taken)

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12. JCUS-SEP 18, p. 9.

13. The Executive Committee deferred consideration of this recommendation until the DSC included its views on Recommendation 3 in its response to the Executive Committee's five-year survey. See JCUS-SEP 18, p. 10. At its February 2019 meeting, the Executive Committee considered the DSC's response supporting the addition of the Defender Services Advisory Group (DSAG) co-chairs to the DSC but ultimately determined not to make any recommendation on the request, as the decision rests solely within the Chief Justice's discretion. See JCUS-MAR 19, pp. 6–7.

14. This recommendation was referred to the AO director for consideration. In September 2018, the director reported that he had implemented the overall recommendation to move FDO to a directorate. (JCUS-SEP 18, p. 11.) Other than subpart c, which relates to the defender technology program and is addressed in Section IV of this chapter, the other subparts were not addressed in the next JCUS report. "The Director is still considering aspects of interim recommendation 4 as they relate to Defender IT programs." See JCUS-SEP 18, p. 11, fn. 2. Thus, Recommendations 4a and 4d saw no action taken by the JCUS, while 4b and 4c saw the AO director move DSO from Program Services and into an independent directorate (4b) and give DSO exclusive control over NITOAD (4c).

- b. Operate independently from the AO Department of Program Services or any other department that serves the courts. (approved)
- c. Retain exclusive control with National Information Technology Operations and Applications Development Branch (NITOAD) over defender IT programs. (approved)
- d. Retain ultimate discretion with DSC in setting the agenda for DSC meetings—no requirement of approval from other AO offices. (no action taken)

(Chapter 2) DSO was restored to directorate level in 2018. Information from our interviews, however, indicates that DSO does not operate independently from “other AO departments that serve the courts.”

In 2019, two of the former DSO IT staff positions moved during the 2013 reorganization were returned by the AO director, and the Memorandum of Understanding governing the relationship among DSO, CMSO, and NITOAD was revised (effective in FY 2020).

DSO now holds control over NITOAD, and non-procurement decisions that affect the defender program IT and data nationally are made within DSO in consultation with NITOAD staff.

No JCUS action was taken on the remaining parts of Recommendation 4.

### **Recommendation 5 (endorsed)<sup>15</sup>**

DSO should be made a member of the AO Legislative Council to consult on federal legislation.

(Chapters 2 and 8) DSO gained a seat on the Legislative Council. However, the limited decision-making authority of this group hampers the ability of DSO to meaningfully advocate for program needs. In early 2023, the Legislative Council was dissolved.

### **Recommendation 6 (endorsed as modified)<sup>16</sup>**

Representatives of the Defender Services program should be involved in pursuing Defender Services-related legislative and appropriations priorities, provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress.

(Chapters 2 and 8) Though DSO staff participate in the appropriations process, the modification of the recommendation to add “provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with the Administrative Office” sets as JCUS policy the “one voice” approach that had been identified by the Cardone Report as an impediment to defender program independence. DSO participation in pursuing legislative and appropriations goals continues to occur through judiciary processes that require JCUS to adopt the DSC’s position for advocacy to move forward.

15. The AO director implemented this recommendation, and the JCUS endorsed the action. JCUS-SEP 18, p. 11.

16. JCUS-MAR 2019, p. 20.

## Recommendation 7 (approved as modified)<sup>17</sup>

The annual budget request should reflect the highest statutorily authorized rate for Criminal Justice Act panel attorneys, unless adverse fiscal conditions require the Defender Services budget request to reflect less than the highest statutorily available rate.

(Chapter 3) Recommendation 7 has been implemented, and the hourly rate paid to CJA panel attorneys has been raised to the statutory maximum. In at least some jurisdictions, Cardone Report-identified recruiting, retention, and compensation problems remain because the statutory rate is too low.

## Recommendation 8 (approved as modified)<sup>18</sup>

The Cardone Committee has identified a number of problems related to voucher cutting. The Judicial Conference should:

- a. Adopt the following standard for voucher review –  
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.
- b. Provide, in consultation with the Defender Services Committee, comprehensive guidance concerning what constitutes a compensable service under the CJA.

(Chapter 3) JCUS approved a modification of Recommendation 8. Implementation of the recommendation occurred in both national policy (incorporation into the *Guide to Judiciary Policy*, which already details costs that are or are not compensable under the CJA, and modification of eVoucher to require a reason for reduction) and locally (revision of 32% of district court CJA plans). Attorneys continue to reduce their own vouchers by submitting less than the full costs of litigation (44% of attorneys). After submission and during review for payment, reductions occur in 15% of appointments (ranging from near 0% to nearly 72% at the court level and from 0% to over 90% at the reviewer level).

## Recommendation 9 (approved as modified)<sup>19</sup>

Every circuit should have available at least one case-budgeting attorney and reviewing judges should give due weight to their recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from the case-budgeting attorney's recommendations.

(Chapter 3) The JCUS approved Recommendation 9 to increase access to case-budgeting attorneys. CBAs assist with budgeting and voucher review in ten of twelve circuits—a number unchanged since publication of the Cardone Report. Though judges report consulting with CBAs when reviewing vouchers, their involvement is at the discretion of the judges, and there is no requirement for consultation with CBAs in most court CJA plans.

17. JCUS-MAR 19, p. 19.

18. JCUS-SEP 18, p. 42.

19. JCUS-MAR 19, p.19.

## Recommendation 10 (no action)<sup>20</sup>

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.

(Chapter 4) The JCUS did not adopt the recommendation, but one circuit changed its practice to presume reappointment of the FPD. Elsewhere, reappointment processes can influence the decisions FPDs in those circuits make regarding staffing, workload, and other assigned responsibilities, as was detailed in the Cardone Report.

## Recommendation 11 (approved)<sup>21</sup>

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.

(Chapter 4) The JCUS-adopted recommendation that eligible districts should establish an FDO has not been implemented in the two districts without an FDO that meet the target number of CJA appointments.

## Recommendations 12 and 13 (approved as modified)<sup>22</sup>

Circuit court judges should give due weight to Defender Services Office recommendations and Judicial Conference-approved Judicial Resources Committee staffing formulas when approving the number of assistant federal defenders in a district.

(Chapter 4) The recommendations, in addition to changes brought about by adoption of the staffing formulas, have affected some circuit courts' willingness to approve FPDO requests for litigating attorneys. However, judicial control to impose administrative burdens on FPDOs for staffing requests and judicial control over the outcome of those requests remains.

## Recommendation 14 (approved as modified)<sup>23</sup>

Modify the work-measurement formulas, or otherwise provide funding to reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and 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.

(Chapter 4) The process for revising the work-measurement formula is underway. FDOs report continuing their work of training panel attorneys, recruiting a diverse workforce, and other tasks assigned to the office under CJA plans.

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20. The JCUS took no action on this recommendation. See JCUS-SEP 18, p. 7.

21. See JCUS-SEP 18, p. 39. This recommendation, and now JCUS policy (added to the *Guide* February 2019 as § 410.20), is identical to the provisions of what districts may do under 18 U.S.C. § 3006A (g)(1) permitting the creation of institutional defender offices.

22. When the JCUS considered Recommendations 12 and 13 for adoption as policy, they combined the two together and modified the text to read as noted above. JCUS-MAR 19, pp. 19–20.

23. JCUS-SEP 18, p. 42.



## Recommendation 15 (approved)<sup>24</sup>

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.

(Chapter 3) Recommendation 15 was adopted by JCUS to address concerns with judicial control of the selection, appointment, and retention of CJA panel attorneys. At the time the Cardone Committee did its work, most district court plans (seventy of ninety-four) already detailed these processes, and sixty-two courts detailed how judges participated in these processes through membership on CJA committees. After JCUS approved the recommendation, thirteen more district courts added processes, and six courts revised their plans to include judicial input in these processes. Because judges were already involved, and because so many courts already detailed panel selection, appointment, and retention, there was little opportunity for change. Some courts continue to report ongoing challenges with judicial control over panel attorney selection, appointment, and retention.

## Recommendation 16 (approved as modified)<sup>25</sup>

Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).

(Chapter 3) After approval of Recommendation 16 by JCUS, forty-one district court CJA plans (44%) and two circuit court CJA plans (17%) included a process for appealing voucher reductions to someone other than the original reviewer. When vouchers are reduced, fewer than 6% of attorneys appeal the reduction (as reported in a survey of panel attorneys). Attorneys did not appeal reductions because of the burden of doing so and out of concerns that the appeal would affect future appointments negatively.

## Recommendation 17 (approved)<sup>26</sup>

The Defender Services Office (DSO) should regularly update and disseminate best practices.

(Chapter 5) The JCUS adopted Recommendation 17. The model plan in the *Guide to Judiciary Policy* was revised to reflect all adopted Cardone Report recommendations, and other best practices were provided by the DSO, the DSC, and affiliated working groups.

## Recommendation 18 (approved)<sup>27</sup>

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.

(Chapter 5) The JCUS adopted Recommendation 18. Best practices for creating mentorship programs, a diversity fellowship program, and studies of diversity within FDOs and the CJA panel were conducted

24. JCUS-SEP 18, p. 39.

25. *Id.*

26. JCUS-SEP 18.

27. *Id.*

to assess needs for increased recruitment and diversity. Best practices on the use of expert service providers and interim payment show more limited success.

### **Recommendation 19 (approved)<sup>28</sup>**

All districts must develop, regularly review and update, and adhere to a CJA plan as per Judicial Conference policy. Reference should be made to the most recent model plan and best practices. The plan should include:

- a. Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
- b. A training requirement to be appointed to and then remain on the panel.
- c. A mentoring program to increase the pool of qualified candidates.

(Chapter 5) The JCUS adopted Recommendation 19. Eighty-one percent of district courts and 50% of appeals courts revised their plans between FY 2017 and FY 2021. District court plans were revised to include provisions for appointing panel attorneys to a sufficient number of cases to maintain proficiency (a feature also common in early plans), for training to be a member of the CJA panel, and for creating mentorship programs.

### **Recommendation 20 (approved)<sup>29</sup>**

The Federal Judicial Center (FJC) and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

### **Recommendation 21 (approved)<sup>30</sup>**

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.

(Chapter 5) The JCUS adopted Recommendations 20 and 21. Training on the use of experts and eDiscovery has seen improvements driven by the surge in attendance at events held online during the pandemic. Training on use of experts has been covered more frequently in training since in-person programming resumed in March 2022. Training on eDiscovery increased steadily until FY 2021.

### **Recommendation 22 (approved)<sup>31</sup>**

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.

(Chapter 5) Recommendation 22 was adopted. Despite a few recent developments, incorporating defense best practices and eDiscovery into judicial training programs has been slow, in part due to the disruption caused by the pandemic but also because other issues have higher priority.

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28. *Id.*

29. JCUS-SEP 18.

30. *Id.*

31. JCUS-SEP 18.

## Recommendation 23 (approved)<sup>32</sup>

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.

(Chapter 5) Recommendation 23 was adopted. The *Criminal e-Discovery Pocket Guide* was distributed to all judges shortly after publication in 2015 and has been available online since then. It is in the process of revision.

## Recommendation 24 (approved as modified)<sup>33</sup>

Local or circuit restrictions prohibiting Capital Habeas Unit (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.

(Chapter 6) The one plan that included a provision restricting CHUs from engaging in cross-district or cross-circuit representation was amended, in compliance with Recommendation 24. In practice, the majority of circuits reported that CHUs from districts in the circuit could be appointed beyond their existing jurisdiction, with some limitations. CHUs are appointed out-of-district and out-of-circuit under the appointment protocol. Following the protocol to appoint cross-district or cross-circuit causes some delay in appointing counsel.

## Recommendation 25 (approved)<sup>34</sup>

Circuit courts should encourage the establishment of Capital Habeas Units (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.

(Chapter 6) The JCUS-approved recommendation that circuit courts should encourage establishment of CHUs where they do not already exist and make resource counsel and other resources as well as training opportunities more widely available to attorneys who take these cases saw mixed implementation. Eleven districts in states with the death penalty gained access to a CHU after the start of FY 2017. However, currently ten districts in five states do not have routine access to a CHU for § 2254 proceedings that may need them.

Most resource counsel felt that they had sufficient funding and staff to manage their current work. They also recognized that some needs remain unmet due to limits on the number of cases they can take and their ability to be proactive.

The number of DSO and local FDO training programs and attendance at those programs increased between FY 2017 and FY 2021. Training reached a wider audience due to the move to online training.

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32. *Id.*

33. JCUS-MAR 19, adopted as modified above.

34. JCUS-SEP 18.

## Recommendation 26 (approved)<sup>35</sup>

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 case-budgeting attorneys (CBAs) and/or resource counsel where appropriate.

(Chapter 6) The JCUS-approved recommendation to eliminate any formal or informal non-statutory budget caps on capital cases was difficult to capture from our review of district court CJA plans. However, our interview data showed that, in practice, caps both formal (i.e., found in local rules or CJA plans) and informal (e.g., presumptive limits about how much cases should cost and what services should be resourced) continue to exist but appear to be improving in some circuits.

Despite working with CBAs to budget capital cases and make decisions about case resourcing, voucher reductions were more likely to occur in appointments in capital cases than in non-capital appointments.

## Recommendation 27 (approved as modified)<sup>36</sup>

In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so.

(Chapter 6) The JCUS-modified approved recommendation that in appointing counsel judges should give due weight to the recommendations by federal defenders and resource counsel and articulate the reasons for not doing so was not implemented across all districts. Specifically, our review of district court plans showed that 77% of plans included a provision regarding court consultation with federal defenders, an increase from 50% in FY 2017 plans. However, despite the statutory requirement, about a quarter of plans (23%) do not have such a provision. In addition, we found that 46% of plans included a provision regarding courts weighing the recommendation of resource counsel, an increase from 2% of FY 2017 plans. Data from our interviews indicated that courts do not always provide a reason for declining the recommendations of defenders and resource counsel.

## Recommendation 28 (approved)<sup>37</sup>

Modify work-measurement formulas to:

- a. 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.
- b. Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.
- c. Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

(Chapter 6) The JCUS-approved recommendation to modify the work-measurement formula to increase resources to CHUs overall, specifically allowing them to take a larger portion of existing capital habeas

35. JCUS-MAR 19.

36. JCUS-MAR 19, approved as modified. The model plan includes more expansive best practices for consultation with experts in capital litigation. See Appendix C: District Court CJA Plan Analysis for complete details on district court adoptions of each section of the model plan.

37. JCUS-SEP 18.

cases, cannot be assessed at this time, as the work-measurement formula is currently being revised. Resource needs for CHUs are ongoing.

### **Recommendation 29 (approved)<sup>38</sup>**

FJC should provide additional judicial training on:

- a. The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
- b. 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.

(Chapter 6) The JCUS-approved recommendation that the FJC provide additional judicial training on the requirement of § 2254 and § 2255 appeals and best practices on the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment was not implemented. On-demand resources are offered and have been since before the Cardone Report was published. No changes were made to those resources, and no additional training for judges was held on capital litigation. Some district court judges as well as federal defenders and resource counsel reported ongoing training needs, especially regarding the use of mitigation.

### **Recommendation 30 (approved)<sup>39</sup>**

Adequately fund and staff the National Information Technology Operations and Applications Development Branch to control and protect defender IT client information, operations, contracts, and management.

(Chapter 2) NITOAD resources have increased during the study period, in part through normal budgeting processes and in part through emergency COVID-19 funding provided by Congress. Hiring has not yet reached staffing levels determined by the NITOAD formula, and not all resourcing issues identified in the Cardone Report have been addressed. Progress has been made, nonetheless. Additional training resources have been added, long-standing issues with bandwidth and outdated telephone systems were addressed, and the program instituted a solution to prevent another data security breach.

### **Recommendation 31 (approved)<sup>40</sup>**

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.

(Chapter 7) The JCUS-adopted recommendation to increase staff and funding for the NLST and CDA contracts was implemented. Eight additional positions for the NLST and two additional CDA contracts were approved during this study period. The resources are modest increases relative to the demand and in relation to eDiscovery resources for prosecutors.

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38. JCUS-SEP 18.

39. JCUS-SEP 18.

40. JCUS-SEP 18, p. 41.

### Recommendation 32 (approved)<sup>41</sup>

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.

(Chapter 7) The JCUS-adopted recommendation to create new litigation support position(s) in each district or at the circuit level was implemented by the newly approved positions described above. This recommendation's language contemplates continued increases "as needed."

### Recommendation 33 (approved)<sup>42</sup>

Develop a national policy requiring the use of qualified interpreters whenever necessary to ensure defendants' understanding of the process.

(Chapter 7) The JCUS-adopted recommendation to develop a national policy requiring the use of qualified interpreters has not been implemented, though related work is underway.

### Recommendation 34 (approved)<sup>43</sup>

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.

(Chapter 8) Recommendation 34 was adopted by the JCUS. Despite the JCUS support (ongoing since 1993), and despite many proposed bills (individually and combined with other judiciary efforts), courts have no authority to order the Marshals Service to provide transportation and subsistence or return travel, and no separate funding source has been enacted. 18 U.S.C § 4285 was not amended.

### Recommendation 35 (deferred)<sup>44</sup>

Congress must amend the Criminal Justice Act to eliminate circuit court review of attorney and expert fees exceeding current statutory caps.

(Chapter 8) The JCUS deferred action on Recommendation 35 and no legislative effort to amend the CJA has been expended in Congress to achieve greater delegation of excess compensation voucher review. Some individual circuits have nonetheless made changes to delegate review of excess compensation vouchers to non-judicial staff while the circuit retains the authority to approve the voucher.

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41. *Id.*

42. JCUS-SEP 18, p. 41.

43. JCUS-SEP 18, p. 41.

44. JCUS-MAR 19, p. 6. "On the recommendation of the Defender Services Committee, the Executive Committee deferred consideration of interim recommendation 35 until the Conference considers the Cardone Committee's final recommendation to create an independent defender commission."

# Chapter 1

## Introduction

In 2015, the Chief Justice of the United States appointed an ad hoc committee to study “the current quality of public defense in federal courts nationwide provided under the auspices of the Criminal Justice Act (CJA).”<sup>45</sup> That committee, known as the “Cardone Committee” after its chair Judge Kathleen Cardone, initially published a report of its findings in November 2017.<sup>46</sup>

While noting the successes of the Defender Services program under the stewardship of the judiciary, the Cardone Committee concluded that “the current governance of the program by the Judicial Conference of the United States and management by the Administrative Office of the U.S. Courts, with their different missions and competing budgetary needs, has led to fundamental fissures and inequities in a system that nearly 250,000 people each year depend upon for effective representation in federal court.”<sup>47</sup> The Cardone Report notes further:

One reason often given for the concentration of decision making authority within the Judicial Conference structure is the importance of the judiciary speaking with ‘one voice’ in its representations to other branches of government, the press, or any other entity. However, as the CJA Program has grown in size and sophistication, its requirements and responsibilities have increasingly diverged from those of the judiciary.<sup>48</sup>

The Cardone Committee’s recommended solution to this most basic problem is to create an independent administrative entity “with the same mission as frontline defenders”<sup>49</sup> to give the defender services program a “governance structure that has an unconflicted mandate to carry out a clearly defined mission and that can be held accountable for its successes and failures.”<sup>50</sup>

Recognizing that its recommendation will require Congressional action, the Cardone Committee also developed thirty-five interim recommendations intended to provide “more authority and autonomy”<sup>51</sup> for the defense function while Congress weighed the merits of the ultimate recommendation of the Cardone Committee—the creation of an independent Federal Defender Commission—and determined how best to proceed.<sup>52</sup>

The Executive Committee of the Judicial Conference of the United States (Executive Committee) was tasked with coordinating the response of the Judicial Conference of the United States (JCUS) to the Cardone Report and its recommendations.<sup>53</sup> As part of that process, the committee sought comments from

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45. The 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (2017), (hereinafter “the “Cardone Report”), p. xiii.

46. The final report of the Cardone Committee was “delivered to Director James C. Duff, Administrative Office of the U.S. Courts, on November 2, 2017,” and a revised version was made public in April 2018. See [cjastudy.fd.org](http://cjastudy.fd.org), last accessed Feb. 21, 2023.

47. Cardone Report, p. xxvi.

48. *Id.*, p. 29.

49. *Id.*, p. x.

50. *Id.*, p. 24.

51. *Id.*, p. xxxvi.

52. *Id.*, p. xxxvi.

53. Letter from Hon. Merrick Garland, chair of the Executive Committee of the Judicial Conference of the United States, to Hon. Raymond J. Lohier, chair of the Defender Services Committee, re: Next Step Regarding the Cardone Committee Recommendations, Sep. 19, 2019. On file with FJC.

other JCUS committees, such as the Defender Services Committee (DSC) and the Judicial Resources Committee (JRC), about those recommendations that crossed committee jurisdictional lines.<sup>54</sup> At the meetings of the JCUS in September 2018 and March 2019, the JCUS reported action on twenty-nine of the thirty-five recommendations.<sup>55</sup>

As expected, a number of the recommendations addressed subjects within the jurisdiction of the DSC. In 2019, at the end of the Executive Committee’s review of the Cardone Committee’s Report (hereinafter “the Cardone Report”), the chair sent a letter to the DSC chair discussing what next steps to take regarding the report’s recommendations.

Now that the Conference has completed its work on the interim recommendations, the Executive Committee has concluded that the next logical step is to undertake an assessment of how the judiciary has implemented the adopted interim recommendations and of the degree to which those actions have addressed the concerns identified by the Cardone Committee.

The Executive Committee believes that it makes the most sense to undertake this assessment before considering any additional study with respect to the Cardone Committee’s final recommendations. Such an assessment would provide useful information for any final-recommendations study and would help identify areas in which we can promote further implementation of the interim recommendations.<sup>56</sup>

The letter proposed that the DSC, with the assistance of the FJC, undertake the assessment.

To conduct this assessment, the FJC Research Division developed a multistage, multimethod research design<sup>57</sup> and presented it to the DSC in December 2019. The research design provided for

- interviews with stakeholders from across the judiciary about their experiences with CJA administration in general and implementation of the Cardone Report recommendations in particular<sup>58</sup>
- an analysis of data from the eVoucher payment system<sup>59</sup>
- a survey of CJA panel attorneys about their experiences with voucher submission and review<sup>60</sup>
- an analysis of court CJA plans<sup>61</sup>

We supplemented this research with information from reports of JCUS proceedings, materials gathered for the meetings of the DSC, judiciary budget requests to Congress, published reports from the Administrative Office of the U.S. Courts (AO), and data provided by the Defender Services Office (DSO) regarding human resources staffing,<sup>62</sup> DSC budget requests,<sup>63</sup> and training programs.<sup>64</sup> The study period began in FY 2017, before the JCUS began adopting the Cardone Report recommendations, and ended in FY 2021, with some analyses continuing into FY 2022 because of data availability. This report presents the results of our more than three years of research evaluating the impact of the Cardone Report using the specified variety of methods and sources.

54. See [The Judicial Conference of the United States and its Committees](#), last accessed Feb. 16, 2023.

55. See Technical Appendix 2: Status of Implementation.

56. Garland, *supra* note 9.

57. See [Study Design](#), last accessed Feb. 16, 2023.

58. See, e.g., Technical Appendix 3: Project Interviews.

59. See Appendix E: eVoucher Review Data Analysis.

60. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

61. See Appendix C: District Court CJA Plan Analysis and Appendix D: Circuit Court CJA Plan Analysis.

62. See Appendix B: Defender Services Human Resources.

63. See Appendix A: Defender Services Budgeting and Funding Process.

64. See Appendix G: Attorney Training Resources and Challenges.



The structure of this report uses the categories of recommendations from the Cardone Report itself. Recommendations were grouped into seven categories—structural changes, compensation and staffing for defenders and CJA panel attorneys, standards of practice and training, capital representation, defender information technology, resources for litigation support and interpreters, and legislative changes. Chapters in this evaluation generally correspond to each of these categories. For clarity, we grouped the recommendations thematically and therefore do not necessarily discuss them in the order they are listed in the Cardone Report.

The chapters evaluating the recommendations follow this format:

- introduction of the topic
- issues specific to the topic as identified in the Cardone Report
- recommendations intended to address the issues
- implementation and impact of JCUS actions regarding the recommendations, with an assessment of the current status of the Cardone-identified issues based on the most recent information available from our research
- conclusions regarding the extent to which the Cardone Committee’s recommendations had an impact on CJA program operations in the five years following their publication

Working systematically through the information gathered from the various sources, we aimed to answer the questions that motivated this study, namely, “how the judiciary has implemented the adopted interim recommendations and ... the degree to which those actions have addressed the concerns identified by the Cardone Committee.”<sup>65</sup>

Examining implementation of the recommendations presented several challenges, first among them untangling the actions of the JCUS. The actions of the JCUS did not all fall into a discrete “adopted” category. Some recommendations were not within the purview of the JCUS; hence, its action merely endorsed steps taken by others, such as the AO director. In other instances, the JCUS simply deferred or took no action because it was awaiting steps to be taken elsewhere. When reporting on JCUS actions, we use the following terms:

- *Adopted/Approved*. Recommendation was adopted as JCUS policy as proposed by the Cardone Committee. Includes those recommendations where the AO director took action because the matter was within their jurisdiction.
- *Adopted/Approved as modified*. Recommendation was adopted as JCUS policy after modification (including qualifications) by the JCUS or a committee of the JCUS. Includes those recommendations where the AO director took action because the matter was within their jurisdiction.
- *Declared moot*. Recommendation was declared moot by the Executive Committee because a related recommendation was not adopted; thus, it did not move forward to the JCUS.
- *Declined to adopt*. Recommendation did not move forward to the JCUS because the Executive Committee declined to adopt it. Includes recommendations where the committee “determined not to make a recommendation.”
- *Endorsed*. Recommendation for action by others as proposed by the Cardone Committee was endorsed by the JCUS or a committee of the JCUS.
- *Endorsed as modified*. Recommendation for action by others was endorsed as modified by the JCUS or a committee of the JCUS.

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65. Garland, *supra* note 9.

- *Deferred.* Recommendation was deferred for further consideration.
- *No action.* No JCUS action was noted in the JCUS reports.

The first six recommendations regarding structural changes are especially challenging to categorize as either adopted or not adopted because the JCUS modified some of these recommendations before adoption and adopted others in part but not in whole. These structural recommendations seek to change the control of defenders over the program, including the ability to request needed resources, which is the subject of several later recommendations. This point highlights a further complication of this evaluation, the interrelated nature of the Cardone Report recommendations themselves.

For example, implementing recommendations calling for increased resources for defender programs, such as Recommendation 30 to adequately fund and staff the National Information Technology Operations and Application Development Branch (NITOAD) (adopted without modification by the JCUS), depends in part on the ability of defenders to advocate for the needed resources through the judiciary budget process. This process was affected by other recommendations, including

- Recommendations 5 and 6 (giving defenders a path for advocating legislative and appropriations goals through participation in legislative council; acted on by the AO director and endorsed by the JCUS)
- Recommendation 4b (allowing DSO to operate independently of the AO Department of Program Services; approved by the AO director)
- Recommendation 4c (defender control over NITOAD; acted on by the AO director)
- Recommendation 2 (placing any defender budget disputes on the JCUS discussion calendar; not adopted by the JCUS)
- Recommendation 1b (giving DSC the ability to request assistance of JRC staff on work-measurement formulas; declared moot by the Executive Committee)
- Recommendation 1e (giving DSC exclusive control over the spending plan for the program; deferred by the Executive Committee)

The implementation of Recommendation 30 is but one example of how the recommendations in the Cardone Report build on one another. Later recommendations are contingent on, or at least related to discussions of, earlier recommendations. Given the interdependency of the recommendations, it therefore would not be possible to give an accurate picture of “the degree to which those actions have addressed the concerns identified in the Cardone Report” without considering the entire set of recommendations together.

When recommendations are first introduced in the chapters, we denote them as adopted/approved, adopted/approved as modified, etc. To clarify recommendation status, we have created a technical appendix that lists the recommendations and JCUS actions.

The report has additional appendices to supplement the information in one or more of the chapters. While each chapter is organized around the Cardone Report recommendation categories, several underlying data collection efforts contribute to multiple chapters. Each data collection effort is a separate appendix. The following appendices accompany this report:

- Defender Services Budgeting and Funding Process
- Defender Services Human Resources
- District Court CJA Plan Analysis

- Circuit Court CJA Plan Analysis
- eVoucher Review Data Analysis
- Survey of Panel Attorney Experiences with Voucher Review
- Attorney Training Resources and Challenges
- Training and Education for Federal Judges on the Criminal Justice Act

Chapters reference the relevant appendices and are supported by technical appendices that provide methodological detail about each data collection effort. For instance, interviews with district and circuit stakeholders are discussed in chapters concerning compensation and staffing for CJA panel attorneys, federal defender staffing, standards of practice and training, and capital representation, among others. The interviews are referenced and briefly described as necessary in each of these chapters, but the full details on the interviews (including interview protocols) are contained in Technical Appendix 3: Project Interviews to spare the reader from having to read the details repeatedly. A technical appendix also provides a list of acronyms used in this report.

This report represents not only the work of FJC Research Division staff, past and present, but also the hundreds of people (judges, defenders, DOJ staff, judiciary staff, etc.) who contributed their time and expertise to this evaluation. The analysis that follows systematically evaluates each recommendation and its impact on the problems identified in the Cardone Report.

# Chapter 2

## Structural Changes

### (Recommendations 1-6 and 30)

## I. Introduction

As noted in Chapter 1, among the key findings of the Cardone Committee were that the mismatch between the missions of the federal judiciary and the Defender Services program had become more significant over time, and that the current administrative structure did not provide an adequate way for defender advocates to present their own points of view as to the program's resource needs and policy priorities.

The Judicial Conference of the United States (JCUS) is the governing body of the federal courts. The administrative business of the federal courts is managed by the Administrative Office of the U.S. Courts (AO).

The JCUS is the national policymaking body for the federal judiciary. It is presided over by the Chief Justice and composed of the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit. It convenes twice a year to consider administrative and policy issues affecting the federal court system and to make recommendations to Congress concerning judiciary appropriations and other legislation involving the federal courts.<sup>66</sup> These recommendations typically originate in the committees of the JCUS.<sup>67</sup>

The Executive Committee is the senior executive arm of the JCUS and acts on behalf of the Conference between sessions. There are nineteen other committees that review issues and make recommendations to the JCUS within their established jurisdictions. The following three are key to the administration of the Defender Services program:<sup>68</sup>

- *Defender Services Committee (DSC)*. Its mission is to “oversee the implementation of the Criminal Justice Act and other matters related to the criminal defense function.” The DSC is responsible for reviewing and making recommendations on Defender Services policy issues to the JCUS and for recommending program resource needs to the Budget and Judicial Resources Committees.
- *Budget Committee*. Its mission is to “assemble and present to Congress the budget for the judicial branch.” The Budget Committee is responsible for setting annual budget goals, reviewing the budget requests of all program and resource committees, and making recommendations to the JCUS as to the congressional budget request for all programs, including Defender Services.
- *Judicial Resources Committee (JRC)*. Its mission is to “consider all issues of human resource administration, including the need for additional Article III judges and support staff, and oversee the operation of statistical systems and the development of methodologies for human resource needs assessment and allocation.” As part of this mission, the JRC is responsible for overseeing

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66. See JCUS materials at <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference>.

67. See Chapter 8: Legislative Changes for a discussion of crafting and advocating for the legislative goals of the federal courts.

68. See “Judicial Conference of the United States, Jurisdiction of Committees,” [https://jnet.ao.dcn/sites/default/files/pdf/22\\_Mar\\_Juris\\_Statements\\_0.pdf](https://jnet.ao.dcn/sites/default/files/pdf/22_Mar_Juris_Statements_0.pdf).

work-measurement studies to determine the optimum level of staffing in federal defender organizations (FDOs) and the defender national IT program, and for reviewing and determining whether to further recommend additional positions in other national programs as requested by the DSC.<sup>69</sup>

As discussed in more detail in Section II, although the DSC is charged with overseeing the implementation of the CJA and other matters related to the criminal defense function, it has only an advisory role with respect to budget and staffing.

The AO is the administrative agency for the federal judiciary. As shown in the Organization Chart in Attachment 1, the AO is headed by the Office of the Director and Deputy Director, to which the chiefs of nine offices and the Judicial Conference Secretariat report directly. An additional fifteen offices are organized under three departments: Program Services, Administrative Services, and Technology Services, each headed by an associate director who also reports to the AO director.

The AO's Defender Services Office (DSO) is responsible for administering the Defender Services program. This office is currently one of the nine offices that reports directly to the AO director. At the time of the Cardone Committee's study, as discussed in detail in Section III, DSO was situated within the Department of Program Services. This orientation, the result of an AO reorganization in 2013, added an administrative layer (without expertise in the defense function) between the program experts in DSO and the AO decision makers. As described in the Cardone Report, this move was widely perceived as a demotion that reduced the respect for and independence of the Defender Services program.<sup>70</sup>

The Cardone Report described how the JCUS and AO prioritize the broader goals of the judiciary over the maximization of resources for any of its programs, noting that, with its incompatible mission, the Defender Services program is particularly vulnerable to having its priorities overshadowed:

Because the judiciary's primary mission is to support the courts as a branch of the government, the defender program, which is not a core function of the judiciary, particularly in an adversarial system, is at a disadvantage in obtaining the funding it requires .... The Committee heard testimony that the needs of the CJA program were, by design of the current structure, necessarily subordinated to those of the judiciary.<sup>71</sup>

The next sections discuss how the judiciary's pursuit of its larger goals under the current governance structure has affected the Defender Services program's ability to advocate meaningfully for its own resource and policy goals, and the status of the Cardone Committee's recommendations to address these issues.

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69. The JCUS had moved this responsibility from the DSC to the Judicial Resources Committee in 2013 "to achieve better coordination and oversight of judiciary resources." JCUS-Mar 13, p. 5. Among its charges, the Judicial Resources Committee was to supervise, coordinate, and make recommendations to the JCUS regarding all staffing formulas and requirements for personnel in federal public and community defender organizations. Excepted from this jurisdiction are the head defenders who are, under the provisions of 18 U.S.C. § 3006(A)(g), to be appointed by the court of appeals or, if a community defender organization, by its board. *Id.* See Chapter 4: Federal Defender Staffing for more information on federal defender appointment.

70. Cardone Report, p. 28.

71. *Id.*, p. 41.

## II. DSC Authority and Structure: Recommendations 1–3

### Issues

The Cardone report identified issues resulting from the limited authority of the DSC to control system resources and concluded that “under the current JCUS structure, this Committee does not have final decision-making authority on any aspect of the CJA program and cannot advocate directly to Congress for appropriations for the defender program.”<sup>72</sup> On issues relevant to program resourcing, the DSC<sup>73</sup>

- operates under cost-containment targets imposed by the JCUS Budget Committee and within the limits of FDO staffing needs as determined by the JRC’s work-measurement formulas
- may only recommend its staffing and budget positions to the JCUS Judicial Resources and Budget Committees, respectively<sup>74</sup>
- has limited opportunity to present the defender perspective in any resource disagreement before the JCUS or the Executive Committee when those entities are making the final decisions as to staffing and budget
- may not advocate the defender position directly before Congress during the appropriations process

The JCUS Executive, Budget, and Judicial Resources Committees thus have more control over defender program resourcing than the DSC, and those committees understandably exercise their authority to promote the more general goals of the judiciary as a whole. The Cardone Report identified the judiciary’s broader commitment to the following as potentially incompatible with the best interests of securing resources for the Defender Services program: cost containment, the work-measurement-formula staffing process, balancing the needs of various judiciary accounts, and the judiciary speaking with “one voice.”

### Cost Containment Priorities

The judiciary’s commitment to cost containment was described in the Cardone Report as a purposeful strategy designed “to demonstrate to the appropriators that the judiciary is a prudent manager of resources,”<sup>75</sup> a priority that superseded its commitment to securing full funding to meet program needs. As an example, the report quoted the Budget Committee as informing the DSC that it was not questioning that the defender program’s stated needs were legitimate, but, “We’re just telling you you’re not going to get it and you’re going to have to operate with less.”<sup>76</sup>

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72. *Id.*, p. 19.

73. See Appendix A: Defender Services Budgeting and Funding process for detail.

74. The limited authority of JCUS committees is stated clearly in the [U.S. Courts public website’s description of governance](#): “Judicial Conference committees review issues within their established jurisdictions and make policy recommendations to the Conference. The committees are policy-advisory entities and are not involved in making day-to-day management decisions for the United States courts or for the Administrative Office. Judicial Conference committees derive their jurisdiction and legal basis for existence from the Conference itself and the Chief Justice as presiding officer. The committees and their chairs have no independent authority or charge apart from those conferred upon them by the Conference or its Executive Committee.”

75. Cardone Report, p. 40.

76. *Id.*, p. 41.

## Inflexible Work-Measurement Formulas

The judiciary has long used work-measurement formulas, developed by JRC staff, to determine appropriate staffing levels for its larger programs (e.g., Probation and Pretrial Services) and began using such a formula for staffing FDOs in fiscal year 2016.<sup>77</sup> Despite initial concern in the defender community that this budget-driven process would result in funding decreases,<sup>78</sup> the work-measurement study found that many defender offices were *understaffed*<sup>79</sup> and that implementation of the formulas resulted in an 8.6% increase in FDO staff nationally.<sup>80</sup>

Despite this initial FDO staffing boost, the Cardone Report identified foundational problems with the formula approach when applied to the defense function: “[T]he staffing formulas ... are not flexible enough for a program that is reactive to the decisions of another branch of government, and the staffing and weight measures don’t take into account the many forms of representations that defenders engage in for their clients.”<sup>81</sup> The report linked this inflexibility to the diminution of the DSC’s authority to adjust DSO staffing to address unforeseen circumstances.

The rigid application of the current formula, which averages work-measurement findings over five years, removes needed flexibility from the DSC that has the institutional experience and responsibility to support the defenders unique mission. Defenders need to be able to respond to changes in prosecution policies or court initiatives in different areas of the country.<sup>82</sup>

## Competition with Other Judiciary Accounts

The Cardone Report cited “zero sum” budget considerations, i.e., the impact that requests for the Defender Services account could have on other judiciary accounts, as a feature of the process that puts the Defender Services program at a disadvantage.<sup>83</sup> Including the budget for the DSC in the overall judiciary appropriations request risks putting assumptions about congressional cuts to other accounts above defender program requirements. Quoting a Budget Committee memorandum:

In spite of the mission of the Defender Services program, the judiciary cannot expect Congress to continue to provide significant appropriations increases annually. If such increases are provided, it will be at the expense of the Salaries and Expenses account and by extension, the courts. Thus, the judiciary must re-focus its efforts to achieve real, tangible cost savings in this program.<sup>84</sup>

77. See Appendix A: Defender Services Budgeting and Funding for information about formula development, what is measured, and how formulas are used to determine FDO staffing.

78. Cardone Report, p. 65. “The chair of the JRC told the Committee that, ‘despite early concerns that a rigorous, statistically-driven work-measurement study would lead to a recommendation . . . for a reduction of the staffing formula . . .,’” staffing increased. In 2013, the chairs of the JCUS Budget and Executive Committees jointly requested that the JRC accelerate the FDO work-measurement study so that they could be assured there was an objective measure for determining FDO staffing requirements. Interview 142.1.

79. Cardone Report, p. 65.

80. For more discussion of the work-measurement formula, see Chapter 4: Federal Defender Staffing.

81. Cardone Report, p. 65.

82. *Id.*

83. *Id.*, pp. 43–44.

84. *Id.*, p. 41 quoting from a JCUS Budget Committee memo provided to the Cardone Committee.

## One-Voice Policy

AO and JCUS leadership believe that it is critical that the judiciary speak with “one voice.”<sup>85</sup> However, this limits the ability of the defender program to advocate for its own priorities and needs, which may be, and often are, different from those of the judiciary.

In addition to these issues, the Cardone Report further expressed concern “about the pervasive inability of those most impacted by the oversight of the federal defense program to have any say in its governance.”<sup>86</sup>

## Recommendations

The first three Cardone Recommendations proposed seven modifications to the jurisdiction and composition of the DSC that were designed to give the committee more authority over Defender Services program resourcing and to give front-line defenders a greater voice in DSC decision making. Three of the seven modifications were adopted in whole or part.

### Recommendation 1 (see subparts)

The Defender Services Committee should have:

- 1a. Exclusive control over defender office compensation and classification and qualification standards. (approved as modified)<sup>87</sup>
- 1b. The ability to request assistance of JRC staff on work-measurement formulas. (declared moot)<sup>88</sup>
- 1c. Control over development and governance of eVoucher in order to collect data and better manage the CJA program. (approved)<sup>89</sup>
- 1d. Management of the eVoucher program and the interface with the payment system. (approved as modified)<sup>90</sup>
- 1e. Exclusive control over the spending plan for the defender services program. (deferred)<sup>91</sup>

85. *Id.*, p. 29, “One reason often given for the concentration of decision-making authority within the Judicial Conference structure is the importance of the judiciary speaking with ‘one voice’ in its representations to other branches of government, the press, or any other entity. However, as the CJA Program has grown in size and sophistication, its requirements and responsibilities have increasingly diverged from those of the judiciary.”

86. *Id.*, p. 37.

87. JCUS-SEP 18, p. 8.

88. Declared moot by the Executive Committee after its modification of Recommendation 1a (see Chapter 2 Implementation Section). JCUS-SEP 18, p.8.

89. JCUS-SEP 18, p. 8. The DSC jurisdictional statement now reads “Make policy recommendations on initiatives related to the development of any voucher processing system, including the eVoucher program, that affect the provision of legal representation under the Criminal Justice Act.” *Supra* note 3.

90. *Id.* Initially, the Executive Committee revised the jurisdictional statement of the DSC in toto to give it primary jurisdiction over the eVoucher program and officially recognize its role in overseeing policy development for the program. In 2019, however, the AO director reported that “AO staff working on day-to-day support of the e-Voucher program should remain in CMSO [the Case Management Services Office within the Department of Administrative Services] because of e-Voucher’s interaction with the judiciary’s broader payment system and its unique interrelationship with non-DSO stakeholders (including judges and clerks’ offices) in addition to defenders and CJA panel attorneys.” JCUS-MAR 19, p. 7. See also the AO Organization Chart at Attachment 1.

91. The Executive Committee deferred consideration until the final recommendation of independence is considered. See JCUS-SEP 18, pp. 8–9.



## Recommendation 2 (declined to adopt)<sup>92</sup>

For any period during which the Administrative Office and Judicial Conference 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 Defender Services Committee, the matter should be placed on the discussion calendar of the full Judicial Conference.

## Recommendation 3 (declined to adopt)<sup>93</sup>

The composition of the Defender Services Committee should include the co-chairs of the Defender Services Advisory Group, both as voting members.

## Implementation and Impact

Implementation of Recommendations 1c and 1d as to DSC control over the eVoucher system is discussed in Section IV of this chapter, which addresses Cardone-identified issues with defender data systems in more depth.

Recommendation 1a, the transfer of control over FDO compensation and classification and qualification standards to DSC, was implemented by a change to the committee's jurisdictional statement. DSC is now to:

[r]eview and make recommendations to the Judicial Conference on policy concerning compensation and classification and qualification standards for federal public and community defender organizations.<sup>94</sup>

As adopted, Recommendation 1a was modified to remove a provision that would have also given the DSC “exclusive control of defender office staffing.”<sup>95</sup> This was rejected, with staffing to remain with the JRC, “recognizing that committee's expertise and experience with staffing formula development and requirements.”<sup>96</sup> Recommendation 1b, the ability to request assistance of JRC staff on work-measurement formulas, was then rejected as moot.<sup>97</sup>

Two additional recommendations in the Cardone Report were not adopted by the JCUS. In declining to adopt Recommendation 2, the JCUS report cited that adequate mechanisms are already available for a chair to suggest that an item be placed on the discussion calendar, and “the automatic placement of any item on the discussion calendar would effect a substantial change to current Conference procedure.”<sup>98</sup> Likewise, after considering the views of the DSC (who supported the addition of the Defender

92. JCUS-SEP 18, p. 9.

93. The Executive Committee deferred consideration of this recommendation until the DSC included its views on Recommendation 3 in its response to the Executive Committee's five-year survey. See JCUS-SEP 18, p. 10. At its February 2019 meeting, the Executive Committee considered the DSC's response supporting the addition of the Defender Services Advisory Group (DSAG) co-chairs to the DSC but ultimately determined not to make any recommendation on the request, as the decision rests solely within the Chief Justice's discretion. See JCUS-MAR 19, pp. 6–7.

94. [The Judicial Conference and its Committees](#), Appendix, p. 8.

95. See Technical Appendix 2: Status of Implementation.

96. JCUS-SEP 18, p. 8.

97. *Id.*

98. *Id.*, p. 9.

Services Advisory Group (DSAG)<sup>99</sup> co-chairs to the committee), the Executive Committee declined to recommend the action,<sup>100</sup> noting that the decision to add members rests with the Chief Justice of the United States.<sup>101</sup>

As the preceding recommendations regarding staffing and budget were not adopted as JCUS policy, there is no implementation to discuss; the DSC’s role in determining staffing levels and accompanying funding for FDOs has not changed since the Cardone Committee issued its recommendations. Likewise, the role of defenders on the DSC—as invited participants, but without a vote—is unchanged. Thus, the examination below focuses on whether the staffing and budget issues identified in the Cardone Report have been otherwise addressed.

The next sections examine the status of the issues identified in the Cardone Report (see Issues section) based on information collected during the Fiscal Year 2017–2022 study period.

## Cost Containment

As shown in Table 1, during the study period the judiciary has never asked Congress to appropriate funding to support 100% of FDO staffing needs as determined by the JCUS-approved work-measurement formulas, with requests hovering around 98%.

**Table 1.** Percent of Work-Measurement Staffing Formula Funding in the Initial Defender Services Congressional Budget Request, FY 2017–FY 2022.

	Fiscal Year					
	2017	2018	2019	2020	2021	2022
Formula FDO Staff	3,920	3,969	4,031	4,110	4,223	4,326
Congressional Budget Request						
% Formula	97.7%	98.0%	98.0%	98.0%	98.0%	98.0%
FTE Equivalent	3,830	3,890	3,950	4,028	4,139	4,239

Note: Data provided by DSO. Spreadsheet on file with the FJC. See Appendix A: Defender Services Budgeting and Funding Process for a discussion of how initial budget requests may be modified before the final congressional appropriation.

After Congress has finalized and passed the judiciary’s appropriation,<sup>102</sup> the Executive Committee develops a financial plan that controls how the combination of funds available from the appropriation, carryforward, and fees are to be expended. Table 2 compares FDO staffing as approved in the final financial plans for each year of the study period with that required by the staffing formulas.

99. DSAG is a working group of the DSC that includes federal defenders and CJA panel attorneys. DSAG members are elected by defenders nationally and it has a representative from each circuit. The purpose of the working group is to be “the voice of defenders with respect to both the Defender Services Office and the Administrative Office of the [U.S.] Courts more generally on issues of policy that affect the defender services program.” Interview 194.1.

100. There are some non-judge members (attorneys, academics) on the Committee on Rules of Practice and Procedure, which is subject to the statutory provisions of the Rules Enabling Act ([28 U.S.C. Sec. § 2073](#)), and there are two academics on the Committee on Federal-State Jurisdiction.

101. JCUS-MAR 19, pp. 6–7.

102. See Attachment 2 for budget requests and appropriations for the entire judiciary and the defender account during our period of study.

**Table 2.** Percent of Work-Measurement Staffing Formula Funding in the Final Financial Plan, FY 2017–FY 2022

	Fiscal Year					
	2017	2018	2019	2020	2021	2022
Formula FDO Staff	3,920	3,969	4,031	4,110	4,223	4,326
Final Financial Plan						
% Formula	95.7%	94.4%	94.3%	93.8%	96.1%	98.0%
FTE Equivalent	3,751	3,747	3,801	3,855	4,058	4,239

Note: Data provided by DSO. Spreadsheet on file with the FJC.

## FDO Staffing Under Work-Measurement Formulas

The percentage of plan-approved staffing to formula requirements ranged from 94% in FY 2018 through 2020 to 96% in FY 2021 and 98% in FY 2022. This translates to between one and three fewer-than-needed staff, on average, in each of the eighty-one FDOs in operation during the study period.<sup>103</sup> The eventual distribution of the staffing shortfall affects some FDOs more than others, as it is based on their competing needs at the time. For example, in FY 2022, the range of on-board staffing as a percent-of-formula across FDO traditional units ranged from 74% to over 100%.<sup>104</sup>

As to how defenders perceive the adequacy of the resulting staffing, twenty-six of the thirty-four federal defenders we interviewed from September 2020 to February 2021 said that they were without the staffing resources needed to adequately represent their clients at that time.<sup>105</sup> Specifics cited during these interviews echoed testimony before the Cardone Committee, with one set of concerns about how well the formula captures the work involved in CJA representations,<sup>106</sup> and the other focused on the inflexibility of the work-measurement staffing process.<sup>107</sup>

103. Effective November 8, 2021, the FDO in the Northern District of Oklahoma—which has served both it and the Eastern District of Oklahoma, was split in two, bringing the number of FDOs to eighty-two. For purposes of this report, however, the two districts are combined when looking at changes over our five-year study period.

104. Appendix B: Defender Services Human Resources, Attachment 3. The “over 100 percent” traditional units include those that were provided with additional temporary FTE positions to address emergency situations using authority delegated by the AO director to the DSO chief. It also includes those units for which this was the first year of their having more staff on board than required by the formula and so not yet meeting the “two-years-in-a-row” requirement for implementing either increases or reductions in approved staffing levels. See Appendix A: Defender Services Budgeting and Funding Process.

105. Note that this was during the pandemic at which time weighted case openings—the primary metric used by the work-measurement formula—were down. FDOs were reporting being overworked based on their pending cases due to the challenges of representation during the pandemic, and some FDOs faced cuts to staffing based on projections for reduced case openings caused by the pandemic. This issue would continue to be an area of concern for FDOs if no adjustments were made to address the non-representative pandemic case-opening numbers.

106. *E.g.*, Interview 80.1 emphasizing that their CJA cases “are not widgets.” Other defenders focused more on non-representational responsibilities for which they received too little or no credit under the formula, including ten who mentioned serving on their CJA Committee and sixteen who provided mentoring programs. See Chapter 4: Federal Defender Staffing for more detail.

107. Interview 27.1 and Interview 175.1 described how formula staffing was not adequate to address fast-moving changes that dramatically affected their CJA caseloads.

Because the work-measurement formulas are currently undergoing revision,<sup>108</sup> we focus here on the concerns stated in the Cardone Report regarding the lack of flexibility built into the staffing process, which hampers defender offices' ability to respond to changes to statutes, case law, and prosecutorial priorities.<sup>109</sup> Following are examples of unanticipated changes with large and immediate impacts to CJA caseloads in affected districts during the study period:

- *McGirt v. Oklahoma* (2020).<sup>110</sup> Supreme Court decision ruling that, under the Indian Major Crimes Act,<sup>111</sup> the state cannot legally try a Creek citizen for criminal conduct on tribal land. Thus, Creek Nation criminal cases are to be moved to federal court (including tribal members currently serving prison terms).
- “Zero Tolerance” (2018).<sup>112</sup> Immigration policy that sought criminal prosecution, under expedited timelines, of all unauthorized persons crossing the U.S.-Mexico border.
- First Step Act (2018).<sup>113</sup> Statute that, among other things, expanded compassionate release and made retroactive the provisions of the Fair Sentencing Act of 2010 (P.L. 111-220) that reduced the penalties for crack cocaine. Compassionate release became even more urgent during the COVID-19 pandemic.
- Department of Justice (DOJ) approval of Arizona’s expedited “Opt-In” procedures for handling capital state habeas petitions filed under 18 U.S.C. § 2254 (2019) is expected to significantly affect the workload and applicable timelines in the Arizona FDO’s Capital Habeas Unit.<sup>114</sup>

While it is difficult for the judiciary in general to expeditiously reallocate resources when unanticipated caseload fluctuations occur, this delay may be most acutely felt by the defenders who can be appointed to cases without consultation and must still maintain the high standard of defense required under the rules of federal criminal litigation, standards of litigation practice, and ethical responsibilities.

The formulas provide a starting point for determining and allocating FDO staff, but they can never be expected to meet “unexpected surges” in caseload that result from decisions such as these. And the time necessary to seek resources using the regular budget process to justify new positions is lengthy compared to the immediate needs.<sup>115</sup>

Outside the normal budget and formula staffing processes, there are limited avenues to provide temporary staffing relief to FDOs heavily impacted by such surges. DSO has two small pools from

108. Updated formula recommendations are expected in 2023. One other set of concerns involves the lack of “credit” the formulas give for non-representational responsibilities. These concerns are addressed, in part, by Recommendation 14 and discussed in Chapter 4: Federal Defender Staffing.

109. Cardone Report, p. 32.

110. 140 S. Ct. 2452 (2020). Further demonstrating the unpredictability of caseloads in this area of litigation, just two years later, *McGirt* was altered by the Supreme Court decision in *Oklahoma v. Castro-Huerta*, holding that there is concurrent federal and state jurisdiction. 142 S. Ct 877 (2022). Oklahoma state courts have also changed the scope of the Supreme Court decision. See *State ex rel. Matloff v. Wallace*, 2021 OK CR 21 (2021).

111. 18 U.S.C. § 1153 (1885).

112. [https://oig.justice.gov/sites/default/files/reports/21-028\\_0.pdf](https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf)

113. P.L. 115- 391, December 2018.

114. The expedited provisions were part of the Antiterrorism and Effective Death Penalty Act of 1996, but to qualify, states needed to apply and then have their plans approved by the DOJ. To date, only Arizona and Texas have applied, and only Arizona was certified (on April 14, 2020). Pursuant to litigation, DOJ voluntarily remanded that certificate in April 2021 and is pursuing further information. ([October 12, 2021 letter](#) from DOJ Legislative Affairs to the Arizona attorney general.) For additional background and assessment of the potential impact of these provisions, see M. S. Williams and B. S. Meierhoefer, *Opt-in: Potential Workload Implications for the Federal Judiciary* (FJC 2020).

115. See Appendix A: Defender Services Budgeting and Funding Process.

which they may distribute additional temporary FTEs to address emergencies that arise during the year.<sup>116</sup> In addition, understaffed districts can distribute more of their cases to CJA panel attorneys, but this option is limited by the size and expertise of the panels, and is one that can impact the FDOs' work-measurement staffing numbers in the future. Overwhelmed districts can also personally reach out to request the assistance of other FDOs' staff or panel members,<sup>117</sup> but this is a temporary solution that may impact both offices' work-measurement staffing in the future.

Further, as is true of all work-measurement formulas, the FDO formulas are only able to measure what is being done with current resources rather than what should be done optimally, so there is a potential danger of yoking the future to an imperfect past.

## Zero-Sum Budgeting

The Budget Committee continues to have control over the Defender Services congressional budget request as approved by the JCUS. It balances justifications for additional requests with the competing needs across judiciary accounts to develop the best approach for maximizing judiciary resources, given its assessment of the congressional fiscal climate at the time.<sup>118</sup>

Two AO interviewees with experience with the Budget Committee reported that the committee now gives more respect to Defender Services program requirements than it had in the past.<sup>119</sup> But this perception was not shared by other AO staff who had never been privy to these deliberations.<sup>120</sup> A recent disagreement as to how Defender Services carryforward funds should be used in formulating the budget request suggests that the balancing of defender program needs against broader judiciary objectives is still the governing perspective.<sup>121</sup>

The dispute was over how the pandemic-related Defender Services carryforward available at the end of FY 2022 would be used to offset the program's request for congressional appropriations for FY 2023 and FY 2024. DSO proposed that approximately three-quarters of the carryforward be used to reduce its

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116. One, begun in FY 2022, is a reserve pool of additional FTEs in the financial plan which could be utilized when there are no formula FTEs available. The reserve was 28.5 in FY 2022. The other pool uses authority delegated to DSO by the AO Director in 2017 to approve additional FTEs to individual FDOs above their formula limit (capped at no more than one percent of the total), provided unused FTEs are available. See Appendix A: Defender Services Budgeting and Funding Process. In FY 2022, DSO provided 22.3 above formula positions to 15 FDOs using this delegated authority. Because only the amount of FTE utilized above the FDO unit's DSC-approved FTE level is considered delegated authority, only 3.3 FTEs were utilized for the 22.3 positions authorized.

117. Interview 191.2.

118. See Appendix A: Defender Services Budgeting and Funding Process. Defender Services is one of four subaccounts within the general "Courts of Appeals, District Courts, and Other Judicial Services" category. The other subcategories are: Salaries and Expenses, Fees of Jurors and Commissioners, and Court Security. The other general discretionary judiciary accounts are: Supreme Court, Court of Appeals for the Federal Circuit, Court of International Trade, Administrative Office of the U.S. Courts, Federal Judicial Center, and Sentencing Commission.

119. Interview 140.1.

120. Interview 3.2.

121. Defender Services is a separate account, and its funds are considered "no year," i.e., available until expended, and so may be carried forward into future fiscal years. These "carryforward" dollars can be made available to fund future Defender Services program needs; moved to other underfunded judiciary accounts with congressional approval; or used to offset the Defender Services request for congressional appropriations. The AO Budget Division determines the latter when making its recommendation to the director on the judiciary's final budget request to Congress for the upcoming fiscal year based on the carryforward available towards the end of the fiscal year.

2023 appropriations request and that one-quarter be used to reduce its 2024 appropriations request.<sup>122</sup> The AO director opted to include the entire amount to offset the final FY 2023 Defender Services congressional request.<sup>123</sup>

One interviewee explained that this decision was taken because it would mean that more funds would be available in the Financial Services and General Government appropriation potentially to fund non-defender judiciary accounts that would have been underfunded under then-current House and Senate marks.<sup>124</sup> Using all of the carryforward significantly reduced the FY 2023 appropriation request, but placed Defender Services in the position of submitting a FY 2024 budget appropriation request that at the time was a 12% increase over the FY 2023 appropriation.<sup>125</sup> Due to several adjustments, the “Yellow Book” (appropriation request) increase was 10.9 percent.

Although it is not known at this time how this will affect FY 2024 appropriations, defender staff are concerned that a requested increase of this size is less likely to be funded because it could be perceived negatively as uncontrolled program growth rather than a combination of (1) a 5.8% increase in the program’s projected requirements (due in part to inflation) and (2) accounting decisions which the program had advocated against. Regardless, the budget process created the issue. As one defender program staff member put it:

It’s very frustrating for us because it really should be considered Defender Services money. And we should be able to use the surplus in a way that benefits the Defender Services program and not the other parts of the judiciary .... So to reiterate, it’s definitely not beneficial to us; it’s harmful to us, and I don’t think any consideration is being given to what would serve us best.<sup>126</sup>

## Limited Opportunity to Advocate under the Judiciary’s “One Voice”

The DSC role in the appropriations process was summarized in the Cardone Report as follows and has not since changed:

Although defender services is a separate line-item constituting approximately 16 percent of the judiciary’s annual budget, defenders cannot advocate for funding before Congress. The Defender Services Committee has little influence over the Chair of the Budget Committee and the Director of the AO who represent the judiciary in Congressional budget hearings.<sup>127</sup>

Because Defender Services is a separate component of the judiciary’s appropriation, the financial plan cannot change the amount of the defender appropriation. But if there is a shortfall in that appropriation, the financial plan dictates how funds are to be allocated across the various program functions—most significantly for this discussion, between expenditures for FDOs and those for CJA payments to panel attorneys. It also determines how no-year carryforward funds are distributed.

122. The specific proposal was to split the carryforward reduction to the appropriation request by \$84 million in 2023 and \$27 million in 2024. Larger-than-usual carryforwards had, in the past, been split across multiple future fiscal years. DSC Dec. 2022 Agenda Item 1B.

123. *Id.*

124. The judiciary is funded from the Financial Services and General Government Congressional appropriation. Congress need not keep the “returned” funds in the judiciary account but could move it to other agencies funded from this appropriation. The judiciary’s biggest agency competitors for this appropriation are the IRS and GSA. Interview 140.1.

125. DSC Dec. 2022 Agenda Item 1B.

126. Interview 3.2 and Interview 192.2. This inability of the Defender Services program to use unspent funds to plan for future needs stands in contrast to the Department of Justice, where unspent funds are allocated based on a competition among programs across the prosecution that submit proposals to use unspent funds. Interview 103.1.

127. Cardone Report, p. xxiii.

The Executive Committee makes financial plan decisions based on input from AO staff. The DSO staff who are accountable to the DSC are not invited to attend the Executive Committee meetings, so in the budget context, defender positions are presented to the Executive Committee by staff from the AO Budget Division—an office that may not understand defender program needs or share its objectives.<sup>128</sup>

An example of the issues that can arise from this lack of a direct voice occurred in FY 2020 when the judiciary had an unexpected reduction to its final appropriation, with the Defender Services program funded at \$23 million less than the program's full requirements.<sup>129</sup> In response, two financial plan proposals were submitted to the Executive Committee by the AO Budget Division. One was developed by the AO Budget Division that would fund FDOs at 93.8% of formula (fifty-six new FDO positions and no proposed deferral of panel attorney payments). The other was developed by the DSO that would fund FDOs at 95.5% of formula (126 new FDO positions and deferral of panel attorney payments for up to four days). DSO did not present its proposal to the Executive Committee and so was unable to ensure the committee had the full picture of the impact of each option when it made its final decision. The Executive Committee approved the Budget Division's proposal.<sup>130</sup>

Decisions such as these have an outsized effect on the availability of CJA resources. Postponing CJA payments—although clearly not optimal—need not affect the availability of panel attorneys in the short run and can be remedied as soon as funds are available. Implementing a freeze on FDO staff—which occurred as a result of the Executive Committee action<sup>131</sup>—had an immediate impact on the institutional CJA resources that were available and also negatively affected FDO hiring in future years.<sup>132</sup>

Defenders thought their more limited participation as guests, not voting members of the DSC, hindered their ability to advocate for defense needs, especially with respect to the budget. As one interviewee said, “the reality is, without a vote in that decision-making process, you're relegated to a lesser member of the committee.”<sup>133</sup> Without a vote, DSAG members are not part of the consensus building that goes on in the DSC.<sup>134</sup> Widening the scope of perspectives over which consensus needs to be reached could meaningfully affect policy, according to interviewees. “The more robust the discussion, I think the more likely it is that people may be willing to adjust their opinions in order to reach the consensus that seems to be necessary.”<sup>135</sup>

Adding Defender Services Advisory Group chairs to the DSC, as recommended, would “unite the forces that are supposed to be advocating for the defense program.... We would all have to come together and decide what's best for the program.”<sup>136</sup> Collaboration would be necessary,<sup>137</sup> which matters because defenders continue to have different perspectives from those making decisions about the program.

128. See discussion of “zero-sum” funding discussion above.

129. DIR19-146, Memorandum, James C. Duff, Director, Administrative Office of the United States Courts, re: Congressional Action on Full-Year Fiscal Year 2020 Judiciary Appropriations (IMPORTANT INFORMATION), Dec 19, 2019 available at: <https://jnet.ao.dcn/sites/default/files/pdf/DIR19-146.pdf>.

130. DSO email response to request for budget information, Jan. 3, 2023. On file with FJC.

131. On October 8, 2019, DSO implemented a hiring freeze on new FDO positions. All outstanding offers were honored, and FDOs were permitted to backfill vacancies that arose. Then, on May 7, 2020, DSO updated the hiring guidance to require that most vacated FDO positions remain vacant for at least four months before being filled. See Memorandum from Cait T. Clarke, re: Budget Update and Revised Hiring Guidance (Important Information), May 7, 2020, on file with the FJC, and DSC Dec. 2020 Agenda Item 2A, p. 4. This freeze was lifted in Dec. 2020.

132. Interviews 17.1, 21.1, 31.1, 35.1, 113.1, 175.1, 176.1, and 180.1.

133. Interview 165.1.

134. Interview 194.1.

135. Interview 165.1.

136. Interview 194.1.

137. *Id.*

Defenders do not necessarily agree with the decisions being made about FDO budget requests (the percentage of formula in the budget request, for example) and panel attorney compensation (until recently, the difference between the hourly rate and the statutory maximum).<sup>138</sup>

In sum, the JCUS Executive, Budget, Judicial Resources, and Defender Services Committees play the same roles under the same rules to determine defender program resources as they did before the Cardone Report issued its recommendations. The Cardone-identified problems resulting from the process of placing program resource decisions in the hands of those whose commitment is to the larger goals of the federal judiciary rather than to the Defender Services program have not been resolved.

Further, front-line defenders are not given a vote on the DSC, and there has been no movement towards otherwise providing avenues for them to promote their priorities to judicial or congressional decision makers.<sup>139</sup>

### III. Defender Services Office Independence: Recommendations 4–6<sup>140</sup>

#### Issues

The Cardone Report identified the lack of DSO independence within the AO as a fundamental weakness in the current administrative structure, noting that, “Similar to the structural tensions discussed between the DSC and the larger JCUS, DSO operates within a structure that is predominantly focused on judges and court staff.”<sup>141</sup> The report emphasized that—unlike the DSO—the “other offices within the AO that have substantial influence over the defender program focus their efforts on support of the judiciary as a whole.”<sup>142</sup>

Much of the Cardone Report discussion was grounded in the lessening of DSO’s independence under a reorganization of the AO that took place in 2013. This reorganization moved DSO from the AO directorate level, i.e., reporting directly to the AO director, to reporting through the assistant director of the Program Services Department.<sup>143</sup> As noted in the Cardone Report, this move reduced the autonomy and flexibility of the DSO and was demoralizing for many defenders, who saw it as a sign that the AO viewed defense work as a service to the courts rather than a commitment to their clients.<sup>144</sup>

The reorganization exacerbated DSO’s lack of authority within the AO, but it did not create the broader disconnect between the missions of the DSO and the AO. As summarized by the Cardone Report,

In short, the distinct missions of DSO, which primarily supports the provision of defense counsel and expert services, and of the AO, which primarily provides administrative support to the courts, are not aligned. With these vastly different missions, DSO fits poorly within a larger structure dedicated to serving the interests of the judiciary as a whole.<sup>145</sup>

138. Budget is not the only issue where defenders differed in their perspective. The national workplace survey and the use of the Judiciary Sentencing Information (JSIN) sentencing tool were both issues where the DSAG co-chairs objected on behalf of the defender community, and both the survey and implementation of the sentencing tool moved forward with DSC support despite defender objections. Interviews 165.1, 193.1, and 194.1.

139. See Section IV in this chapter for additional discussion of defenders’ influence on the legislative priorities of the judiciary.

140. See also Chapter 8: Legislative Changes for more detail on implementation of Recommendations 5 and 6.

141. Cardone Report, p. 32.

142. *Id.*, p. 26.

143. *Id.*, p. xxiii.

144. *Id.*

145. *Id.*, p. 27.



## Recommendations

Although the Cardone Report’s primary focus was on restoring DSO to its previous status as an AO directorate, its recommendations went further: to promote DSO independence from other AO offices and to give DSO a more active role in determining AO-level policies that affect the resourcing, management, and oversight of the Defender Services program.

### Recommendation 4 (see subparts)<sup>146</sup>

The 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:

- a. Exclusively control hiring and staffing within DSO. (no action taken)
- b. Operate independently from the AO Department of Program Services or any other department that serves the courts. (approved)
- c. Retain exclusive control with National Information Technology Operations and Applications Development Branch (NITOAD) over defender IT programs. (approved)
- d. Retain ultimate discretion with DSC in setting the agenda for DSC meetings—no requirement of approval from other AO offices. (no action taken)

### Recommendation 5 (endorsed)<sup>147</sup>

DSO should be made a member of the AO Legislative Council to consult on federal legislation.

### Recommendation 6 (endorsed as modified)<sup>148</sup>

Representatives of the Defender Services program should be involved in pursuing Defender Services-related legislative and appropriations priorities, provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress.

## Implementation and Impact

DSO was restored to directorate level in 2018. Information from our interviews, however, indicates that DSO does not operate independently from “other AO departments that serve the courts.” The next sections explore the current state of DSO’s independence within the AO in the other areas specifically

146. This recommendation was referred to the AO director for consideration. In September 2018, the director reported that he had implemented the overall recommendation to move FDO to a directorate. (JCUS-SEP 18, p. 11.) Other than subpart c, which relates to the defender technology program and is addressed in Section IV of this chapter, the other subparts were not addressed in the next JCUS report. “The Director is still considering aspects of interim recommendation 4 as they relate to Defender IT programs.” See JCUS-SEP 18, p. 11, fn. 2. Thus, Recommendations 4a and 4d saw no action taken by the JCUS, while 4b and 4c saw the AO director move DSO from Program Services and into an independent directorate (4b) and give DSO exclusive control over NITOAD (4c).

147. The AO director implemented this recommendation, and the JCUS endorsed the action. JCUS-SEP 18, p. 11.

148. JCUS-MAR 2019, p. 20.

mentioned in Recommendations 4, 5, and 6: DSO staffing, DSC agenda setting, and participation in system budgetary and legislative decision making. Implementation of Recommendation 4c is discussed in Section V, which addresses control over Defender Services data.

## Control Over DSO Staffing

DSO does not have exclusive control over its hiring and staffing. It remains subject to the AO's human resources policies, including approval to advertise or hire new positions, and telework and remote work policies. Some DSO positions are paid out of the AO's appropriation, while others are reimbursable positions out of the Defender Services appropriation, subject to the Budget Committee's funding approval. The JRC continues to approve positions for national projects. Following are examples of the DSO's continued dependence during the study period:

- DSO was denied permission to create an administrative unit within the office.<sup>149</sup>
- DSO may not hire, even if it has money available from its own appropriation to do so, if the AO is operating under a hiring freeze.<sup>150</sup>
- Faced with a shortfall, the financial plan in FY 2020 did not fund four of the eight new DSO reimbursable positions that had been approved.<sup>151</sup>
- A DSC-endorsed request for eight additional reimbursable positions in 2022 (for the FY 2024 budget) was reduced by the Budget Committee, which instead approved three new positions of its choosing.<sup>152</sup>

## Agenda Setting

Although DSO has (and always has had) responsibility for preparing the DSC agenda—and thus may have technical control over “agenda setting”—it does not have complete control over the content of the items submitted on that agenda. Under past and current practices, the AO's Judicial Conference Secretariat must sign off on all JCUS Committee agenda items, and other AO offices may also be involved, depending on the item subject matter. For example, budget requests are reviewed by the AO Budget Office and by Financial Liaison and Analysis Staff, staffing items are to be coordinated with the AO's Policy and Strategic Initiatives Division, and items that affect other AO offices or programs (e.g., Legislative Affairs, Administrative Services, Information Technology) are reviewed by those offices as well.<sup>153</sup>

Interviews with AO staff in the reviewing offices indicate that they look primarily to correct any technical errors in presentation and provide suggestions for how best to achieve the item's objective.<sup>154</sup> But this required review and coordination has also resulted in items as proposed by DSO being substantively modified or, in some cases, removed from the DSC agenda.<sup>155</sup>

149. Interview 4.2.

150. Interview 143.1.

151. DSO email response to request for budget information, Jan. 3, 2023. On file with FJC.

152. CR-DEFSVS-MAR 23, p. 6 and Interview 143.2.

153. See Appendix A: Defender Services Budgeting and Funding Process, Attachment 3 (the flow chart) showing the myriad entities involved with approving new positions for national programs not subject to work-measurement formulas, Section IV of this chapter, and Chapter 8: Legislative Changes for more detail on the involvement of other AO offices.

154. Interview 156.1.

155. For example, DSO proposed a topic on the agenda for the DSC endorsing the “[Access to Justice Act of 2022](https://www.ossoff.senate.gov/wp-content/uploads/2022/03/ACCESS-TO-JUSTICE-ACT.pdf),” (<https://www.ossoff.senate.gov/wp-content/uploads/2022/03/ACCESS-TO-JUSTICE-ACT.pdf>) which would implement the judiciary's long-standing position of requiring an FDO in all districts that meet the CJA caseload criteria. This was not approved for inclusion on the agenda reportedly due to concerns that it lacked the support of Senate leadership. Interview 56.3.

## Voice in Resourcing and Legislative Decisions

The JCUS endorsed Cardone Recommendation 5 and modified Recommendation 6, which were, respectively, “DSO should be made a member of the AO Legislative [Council] to consult on federal legislation” —an action that was undertaken by the AO director in 2018, and “Representatives from DSO should be involved in the Congressional appropriations process.” The modification to Recommendation 6<sup>156</sup>

- included involvement in the legislative as well as the appropriations process
- narrowed the scope of what Defender Services representatives were to be involved in to “pursuing Defender Services-related legislative and appropriations priorities”
- added the qualifier that these priorities were to be pursued “provided” they were consistent with the judiciary’s overall strategies and undertaken in coordination with the AO

The addition of the qualifier sets as JCUS policy the “one voice” approach that had been identified by the Cardone Report as an impediment to defender program independence.<sup>157</sup>

The AO implemented Recommendation 5 in March of 2019, giving DSO a seat on the Legislative Council, a step designed to enhance DSOs involvement in setting the legislative agenda. As discussed in Chapter 8, one interview indicated that this group is focused on planning and sharing information about the status of existing legislative initiatives and does not make recommendations on legislative policy priorities or approaches to legislative funding.<sup>158</sup> In early 2023 the Legislative Council was dissolved. Therefore, DSO’s involvement appears to have fallen short of its intended outcome.<sup>159</sup> One interviewee further observed that DSO representatives are not invited to attend meetings of the Executive Management Group, which is reportedly where legislative AO policy decisions are actually made.<sup>160</sup>

The lack of an influential DSO voice in resourcing and legislative matters led to a missed opportunity to secure additional Defender Services program funding to address the COVID-19 pandemic. Before Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in March 2020, the judiciary’s OMB contact was in touch with the AO’s Financial Liaison and Analysis Staff (FLAS) to advise that the supplemental funding was moving forward and ask for the judiciary’s supplemental needs to respond to the pandemic.<sup>161</sup> After being solicited by FLAS for its input in response to this outreach, DSO documented an immediate need for a \$2.5 million supplemental funding. Without further consultation with DSO, the AO included only \$1 million for Defender Services in the supplemental request to Congress. DSO staff were notified after the decision had been made. Although the AO subsequently requested additional funds for Defender Services, these needs were never funded.<sup>162</sup> As one DSO interviewee noted, “We had no opportunity to ask [directly] for what we needed. It got cut upstairs, and no one told us.”<sup>163</sup>

156. “Representatives of the Defender Services program should be involved in pursuing Defender Services related legislative and appropriations priorities, provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with Administrative Office.” JCUS-MAR 19.

157. Cardone Report, p. 29.

158. Interview 138.1.

159. See Chapter 8: Legislative Changes for additional information on this element of the recommendation.

160. Interview 138.1.

161. Interview 164.1.

162. See Section V for a description of defender program IT needs requested and not funded at this time.

163. Interview 4.1.

More broadly, Defender Services staff made the point that their lack of a meaningful defender voice in influencing judiciary resourcing decisions and legislative policy contributed to a cycle of tension between the AO, DSO, and frontline defenders.

Our lack of inclusion at the decision-making table makes our job on the other side, dealing directly with the attorneys, more difficult. It undermines our credibility and creates a backlash. When the defenders see how little funding we got under the CARES Act supplemental,<sup>164</sup> they wonder why DSO didn't advocate for them. Then the defenders go to the Hill (where some of them have built relationships), and we get the backlash from the AO. And of course they went, because they don't feel like we did a good job. A vicious cycle. It's a terrible position to have the responsibility for the problems but none of the power or authority to address them.<sup>165</sup>

In sum, implementation of the Cardone Report's recommendations has not addressed the identified issues arising from the DSO's continued subordinate position in the AO decision-making structure.

## **IV. Defender Control Over Defender Services Information Technology and Data Systems: Recommendations 1c and 1d**

### **Issues**

Under the CJA, eligible defendants may be represented either by private attorneys who serve on a court's CJA panel and are paid pursuant to court-reviewed CJA vouchers they submit for each individual representation, by salaried institutional defenders in FDOs, or both.<sup>166</sup> Although the IT software and data collection needs for each of these components are distinct, they are both implicated in the Cardone Report's finding of a "persistent data deficit,"<sup>167</sup> which hampered the Committee's ability to carry out its charge and prompted a call for remediation:

The kind of comprehensive approach to data collection needed to effectively manage and evaluate a billion-dollar-plus government program is not taking place. The lack of data hamstrung this Committee, just as it did its predecessor a quarter-century ago. Much of the data that the Committee sought out to complete its review was unavailable, non-existent, or inaccessible.... As a result, the most extensive effort ever to collect data on the administration of the Criminal Justice Act was undertaken by this Committee. Moving forward, it is imperative that government assume this responsibility, use all available tools—including full implementation of the electronic vouchering system (eVoucher)—and develop data collection protocols when none exist.<sup>168</sup>

In this section we focus on eVoucher, the primary data system for managing the CJA panel attorney component of the Defender Services program. The eVoucher system is used for the submission, review, payment, and tracking of the representational services provided by CJA panel attorneys and the outside

164. This was the Coronavirus Aid, Relief, and Economic Security (CARES) Act passed in 2020 to address agencies' COVID-related financial needs.

165. Interviews 4.1 and 143.1.

166. See Appendix B: Defender Human Resources for how services are distributed across these two program elements.

167. Cardone Report, p. xxii.

168. *Id.*

experts necessary to litigate these cases. It was deployed in all district and appellate courts in a phased launch that began in early 2014 and continued through 2015.<sup>169</sup>

The Cardone Report cited generally positive testimony from local eVoucher users but noted that the system had not yet reached its potential for addressing the data deficit issue because its national reporting capabilities had not been activated. These capabilities had been among the original system requirements,<sup>170</sup> but they were neither built into eVoucher as it was originally designed nor prioritized for inclusion in the early years of implementation.<sup>171</sup> The Cardone Report cited this continued lack of necessary information for program governance and oversight as “a lost opportunity to improve the CJA program nationally.”<sup>172</sup>

The Cardone Report cites the mismatch between those with responsibility for overseeing the defender program and those managing the data system on which the program relies as a source of the problem:

Further, the governance and oversight of the eVoucher program is not currently placed with the entities that have been tasked with oversight of the CJA program: DSO and DSC. The program is currently managed out of the Case Management Systems Office. While this office may seek input from DSO and DSC, it is an additional level of bureaucracy between the management of the system and the main stakeholders in its use.<sup>173</sup>

## Recommendation

In its first recommendation, the Cardone Report included two proposed changes designed to shift responsibility for management and administration of the IT programs and databases required by the CJA panel component to those responsible for implementing and overseeing the Defender Services program.

### Recommendation 1 (see subparts)

The Defender Services Committee (DSC) should have:

- c. Control over development and governance of eVoucher in order to collect data and better manage the CJA program. (approved)
- d. Management of the eVoucher program and the interface with the payment system. (approved as modified)

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169. [AO Memorandum from Judge John D. Bates, Director, Administrative Office of the U.S. Courts, Oct. 14, 2014, Electronic Criminal Justice Act Voucher Processing System Implementation](#), (DIR14-083 ), p. 2.

170. “Electronic CJA Vouchers Systems, Independent Assessment eCJA VPS and eVoucher,” December 2013. On file with the FJC. This document describes the selection of the automated voucher system developed by the District of Nevada (eVoucher) over one developed by a DSO contractor. It also includes all of the functional system requirements against which the competing systems were judged. Among these requirements, 155 were flagged in the eVoucher system as “Not Available” or “In Progress.” These included the ability to support local practices that were different from those in Nevada, e.g., interim vouchers, as well as the ability to generate the data and reports needed for the efficient administration and auditing of the national program that were at the heart of the Cardone Committee’s concern about the application.

171. Interviews 2.1 and 56.2.

172. Cardone Report, p. 84.

173. *Id.*, p. 8.

## Implementation and Impact

In 2018, the Executive Committee agreed to revise the DSC jurisdictional statement “to give it primary jurisdiction over the eVoucher program and officially recognize its role in overseeing policy development for the program.”<sup>174</sup> The AO director then “determined that AO staff working on day-to-day support of the e-Voucher program should remain in CMSO (Case Management Systems Office) because of e-Voucher’s interaction with the judiciary’s broader payment system and its unique interrelationship with non-DSO stakeholders (including judges and clerks’ offices) in addition to defenders and CJA panel attorneys.”<sup>175</sup>

Implementing Recommendations 1c and 1d with the proviso that day-to-day support of eVoucher was to remain with the CMSO—an office in the AO Department of Program Services—likely does not grant DSC oversight of eVoucher as intended by the Cardone Committee. CMSO does not staff the DSC, and although both the DSC and DSO had a representative who was allowed to attend the eVoucher working group meetings, they did not chair the meetings and had limited input on key eVoucher management decisions during the implementation phase.<sup>176</sup> The proviso also contravenes the goal of approved Recommendation 4b that DSO operate independently from the AO Department of Program Services,<sup>177</sup> and continues the bureaucratic inefficiencies identified in the Cardone Report.<sup>178</sup>

Although Recommendation 1c was implemented by changing the DSC’s authority to give it primary jurisdiction over management of eVoucher, responsibility for program funding remains with the JCUS Information Technology Committee.<sup>179</sup> The resulting lack of Defender Services program control over eVoucher management decisions, dollars, or human resources produced a situation described by an AO staff member as, “We have all the responsibility, but none of the authority. This system spends our money, but we don’t own it.”<sup>180</sup>

Interviews with AO staff indicated that the working relationship between CMSO and DSO has improved over time and that they continue their joint efforts to build and implement the eVoucher functionality required for national reporting.<sup>181</sup> The change in DSC jurisdiction may have accelerated this process by emphasizing that eVoucher must be capable of generating the types of information that DSC needs to oversee expenditures and project future resource needs, but the AO staff we interviewed<sup>182</sup> also noted that changes to personnel and a gradual coming-to-terms with numerous problems that had been built into eVoucher at its inception<sup>183</sup> eased the offices into a more collaborative posture. However, several interviewees cautioned that the current situation is based on improved relationships among staff, not structural or policy changes, and is therefore impermanent and fragile.<sup>184</sup>

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174. JCUS-SEP 18, p. 8.

175. JCUS-MAR 19, p. 7.

176. Interview 56.1.

177. Cardone Report, p. xxxvii. See Section V for a detailed discussion of Recommendation 4, including that subsection b “was approved by AO Director.” See JCUS-SEP 18.

178. See Section II, *supra*, for additional discussion of the AO administrative structure and its inefficiencies, as identified in the Cardone Report.

179. Interview 2.2.

180. Interview 56.2.

181. Interview 2.1.

182. Interviews 2.1 and 2.2.

183. Interviews 2.1 and 2.2. See also, Electronic CJA Vouchers Systems: Independent Analysis, Administrative Office of the U.S. Courts, Dec. 2013, for eVoucher system requirements.

184. Interviews 2.2 and 56.2.

The passing of time has served to move the eVoucher system forward, with upgrades at both the local and national levels progressing as higher priority deficiencies have been addressed, and staff changes have alleviated some early interpersonal tension.<sup>185</sup> As a result, important functionality has been added to eVoucher, including two features that the Cardone Report had cited as specific needs: collecting information on voucher reductions and requiring a reason for any voucher reduction, consistent with Recommendation 8.<sup>186</sup> Other efforts to improve payment, such as those to improve functionality for paying panel attorneys electronically, were hindered by the AO's interpretation of permitted payment methods under the CJA.<sup>187</sup>

In sum, changing the DSC mission statement to implement Recommendations 1c and 1d had no effect on shifting management of the eVoucher system to the program it supports because neither the DSC nor DSO was given operational control. The national reporting features championed by the Cardone Committee were not given priority, and the inefficiencies resulting from shared DSO-CMSO responsibilities identified in the Cardone Report persist.

Yet, the eVoucher system has continued to evolve and, although still unable to address all defender program needs,<sup>188</sup> is much farther along in its ability to address the data deficit that had so hampered the Cardone Committee in its work. Time and effort brought changes to eVoucher, which can now provide more data to program administrators. But, as put succinctly by an AO staff member, "You look back and see progress but look forward and see how much further you still have to go."<sup>189</sup>

## **V. Restructuring and Adequately Funding the National Information Technology Operations and Applications Development (NITOAD) Program: Recommendations 4c and 30**

### **Issues**

The National Information Technology Operations and Application Development program (NITOAD), housed in the Western District of Texas, is responsible for providing and maintaining the IT and data systems required to administer the defender program nationally and in the FDOs locally. NITOAD supports IT staff in local FDOs when issues of network access, security threats, and hardware needs arise and supports both the IT and administrative staff of local FDOs managing the business needs of these offices. NITOAD systems either contain or directly link to networks that contain confidential and privileged attorney-client information.<sup>190</sup>

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185. The competition for selection as the national electronic voucher system (*see* Electronic CJA Vouchers Systems: Independent Analysis, Administrative Office of the U.S. Courts, Dec. 2013) had resulted in tension between the development team from the DSO and its contractor (whose product was not chosen) and the team from the District of Nevada (who moved to the AO when its product was selected). Interview 2.1.

186. Cardone Report, p. 85. This recommendation was approved as modified by the JCUS in September 2018. *See* JCUS-SEP 18, pp. 41–42.

187. For a discussion of the challenges of paying attorneys electronically with the eVoucher payment system, *see* CR-DEFSVS-SEP 22, pp. 19–21. Panel attorneys surveyed for this study continued to express frustration with paper checks. *See* Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

188. Interview 2.1.

189. *Id.*

190. Cardone Report, p. 217.

After the 2013 AO reorganization, NITOAD staffing and program decisions made by the program managers had to be approved, depending on subject matter, by both DSO and CMSO: CMSO held the contracts for, controlled, and maintained the applications that manage and transmit defender data, and DSO worked in conjunction with CMSO to request changes, updates, or additions to their IT and data systems.

The Cardone Report identified numerous ethical, practical, and resourcing issues regarding data managed by the NITOAD program, specifically, inappropriate access to defender data and inadequate resources to protect it.

First, the Cardone Report concluded, “In short, information security is absolutely necessary to the practice of public defense.”<sup>191</sup> It then provided examples of defender data breaches<sup>192</sup> facilitated in part by non-defender judiciary staff who did not understand the nature or importance of defenders’ legal obligation and ethical duty to maintain client confidentiality.<sup>193</sup> The report found that

defenders cannot entrust their clients’ confidences to an institution they do not and cannot control. In short, the inherently different obligations of the AO and defenders’ offices inevitably result in tension, miscommunication, and uncertainty.<sup>194</sup>

Second, the Cardone Report highlighted structural inefficiencies that resulted from the shared-responsibility management model under which NITOAD staff reported to two AO offices, with an accompanying lack of clarity on the part of NITOAD’s FDO constituency as to which office was responsible for what. One federal defender testified during the Cardone Committee hearings, “With the new CMSO bureaucratic overlay, the IT administrative structure for defenders is now hopelessly Byzantine,” and when defenders encountered IT problems, their questions triggered “a tsunami of flow-chart discussions and conference calls on bureaucratic structures.”<sup>195</sup>

Finally, the Cardone Report identified a second data deficit in addition to that cited more generally above in Section IV: the inaccessibility of data needed to manage FDOs locally. This has been a persistent problem. “The inability of defender offices to project budgets and determine staffing levels for their offices due to a lack of data was an issue at the time of the Prado Report, and it continues to be an issue in 2017.”<sup>196</sup>

## Recommendations

Two recommendations from the Cardone Report involve changes to the NITOAD program: a reorganized management structure, and provision of the resources required to address issues of data security, administrative inefficiencies, and data deficiencies.

191. *Id.*, p. 216.

192. In one instance, an AO Help Desk staff member shared unredacted privileged information to a member of a JCUS committee. Cardone Report, pp. 223–224.

193. Cardone Report, p. 216. A federal defender was told by a clerk’s office IT manager that he had top secret clearance, so she should not be concerned about his access to their data. Cardone Report, p. 222.

194. *Id.*, p. 223.

195. *Id.*, p. 220.

196. *Id.*, p. 220. The “Prado Report” is the 1993 report of the ad hoc committee to review the criminal justice act, chaired by Judge Edward C. Prado. See Report of the Committee to Review the Criminal Justice Act, Jan. 29, 1993.



**Recommendation 4c (approved)<sup>197</sup>**

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 ...

- c. Retain exclusive control with National Information Technology Operations and Applications Development Branch (NITOAD) over defender IT programs.

**Recommendation 30 (approved)<sup>198</sup>**

Adequately fund and staff the National Information Technology Operations and Applications Development Branch to control and protect defender IT client information, operations, contracts, and management.

**Implementation and Impact****Recommendation 4c: Administrative Structure and Control**

At the March 2019 JCUS meeting, the AO director reported (1) that the AO had returned to DSO two of its former IT staff positions that had been reassigned to CMSO during the 2013 reorganization and (2) that the Memorandum of Understanding governing the relationship among DSO, CMSO, and NITOAD was to be reevaluated.<sup>199</sup> A new memorandum was created in October 2019.<sup>200</sup>

DSO now holds control over NITOAD and non-procurement<sup>201</sup> decisions that affect the defender program IT and data nationally; decisions are made within DSO in consultation with NITOAD staff.<sup>202</sup>

**Recommendation 30: NITOAD Funding and Staffing**

Recommendation 30 moves beyond the process concerns addressed in Recommendation 4c to require that the NITOAD program “be funded and staffed adequately,” but it does not provide criteria for or describe how “adequate funding” should be measured.

197. Approved by the JCUS in March 2019, see JCUS-MAR 19, p. 39–41.

198. JCUS-SEP 18.

199. JCUS-MAR 19, p. 7.

200. Memorandum, Cait T. Clarke, Chief, Defender Services Office, re: Defender Information Technology (IT) Governance (ACTION REQUESTED), Oct. 15, 2019.

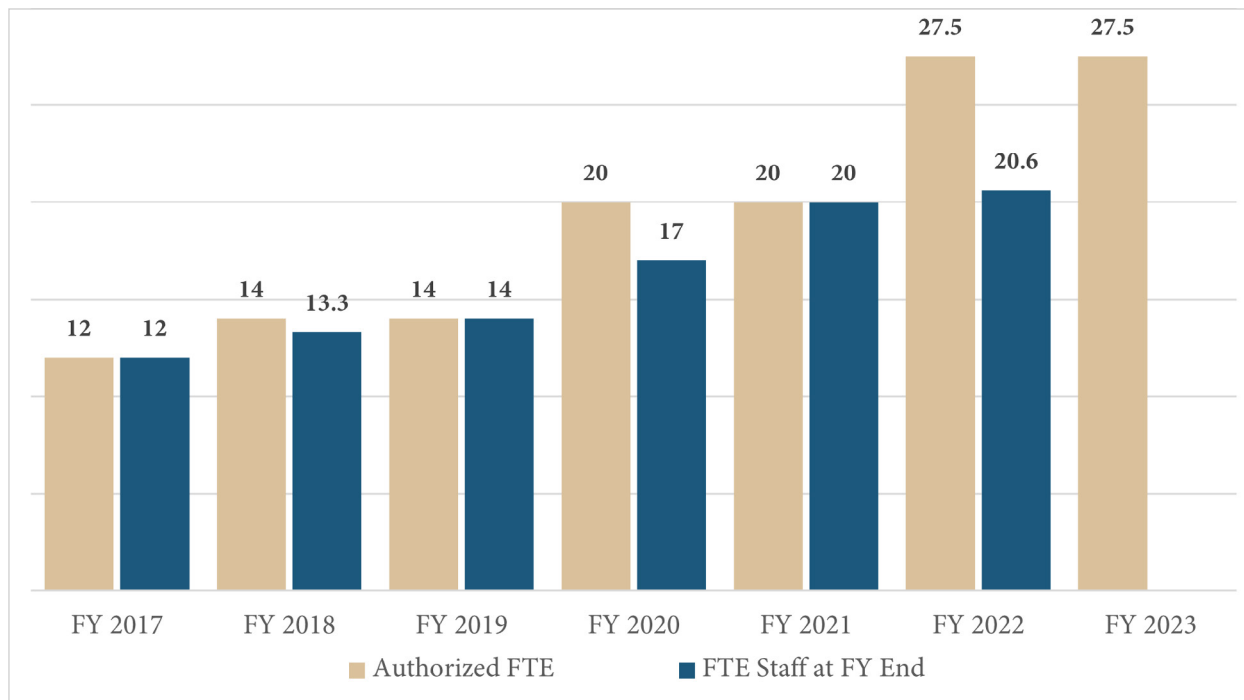
201. Although Recommendation 4c addressed many of the issues involving dual-office program management, continuing challenges result from NITOAD being governed by the procurement policies—managed by the AO Procurement Management Division (PMD)—that apply throughout the judiciary. The same competitive bidding practices governing requests for chairs, desks, and conference tables also apply to hardware, such as servers for physical and cloud-based storage, and software. As Interviewee 102.1 discussed, the rules for procuring physical objects do not fit IT products very well. However, these challenges are not unique to NITOAD and must await more basic structural changes before they can be addressed.

202. Interview 102.1, noting the benefits of directly reporting to DSO leadership, “that line of communication, just on day-to-day operations and planning and all kinds of things, just seemed to flow a lot better.”

During our study period, the JRC developed a work-measurement formula for NITOAD staffing.<sup>203</sup> The results of the work-measurement study provide an empirical metric for the judiciary to use to assess NITOAD program needs, against which current staffing levels can be assessed for adequacy.<sup>204</sup>

Authorized NITOAD staffing has been based on the newly approved work-measurement formula since the 2020 request for FY 2022 staffing. The approval of lower than requested staffing levels,<sup>205</sup> timing of the budget process,<sup>206</sup> and delays in hiring have affected the ability of NITOAD to add staff to fill available positions during the study period. As shown in Figure 1, onboarding additional authorized staff has taken more than a year, historically.

Figure 1. NITOAD FTEs, Authorized and On Board at the End of Fiscal Year.



Note: Staff on board at the end of FY 2023 will not be available until the end of September 2023.

Despite this lag in hiring, there has been an increase in NITOAD staffing during the study period from 12 to 20.6 FTEs on board, and program allotments have increased as well, from \$20.2 million in FY 2017 to \$41.2 million in FY 2022.<sup>207</sup>

203. The new staffing formula was developed from an expedited study undertaken by the AO’s Policy and Strategic Initiatives Division under the direction of the JCUS Judicial Resources Committee. Interview 142.1.

204. The formula provides for 10.25 NITOAD staff hours for every Defender Services program FTE. See JRC Dec. 2019 Agenda Item 11, Attachment 2.

205. Just because FTEs are authorized by the DSC does not mean that they are ultimately included in the JCUS request to Congress, the judiciary’s appropriation, or the financial plan. See Appendix A: Defender Services Budgeting and Funding Process.

206. See Appendix A: Defender Services Budgeting and Funding Process for a detailed discussion of the timing of the budgeting process.

207. DSO Finance and Budget report for each fiscal year for the F05TXWU Budget Organization Code.

In addition to the increases obtained through the judiciary’s budget process, NITOAD was able to secure resources from the emergency funding provided by the Coronavirus Aid, Relief, and Economic Security (CARES) Act in 2020.<sup>208</sup>

Of most concern to the Cardone Committee was the NITOAD data security issues. As noted above, the Cardone Report described the absence of central control as the source of problems in the past resulting in unauthorized access to sensitive client information.<sup>209</sup> NITOAD staff expressed confidence that these issues were now resolved through the implementation of an electronic auditing program maintained by a third-party contractor monitoring access and changes to data systems twenty-four hours a day.<sup>210</sup>

As one interviewee noted, however, contracting with third parties can’t always be the solution to addressing IT needs.<sup>211</sup> Contractors, even if they are lawyers, are not able to speak to the FDO’s specific needs or ethical obligations.<sup>212</sup> Funding NITOAD so that staff are able to undertake additional duties is essential to addressing the concerns—ongoing cybersecurity threats, substantial increases in the volume of eDiscovery, and ethics issues—raised in the Cardone Report.

This point raises a fundamental issue with the work-measurement study that produced the NITOAD (and all other) staffing formulas. By design, these studies only account for the level of observable work NITOAD was doing at the time of the study, not the work they should be doing, the work they were expected to do at the time (but could not perform), or the work they will be expected to do in the future. However, implementing the formula did support recent NITOAD resourcing increases, which have given program managers the opportunity to move from “fighting fires” on a daily basis to thinking more comprehensively about program needs and challenges.<sup>213</sup>

Resource increases have also allowed NITOAD to upgrade current services and provide some new offerings. These include hiring a dedicated trainer, which will allow the program to expand training offerings in two currently under-addressed areas: (1) additional training of local IT leadership on how to supervise local IT staff and (2) hands-on technology training at national Computer Systems Administrator (CSA) training events.<sup>214</sup> Further, NITOAD was able to use CARES Act emergency funds to make urgently needed upgrades to the virtual private network (VPN), through which FDO staff access their files remotely, and the phone systems of approximately eighteen FDOs that previously did not allow for call forwarding.<sup>215</sup>

In sum, NITOAD resources have increased during the study period, in part through normal budgeting processes and in part through emergency COVID-19 funding provided by Congress. Hiring has not yet reached staffing levels determined by the NITOAD formula, and not all resourcing issues identified

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208. For resource requests such as this that are outside the usual budget cycle, NITOAD now appeals directly to DSO leadership, a streamlined process also resulting from the adoption of Recommendation 4c.

209. Cardone Report, pp. 216–225.

210. Interview 102.1.

211. *Id.*

212. The National Litigation Support Team (NLST) faces similar issues when contracting. See Chapter 7: Resources for Litigation Support and Interpreters for additional detail.

213. Interview 102.1.

214. Interview 102.1 indicated that training local IT leadership on how to supervise subordinate IT staff was a goal for the future, along with training that permitted “actually getting to touch some of the equipment and play with it in a lab environment.” Despite having tried in the past, annual CSA conferences were less desirable locations for such training because “the logistics of 200 people doing hands-on training is a little overwhelming and not cost effective.”

215. The inadequate VPN bandwidth and anachronous phone systems were known issues pre-pandemic, but resources were not available to address these needs until a national emergency made them absolutely essential and funding was offered from Congress. Interview 4.1.

in the Cardone Report have been addressed. Nevertheless, progress has been made. Additional training resources have been added, long-standing issues with bandwidth and outdated telephone systems were addressed, and the program instituted a solution to prevent another data security breach.

The larger question of whether a work-measurement formula, even with further modifications, can be relied upon to match NITOAD resources to needs remains unanswered. Work that is needed, but not currently being performed—either due to staffing or unanticipated needs—cannot be captured under a work-measurement framework. And the ever-changing definition of “adequate resources” (consistent with Recommendation 30) needed to meet the dynamic needs of IT and data security remains an issue.

## **VI. Conclusion**

### **Recommendation 1**

The JCUS Executive, Budget, Judicial Resources, and Defender Services Committees play the same roles under the same rules to determine defender program resources as before the Cardone Report issued its recommendations. Problems, identified by the report, resulting from the process of placing program resourcing decisions in the hands of those whose commitment is to the larger goals of the federal judiciary rather than to the Defender Services program have not been resolved.

The DSC jurisdictional statement was changed in 2018 to implement recommendations 1c and 1d but had no effect on shifting management of the eVoucher system to the program it supports, because neither the DSC nor DSO was given operational control, due to a proviso added by the AO director when implementing the recommendation. The national reporting features championed by the Cardone Committee were not given priority, and the inefficiencies resulting from shared DSO-CMSO responsibilities identified in the Cardone Report persist.

### **Recommendation 2**

The Executive Committee declined to adopt Recommendation 2. The same mechanisms exist for JCUS members to place items on the discussion calendar for its meetings, and the defender budget request was not moved to the discussion calendar during this period of study, to address ongoing disagreements over the use of carryforward and how to meet budget shortfalls.

### **Recommendation 3**

Defender Services Advisory Group (DSAG) co-chairs have not been added to the committee. The DSAG co-chairs continue to participate in DSC meetings as non-voting guests of the committee chair.

### **Recommendation 4**

DSO was restored to directorate level in 2018. Information from our interviews, however, indicates that DSO does not operate independently from “other AO departments that serve the courts.”

In 2019, two of the former DSO IT staff positions moved during the 2013 reorganization were returned by the AO director, and the Memorandum of Understanding governing the relationship among DSO, CMSO, and NITOAD was revised (effective in FY 2020).

DSO now holds control over NITOAD, and non-procurement decisions that affect the defender program IT and data nationally are made within DSO in consultation with NITOAD staff.

No JCUS action was taken on the remaining parts of Recommendation 4.

## **Recommendation 5**

DSO gained a seat on the Legislative Council. However, the limited decision-making authority of this group hampers the ability of DSO to meaningfully advocate for program needs. In early 2023, the Legislative Council was dissolved.

## **Recommendation 6**

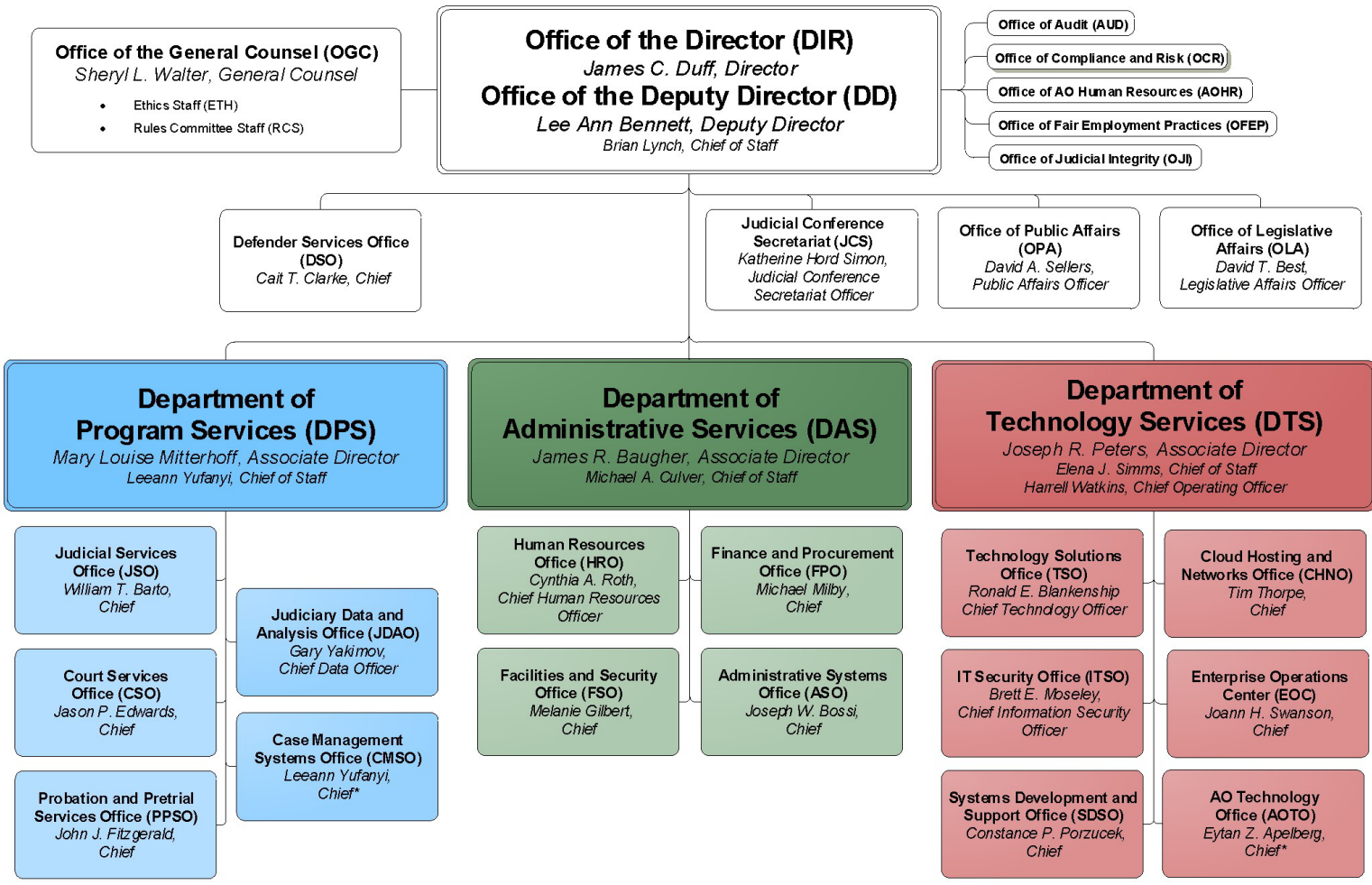
Though DSO staff participate in the appropriations process, the modification of the recommendation to add “provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with the Administrative Office” sets as JCUS policy the “one voice” approach that had been identified by the Cardone Report as an impediment to defender program independence. DSO participation in pursuing legislative and appropriations goals continues to occur through judiciary processes that require JCUS to adopt the DSC’s position for advocacy to move forward.

## **Recommendation 30**

NITOAD resources have increased during the study period, in part through normal budgeting processes and in part through emergency COVID-19 funding provided by Congress. Hiring has not yet reached staffing levels determined by the NITOAD formula, and not all resourcing issues identified in the Cardone Report have been addressed. Progress has been made, nonetheless. Additional training resources have been added, long-standing issues with bandwidth and outdated telephone systems were addressed, and the program instituted a solution to prevent another data security breach.

### Administrative Office of the United States Courts

# Attachment 1 AO Organizational Chart



\* As of this chart's revision date, this individual is leading the unit in an interim, acting capacity.

Last revised 10/1/2020

## Attachment 2

# Judiciary and Defender Services Program Congressional Funding Requests and Appropriations, Fiscal Years 2017–2022

The table below presents the discretionary funding requested by the judiciary—overall and for its Defender Services program—in its detailed February submission to Congress for each fiscal year<sup>216</sup> and the funds allocated in the final appropriation for that year.<sup>217</sup> It shows that, between fiscal years 2017 and 2022 Defender Services budget requests and appropriations have grown at a greater rate than those for the judiciary as a whole. The Defender Services appropriation was between 15% and 17% of the total judiciary appropriation across the years.

Fiscal Year	Total Judiciary Discretionary Funding (in millions)			Defender Services Program Funding (in millions)		
	Requested Dollars	Appropriated		Requested Dollars	Appropriated	
		Dollars	Percent		Dollars	Percent
2017	6,991,821	6,926,960	99%	1,056,326	1,044,647	99%
2018	7,193,157	7,110,675	99%	1,122,659	1,078,713	96%
2019	7,224,230	7,252,953	100%	1,141,489	1,150,450	101%
2020	7,624,628	7,486,508	98%	1,234,574	1,234,574	100%
2021	7,815,744	7,719,832	99%	1,316,240	1,316,240	100%
2022	8,122,563	8,000,000	98%	1,409,591	1,300,000	92%
% Increase	16%	15%		33%	24%	

216. Requests for discretionary funds are taken from the three-year “Judiciary Appropriation Funding” summary table in the Judiciary Budget Request (“Yellow Book”) for each fiscal year. (FYs [2017](#) [2018](#) [2019](#) [2020](#) [2021](#), [2022](#).) As discussed in this chapter, these requests may be modified based on re-estimates of program needs in the spring and fall of each year and do not therefore represent the final request. See Appendix A: Defender Services Budgeting and Funding Process for additional detail.

217. Appropriations are from this same source except for FY 2022, which was not available for the FY 2023 request and was therefore taken from the AO’s director’s [Annual Report to the Judicial Conference](#). Appropriations include amounts for both the “Total Direct” and “Vaccine Injury Trust Fund” categories for which there were requests and appropriations for each year between 2017 and 2022. The 2020 total judiciary appropriation does not include the \$7.5 million the judiciary received as part of the CARES Act supplemental, since this was not part of the request for that year.

# Chapter 3

## Panel Attorney Compensation (Recommendations 7-9 and 15-16)

### I. Introduction

When comparing how CJA representations proceed for litigants represented by institutional defenders to those by CJA panel attorneys, the Cardone Report found judges retain control over the defense function in ways that affect the independent judgment of CJA panel attorneys.<sup>218</sup> In many courts, judges control panel appointment and removal of attorneys and may determine which and how many CJA appointments attorneys are offered.<sup>219</sup> And, unlike the salaried institutional defenders who have access to in-house and contract service providers, panel attorneys and their service providers are paid per appointment after submitting detailed vouchers, which must be approved by the court.

To be compensated for each appointment, CJA panel attorneys complete and submit voucher payment requests (“vouchers”) for themselves and any expert service providers hired for the case through an automated system called eVoucher.<sup>220</sup> Once submitted, each voucher is reviewed under the processes in place for the jurisdiction, governed by national policy (detailed in the *Guide to Judiciary Policy*), local rules (detailed in CJA plans), and distinctive practices in specific courts, divisions, or courtrooms.

Testimony before the Cardone Committee highlighted how reductions to vouchers, and lower-than-market rates for compensation, were the result of three factors. First, the judiciary made funding requests for defenders below needed amounts.<sup>221</sup> Second, some judges and judiciary staff held the mistaken belief that reductions to defense costs returned money to other judiciary accounts, putting defender funding requests in competition with judiciary requests.<sup>222</sup> Third, some judges reduced vouchers arbitrarily<sup>223</sup> and averaged across cases or clients.<sup>224</sup> CJA panel attorneys who rely on courts for their livelihood are reluctant to risk alienating the judges by raising concerns about the denial of resources and reductions to vouchers.<sup>225</sup>

The Cardone Report highlighted variation in the administration of CJA voucher payments as a major concern, summarizing the state of panel attorney compensation in the years leading to the report’s publication in 2017 as follows:

A system of voucher review involving more than 1,000 independent decision makers who receive no formal training yet are tasked with deciding whether services rendered are

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218. Cardone Report, p. 92.

219. See Section IV of this chapter for additional details on judicial control of panel management.

220. In March 2014 the AO announced the beginning of a nationwide implementation of eVoucher, an electronic processing system for panel attorney compensation. See DIR14-026, <https://jnet.ao.dcn/sites/default/files/pdf/DIR14-026.pdf>. Panel attorneys utilize eVoucher to create vouchers for each of the cases they are assigned, then add line items for services such as arraignment appearances and for expenses such as travel time. Using the dates of the service provided, eVoucher automatically assigns the correct rate of compensation to each line item. After a case has concluded, the panel attorney submits the associated voucher to the court. See CJA eVoucher Attorney User Manual, Release 6.4, AO. <https://training.sdo.ao.dcn/CourseResource.aspx?id=1296#MAT> for more information on voucher submission processes.

221. Chapter 2: Structural Changes describes in detail the zero-sum approach to funding requests for the defense function.

222. Cardone Report, pp. 95–96.

223. *Id.*, p. 96.

224. *Id.*, p. 101.

225. *Id.*, pp. 89–90.



“reasonable” will necessarily produce wildly varying results. Testimony confirmed this. There is no uniformity in how “reasonableness” determinations are made. And given that judges are not held to or constrained by any administrative direction, it is unlikely that uniformity could be imposed. Outcomes vary widely between circuits, between districts, and even between judges in the same district.<sup>226</sup>

The Cardone Report recommended five changes to address issues of CJA panel attorney compensation and judicial control over the litigation of cases with CJA panel attorneys serving as appointed counsel. This chapter first discusses the recommendation to raise the panel attorney hourly rate to reflect the statutory maximum, then moves to three recommendations aimed at minimizing inappropriate voucher reductions and denial of case resources, and lastly discusses one recommendation that seeks to address judicial control over panel attorney selection, appointment, retention, and removal.

## II. Addressing Insufficient Hourly Rates for Panel Attorneys: Recommendation 7

### Issues

The Cardone Report identified the panel attorney hourly rate for compensation as “a threat to effective representation.”<sup>227</sup> The rate had “fallen well behind prevailing rates for legal work,”<sup>228</sup> resulting in highly qualified attorneys no longer accepting CJA appointments and leaving the panel. Additionally, lower-than-market rates for compensation created challenges for recruiting new attorneys to a panel.<sup>229</sup>

Four factors determine the hourly rate of compensation CJA panel attorneys may receive: the statute,<sup>230</sup> the judiciary’s budget request to Congress,<sup>231</sup> the defender services appropriation, and the financial plan.<sup>232</sup> Since 2005, increases in the maximum hourly rates have been tied to the General Schedule<sup>233</sup> and automatically increase with inflation (no separate request to Congress is required). These increases set a ceiling for panel attorney compensation. The rate that is actually paid to panel attorneys, however, does not automatically increase with the statutory maximum; it increases only if the judiciary includes an increase in its budget request to Congress and if Congress funds the full amount requested.<sup>234</sup>

At the time the Cardone Report was published in 2017, the rate paid to panel attorneys (\$132) was 9.6% below the maximum rate set by statute (\$146). The rate was the result of the judiciary’s budget request (\$135), which was already 7.5% below the statutory maximum, and not being fully funded by Congress (*see* Table 1). The Cardone Report concluded that “in order to maintain a high quality of panel representations, both the hourly rates and case compensation maximums must be addressed.”<sup>235</sup>

226. *Id.*, p. 95.

227. *Id.*, p. 53.

228. *Id.*

229. *Id.*

230. 18 U.S.C. § 3006A(d)(1).

231. *Guide to Judiciary Policy*, Vol. 7A (<https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf>).

232. For more information on the budget process, including financial plan creation, *see* Appendix A: Defender Services Budgeting and Funding Process and Chapter 2: Structural Changes.

233. *See* Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, Title IX, § 903(a), Apr. 24, 1996, 110 Stat. 1318).

234. For more information on the budget process, *see* Appendix A: Defender Services Budget and Funding Process.

235. Cardone Report, p. 55.

Raising the maximum hourly rate for attorney compensation would require amending the CJA itself, a task for Congress alone, but the Cardone Committee made the following recommendation to address the below-statute maximum hourly rate being paid to CJA panel attorneys.

## Recommendation

### Recommendation 7 (approved as modified)<sup>236</sup>

The annual budget request should reflect the highest statutorily authorized rate for Criminal Justice Act panel attorneys, unless adverse fiscal conditions require the Defender Services budget request to reflect less than the highest statutorily available rate.<sup>237</sup>

## Implementation and Impact

The Judicial Conference of the United States (JCUS) adopted Recommendation 7, and its language was incorporated into the *Guide to Judiciary Policy*.<sup>238</sup> Since FY 2021, the budget recommendation made by the Defender Services Committee (DSC), the budget request made by JCUS to Congress, and the congressional appropriation set hourly compensation at the statutory maximum.

Table 1. Hourly Rate of Panel Attorney Compensation, 2017 through 2023.

Fiscal Year	Statutory Maximum	DSC Recommendation	JCUS Budget Request	Congressional Appropriation	Percentage of Maximum
2017	\$146	\$146	\$135	\$132	90.4%
2018	\$147	\$147	\$140	\$140	95.2%
2019	\$149	\$149	\$146	\$148	99.3%
2020	\$153	\$149	\$148	\$152	99.3%
2021	\$155	\$155	\$155	\$155	100.0%
2022	\$158	\$158	\$158	\$158	100.0%
2023	\$164	\$164	\$164	\$164	100.0%

Note: Information from Cardone Report Table, p. 54, and DSC materials for 2020, 2021, and 2022 June meetings. Subsequent to JCUS approval, further updates regarding the non-capital rate were made once the appropriation from the previous year was known. Therefore, the final non-capital rate approved by Congress in FYs 2019 and 2020 exceeded the JCUS budget request level.

District judges, defenders, and panel attorneys interviewed for this project (111 people in total) recognized and appreciated the effort to increase panel attorney hourly rates. As one interviewee said, “I know a lot of work has been done to increase the hourly rate over the years by defender services, and I think everyone on the panel is appreciative of that.”<sup>239</sup>

236. JCUS-MAR 19, p. 19.

237. Recommendation 7, as adopted by the JCUS. See JCUS-MAR 2019, p. 19.

238. *Guide to Judiciary Policy*, Vol. 7A, § 230.20 and § 630.10.10(b).

239. Interview 29.1.

Appreciativeness notwithstanding, at least four interviewees reported that the statutory rate continued to be insufficient<sup>240</sup> because it did not reflect the amount<sup>241</sup> and difficulty of the work<sup>242</sup> involved in quality representation, and it still trailed market rates.<sup>243</sup> Because the rate continued to be under market value, some interviewees felt the hourly rate inhibited recruitment,<sup>244</sup> especially of young attorneys,<sup>245</sup> and retention of experienced attorneys.<sup>246</sup> The insufficiency of the rate remained problematic where the cost of living<sup>247</sup> and overhead costs were high.<sup>248</sup>

Other interviewees reported that the hourly rate was not a problem, either locally<sup>249</sup> or nationally,<sup>250</sup> with one noting that the increase had, in fact, helped to recruit new attorneys.<sup>251</sup> One interviewee noted that attorneys were willing to accept the rate of compensation in exchange for experience litigating in federal court.<sup>252</sup> Places with lower costs of living reported fewer problems finding attorneys to work for

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240. *E.g.*, Interview 182.1, “But the hourly rate is laughable. Again I came from private practice, so to me \$140 or \$150 an hour is, like, what we would pay a paralegal or law clerk kind of case”; Interview 183.1, “I think the hourly rate is a joke”; Interview 62.1, noting that panel attorneys were underpaid, “period”; and Interview 60.1, “No, it’s not—plumbers make more.”

241. Interview 29.1. “But I think the rate probably is not a good reflection of the work that gets put into the case.”

242. Interview 34.1. “I would say on average [the rate] is probably \$200 below [rates for civil litigators]. And it’s way more significant and difficult work.”

243. Interview 9.1; Interview 68.1, “[Hourly rates are] certainly nowhere near the level that private practitioners in the criminal defense bar charge their privately retained clients”; Interview 5.1, noting that while the rate was not currently a problem, it would be because “the \$152 an hour doesn’t compare to the \$400 an hour that private attorneys can charge”; Interview 184.1, “\$152 per hour is almost like pro bono work for them. And then there’s the segment of the panel that relies very heavily [on CJA work], but even for them it’s under probably what the market would otherwise support.”

244. *E.g.*, Interview 43.1. “In my view, that’s just woefully inadequate, and you’re not going to get the best attorneys at that rate”; Interview 62.1, noting raising the compensation would help the court to attract additional members among the more seasoned attorneys in the district; and Interview 36.1, “We’re doing it at a significantly discounted rate to what we would have for the same case where it retained.”

245. On recruiting new attorneys: Interview 13.1, “I think, you know, there are attorneys who just don’t want to take the reduced hourly rate”; and Interview 75.1, “I think there are attorneys that are very well qualified that choose not to be on the panel probably based upon the statutory max and the hourly rate.”

246. Interview 18.1, “I think it deters competent, experienced attorneys from joining the panel, and I think it greatly contributes to new attorneys leaving the panel once they start getting some good experience”; Interview 185.1, “[Newer attorneys] agree to a lesser hourly rate in order to get the experience and to have the opportunity to work through cases. For experienced lawyers particularly, those lawyers who have good private practices, we’re losing them from the panel.”

247. Interview 9.1, “It’s less insufficient in [my district] than it is in San Francisco”; Interview 40.1, “It is still a low rate for the work you’re doing, especially in some areas. Now it’s probably not as big of an issue here because of the cost of square footage for rent for an office.”

248. Interview 188.1. “When you look at overhead cost and that sort of thing, it can eat into that hourly rate. So, it would be nice if it were higher.”

249. Interview 186.1, “I can hire lawyers by the barrel around here at \$150 an hour”; Interview 187.1, “So \$155 an hour is a pretty relatively competitive rate around here, especially when it’s a client that will actually pay you”; Interview 5.1, “The hourly rate has not become a problem with attracting good, qualified attorneys”; Interview 47.1, “I think that that is a good working hourly rate.”

250. Interview 12.1; Interview 47.1, “I worry that the cap still—even though they now move up with when the hourly rate moves up—that it still lags behind a little bit.”

251. Interview 68.1. “Now that the hourly rates have increased, it has at least attracted more people, particularly, say, associates in larger firms.”

252. Interview 13.1, analogizing CJA work to internships. “I’ve always viewed this as something that attorneys can do along the way. They’re corporate attorneys, and it gets them into federal court.”

the current hourly rate.<sup>253</sup> The rate was also considered sufficient where practicing exclusively in CJA cases was economically viable.<sup>254</sup>

One interviewee noted that the similarity of the rate across jurisdictions was “ridiculous,” but recognized that while it had not “caused a deficiency in applications or retention for [the district], it would for others.”<sup>255</sup>

In all, Recommendation 7 has been implemented, and the hourly rate paid to CJA panel attorneys has been raised to the statutory maximum. However, some interviewees thought the statutory rate continued to be insufficient and that the associated Cardone-identified problems of recruitment, retention, and adequate compensation for panel attorneys remained in some jurisdictions.

### III. Limiting Voucher Reductions

#### Issues

The Cardone Committee received “a great deal of ... written and oral testimony” on the subject of reductions to panel attorney compensation (also referred to as “voucher cutting” or “the failure to pay attorney bills in full”).<sup>256</sup> Indeed, “more dissatisfaction was expressed in this area than in any other into which the Committee inquired,” making reduction of compensation “a major concern.”<sup>257</sup>

Witnesses at the Committee’s hearings testified about the consequences of reducing panel attorney compensation on the quality of the defense function, raising concerns that panel attorneys might reduce their efforts on behalf of clients for fear of not being paid for their work or might accept fewer panel assignments, ultimately leaving the panel.<sup>258</sup> The Committee also heard testimony that payment reductions can (a) have a “chilling effect” on the entire panel—potentially affecting the efforts of other attorneys besides the attorney who is not paid in full, (b) affect solo practitioners and small law firms especially,<sup>259</sup> and (c) discourage experts from working for panel attorneys in districts where voucher cutting is prevalent.<sup>260</sup>

The Cardone Report further detailed that payment reductions were, according to witnesses, more common in certain courts because of the perception that “CJA representation is part of an attorney’s pro bono obligation, and therefore counsel should not expect to receive full payment,”<sup>261</sup> because of the exclusion of specific categories of expenses from those deemed reimbursable in certain courts<sup>262</sup> or, for

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253. Interview 9.1, “Do we have trouble getting people on the panel on the result? I don’t think we do”; Interview 189.1, noting that the hourly rate is sufficient in the district but not elsewhere; and Interview 61.1, “I think if you’re talking about our area, I think it is. But when you get somewhere like New York City or D.C., ...[it’s not].”

254. Interview 33.1. “I don’t think we have that problem here, just because our volume of work is so high that the people are satisfied with the hourly rate and the amount of work that we get.”

255. Interview 84.1.

256. Cardone Report, p. 103.

257. *Id.*

258. *Id.*, p. 110.

259. *Id.*, p. 109.

260. *Id.*, p. 111.

261. *Id.*, p. 97. “When Congress passed the CJA, it considered attorneys’ professional obligation to provide pro bono services and accounted for it with an hourly rate below market levels.”

262. *Id.*, p. 98. “In certain districts and/or circuits, classes of otherwise compensable work are excluded from payment, resulting in substantial cuts to payments. These disfavored expenses include client meetings, travel time, and discovery review.”

capital appointments, because of “formal and informal” policies in certain appeals courts regarding the funding of capital defense.<sup>263</sup>

The Committee heard testimony suggesting individual presiding judges or other voucher reviewers reduced payment at disparate rates because of their different approaches to panel attorney compensation, including “the varying degree of pressure judges feel to contain costs,”<sup>264</sup> their use of practices like generalizing or averaging costs across cases as shortcuts in determining what is a reasonable expense,<sup>265</sup> and their professional backgrounds.<sup>266</sup> The Cardone Report noted that reviewers with experience as defense attorneys, including case-budgeting attorneys (CBAs), would have a greater familiarity with the work needed to mount an effective defense and therefore might be better equipped to review CJA payments and be a resource for judges making these decisions.<sup>267</sup>

The report stated that “the evidence that inappropriate voucher cutting regularly occurs and is widespread—if not pervasive—was overwhelming. Witnesses, both judges and attorneys alike, described it.”<sup>268</sup> Furthermore, “at every hearing, witnesses testified that voucher cutting had increased markedly over the past few years, particularly since sequestration.”<sup>269</sup> In addition to witness testimony, the Committee drew its conclusions about the extent of voucher cutting based on a survey of panel attorneys, stating, “Although the majority of panel attorneys surveyed (72%) believe that voucher cutting happens in just one out of four cases or less, given the volume of cases handled by panel attorneys nationwide that’s still an extraordinary number of vouchers being cut.”<sup>270</sup>

The Cardone Committee further heard that it was the practice of many attorneys to submit vouchers for less than the full costs of the litigation. This practice, referred to in the report as “self-cutting,” was ascribed to “attorneys who are unwilling to bill for all time reasonably expended in order to avoid disclosing confidential client information, prevent larger voucher cuts by judges and the impression that their billing is ‘excessive,’ and/or avoid delays in payment.”<sup>271</sup>

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263. *Id.*, p. 197.

264. *Id.*, p. 95. “What is considered ‘reasonable’ can change depending on the general fiscal climate or specific pressures to conserve funds. Although Judicial Conference policy discourages consideration of funding levels or appropriations shortfalls in voucher review, judges candidly admit they are affected by these concerns.”

265. Cardone Report, pp. 101–102. “Generalizing” refers to the practice of the reviewer using his or her “belief about what [a] type of case ‘should’ cost” to set informal maximums on compensation. “Averaging” occurs when a reviewer “compare[s] the fees of lawyers representing co-defendants and award[s] all fees close to the average.” The Cardone Report states, “These practices may seem like logical ways to save time or control costs. But by their nature, they are contrary to the letter and spirit of the CJA, which requires judges to review each voucher independently, within the context of the client, the case, and the services provided.”

266. *Id.*, p. 93. “The number of federal judges with significant criminal defense experience is limited.” According to the FJC’s Biographical Directory of Article III Federal Judges (<https://www.fjc.gov/history/judges>), of the 2,281 individuals who received commissions to Article III positions from 1970 through September 2022, forty-three (1.9%) had prior experience as a full-time employee of a federal defender office (federal defender offices were created in 1970). Of these forty-three individuals, four were initially appointed to a district court and then later elevated to a court of appeal. One individual was initially appointed to a district court, elevated to an appeals court, and then again elevated to the U.S. Supreme Court. Forty-two remained active judges as of the end of FY 2022. These numbers do not capture judges who served as CJA panel attorneys prior to nomination or judges with state/local criminal defense experience. In comparison, 564 individuals appointed during the same period had experience as a U.S. attorney or assistant U.S. attorney (24.7%). Eight individuals had both federal defense and federal prosecutorial experience. No similar database exists for magistrate judges.

267. Cardone Report, pp. 130–133, discusses the role of CBAs.

268. *Id.*, p. 103.

269. *Id.*, p. 107.

270. *Id.*, p. 103.

271. *Id.*, p. 104.

Lastly, the Cardone Report detailed how attorneys who felt voucher reductions made by reviewers were unfair or inappropriate had no mechanism for appealing these reductions,<sup>272</sup> and that many CJA panel attorneys weren't notified or given an explanation why vouchers were reduced.<sup>273</sup> Thirty-nine percent of attorneys responding to the Cardone Committee's survey said they were always given an opportunity to contest the decision or provide an explanation, and 28% said they were never given an opportunity.<sup>274</sup> Testimony indicated that reviewers were not required to provide an explanation for the reductions, leaving attorneys guessing as to what aspect of the voucher judges objected and thus unable to improve future voucher requests,<sup>275</sup> and that often no opportunity was afforded to provide further support for the voucher submission.<sup>276</sup> Moreover, when attorneys lacked an avenue to request independent review of reductions, feelings of inequality across the defense system were compounded, leading to demoralization and difficulties in attorney retention and recruitment.<sup>277</sup>

To address these concerns, the Cardone Report made three recommendations designed to limit inappropriate voucher reductions and increase the resources available in cases where CJA panel attorneys are appointed.

## Recommendations

### Recommendation 8 (approved as modified)<sup>278</sup>

The Cardone Committee has identified a number of problems related to voucher cutting. The Judicial Conference should:

- a. Adopt the following standard for voucher review –  
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.
- b. Provide, in consultation with the Defender Services Committee, comprehensive guidance concerning what constitutes a compensable service under the CJA.

### Recommendation 9 (approved as modified)<sup>279</sup>

Every circuit should have available at least one case-budgeting attorney and reviewing judges should give due weight to their recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from the case-budgeting attorney's recommendations.

272. Cardone Report, p. 120. "Without formal procedures, attorneys are often unwilling to challenge a judge's decision on fees because of the tremendous power judges wield over selection, appointment, and compensation of attorneys."

273. Cardone Report, p. 118. "In some districts, we will receive notification when our vouchers are being cut and given the opportunity to respond to that. In other districts, we don't know until we receive a check in the mail."

274. *Id.*

275. *Id.* "A panel attorney expressed frustration with this, testifying, 'If you have a judge who cuts your bill by a certain amount of money and says, "Well, it was just a gut feeling," how is a panel attorney supposed to take that? What was it about my bill? What line item did you have a problem with?'"

276. *Supra* note 56.

277. Cardone Report, p. 206, citing testimony from Public Hearing—Birmingham, Ala., Panel 4, Tr., at 18, "[Voucher reduction is] a huge problem in terms of recruitment of lawyers and it's pervasive throughout the system."

278. JCUS-SEP 18, p. 42.

279. JCUS-MAR 19, p.19.

## Recommendation 16 (approved as modified)<sup>280</sup>

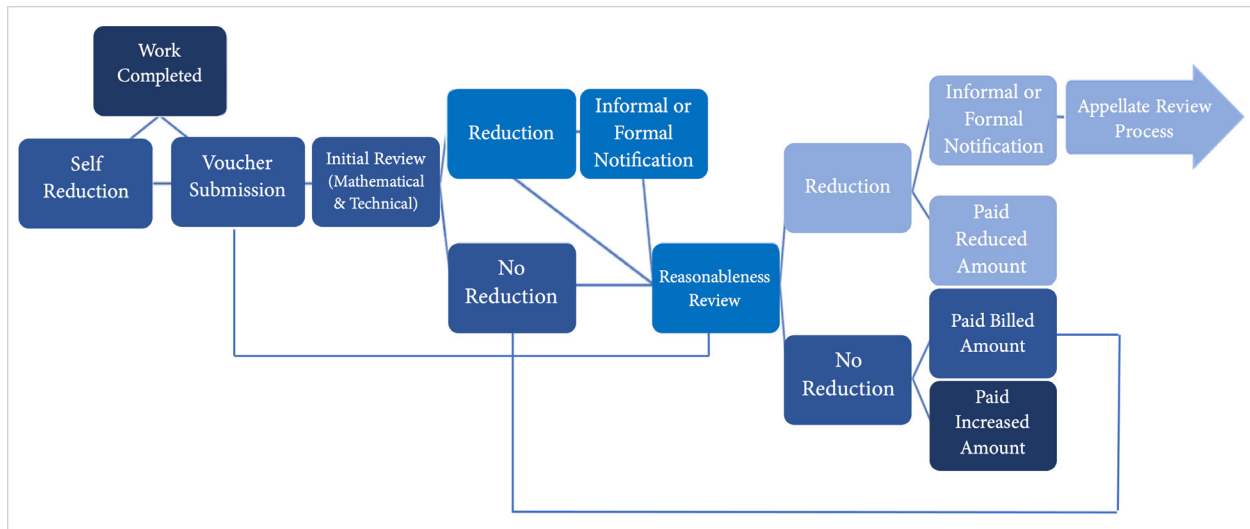
Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).

### Implementation and Impact

Before discussing implementation of the above recommendations, a brief explanation of voucher review is necessary. Courts create their own local processes for voucher review, though these processes have several commonalities, detailed below.

As identified in our analysis of district court plans,<sup>281</sup> submitted vouchers proceed through two levels of review, often completed by two separate entities, in the district courts. Figure 1 shows the typical voucher review process in the district courts as both described in court plans and interviews (*see below*). The initial review, sometimes referred to as the “mathematical/technical review,” focuses on correcting obvious mathematical errors, incorrect billing types, or requests for compensation of non-compensable tasks and services. The second type of voucher review is often referred to as the “reasonableness review” and focuses on the reviewer’s assessment of the reasonableness of the number of hours and types of work billed for the case. A submitted voucher may go through several cycles of auditing, information request, revision, and resubmission during the review process. Reductions to vouchers can occur at any stage of the review process.

Figure 1. Review Paths for Vouchers under the Excess Compensation Cap.



280. *Id.*

281. *See* Appendix C: District Court CJA Plan Analysis.

By statute, a third level of review occurs when district court voucher amounts exceed the statutory case maximum or when expert services fees exceed statutory limits. Circuit chief judges (or their designees) conduct this review.

CJA representations in appellate courts also require submission of vouchers for compensation and payment of litigation costs. Excess compensation vouchers in appellate cases are also authorized for payment by the chief circuit judge (or designee). Beyond the statutory requirements, CJA plans in the appellate courts provide less detail about voucher review processes.<sup>282</sup>

## Recommendation 8: Limiting Voucher Reductions to Four Reasons

The standard for voucher review in Recommendation 8a<sup>283</sup> has been incorporated in the *Guide to Judiciary Policy*, Vol. 7A, which also details costs that are or are not compensable under the CJA, consistent with Recommendation 8b.<sup>284</sup> At the end of FY 2021, thirty district courts (32%) had adopted this standard in their CJA plans, an increase over no plans in 2017.<sup>285</sup> Appeals court plans do not include these specific provisions about voucher review.<sup>286</sup>

In January 2020, functionality was added to eVoucher that allows reviewers to select a reason for reducing a voucher (from the four reasons specified in Recommendation 8a) and provides an open-ended explanation box for any reason(s) selected. See Figure 2. In February 2020, selecting a reason for reduction became mandatory,<sup>287</sup> thus addressing the concern identified in the Cardone Report that reductions were made without explanation to the attorney.<sup>288</sup>

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282. By statute, when approving district court CJA plans, circuits are required to supplement information about appellate representations. See 18 U.S.C. § 3006A(a)(3), “Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal.” Most court of appeals CJA plans did not detail a process for reviewing either district court excess or appellate appointment vouchers. See Appendix D: Circuit Court CJA Plan Analysis.

283. The analysis in this section focuses on part a of Recommendation 8. The DSC also released a video about the new standard of review (see “[What the Committee to Review the Criminal Justice Act Program Wants You to Know about the Criminal Justice Act](#)”). See, DIR20-021, Memorandum, James C. Duff, Director, Administrative Office of the United States Courts and Hon. Raymond J. Lohier, Jr., Chair, Judicial Conference Committee on Defender Services, re: Informational Video on CJA Voucher review standard (INFORMATION), Feb. 10, 2020 available at: <https://jnet.ao.dcn/sites/default/files/pdf/DIR20-021.pdf>.

284. See <https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses>.

285. See Appendix C: District Court CJA Plan Analysis, Table 12: Voucher Reduction.

286. See Appendix D: Circuit Court CJA Plan Analysis.

287. See DIR20-021, Memorandum, James C. Duff, Director, Administrative Office of the United States Courts and Hon. Raymond J. Lohier, Jr., Chair, Judicial Conference Committee on Defender Services, re: Informational Video on CJA Voucher review standard (INFORMATION), Feb. 10, 2020, available at: <https://jnet.ao.dcn/sites/default/files/pdf/DIR20-021.pdf>.

288. Cardone Report, pp. 118–120.



Figure 2. Voucher Reduction Module in eVoucher.

Recommendation 8a has therefore been implemented.

Next, we use analysis of data collected from the eVoucher online payment system, responses to our 2021 survey of CJA panel attorneys,<sup>289</sup> and information from our interviews with court stakeholders,<sup>290</sup> to assess the impact of these changes on addressing the Cardone-identified issues of inappropriate voucher reduction and not providing attorneys with information about voucher review decisions.<sup>291</sup>

### *eVoucher Data*

At the time the Cardone Report was released, data from eVoucher was not nationally available.<sup>292</sup> As of the end of FY 2022, six years of data from eVoucher are now available for all districts and appeals courts (106 total appointing authorities).<sup>293</sup> The following section analyzes this data to determine the rate at which vouchers are reduced, the factors that may influence voucher payment reductions, and the effect of adopting Recommendation 8a on payment reductions across courts and reviewers. The purpose of this section is not to suggest a rate of reduction is or is not appropriate but instead to describe whether voucher reduction practices vary between courts and if the Cardone Report recommendations changed reduction practices within courts.

This analysis is based on the 391,516 appointments that had a final voucher payment on or after October 1, 2016, the start of fiscal year 2017. It compares the sum of claims on all vouchers associated with each appointment (including any that may have been submitted before fiscal year 2017) to the total

289. See Technical Appendix 4: Survey of Panel Attorney Experiences with Voucher Review for more information on this data collection and Appendix F: Survey of Panel Attorney Experiences with Voucher Review for complete results.

290. See Technical Appendix 3: Project Interviews for more information on this data collection.

291. See Appendix E: eVoucher Review Data Analysis for more information on this data collection.

292. Cardone Report, p. 104. “[A]lthough the Prado Report was criticized for the lack of data supporting its recommendation to unburden judges of the responsibility for voucher review, the AO and the judiciary have not, in the intervening 24 years, collected system-wide data on the payment of vouchers. Even today, the newly deployed eVoucher system does not currently have the national reporting capabilities to provide all of the data which the program should have for its management.”

293. Both district and circuit courts have responsibilities for administering the CJA, including appointing counsel for those who cannot afford an attorney and authorizing payment to service providers and attorneys who submit vouchers. Because the courts have similar responsibilities and face similar challenges (as described here and in the Cardone Report), and because Recommendation 8 is not limited to district courts, we analyze all courts together.

amount paid to determine whether total claims for an appointment were paid in full or reduced, and how various features of the case and the process affect these payment outcomes.<sup>294</sup>

### Rate of Reduction Based on Data from eVoucher

Payment reduction is not common when analyzing the data nationally. There was no reduction in 85% (330,276) of appointments with a final payment from FY 2017 to FY 2022. The remaining 15% (58,466 appointments) were split evenly between those where the reduction was for \$100 or less (8% of all appointments) or for more than \$100 (7% of all appointments, ranging up to \$176,695).

However, as described in the Cardone Report, administration of the CJA, including voucher review, varies by court and reviewer. Thus, we explore variation in reduction practices by court and reviewer below.

### Summary of Court Level Appointment Data from eVoucher

As shown in Table 2, courts differ in the number of appointments they review, the average amounts of payments associated with those appointments, and the frequency and size of reductions made to those appointments. The number of non-capital appointment claims reviewed over this six-year period ranged across courts from 149 to tens of thousands; the average amount of total claims ranged from just over \$1,000 to nearly \$20,000, and the percentage of appointments with reduced payments ranged from 0.2% to 71.6%. Capital appointments show additional variation, with fourteen courts (13%) having no capital appointments while others had hundreds, and average claims ranged from just over \$1,000 to \$1.25 million. This variability means that the practices in some courts have more influence than others on the overall numbers and emphasizes the importance of controlling for these differences in a statistical analysis to separate out the effects of other features.<sup>295</sup>

Table 2. eVoucher Data Summary, by Court.

	Non-Capital Appointments					Capital Appointments				
	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.
Court 1	2391	352	14.7%	\$11638.83	-\$44.19	93	53	57%	\$116392.58	-\$612.71
Court 2	4112	1018	24.8%	\$15059.47	-\$81.79	60	38	63.3%	\$98260.72	-\$312.43
Court 3	43139	920	2.1%	\$21677.77	-\$5.53	7	2	28.6%	\$178766.59	\$914.00
Court 4	3173	160	5%	\$10370.46	-\$21.30	15	12	80%	\$95348.66	-\$1486.73
Court 5	2311	77	3.3%	\$6088.60	-\$15.85	78	11	14.1%	\$65288.62	-\$13.29
Court 6	3934	360	9.2%	\$6329.35	-\$94.41	9	0	0%	\$28460.40	\$0.00
Court 7	975	30	3.1%	\$9745.26	-\$54.85	3	0	0%	\$97958.15	\$0.00
Court 8	20563	2123	10.3%	\$2125.55	-\$42.13	72	27	37.5%	\$65354.69	-\$2859.42
Court 9	5086	943	18.5%	\$6641.27	-\$218.97	36	20	55.6%	\$30951.55	-\$4658.44

294. Appendix E: eVoucher Review Data Analysis discusses the frequency with which these reasons are given for voucher reductions and analyzes the accompanying notes visible to CJA panel attorneys to explain the decision. That analysis is based on the 21,675 vouchers reduced since February 2020, when the eVoucher system began requiring reviewers to explain voucher reductions, rather than the 58,466 appointments (including multiple vouchers) in which reductions were made since 2017.

295. See Appendix E: eVoucher Review Data Analysis for details about the analysis using statistical controls.

	Non-Capital Appointments					Capital Appointments				
	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.
Court 10	2291	231	10.1%	\$6522.45	-\$52.57	28	4	14.3%	\$135718.06	\$109.68
Court 11	63100*	5585	8.9%	\$1008.20*	-\$29.90	14	6	42.9%	\$53451.99	-\$3659.50
Court 12	1368	485	35.5%	\$14409.75	-\$175.30	18	13	72.2%	\$296113.58	-\$557.39
Court 13	2576	134	5.2%	\$5877.53	-\$31.45	3	1	33.3%	\$594981.35	-\$1120.33
Court 14	1857	539	29%	\$8778.49	-\$80.27	10	5	50%	\$408427.70	-\$1105.10
Court 15	1986	170	8.6%	\$12248.50	-\$67.48	18	2	11.1%	\$60037.71	-\$500.33
Court 16	2058	478	23.2%	\$7790.39	-\$195.48	38	12	31.6%	\$100862.74	-\$7357.58
Court 17	1536	150	9.8%	\$4671.24	-\$88.46	3	3	100%	\$136899.67	-\$674.33
Court 18	1651	302	18.3%	\$10344.18	-\$188.43	42	13	31%	\$72567.99	-\$1135.21
Court 19	8602	291	3.4%	\$12141.14	\$28.65*	402*	35	8.7%	\$52973.22	-\$48.15
Court 20	2853	235	8.2%	\$12803.81	-\$35.65	133	15	11.3%	\$68937.65	-\$109.08
Court 21	933	143	15.3%	\$5311.69	-\$205.71	13	8	61.5%	\$48780.18	-\$5144.31
Court 22	462	18	3.9%	\$5554.53	-\$53.81	1	0	0%	\$19577.80	\$0.00
Court 23	2332	200	8.6%	\$6454.10	-\$86.64	11	2	18.2%	\$123204.83	-\$215.91
Court 24	1453	13	0.9%	\$7528.19	-\$1.39	17	1	5.9%	\$25407.37	-\$8.29
Court 25	3672	251	6.8%	\$8870.33	-\$134.85	33	7	21.2%	\$125924.32	-\$257.79
Court 26	949	329	34.7%	\$6550.46	-\$50.24	2	0	0%	\$360991.29	\$0.00
Court 27	869	54	6.2%	\$6556.01	-\$16.58	5	2	40%	\$120246.02	-\$142.80
Court 28	1877	258	13.7%	\$5418.67	-\$402.09	25	10	40%	\$45050.51	-\$11849.88
Court 29	245	17	6.9%	\$12536.25	-\$5.07	2	0	0%	\$53258.38	\$0.00
Court 30	2112	275	13%	\$13010.58	-\$70.16	6	0	0%	\$47702.71	\$0.00
Court 31	4644	564	12.1%	\$5860.37	-\$61.77	115	28	24.3%	\$49377.46	-\$8.70
Court 32	1600	332	20.8%	\$10080.50	\$24.06	16	5	31.2%	\$52024.22	\$2991.12*
Court 33	1167	4	0.3%	\$6544.48	-\$15.61	4	0	0%	\$11276.12	\$0.00
Court 34	3191	722	22.6%	\$4656.48	-\$139.55	7	3	42.9%	\$104067.85	-\$2105.57
Court 35	1180	48	4.1%	\$9667.81	-\$62.50	5	3	60%	\$1044417.52	-\$1781.00
Court 36	1072	289	27%	\$11910.08	-\$491.86	5	4	80%	\$235950.06	-\$1653.40
Court 37	547	16	2.9%	\$9357.56	-\$25.99	7	1	14.3%	\$71007.08	-\$513.86
Court 38	1795	20	1.1%	\$7966.81	-\$43.78	12	1	8.3%	\$22917.54	-\$2614.67
Court 39	1433	16	1.1%	\$7425.19	-\$4.96	9	1	11.1%	\$55324.12	-\$489.89
Court 40	1759	384	21.8%	\$6804.89	-\$61.73	0				
Court 41	1671	211	12.6%	\$8943.96	-\$40.47	1	1	100%	\$606961.72	-\$232.00
Court 42	594	93	15.7%	\$8645.46	-\$1054.58*	9	0	0%	\$32340.59	\$0.00
Court 43	4289	3073	71.6%*	\$7023.42	-\$246.17	144	112*	77.8%	\$54554.21	-\$712.04
Court 44	3841	832	21.7%	\$10282.53	-\$150.17	20	5	25%	\$75868.60	-\$280.20
Court 45	796	146	18.3%	\$6490.49	-\$84.85	3	0	0%	\$20350.20	\$0.00

	Non-Capital Appointments					Capital Appointments				
	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.
Court 46	3617	890	24.6%	\$7764.12	-\$213.66	70	21	30%	\$73651.42	-\$510.80
Court 47	1825	89	4.9%	\$10599.83	-\$102.31	0				
Court 48	2398	643	26.8%	\$6210.95	-\$108.11	69	23	33.3%	\$29362.93	-\$89.19
Court 49	2581	461	17.9%	\$7345.50	-\$162.85	17	6	35.3%	\$88373.04	-\$1299.88
Court 50	1001	237	23.7%	\$9517.85	-\$153.87	42	19	45.2%	\$129417.90	-\$304.45
Court 51	2585	360	13.9%	\$9689.96	-\$129.34	119	19	16%	\$92076.26	-\$453.80
Court 52	2342	516	22%	\$18010.27*	-\$126.93	22	16	72.7%	\$209264.73	-\$1974.82
Court 53	1677	86	5.1%	\$9138.79	-\$77.21	1	1	100%	\$1566.40	-\$1050.00
Court 54	1990	101	5.1%	\$10954.09	-\$40.57	37	4	10.8%	\$158615.65	-\$249.49
Court 55	3030	162	5.3%	\$7888.28	-\$39.18	3	1	33.3%	\$66441.36	-\$1559.67
Court 56	823	312	37.9%	\$10080.84	-\$175.24	58	35	60.3%	\$93693.19	-\$3649.33
Court 57	619	52	8.4%	\$6879.33	-\$56.91	2	0	0%	\$65273.75	\$0.00
Court 58	1034	196	19%	\$5574.35	-\$32.89	8	2	25%	\$60871.85	-\$6329.38
Court 59	690	93	13.5%	\$8050.46	-\$249.28	11	0	0%	\$52408.29	\$849.91
Court 60	3276	79	2.4%	\$4490.62	-\$46.69	1	0	0%	\$37060.50	\$0.00
Court 61	2894	9	0.3%	\$3797.44	-\$5.64	12	0	0%	\$35106.98	\$78.17
Court 62	2441	246	10.1%	\$8820.65	-\$43.37	4	3	75%	\$68734.39	-\$341.25
Court 63	1226	110	9%	\$9457.06	-\$32.63	8	2	25%	\$104366.01	-\$456.50
Court 64	1598	172	10.8%	\$6101.30	-\$130.47	0				
Court 65	778	62	8%	\$5631.06	-\$64.73	0				
Court 66	206	25	12.1%	\$10911.45	-\$62.52	0				
Court 67	1807	185	10.2%	\$8135.17	-\$142.07	0				
Court 68	2983	160	5.4%	\$10716.24	-\$105.70	62	1	1.6%	\$109278.86	-\$0.74
Court 69	1924	111	5.8%	\$8424.87	-\$73.74	0				
Court 70	3118	301	9.7%	\$5210.72	-\$170.29	91	19	20.9%	\$17372.39	-\$194.32
Court 71	1737	21	1.2%	\$12138.22	-\$71.86	48	5	10.4%	\$79546.71	-\$8.35
Court 72	1366	168	12.3%	\$6422.13	-\$106.73	4	0	0%	\$113838.67	\$0.00
Court 73	3658	1920	52.5%	\$4942.73	-\$350.30	113	58	51.3%	\$20942.20	-\$1115.39
Court 74	1466	92	6.3%	\$11006.05	-\$142.88	15	3	20%	\$63402.17	-\$1266.47
Court 75	2373	39	1.6%	\$4479.66	-\$7.79	23	0	0%	\$60457.43	\$0.00
Court 76	3064	255	8.3%	\$5185.58	-\$75.39	48	11	22.9%	\$81659.12	-\$163.71
Court 77	3323	193	5.8%	\$7488.57	-\$59.96	6	0	0%	\$11304.59	\$0.00
Court 78	1037	107	10.3%	\$4026.54	-\$195.90	0				
Court 79	1528	88	5.8%	\$5411.62	-\$89.21	2	0	0%	\$22640.42	\$0.00
Court 80	149*	11	7.4%	\$10204.07	-\$226.72	0				
Court 81	386	37	9.6%	\$6122.79	-\$78.69	0				

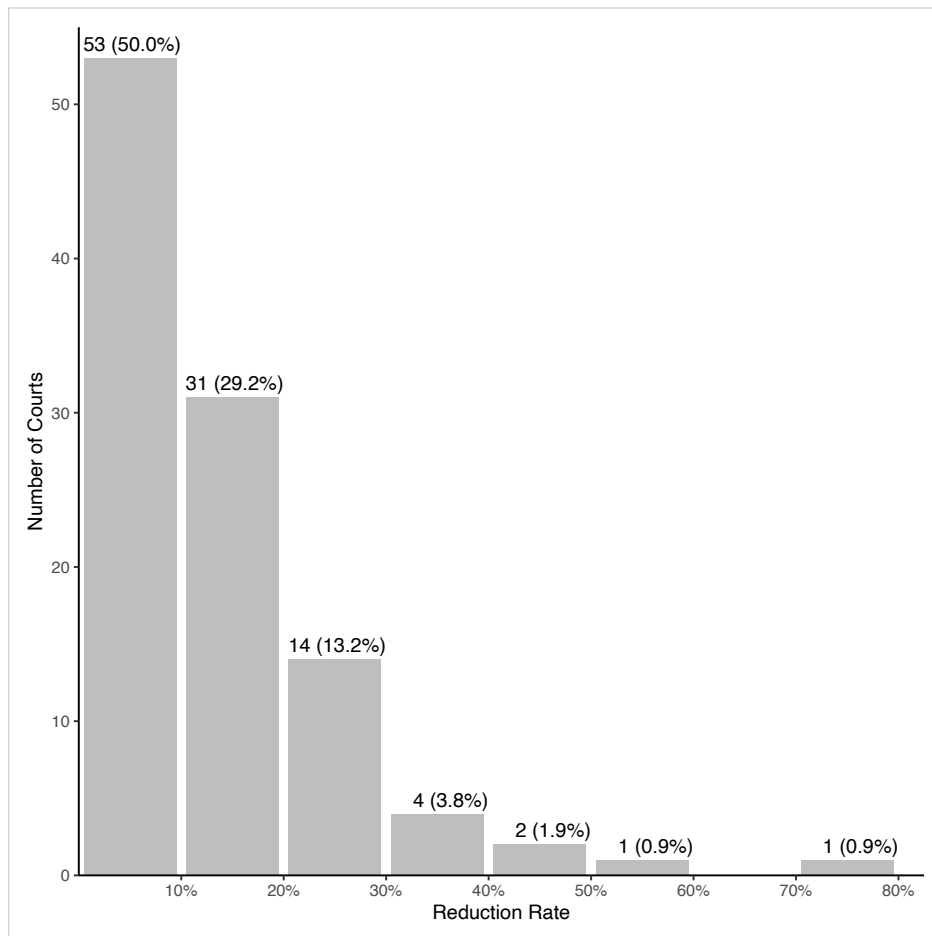
	Non-Capital Appointments					Capital Appointments				
	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.	#	# Red.	% Red.	Avg. Claim	Avg. Pay Diff.
Court 82	1188	56	4.7%	\$13771.83	-\$17.32	0				
Court 83	2155	901	41.8%	\$9348.30	-\$325.67	60	10	16.7%	\$41877.61	-\$278.27
Court 84	1018	99	9.7%	\$7495.05	-\$12.90	0				
Court 85	1407	71	5%	\$4632.10	-\$70.23	3	0	0%	\$21109.58	\$0.00
Court 86	1431	18	1.3%	\$5146.46	-\$1.65	7	0	0%	\$24127.36	\$0.00
Court 87	588	64	10.9%	\$8828.37	-\$118.52	1	0	0%	\$1076.63*	\$0.00
Court 88	726	117	16.1%	\$7262.89	-\$383.42	17	10	58.8%	\$38947.52	-\$3258.29
Court 89	1599	104	6.5%	\$8004.75	-\$101.97	5	1	20%	\$50587.76	\$85.00
Court 90	3554	722	20.3%	\$12568.32	-\$91.27	46	5	10.9%	\$54033.24	-\$142.80
Court 91	17592	2193	12.5%	\$2166.39	-\$12.37	46	37	80.4%	\$227722.16	-\$1081.30
Court 92	487	156	32%	\$7294.87	-\$198.48	12	4	33.3%	\$31540.82	-\$103.08
Court 93	4289	271	6.3%	\$5533.76	-\$22.93	8	2	25%	\$67029.27	-\$517.25
Court 94	1803	219	12.1%	\$4354.30	-\$57.54	1	0	0%	\$21097.28	\$0.00
Court 95	1038	63	6.1%	\$7778.70	-\$33.38	10	1	10%	\$142721.63	-\$32.50
Court 96	331	36	10.9%	\$9456.28	-\$84.27	7	2	28.6%	\$58738.80	-\$1286.57
Court 97	2687	439	16.3%	\$12217.80	-\$203.75	2	2	100%	\$1251245.61*	-\$24490.50*
Court 98	45726	20341*	44.5%	\$2092.18	-\$50.03	27	25	92.6%	\$94284.94	-\$1310.22
Court 99	2436	85	3.5%	\$13329.40	\$24.43	3	1	33.3%	\$73869.81	-\$33.33
Court 100	1982	155	7.8%	\$10244.63	-\$62.37	3	0	0%	\$32505.53	\$73.67
Court 101	2376	210	8.8%	\$12834.41	-\$43.37	26	10	38.5%	\$261003.42	-\$458.50
Court 102	2251	349	15.5%	\$6531.66	-\$488.98	31	2	6.5%	\$37231.41	-\$156.90
Court 103	1415	146	10.3%	\$8854.00	-\$54.89	0				
Court 104	827	131	15.8%	\$10877.82	-\$33.91	2	1	50%	\$291175.84	-\$215.00
Court 105	178	38	21.3%	\$14634.93	\$1.90	7	3	42.9%	\$24869.54	\$2349.57
Court 106	1063	2*	0.2%*	\$5498.52	-\$0.02	0				
<b>Minimum (All Courts)</b>	149	2	0.2%	\$1008.2	-\$1054.58	0	0	0.0%	\$1076.63	-\$24490.50
<b>Maximum (All Courts)</b>	63100	20341	71.6%	\$18010.27	\$28.65	402	112	100%	\$1251245.61	\$2991.12
<b>National Summary</b>	388742	58466	15.0%	\$5193.59	-\$67.78	2774	831	30.0%	\$78930.0	-\$816.01

Note: In each fiscal year, 1% of appointments or fewer saw payments greater than claimed amounts, the result of error correction and early efforts at using a payment system still in development. For completeness, we include those appointments in our analysis as "not reduced." Minimum and maximum amounts in each column are denoted in the table with an asterisk, except values of 0 and 100%, and are found in multiple courts. The average pay differential is the mean difference between the claimed amount and the paid amount for each court. The average claim is also calculated using the mean. We do not identify individual courts by name, instead we assigned randomized numbers to each of the 106 appointing authorities. The assigned numbers remain constant throughout the analysis.

### Variation in Patterns of Reduction

Payment reduction is not common in most courts. As Figure 3 shows, half of appointing authorities (fifty-three district and circuit courts) reduced payment in 10% or fewer of their appointments, and 92% (ninety-eight district and circuit courts) reduced payment in 30% or fewer of their appointments. As discussed below, some of those interviewed and surveyed for this evaluation said that payment reductions were not an issue in their districts, and these numbers support those assertions. However, eight courts reduced payment in more than 30% of appointments, with two of these courts reducing payment in 50% or more of appointments. Thus, as the Cardone Report found, some courts reduce payment in CJA appointments more frequently than others.

Figure 3. Number of Courts by Percentage of Appointments with Payment Reductions (Reduction Rate), FY 2017–2022.



Note: Each bar represents the number of courts that fall between the percentages listed on the horizontal axis.

As Figure 4 shows, courts also differ in how their reduction rates have varied over time. Each panel in Figure 4 displays the proportion of appointments reduced in each year from FY 2017 to FY 2022 in each court (gray points). The size of the points indicates the total number of appointments the court reviewed in that year. The vertical red line represents the date on which the court adopted its most recent CJA plan, if the court adopted a new CJA plan during the time period under study. The area shaded in gray represents FY 2019 to FY 2022, the period after JCUS adopted Recommendation 8.

To characterize each court's reduction rate trend, we draw a (blue) line through each court's data points.<sup>296</sup> Most courts' lines are flat, indicating that their reduction rates did not change over time, or did not change consistently in one direction (eighty courts, 75% of appointing authorities).<sup>297</sup> Of the twenty-six courts that did see change, the reduction rate increased in eight (8% of all courts) and decreased in eighteen (17% of all courts). The variation in court reduction trends provides evidence of the Cardone Report's observation that "[o]utcomes vary widely between circuits [and] between districts."<sup>298</sup>

The adoption of Recommendation 8 likely did not have a court-wide impact on review practices in the eighty-eight courts (83%) in which the proportion of appointments with payment reductions increased or stayed constant since FY 2017; those changes were likely continuation of preexisting trends.<sup>299</sup> The reduction rate was at or below the national average in sixty-eight courts (64%) prior to the adoption of Recommendation 8 in September 2018, and below average in 38 (36%).<sup>300</sup>

- In sixty-four courts, the reduction rate was below the national average prior to the adoption of Recommendation 8, and the reduction rate stayed below the national average after Recommendation 8's adoption.
- In twelve courts, the reduction rate decreased from above average before Recommendation 8's adoption to below average after.
- In twenty-six courts, the reduction rate was above the national average prior to Recommendation 8's adoption and remained above average after its adoption.
- In four courts, the reduction rate increased from below average before Recommendation 8's adoption to above average after.

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296. The line is drawn by estimating a linear regression model. Drawing a straight line across years is a better description of some courts' data than others. However, it illustrates that the trends vary.

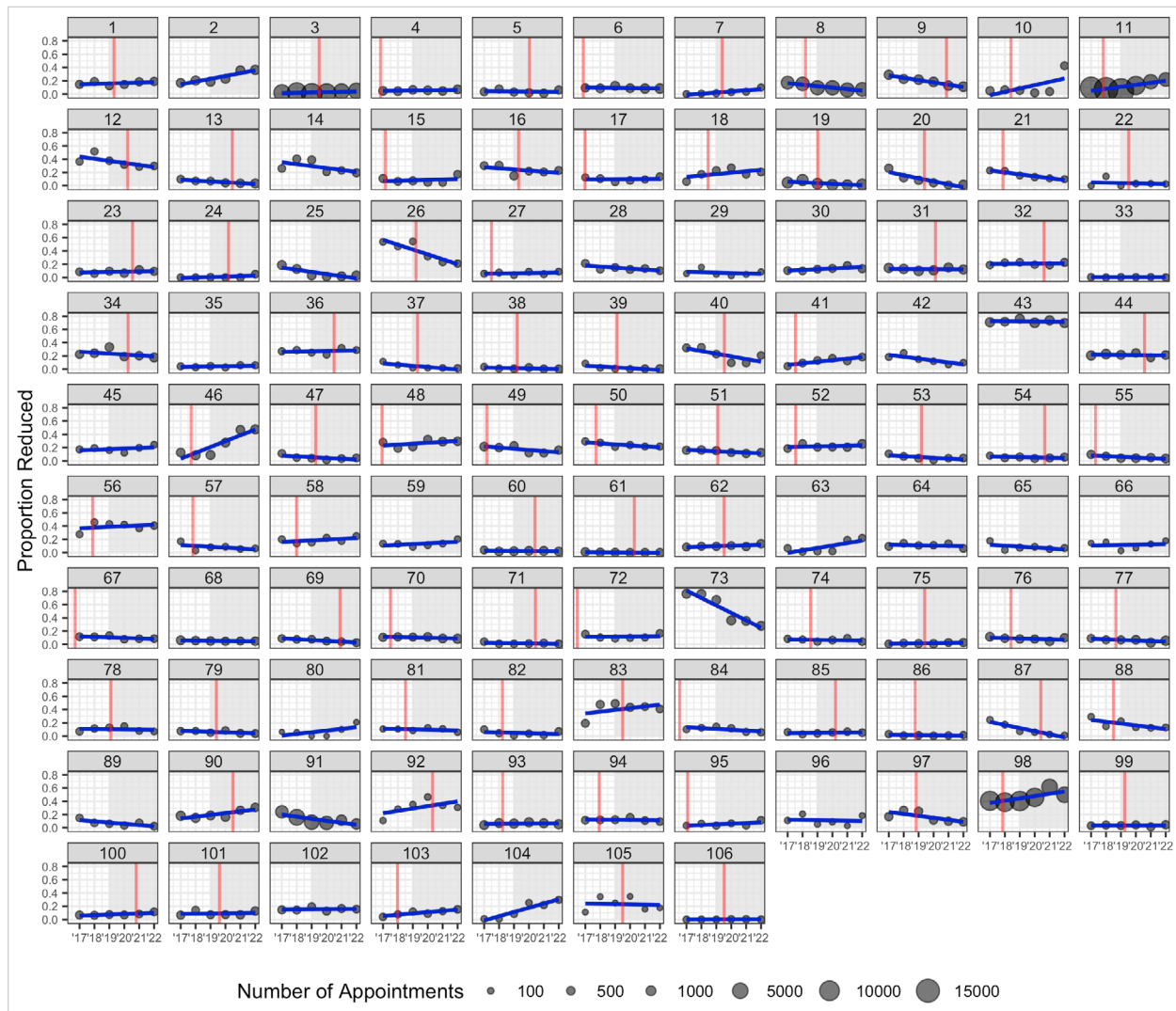
297. The slope of the trend line was not statistically distinguishable from 0 in eighty courts (75% of appointing authorities).

298. Cardone Report, p. 95.

299. Although the JCUS adopted Recommendation 8 in 2019, examining trends in reduction rates since 2017 allows us to consider whether post-adoption trends were simply a continuation of pre-adoption trends.

300. See Appendix E: eVoucher Review Data Analysis.

Figure 4. Proportion of Appointments Reduced, by Court and Fiscal Year.



The blue lines in Figure 4 use FY 2017 as the beginning of each court’s trend in reduction rates. However, considering certain subsets of the time period under study may also be informative. First, if the adoption of Recommendation 8 in September 2018 affected rates of payment reduction across courts, all courts would have lower rates of reduction in FY 2022 than they did in FY 2017, assuming at least some noncompliant reductions were being made in each district in FY 2017. We do not observe such a pattern in Figure 4.

Second, we might expect to see changes in a court’s payment reduction trend after it adopted a new plan (indicated by the vertical red lines in Figure 4), especially if the new plan explicitly adopted the “reasons” standard in Recommendation 8 (as the new plans of 32% of the district courts did). However, there is no apparent trend across courts in reduction rates after the adoption of new CJA plans. Of the thirty district courts that incorporated Recommendation 8’s “reasons” standard in their CJA plans, twenty-two districts (73%) had reduction rates of 15% or below before updating their plans, meaning many of these districts already reduced payment relatively infrequently.<sup>301</sup>

301. Court of appeals plans do not include specific provisions about voucher review.



Finally, we also examined whether these trends changed after the February 2020 update to eVoucher that required those reviewing vouchers to select one of the four reasons specified in Recommendation 8 when making a reduction. This intervention also did not have a consistent effect across courts. The data do not support the expectation in the Cardone Report that a national standard would reduce any inconsistent voucher reduction practices.<sup>302</sup>

### Reduction Rates by Individual Reviewer

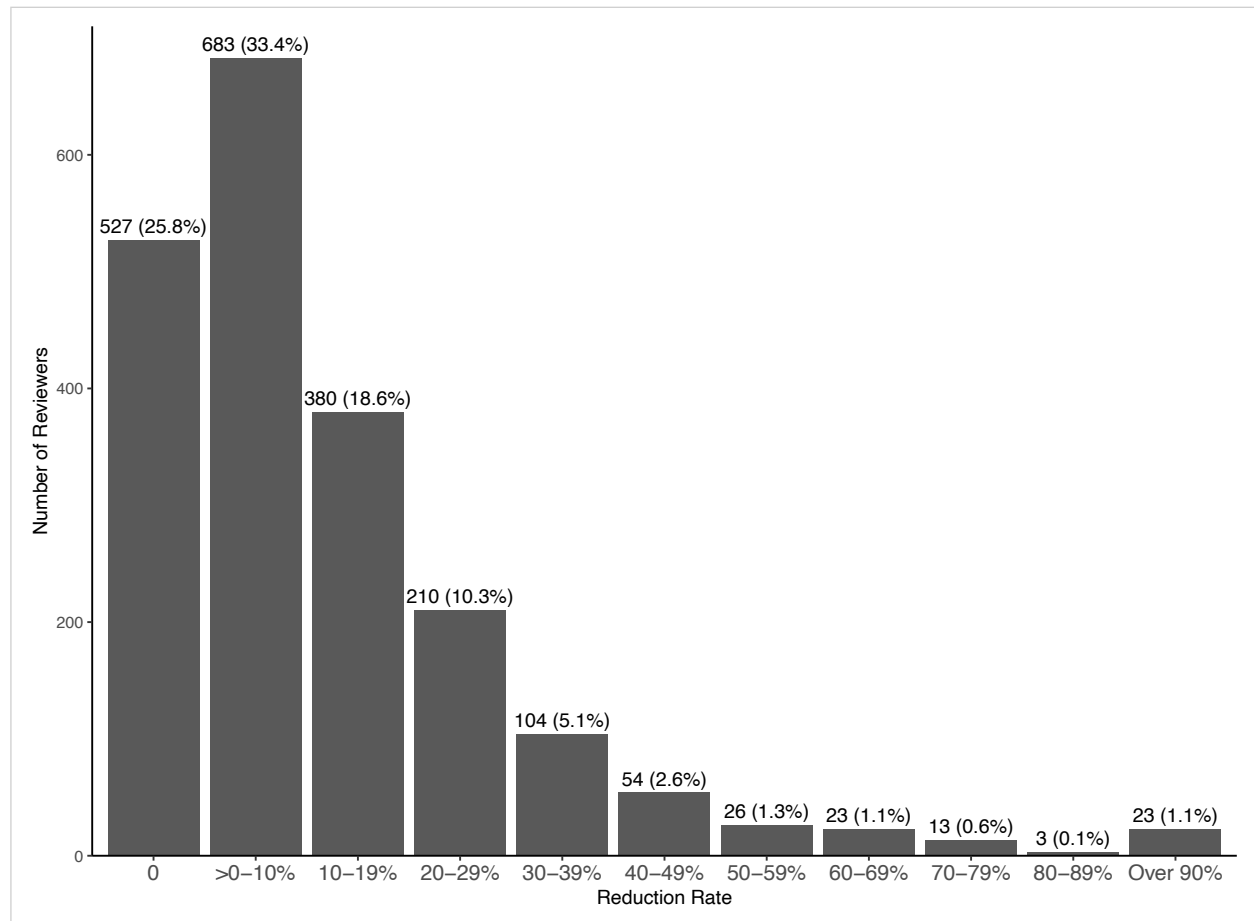
Reduction rates also vary by reviewer,<sup>303</sup> both across and within courts. Across all courts from FY 2017 to FY 2022, 2,046 individuals reviewed payment in CJA appointments. As Figure 5 shows, about one-quarter of these reviewers never reduced payment in an appointment (leftmost bar labeled “0”). One-third reduced payment in 10% or fewer appointments. Eighty-eight percent of reviewers either never reduced payment or reduced payment in less than 30% of the appointments they reviewed.

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302. Cardone Report, p. xxxvii, “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.”

303. Our analyses cannot distinguish reductions made in eVoucher by court staff in the name of a judge from those made by a judge, so both types of reductions are attributed to the judge. As reported elsewhere, in some courts, staff (with the permission of the judge) log in as the judge to review vouchers. It is unclear how much discretion is exercised by the reviewer acting on behalf of the judge and how reliably their decisions reflect the judge’s views. Though presumably the judge delegating this authority to staff agrees with staff decisions, we cannot conclude this with certainty. Future modifications of eVoucher could address this lack of clarity.

Figure 5. Number of Reviewers by Reduction Rate Category.



Note: The number of reviewers in each category is displayed above each bar; the percentage is in parentheses. Reduction rates are calculated using all appointments reviewed by an individual from FY 2017 to FY 2022.

In terms of the type of individuals reviewing payment requests at the first level of review (the appointing court), data from eVoucher show that Article III judges, magistrate judges, and court staff members participated, with the use of magistrate judges and staff varying by court. From FY 2017 to FY 2022, 1,330 Article III judges reviewed 63% of final payments in appointments in the dataset,<sup>304</sup> 671 magistrate judges reviewed 22%, and forty-five staff members reviewed the remaining 15%. Staff reviewed all appointments in six courts.

When considering differences between reduction rates by type of reviewer, notably about half (49%) of magistrate judge reviewers never reduced payment for an appointment, compared to 15% of Article III judge reviewers and 16% of staff reviewers. The highest reduction rate among staff reviewers was 52%, whereas reduction rates for a small number of individual Article III and magistrate judges reached over 90%.

304. Judges serving in U.S. territories are included as Article III judges. Reduction proportions for judges who have served as visiting judges are calculated separately for their home courts and the courts they visited. In other words, in Figure 6, visiting judges who have participated in payment review are included in a court's plot with the court's own Article III judges.

In general, Article III judges and staff reduced payment at similar rates (average reduction rates of 15% and 16%, respectively), while magistrate judges reduced payment at lower rates (average of 8%).<sup>305</sup> However, as Table 3 shows, magistrate judges reviewed appointments involving smaller claim amounts on average. Whereas the median claim total for appointments reviewed by magistrate judges was \$148, the median claim total for appointments reviewed by staff was over ten times higher at \$1,588.90. The median claim total for Article III judges was over twice as high as the staff median at \$3,458.27.

**Table 3.** Average and Maximum Claim Totals by Type of Reviewer.

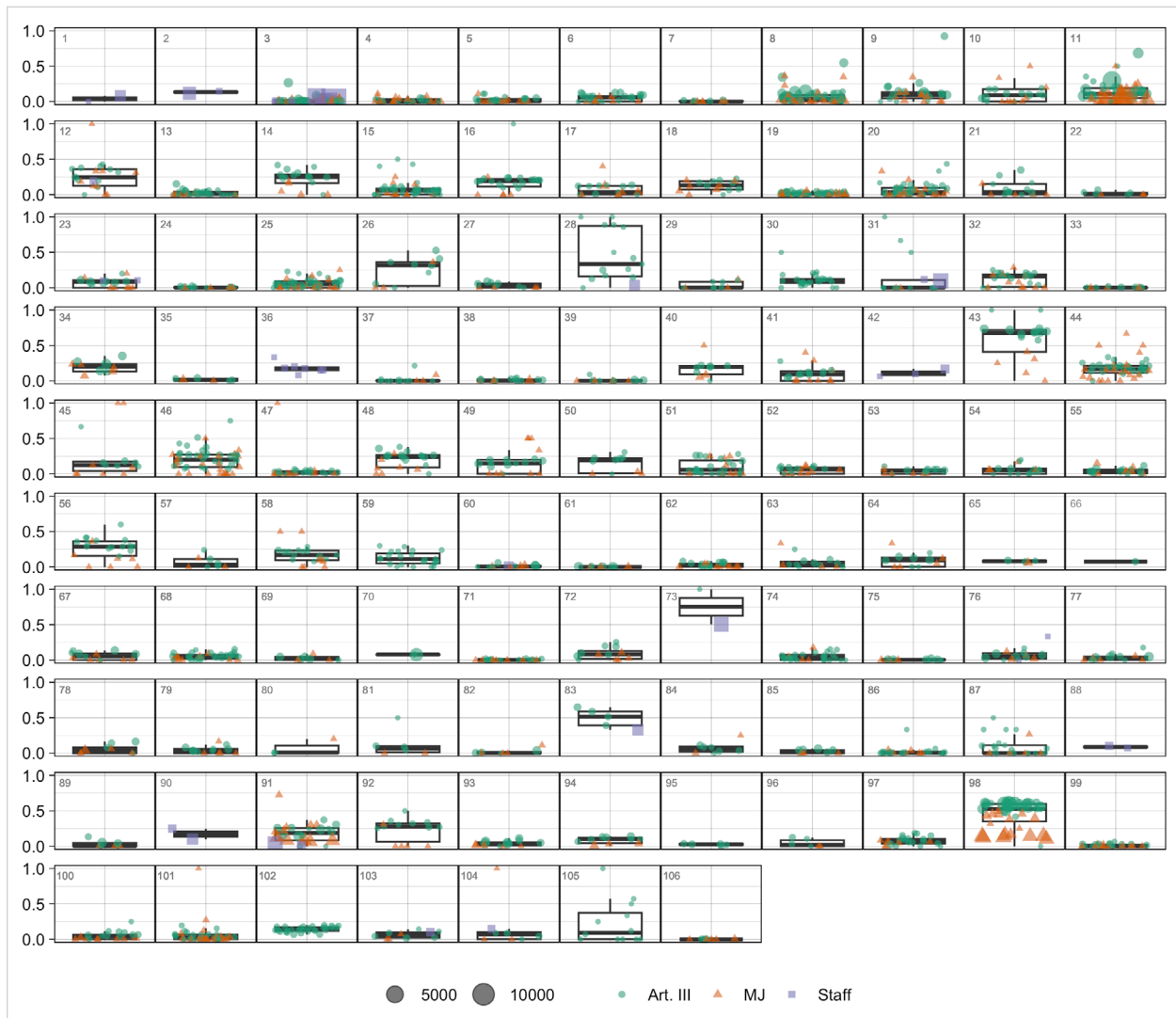
Reviewer	Mean	Std. Dev.	Median	Maximum
Article III judge	\$7,516.98	\$22,745.73	\$3,458.27	\$3,724,741.50
Magistrate judge	\$844.81	\$5,253.95	\$148.00	\$410,006.10
Court staff	\$5,174.88	\$15,511.97	\$1,588.90	\$925,929.90

Figure 6 illustrates the variation in individual reviewer reduction rates by appointing court (non-capital appointments only). Each point represents a reviewer, sized by the total number of appointments reviewed from FY 2017 to FY 2022. The green dots represent Article III judges, the orange triangles represent magistrate judges, and the purple squares represent staff. The boxplots summarize the variation among reviewers in the same court (taller boxplots indicate more variation). The solid line within the box shows the median proportion of appointments with reductions.

The extent of variation in reduction rates among reviewers also differs across courts. In some courts, most or all reviewers reduce payment at similar rates (indicated by the clustering of points in one area of the graph and a very compact boxplot that resembles a single line - see courts 4 through 7 in Figure 6). In other courts, reduction rates vary among reviewers to a greater extent, as indicated by the spread of points and taller boxplots (see courts 28, 43, or 98).

305. See Appendix E: eVoucher Review Data Analysis for further details on reduction rates by reviewer type.

Figure 6. Proportion of Non-Capital Appointments Reduced by Individual Reviewers Within Court.



Note: Appointments with excess compensation review are excluded from the figure. Courts are reported anonymously to avoid potentially identifying information in small courts.

### Factors Affecting Payment Reduction

In addition to variation by appointing court and reviewer, the eVoucher data allows us to examine other factors described in the Cardone Report that may influence whether payment in an appointment is reduced. These factors include claim size, claim type, complexity of the appointment, features of the review process, statutory limits, and features of the district’s CJA plan, including adoption of the four reasons from Recommendation 8.<sup>306</sup> Full results are available in Appendix E: eVoucher Review Data Analysis, and two examples are discussed below.

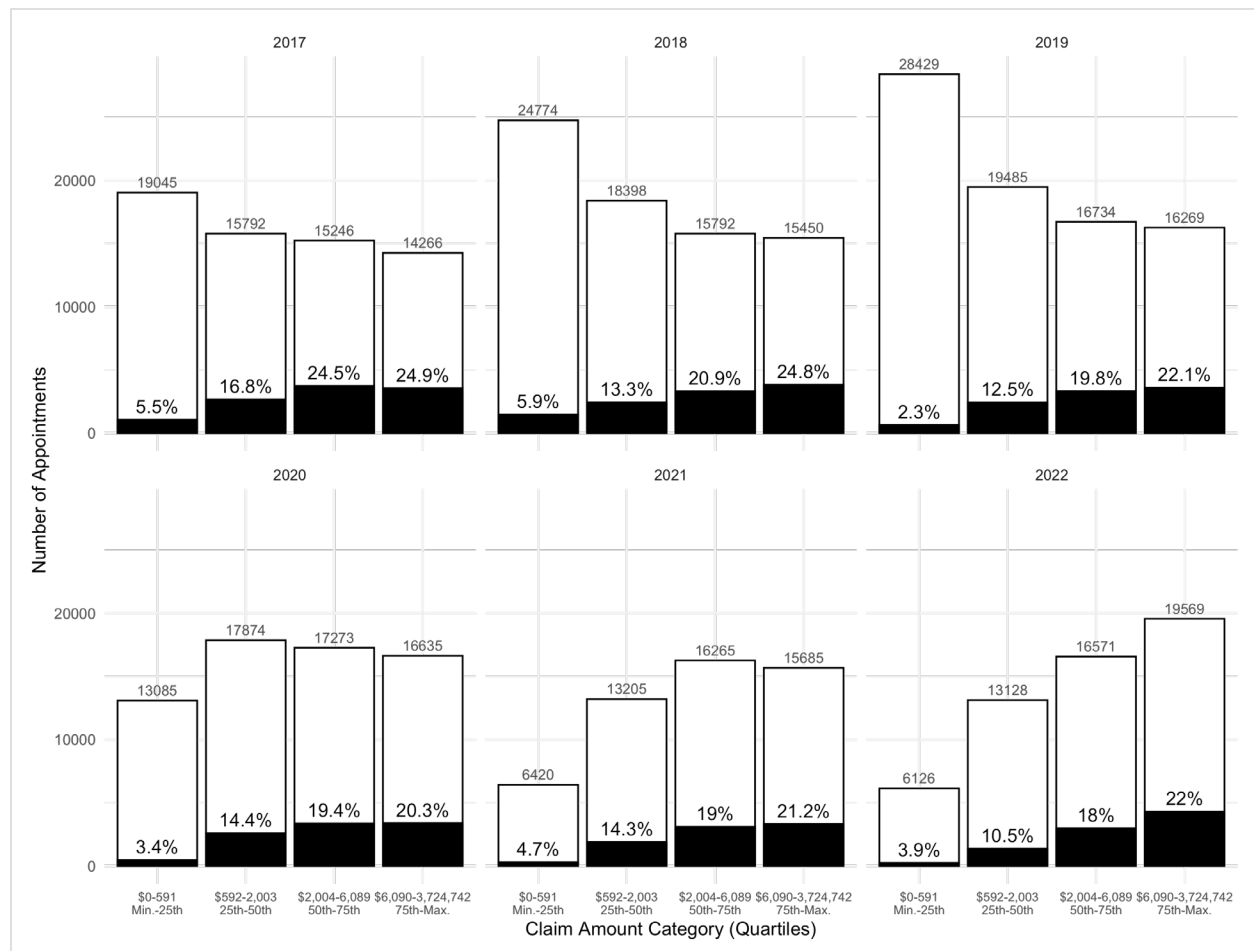
Across all district courts and years, 8% of appointments were reduced when court CJA plans incorporated the four-reasons standard, while 15% of appointments were reduced when court plans did not incorporate this standard.

306. Appendix E: eVoucher Review Data Analysis discusses the frequency with which these reasons are given for voucher reductions and analyzes the accompanying notes visible to CJA panel attorneys to explain the decision.

Controlling for all other factors (listed above) in a regression analysis, specifying that payment reductions should be limited to Recommendation 8’s four reasons decreases the odds that a payment will be reduced by 24% to 26%.<sup>307</sup>

The size of the claim (the total claim amount) is one example of a factor that could influence the probability of a reviewer reducing payment in an appointment. As Figure 7 illustrates, in every year from FY 2017 to FY 2022, reduction rates increased as claim amounts (shown in quartiles) increased. About 2% to 6% of the smallest claim vouchers were reduced, while 20% to 25% of the largest claim vouchers were reduced. Notably, from FY 2017 to FY 2019, smaller claims were more numerous. From FY 2020 to FY 2022, appointments were fewer, and larger claims began to outnumber smaller claims.

Figure 7. Number of Appointments and Proportion Reduced by Year and Claim Amount Category.



Note: Quartiles divide the data into categories based on total claim amount. The first bar in each graph shows the total number of appointments with claim amounts from \$0 to \$592 (the minimum claim total to the 25th percentile); the second bar: \$592 to \$2,003, the 25th to the 50th percentiles; the third bar: \$2,004 to \$6,089, the 50th to the 75th percentiles; and the fourth bar, \$6,090 to \$3,724,742, the 75th percentile to the maximum claim total. The number of appointments in each category is printed on top of each bar. The black portion of each bar indicates the percentage of appointments in the category that were reduced, with the percentage printed above the black portion.

307. By 24% in a model combining appointments across all district courts; by 26% in a model with variables controlling for individual district effects. These results are statistically significant. See Appendix E: eVoucher Review Data Analysis for more details.

## Capital Appointments

Because of the differences between capital and non-capital appointments, including the increased complexity, longer duration, and lack of statutory maximums on attorney compensation in capital litigation, we examine these appointments separately.<sup>308</sup>

There are 2,774 appointments involving capital charges in the eVoucher data, which account for less than 1% (0.7%) of all appointments.<sup>309</sup> In the aggregate, payment for appointments involving capital charges was reduced twice as often as payment for non-capital appointments (30% versus 15%, respectively; *see* Table 4). Claims in capital cases also tended to be larger than those in non-capital cases (*see* Table 2, above).

**Table 4.** Number and Percentage of Non-capital and Capital Appointments Reduced.

	Non-Capital	Capital
Paid in full	330,276 (85%)	1,943 (70%)
Reduced	58,466 (15%)	831 (30%)

The number of capital appointments varies by appointing court, as does the percentage of capital appointments that were reduced (*see* Table 2, above).

- Fourteen courts (13% of all courts) had no capital appointments with final payments between FY 2017 and FY 2022.
- Ninety-two courts had capital appointments with final payments between FY 2017 and FY 2022.<sup>310</sup>
  - Twenty-two courts never reduced payment in capital appointments.
  - Forty-eight courts reduced payments in more than 0 to 50% of capital appointments.
  - Twenty-two courts reduced payments in more than 50% of capital appointments.

When comparing capital appointments in districts that included the reasons for reduction from Recommendation 8 in their CJA plans to those in districts that did not, in the aggregate, 18% of capital appointments were reduced when the reasons were included, while 35% of capital appointments were reduced when they were not.

Figure 8 shows reduction rates by individual reviewers within courts for capital appointments. Conclusions that can be drawn from this visualization are limited due to the low numbers of capital appointments that some reviewers handle. However, we do observe variation in reviewers' reduction rates within and across courts, as demonstrated by the tall boxplots, the vertical spread of points within panels, and the varying median reduction rates (indicated by the solid line in the center of each boxplot) between panels.

308. *See* Chapter 6: Capital Representation and Appendix E: eVoucher Review Data Analysis for more information on voucher review and reduction in capital appointments.

309. Appointments were coded as "capital" if CJA voucher types 30 or 31 were used.

310. *See* Appendix E: eVoucher Review Data Analysis for more details.

Figure 8. Proportion of Capital Appointments Reduced by Individual Reviewers Within Courts.



Note: Appointments with excess compensation review are excluded from the figure. For some courts, this was all capital appointments. Courts are reported anonymously to avoid potentially identifying information in small courts.

**Survey Data**

Using the eVoucher data, we identified a sample of 11,193 panel attorneys to survey regarding a recent appointment in which they received a final payment; 4,262 responded.<sup>311</sup> The survey findings are consistent with findings based on the eVoucher data and the information about voucher reduction practices obtained in the interviews (discussed below).

311. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review and Technical Appendix 4: Survey of Panel Attorney Experiences with Voucher Review for more details on the survey results and data collection process.

## Voucher Reductions

About 15% (654) of attorneys who responded to our survey reported reductions to vouchers submitted for the sampled appointment; a rate that mirrors that found in the eVoucher data analysis nationally. Of those, over two-thirds (69%, 449) were provided advanced notice of the reduction, while just under a quarter (24%, 155) were not.<sup>312</sup> Common reasons given to attorneys for these reductions included mathematical/technical errors (11%, seventy-five) and assessments of the reasonableness of the work (15%, 101). Ten percent (sixty-six) of attorneys who had vouchers reduced by reviewers said no reason was given for the reduction.

When asked, 44% (1,878) of attorneys said the voucher review process in the appointing court had improved since FY 2017, while 40% (1,711) saw the process unchanged, and 7% (310) thought it was now worse. However, these negative responses tended to cluster in a small number of courts; in nine courts, at least 20% of the responding attorneys reported voucher review had gotten worse. By comparison, at least 60% of the responding attorneys in twenty-two other courts reported voucher review had gotten better.

## Submitting Less than the Full Costs of Litigation

Many attorneys (44%, 1,886) reported submitting vouchers for less than the full costs of the litigation in the specific representations we referenced.<sup>313</sup> The vast majority of those (86%, 1,617) reported submitting less than the full costs on their own, while 8% (146) reported being encouraged to do so by various actors.

Reasons given for submitting less than the full costs of litigation included the burdensome nature of the work required to support requests (41%, 769), attorneys seeking to avoid review by the circuit (29%, 544), and because attorneys expected voucher reductions after submission (15%, 283).

## *Interview Data*

In our interviews with 111 chief district judges (or their designees), federal defenders, and CJA district panel representatives, we asked about voucher reductions, the reasons for reductions, and district court compliance with the policy of limiting reductions to the four stated reasons, assuring respondents that their candid answers would be kept anonymous.

## Voucher Reductions

The assumption that revising court plans to incorporate the limits detailed in Recommendation 8 would then change voucher reduction practices was supported by several interviewees. One described the effect as follows: “I think when we went to eVoucher, and where we have to, if you want to change the amount—where you really have to come up with a reason on why you’re changing it—I think that really gives you pause.”<sup>314</sup>

Revising court plans may not address all concerns about inappropriate voucher cutting, as one judge described the difficulty of interpreting the reasonableness standard:

312. Fifty attorneys (8%) who reported reductions did not report whether or not they received prior notice.

313. Attorneys were asked to discuss their experiences with voucher review in a case we randomly selected from among those where final payment had been made since the start of FY 2017.

314. Interview 6.1.



Here I am a judge, and I have been a judge for [redacted] years. And so how am I to put myself in the role of that lawyer? For me to then be judging that it was clearly in excess of what was reasonably required, that's really difficult to do.<sup>315</sup>

Moreover, informal practices, such as rejecting vouchers wholesale and requiring resubmission, were identified in interviews by some district court stakeholders alongside the formal processes for voucher review<sup>316</sup> detailed in court plans. These practices make understanding the frequency of voucher reductions through eVoucher data challenging:

Some judges would say, for example, "We didn't cut any vouchers." And then we drilled into it and we found out that their custom was that they would reject vouchers wholesale. And they would force attorneys to resubmit the vouchers. Well, that's not going to show up obviously as a cut.<sup>317</sup>

Similar to the problems identified in the Cardone Report, travel expenses continued to be an area where voucher reductions persisted and practices varied by reviewer. When asked why vouchers were reduced, twenty-four percent (twenty) of interviewees mentioned travel-related issues. One interviewee stated, "There's always issues with travel [where] people submit requests that are not recognized or permissible under the *Guide*."<sup>318</sup> Another interviewee discussed an unusual practice of one reviewer in their district who would not pay for travel past a geographic boundary, even if the attorney's office was located well beyond it.<sup>319</sup>

Excessive hours billed (17.1%), client meetings (8.5%), and use of experts (8.5%) were also cited as common voucher reduction reasons.

Six interviewees (7.3%) also described a sense that vouchers for larger amounts were more likely to be reduced. This could be attributed to larger vouchers being the sum of more line items eligible for reduction or to the "sticker shock" some reviewers felt in seeing the high costs of complex litigation with which they were unfamiliar.<sup>320</sup> Some interviewees noted they were very cost-conscious and felt as if they were required to reduce larger vouchers, regardless of merit.<sup>321</sup>

It wasn't only the amount of the voucher or the type of request that interviewees felt motivated reductions; the personality or philosophy of a specific reviewer in the district was said to be the motivation for reductions as well (17.1%, fourteen). As one interviewee noted, "There are judges in some districts that they have a routine, 20% reduction, like Macy's."<sup>322</sup> Three interviewees described an overall culture of voucher cutting as a contributing factor in voucher reductions, with two of the three citing recent

315. Interview 6.1.

316. For purposes of this discussion, formal processes are those containing discrete steps that are followed for most or all submitted vouchers and are known to all participants in the process, while informal processes are potentially undocumented or unstated processes with ambiguous steps that may or may not be completed in sequence or at all. Informal processes are not inherently inappropriate and are not explicitly discouraged by the *Guide to Judiciary Policy*, but they are more difficult to evaluate for adherence to the Cardone recommendations and JCUS policy, and they can lack transparency for the panel attorneys seeking approval of their compensation requests. See *Guide to Judiciary Policy*.

317. Interview 13.1.

318. Interview 65.1.

319. Interview 35.1. Because the practice was not written down, attorneys billed for travel outside the boundary, only to see their vouchers reduced.

320. Cardone Report, p. 101.

321. Interview 66.1, "We consider that their requests are legitimate, but we are kind of safeguarding the taxpayer money, and so we're not just writing, you know, blank checks"; and Interview 19.1, "Sometimes it feels like they're trying to protect money, like it's their budget and, you know, 'Guys, it's not your budget. It does not have one bit of impact on your budget.'"

322. Interview 68.1.

changes to court plans to address the culture.<sup>323</sup> One interviewee, describing the fragile nature of the district’s culture, stated that the district no longer experienced unnecessary reductions but that “we are a few judicial appointments away from that problem being re-created.”<sup>324</sup>

As detailed elsewhere, voucher reductions continue to be at issue in a minority of district courts. Even after adopting Recommendation 8, the criteria for reduction are ambiguous, leaving considerable discretion to the reviewer to interpret whether a reduction is merited and allowing the philosophy of the reviewer to override more objective criteria. Both the room for discretion and the absence of clear criteria highlight the need for an appellate process to challenge voucher reductions.

Because most appeals court CJA plans did not detail a process for reviewing district court excess vouchers or vouchers in appellate representations,<sup>325</sup> we asked courts to describe their processes for each.<sup>326</sup> In all twelve courts, appellate court vouchers under the statutory maximum are reviewed by court of appeals staff who may not be an attorney but are supervised by attorneys. This is always at least a mathematical and technical review (removing duplicates and verifying supporting documentation and compensability). In seven of these courts, additional staff (such as a clerk of court or CBA) provide a second type of review and have delegated authority to approve non-excess appellate vouchers. In the remaining courts, the chief judge or the chief judge’s designee, such as the authoring judge for the appellate court panel, approves the final vouchers.

### Submitting Less than the Full Costs of Litigation

The Cardone Report discussed the practice of attorneys submitting vouchers for less than the full costs of litigation,<sup>327</sup> and 65% (twenty-four) of the forty-two district court interviewees who discussed this practice (39% of all district court interviewees) reported that it continued to occur. For comparison, 35% (eighteen) of interviewees who discussed the topic said it was not an issue in their district.

The most common reason for attorneys submitting less than the full cost of litigation, as identified by district court interviewees, was to avoid circuit review (33%, fourteen of forty-two). In discussing the diminishing returns on being above the cap, one interviewee noted that attorneys felt going over the case maximum was “just not worth it.”<sup>328</sup> Even when performed efficiently, another level of review will delay final approval and payment, prompting some attorneys to reduce vouchers and avoid delay, even if they expect the full amount to be approved. One interviewee described a typical situation:

We do let the lawyers know because, like I said, some of them are not familiar [with the voucher submission process], that we’re going to have to forward this to the [redacted] Circuit. It may take a little bit of time. And someone will say, they’re just barely over, some of them will just say, “You know what? Just give us the max.”<sup>329</sup>

323. Interview 13.1 and Interview 49.1 discussed revising the plan to address the culture of voucher reductions, while Interview 172.1 discussed the culture without discussing the court’s plan.

324. Interview 68.1.

325. See Appendix D: Circuit Court CJA Plan Analysis.

326. One court had the same process regardless of whether the voucher was from the appellate appointment or a district court appointment that had exceeded the statutory maximum. Interview 150.1. All others effectively had different processes for each type of appointment, but similar reviewers were involved.

327. Cardone Report, p. 104. “Panel attorneys who are unwilling to bill for all time reasonably expended in order to avoid disclosing confidential client information, prevent larger voucher cuts by judges and the impression that their billing is ‘excessive,’ and/or avoid delays in payment.” The practice is referred to as “self-cutting” in the report.

328. Interview 47.1.

329. Interview 64.1.

Additional review brings an increased risk of reduction coupled with additional processing and payment time, and the pressure to submit less than the full cost is compounded by an awareness that circuit review increases the workload of the reviewer. As one interviewee explained, the attorneys reduced their own vouchers “not because they fear being cut, but they don’t want to cause a lot of problems for the judges just having to certify, going up to the [redacted] Circuit.”<sup>330</sup> But it isn’t just sparing a thought for the additional work of the reviewing judge. In some districts, these reviewers are the judges that panel members practice in front of and who sit on the CJA committees that review attorney performance and control attorney reappointment.<sup>331</sup>

Other interviewees cited a more nebulous “understanding” that self-reduction was needed. These interviewees described a culture in which panel attorneys were not told specifically that they needed to reduce vouchers to a certain amount, they just “knew” that the voucher would be reduced by the reviewer if they did not reduce it themselves.<sup>332</sup>

Staying under informal caps (12%, five), avoiding paperwork (7%, three), fear of reprisal (2%, one), issues with individual experts (2%, one), and the feeling that the additional income was “not worth fighting with a judge for” (2%, one) round out the stated reasons district court interviewees gave for attorneys submitting less than the full costs of litigation.

## Recommendation 9: Increasing Access to Case-Budgeting Attorneys

Evaluating the implementation of Recommendation 9 requires examining the accessibility of case-budgeting attorneys as well as their work, which includes making recommendations to judges regarding review and approval of vouchers. Of course, recommendations by CBAs are not routinely captured in the eVoucher data, nor is the judge’s decision to consult with them (unless the CBA has been delegated some authority for voucher review and approval).

Quantifying the role of CBAs in voucher review is thus more challenging than cataloging their availability, because of the complexity of voucher review (discussed throughout this report) and because Recommendation 9 doesn’t specify when a judge should solicit the CBA’s recommendation or how, or even if, to document such a request. We draw on our analysis of district CJA plans,<sup>333</sup> the results from our survey of CJA panel attorneys,<sup>334</sup> and interviews with circuit court stakeholders,<sup>335</sup> chief district judges,<sup>336</sup> and CBAs<sup>337</sup> to assess implementation of Recommendation 9.

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330. Interview 47.1.

331. Interview 51.1, “The fact that the CJA panel members know that it’s the judges who decide whether or not they’re going to keep their jobs—and for many of them this is the bulk of their livelihood—the fact that they know that part of that might piss a judge off, even if they’re never confronted with it, even if a voucher is never cut, is just if a judge has a sense that somebody is a high biller or that they’re hiring a mitigation specialist or an investigator on a case that was just cut and dry”; and Interview 35.1, “I suspect that a lot of times these lawyers are just eating it, you know, and they want to continue to get work. And so, they’re probably not willing to push the issue.”

332. Interview 19.1 described this knowing as a conditioned “level in my head,” while Interview 55.2 described it as a “kind of a wink and a nod. Don’t give us a bill of more than \$4,000 or \$5,000.”

333. See Appendix C: District Court CJA Plan Analysis.

334. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

335. See Technical Appendix 3: Project Interviews.

336. *Id.*

337. *Id.*

### ***CBA Availability***

CBAs were employed by all but two of the circuits at the beginning FY17, and this level remained static throughout the study period. One circuit considered adding a case-budgeting attorney, but did not do so.<sup>338</sup>

While no additional positions have been created since adoption of this recommendation, the two circuits without a CBA on staff could access the services of a CBA from another circuit. However, when we interviewed eleven CBAs in late 2021,<sup>339</sup> none of them could recall consulting with either circuit or budgeting cases outside their own circuits.<sup>340</sup> Thus, CBAs are no more widely available than they were before the recommendation was adopted by JCUS.

### ***CBA Role in Voucher Review***

To begin examining the processes reviewing judges use to consult with CBAs, we examined court CJA plans.<sup>341</sup> In our analysis of district CJA plans, we did not find any plans that included the language from Recommendation 9 regarding review of vouchers and expert services requests by CBAs. Two plans permit referral of vouchers to CBAs without providing additional details on the process for which to do so. We also looked at whether CBAs were listed in the plans among the entities that judges could consult when considering a voucher reduction, and, if so, under what standard of deference (may/should/must) this would occur. Of the ninety-four plans, only two (2.1%) referenced the CBAs in this way, and both said the presiding judge “may” refer a proposed reduction to a CBA for review but did not detail what the judge should do with the CBA’s recommendation.<sup>342</sup>

Although not institutionalized within the district plans, a few CBAs we interviewed reported that they have some responsibility to review vouchers for district court appointments, especially those which surpass case maximums and require excess compensation review.<sup>343</sup> Reviewing excess compensation vouchers is clearly tied to the placement of the CBA position in the circuit (whose chief judge has statutory authority for approving vouchers over case maximums<sup>344</sup>) and the fact that high-cost cases, such as those involving excess compensation, would also likely be budgeted.

In our interviews with district court chief judges (or their designees), federal defenders, and CJA district panel representatives,<sup>345</sup> CBAs were mentioned in less than half of interviews, although almost

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338. The circuit concluded, after consultation with the district court judges, that there was no need for a case-budgeting attorney. Interview with 160.1.

339. See Technical Appendix 3: Project Interviews.

340. One district stakeholder interviewee from a court without a CBA recalled calling a CBA from another circuit with a question about budgeting, but no CBA budgeted cases in another circuit. Interview 10.1.

341. See Appendix C: District Court CJA Plan Analysis and Appendix D: Circuit Court CJA Plan Analysis for more detail on what information was captured and how plans changed during our period of evaluation.

342. The language of the plans states, “The court, [when/if] contemplating reduction of a CJA voucher for other than mathematical reasons, may refer the voucher to the First Circuit’s Case-Budgeting Attorney for review and recommendation before final action on the claim is taken” or “Additionally, the Court or its Clerk may consult with the First Circuit Case-Budgeting Attorney for advice and recommendation.” Both plans were from the same circuit.

343. Interview 93.1 reported vouchers were reviewed within the office; Interviews 90.1, 86.1, and 88.1 reviewed excess compensation vouchers in budgeted cases; and Interviews 93.1, 88.1, and 95.1 reported that though they do not routinely review vouchers in budgeted cases, they should. Interview 89.1 said only “two or three” CBAs do “much” voucher review.

344. 18 U.S.C. § 3006A (d)(3).

345. See Technical Appendix 3: Project Interviews.

always positively.<sup>346</sup> Thirty-eight (35.8%) of the district court stakeholder interviewees discussed the work of the CBAs in detail.

One-third (33.3%, fourteen) of the forty-two chief district judges/designees, that we interviewed described the work of the CBA in voucher review, both to budget cases likely to exceed the caps and to serve as a general resource for judges reviewing vouchers or resource requests. Because of CBAs' knowledge of defense needs and case budgeting abilities, one judge said, "I'm a great believer in having a case-budgeting attorney."<sup>347</sup> One CBA described an instance when a judge consulted them about a particularly high attorney voucher, and the CBA advised that if the judge believed the attorney did the work, the attorney should be paid for it.<sup>348</sup> Not all judges worked closely with CBAs; four (9.5%) judges/designees said judges didn't consult CBAs.<sup>349</sup>

CJA panel attorney representatives and federal defenders described the work of CBAs in positive terms, especially in eliminating delays in voucher review,<sup>350</sup> helping attorneys secure needed resources,<sup>351</sup> (including when defenders were conflicted out of representations),<sup>352</sup> providing training to help attorneys support requests for funding, decreasing inappropriate voucher reductions,<sup>353</sup> and assisting judges reviewing those requests.<sup>354</sup>

Some courts took measures to increase the visibility of the CBA to panel attorneys and panel attorneys' willingness to use the resource, holding meet-and-greets to encourage future outreach<sup>355</sup> and requiring panel attorney training on case budgeting.<sup>356</sup> But knowing the resource exists and using it are different issues, and one interviewee described a recent case where the panel attorney did not budget, despite knowing about the existence of the CBA, and was surprised to find their voucher was reduced.<sup>357</sup>

Circuit stakeholders,<sup>358</sup> on the other hand, often referred to the role of CBAs in voucher review, likely because CBAs are employees of the circuit and because of their role in excess compensation voucher review. Interviews with circuit stakeholders found the following:

- CBAs are involved in review of district court excess compensation vouchers in six circuits, and two have delegated approval of vouchers to the CBA (or equivalent position).
- CBAs are among the groups responsible for review and approval of vouchers and budgets in four circuits.
- One CBA had no formal role in excess compensation review,<sup>359</sup> and one had an undefined role.

346. *E.g.*, Interview 5.1. "He's been fantastic"; Interview 15.1, "He's a great resource"; Interview 32.1, "Had a strong relationship with [CBA]"; and Interview 22.1, "He's a really valuable resource, has been very helpful to the court, to the judges, I think to the attorneys."

347. Interview 22.1.

348. Interview 23.1.

349. Interview 184.1, Interview 182.1, Interview 6.1, and Interview 64.1.

350. Interview 33.1.

351. Interview 18.1.

352. Interview 177.1.

353. Interview 12.1, saying if the amount was in a budget "you're going to get paid," and Interview 202.1, attributing the decrease in voucher reductions to the work of the CBA.

354. Interview 42.1 and Interview 67.1. *See, also* Appendix H: Training and Education for Federal Judges on the Criminal Justice Act regarding a presentation on case budgeting by a CBA at a recent circuit workshop.

355. Interview 74.1.

356. Interview 83.1.

357. Interview 49.1.

358. *See* Technical Appendix 3: Project Interviews.

359. Interview with 157.1 and 170.1. Consultation with the CBA was at the request of the voucher reviewer as needed.

All ten appeals courts with regular access to a CBA assigned them numerous other responsibilities,<sup>360</sup> especially to help panel attorneys create litigation budgets with requests for expert service providers and other resources.<sup>361</sup> Some courts encourage, even strongly encourage, case budgeting but do not require it,<sup>362</sup> nor were budgets required in most appellate appointments.<sup>363</sup> Some CBAs were also delegated authority to approve authorizations for expert services as part of their budget authority.<sup>364</sup>

For panel attorneys appointed to litigate cases in federal court, the work of the CBAs is relatively unknown. In our 2021 survey of CJA panel attorneys, very few attorneys reported CBA involvement in the voucher review process, with a majority of the instances occurring in the excess compensation review stage.<sup>365</sup> Of the responding attorneys who had not seen a proposed or actual reduction to their vouchers, between 2% and 12% listed CBAs as the person reviewing their vouchers (*see* Table 5). Slightly more than half of reported CBA voucher reviews occurred during the excess compensation review stage.

**Table 5.** Who reviewed the voucher(s) for... ? (by frequency of mathematical/technical group).

Reviewer	Stage of Review					
	Mathematical/Technical		Reasonableness		Excess Compensation	
	Number	Percentage	Number	Percentage	Number	Percentage
Clerk or chambers staff	421	39%	166	22%		
CJA panel administrator	189	17%	103	14%		
CJA supervising attorney	114	11%	103	14%		
Federal Defender Office staff	99	9%	63	8%		
Judge (district, magistrate, or circuit)	82	8%	312	42%	120	31%
Case-budgeting attorney	17	2%	23	3%	48	12%
I don't know, I don't recall, or Unanswered	293	27%	208	27%	229	59%
<b>Total Respondents</b>	<b>1,082</b>		<b>747</b>		<b>386</b>	

Note: Respondents could select multiple, or no, reviewers per stage.

360. One circuit concluded, after consultation with the district court judges, that there was no need for a case-budgeting attorney. Interview with 160.1.

361. Interview 88.2.

362. *See* Appendix C: District Court CJA Plan Analysis, finding 30% of district court plans required budgeting capital cases in FY 2021.

363. *See* Appendix D: Circuit Court CJA Plan Analysis, finding no references to the use of case budgeting or the services of CBAs.

364. Interview with 162.1 and 163.1.

365. *See* Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

The 762 responding attorneys who reported a proposed or actual reduction (with or without notice of the reduction) were asked which reviewers proposed or made the reduction to their vouchers. Here again, a very small number (1%) of reductions were reportedly made by CBAs.<sup>366</sup>

### ***Departures from CBA Recommendations***

As with CBAs' role in voucher review, inferring whether judicial reviewers "articulat[ed] their reasons for departing from the case-budgeting attorney's recommendations" is difficult. Recommendation 9 does not include a suggested avenue or audience for such articulation. All currently serving CBAs felt this part of the recommendation was followed consistently in the circuit, agreeing that judges departing from their recommendations explained why, but some noted such explanation did not appear on the record of the case or in eVoucher.<sup>367</sup> Some CBAs also expressed that the judges most likely to depart from Recommendation 9 were not likely to solicit the input of the CBA in the first instance,<sup>368</sup> greatly reducing the impact of implementation.

## **Recommendation 16: Providing Panel Attorneys Opportunity for Independent Review of Voucher Reductions**

Recommendation 16 directs courts to "implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge." Implementing this recommendation means that there should be a process in place to ensure that every panel attorney is able to challenge a reduction to their vouchers in front of someone other than the original reviewer. As described elsewhere in this report, the variation in voucher review processes means that reductions are not always made by "presiding judges," so moving the process outside the original reviewer (not the presiding judge *per se*) and permitting attorneys to challenge any reduction are necessary conditions for processes to meet the criteria set by this recommendation.

Ideally, these independent voucher review processes would be outlined in court CJA plans and well understood by court stakeholders and panel attorneys. We have found that forty-one district court CJA plans include a description of an independent voucher review process, yet most district court stakeholders and panel attorneys either described processes that fell short of the process outlined in the recommendation or were unaware of any such process existing in their courts.

### ***District CJA Plans***

Our analysis of district CJA plans<sup>369</sup> found that forty-one plans (44%) made independent review of vouchers available to any attorney (either through automatic review of all voucher reductions (three plans) or a right for attorneys to appeal (thirty-eight plans)). This is an increase from the 9% of plans that included these processes in FY 2017. While sixty-eight plans (72%) at the end of the study period included a process for reevaluating voucher reductions, twenty-seven permitted appeal only to the original reviewer, only permitted the judge to seek review, or did not specify who conducted review of voucher reductions, meaning the provisions did not meet the criteria for independent voucher review established in Recommendation 16.

366. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review, Table 13.

367. Interview 87.1, Interview 89.1, Interview 91.1, and Interview 93.1 described off-the-record conversations with judges when the judge did not follow the CBA's recommendations.

368. *E.g.*, Interview 86.1.

369. See Appendix C: District Court CJA Plan Analysis.

### ***District Stakeholder Interviews***

In the interviews<sup>370</sup> that the FJC research team conducted with district court stakeholders, forty-two district judges (or their designees) and thirty CJA panel attorney district representatives were asked an initial question regarding whether the district had a process for attorneys who wished to appeal voucher reductions.<sup>371</sup> Just over half (54%, fifty) of interviewees who discussed the question stated that no process was in place for attorneys to appeal voucher reductions in their district. In seven instances interviewees from the same district reported different answers for whether an appeals process existed, suggesting that information about the processes was not well known. While the remaining 46% of interviewees (forty-two) described a voucher appeals process, only thirteen of these (31%) described an independent review process as prescribed in Recommendation 16.

Many processes described in these interviews were not independent of the original reviewer who made the reduction. For example, consider the following process, explained by a judge interviewee:

Then the lawyer has the option to respond (using a check box in eVoucher) that they either accept or would like to appeal the reduction. If they choose to appeal, they send a written appeal statement that goes back to the presiding judge for *reconsideration*.<sup>372</sup> (*Emphasis added*)

Because this process routes attorney vouchers back to the original reviewer (often called requests for reconsideration), it does not meet the criteria for independence communicated in the recommendation.

Nor were many processes described in the district stakeholder interviews able to be initiated by panel attorneys, failing to meet the other criteria established with the adoption of Recommendation 16. Less than half (42%, eleven) of the twenty-six interviewees answering the question reported that attorneys had a right in their district to initiate an appeal to a voucher reduction. Most (96%, twenty-seven) of the twenty-eight district stakeholders who indicated that the reasonableness reviewer initiated the process said they did so at their discretion.<sup>373</sup> Some interviewees described formal processes in which the reasonableness reviewer received a response from an attorney and then had to decide whether they wished to appeal their own decision to another entity, as this judge interviewee outlined:

If, after considering the discussions between the lawyer and the judge, the judge still contemplates cutting the voucher in excess of 10%, the judge may refer it to the [CJA] Committee for independent review.<sup>374</sup>

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370. See Technical Appendix 3: Project Interviews.

371. Federal defenders were not specifically asked about appealing voucher reductions, but around 59% (twenty) of them discussed the topic when answering other questions.

372. Interview 69.1.

373. Courts included language such as, “The Court, when contemplating reduction of a CJA voucher for other than mathematical reasons, may refer the voucher to the CJA Committee for review and recommendation before final action on the claim is taken.” Because the court was not required to refer reductions for review, and because the affected attorney had no other recourse for review, we did not treat such a provision as consistent with the adopted recommendation.

374. Interview 70.1.



Some interviewees described attorney initiation of an informal process in which attorneys would contact the defender or district panel representative seeking intervention on their behalf with the original reviewer.<sup>375</sup>

Several court stakeholder interviewees who indicated that their districts had an independent review process also described its lack of use. This could be due to the processes being implemented relatively recently, but one judge interviewee theorized that the very existence of the process has negated its use:

I think the actual existence of that has had the salutary effect of cutting down on what I would consider the unsubstantiated cuts to vouchers. I'm not trying to indict my colleagues, but I think they're more careful because they know there's a process in effect. Our CJA attorneys are not without appellate rights.<sup>376</sup>

One interviewee raised doubts about the effectiveness of appeals processes to restore reduced amounts.<sup>377</sup>

### ***Circuit Court CJA Plans***

Two circuit court plans included a process for independent voucher review by someone other than the original reviewer. In one, counsel notified of a proposed voucher reduction could ask the CJA committee to prepare an opinion as to whether the reduction met with CJA guidelines. In the other, after being denied reconsideration by the original reviewer, the request for review could be made to the chief circuit judge or designee.

### ***Circuit Court Stakeholder Interviews***

Five of the twelve circuits discussed an independent voucher review process where someone other than the original reviewer heard attorney appeals, at least in some instances.<sup>378</sup> Three of the five noted the process had been used one time or less,<sup>379</sup> and one reported a process for appealing reductions only when the final review was made by court staff, not a court of appeals judge (who could be the final reviewer in some instances).<sup>380</sup>

375. *E.g.*, Interview 68.1, “And before the new plan came into effect with the notice and opportunity to be heard and all of the due process considerations, we pretty much had an informal agreement that, you know, [the panel representative] would be the guy that would call the judge and say, judge, you know, I got a call from Lawyer So and So. And, you know, he’s saying that his voucher is going to get cut and can we talk”; and Interview 35.1, “I’ve gotten involved a time or two when a judge has asked me to take a look at a voucher. It’s been done where we represented a co-defendant, and they thought that the time that the CJA lawyer had put into the case seemed exorbitant to them. And since we had a co-defendant, they wanted me to take a look at their voucher just to see if it was in line with, you know, like, the work that we did on the case.”

376. Interview 13.1.

377. Interview 9.1, “You know, there’s not a whole heck of a lot of review. Who’s going to do it? So, the reality is, you can ask one judge to review the others but, you know, small district. Is one judge going to say to the other judge, ‘I’m overruling you and your own case?’ I just think the reality of that is, the lawyer can’t advocate for their own fee successfully in front of the judge. It’s probably not going to make a difference going to a second judge.”

378. Interview with 149.1, 148.1, and 87.2; Interview with 90.2, 153.1, 154.1, 155.1; Interview with 146.1, 169.1, and 147.1; and Interview 150.1.

379. Interview with 149.1, 148.1, and 87.2; Interview with 146.1, 169.1, and 147.1; and Interview 150.1.

380. Interview with 90.2, 153.1, 154.1, 155.1.

### *Survey of CJA Panel Attorneys*

The results of our survey of CJA panel attorneys<sup>381</sup> indicate that attorneys consider “independent voucher review processes” to include requests for reconsideration by the original reviewer or informal processes involving third-party intermediaries. Likely because of this broad interpretation, appeals processes were thought to exist in most districts. Only one attorney (3%) who was notified of a proposed reduction, and twenty-four (5%) who had their vouchers actually reduced, reported that they did not appeal because an appeals process was not available to them.

Although thought to be commonly available, actual appeals were rarely reported; of the 721 attorneys who reported a proposed or actual voucher reduction, only forty-six (6%) appealed. Eleven attorneys appealed a proposed reduction, and thirty-five appealed an actual reduction.

As described above, it was not the perceived lack of access to an appeal that prevented attorneys from seeking to have reduced amounts restored. Of the 521 attorneys who did not appeal a proposed or actual reduction,

- 30% (154) said they did not because of the burden to do so
- 27% (140) said they did not believe it would be successful
- 22% (116) said they thought appealing would negatively affect their future in the court
- 19% (98) said appeals are time-consuming and further delay payment

## **IV. Minimizing Judicial Control Over Panel Management: Recommendation 15**

### **Issues**

The role judges play in CJA panel administration—the selection, appointment, retention, and removal of panel attorneys—can impact the independence of the defense function in some districts. As stated in the Cardone Report,

Certainly, any scheme of panel management should consider judges’ views in determining who will be on the panel and, in an individual case, whether work was completed and done well. However, this does not require judicial management.<sup>382</sup>

In places with judge-managed panels, attorneys reported feeling inhibited in requesting resources to litigate cases and uncertain about expressing concerns regarding resource decisions, affecting their ability to zealously advocate for their clients.<sup>383</sup> Indeed, concerns about retaliation by judges affected the ability of the Cardone Committee to gather information about districts with judge-managed panels.<sup>384</sup>

381. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

382. Cardone Report p. 76.

383. Cardone Report, p. 75. “In districts with judge-managed panels, attorneys often believe they have no avenue to remedy problems in panel administration. More often than not, the Committee heard concerns similar to the ones expressed by a panel attorney district representative who testified that at national CJA conferences, other panel attorneys tell me that all the time, they say, ‘In my district, I couldn’t possibly say X, Y and Z to our judge, he would get offended or she would have me off the panel.’”

384. *Id.*

While acknowledging the importance of judicial input, the Cardone Report outlines several benefits of shifting the responsibilities of administering CJA panels to the local defender's office, CJA committee, or CJA supervising attorney,<sup>385</sup> including more effective functioning,<sup>386</sup> greater attorney satisfaction,<sup>387</sup> and allowing for reporting mechanisms when concerns about panel management arise.<sup>388</sup>

In light of the concerns about judge-managed panels, the Cardone Committee made the following recommendation.

## Recommendation

### Recommendation 15 (approved)<sup>389</sup>

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.

## Implementation and Impact

Implementation of this recommendation at the district court level involves two parts:

1. Designation of a panel administrator to be responsible for managing the selection, appointment, retention, and removal of panel attorneys. The administrator could be a CJA committee, a CJA supervisory or administrative attorney (CJA SA), or a defender's office.
2. Inclusion of a mechanism that allows for incorporation of judicial input into those processes.

To evaluate the extent of implementation across the districts, we analyzed district CJA plans and interviewed CJA supervising attorneys, as well as court stakeholders, including district and circuit chief judges (or their designees), federal defenders, and CJA district panel representatives.

## CJA Plan Analysis

### *Designated Panel Administrator*

During our study period, the number of district CJA plans that included an administrative structure, such as a committee, used for some facet of panel management increased from eighty-nine (94.7%) to ninety-two plans (97.9%).<sup>390</sup> During that same period, the percentage of plans that designated a non-judicial CJA panel administrator, such as a federal defender, rose from just over 75% (seventy plans) to almost 90% (eighty-three plans).<sup>391</sup> Few plans included information on the duties that these various

385. *Id.*, p. 74.

386. *Id.*

387. *Id.*

388. *Id.*, p. 75.

389. JCUS-SEP 18, p. 39.

390. See Appendix C: District Court CJA Plan Analysis, Attachment 1 for additional information.

391. Districts list eighteen different position descriptions related to the CJA, including analysts, CJA resource counsel, CJA specialist, and CJA administrator. Our focus here is on the positions discussed in the Cardone Report and most likely to be related to the tasks included in the recommendation. See Appendix C: District Court CJA Plan Analysis for additional information.

entities were expected to perform, and those that did often assigned individual panel management tasks to different entities or assigned the same task to multiple entities.<sup>392</sup> Thus, understanding which components of Recommendation 15 are assigned to panel administrators is somewhat unclear.

Circuit court plans included less detail regarding panel administration than district court plans, in part due to the reliance on lower court counsel to continue on appeal. Overall, five circuit plans discussed a role for a circuit CJA committee to assist with the selection of panel attorneys in the appeals courts.<sup>393</sup> Membership on the circuit CJA committee varied, with some plans listing specific members of the committee and others listing general categories (e.g., one defender from each district in the circuit). Ten plans tasked the clerk of court with maintaining the list of panel attorneys for the circuit, though the clerk could work in conjunction with the federal defender, the court, or the chief judge or the judge's designee. Five of the ten plans with a separate appellate panel list also included detail on reasons for attorney removal from the panel, a process for doing so, or both.

### ***Judicial Input***

One of the most common ways for courts to incorporate judicial input into CJA administration is through judicial membership on court CJA committees. At the end of our study period, nearly three-quarters of district court CJA plans (72.3%, sixty-eight plans) included judicial members on their committees, a 6.3% point increase (six plans).<sup>394</sup> Other forms of judicial input present in panel management processes were rarely listed in district CJA plans and included, per our stakeholder interviews, management of the processes itself<sup>395</sup> and direct authority to select<sup>396</sup> and remove<sup>397</sup> panel attorneys.

## **Court Stakeholder and CJA Supervising Attorney Interviews**

To clarify both who manages the processes stated in Recommendation 15—the selection, appointment, retention, and removal of panel attorneys—and how judicial input is incorporated into these processes, we conducted 106 interviews with 111 stakeholders from forty district courts and twenty-seven stakeholders from twelve circuit courts (responses grouped at the circuit court level).<sup>398</sup> We also interviewed eleven CJA supervising attorneys to gain additional insight and have included their responses in the following analysis, when appropriate.<sup>399</sup>

### ***Selection***

The majority of district stakeholders that we interviewed reported that CJA attorneys were added to their courts' panels in a process managed by a designated CJA panel administrator (77, 72.6%). The

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392. These include tasks listed in Recommendation 15, with the exception of responsibility for attorney removal. Plans discussed the process by which attorneys could be removed from their CJA panel, but the responsibility or criteria for doing so, apart from automatic removal for actions such as ethics violations leading to disbarment were not discussed. See Appendix C: District Court CJA Plan Analysis.

393. The remaining circuit plans either did not reference a committee participating in the panel selection process, or there was no separate appellate panel. See Appendix D: Circuit Court CJA Plan Analysis.

394. See Appendix C: District Court CJA Plan Analysis.

395. Interview 23.1.

396. Interview 69.1.

397. Interview 41.1.

398. See Technical Appendix 3: Project Interviews for additional information on these interviews.

399. See Technical Appendix 3: Project Interviews.

panel administrator in these processes was most often a CJA committee<sup>400</sup> (seventy-four, 96.1%), and most CJA supervising attorneys told us that they were included in the selection process through committee membership (nine, 82%). A majority of district court interviewees reported including judicial input in selection (seventy-three, 68.9%), most often when courts received CJA committee recommendations and made the final appointment to the panel (47, 64.4%).<sup>401</sup> Even when selection authority rested with a federal defender, as described by twenty-five (23.6%) interviewees,<sup>402</sup> judicial input might be included through mechanisms such as requiring CJA applications to include a judicial letter of recommendation.<sup>403</sup>

Selection processes involving judicial input, even without total judicial control, may still result in judicial control over the panel. One interviewee, describing a plan that leaves panel selection to the CJA committee noted, “But it’s already decided between the judges whether they want somebody or not. And even if the panel’s full, they have them.”<sup>404</sup> Another interviewee reported that, though their district’s plan requires a CJA committee, they were unsure whether the committee even existed.<sup>405</sup> Another interviewee who serves on the panel selection committee discussed how the committee did not review applications consistent with the district’s CJA plan.<sup>406</sup> In some districts, divisions had CJA committees on paper only; judges serving in divisional offices determined panel attorney membership, and the divisional CJA committee had never met.<sup>407</sup>

Selecting attorneys for appeals court panels (where they existed) differed as well. Though five circuit plans described a CJA committee, not all appeals courts had such a committee in practice, and others had a committee that was not discussed in their plan. We determined through our interviews that nine courts had a CJA committee of some type, even if they did not have an appellate panel.<sup>408</sup>

The membership of the CJA committee varied as well in the appeals courts. Four circuit courts had judge-only committees, but one of the four was advised by a separate committee that included attorneys. Four circuit courts included attorneys (private or defender staff) on their committee, though they differed in whether private attorneys were from the panel or not. Two interviewees from circuit courts whose plans mentioned a committee reported that the committee did not meet.

The responsibilities of the circuit CJA committees often include panel selection and performance review of the panel. Five committees review and recommend (or select) attorneys to serve on the appellate CJA panel. Three committees conduct performance reviews of attorneys advocating in the courts of appeals or collect feedback from the judges serving on appellate court panels about attorney performance. Even courts without a CJA committee or an appellate panel conduct performance evaluations of counsel, differing on whether only panel attorneys, only appointed counsel,<sup>409</sup> or all attorneys in criminal cases<sup>410</sup> receive review.

400. *Id.*, Attachment, Table 4, Processes as Described by Stakeholder Interviewees.

401. *Id.*, Attachment, Table 5, Judicial Input Inclusion and Mechanism, by Process.

402. *Id.*, Attachment, Table 4, Processes as Described by Stakeholder Interviewees.

403. Interview 77.1.

404. Interview 20.1.

405. Interview 23.1. “I don’t think there is a panel selection committee. I think the last time we got some new attorneys, [the chief judge] just thought of some people and added them.”

406. *E.g.*, Interview 18.1. “I’ve never seen an application. I don’t know if any of the other committee members have seen an application. This last time around, one of the judges on the committee sought my input, just in a phone call, about, ‘Do you know any of these folks? What do you think about them?’”

407. *E.g.*, Interview 25.1.

408. Interview with 162.1 and 163.1; Interview with 149.1, 148.1, and 87.2; Interview 88.2; Interview with 151.1, 152.1, and 89.2; Interview with 90.2, 153.1, 154.1, and 155.1; Interview with 157.1 and 170.1; Interview with 158.1 and 159.1; Interview with 160.1; and Interview 150.1.

409. Interview with 145.1, 166.1, and 167.1.

410. Interview with 158.1 and 159.1.

## Appointment

According to the district stakeholders we interviewed, CJA panel attorneys are most often assigned to representations through a process that is (twenty-eight, 26.4%) or could be<sup>411</sup> (twenty-six, 24.5%) managed by a designated panel administrator. Five CJA supervising attorneys (45%) indicated that they were involved in the appointment process in their courts. Just over a quarter of interviewees were able to affirm that their appointment processes included a judicial input mechanism (twenty-eight, 26.4%), most often direct appointment by a presiding or magistrate judge (twenty-four, 85.7%).<sup>412</sup>

Almost half of the interviewees reported that appointment in their courts is done via a rotation, such as assigned duty days or weeks, or wheel system, with allowances for deviations in exceptional cases (forty-eight, 45.3%), while eight (7.5%) stated that such a system was in place but not used.<sup>413</sup> Eight (7.5%) interviewees said that their courts did not use any kind of random or rotational system,<sup>414</sup> and the remainder did not discuss the appointment system.<sup>415</sup>

Despite efforts in some courts to evenly distribute cases (helping to ensure panel attorney proficiency), some interviewees reported ongoing issues of favoritism in appointing attorneys to cases.<sup>416</sup> One interviewee said, “There’s supposed to be a revolving list. And so, as new cases come in, kind of the next attorney is supposed to get it. But I think, practically speaking, that doesn’t happen. It’s not transparent, and there are attorneys being cherry picked really for cases.”<sup>417</sup>

Where judges were responsible for appointing counsel, concerns were raised about the propriety of such arrangements and how rotating appointment systems could be undermined.<sup>418</sup> Another interviewee noted that this could create inequities between the FDO and the panel, as well as within the panel.<sup>419</sup> Not only were issues of unequal distribution in appointment raised, but one interviewee noted that judges were making appointments wholly outside the panel list.<sup>420</sup>

In part because counsel often continue from the lower courts, appeals courts rarely appoint counsel. All courts require attorneys to file a motion to be relieved of the appointment if they do not wish to continue. One circuit court requires the attorney to file a motion to continue as well. This practice arose from a prior experience (before publication of the Cardone Report) with poor-performing counsel on

411. These interviewees often indicated that a member of the clerk’s office managed appointment processes. As CJA supervising attorneys are often employed in the clerk’s office, it is possible that interviewees are referring to them. For example, Interview 22.1: “In terms of appointments, we do a rotating random assignment that is done by the clerk’s office.”

412. See Technical Appendix 3: Project Interviews, Attachment Table 5, Judicial Input Inclusion and Mechanism, by Process.

413. *E.g.*, Interview 24.1, “I think what the process is supposed to be is, there’s supposed to be a revolving list. And so, as new cases come in, kind of the next attorney is supposed to get it. But I think, practically speaking, that doesn’t happen”; and Interview 75.1, “So it’s not random. It’s up to the judge. You know, the goal is to go off the list and rotate off the list, but it’s not strictly followed at all.”

414. *E.g.*, Interview 74.1, “The truth of the matter is, every judge has their own list of people they like to appoint. So I don’t think we’re unique in that regard”; and Interview 197.1, “The notion of having a [rotation] wheel, for example: that I think has come up before.... That really doesn’t work here. It could not work.”

415. See Technical Appendix 3: Project Interviews, Attachment Table 6, Appointment Rotation Process.

416. *E.g.*, Interview 75.1 “There are several judges that repeatedly appoint to kind of a smaller group of attorneys, so it’s not random. There are some attorneys who get four to five appointments a year. There’re some that get zero to one. There are some that get fifteen to eighteen ... it varies widely.”

417. Interview 24.1.

418. Interview 20.1. “There’s friendships that have been developed, and friends are rewarded with more cases.”

419. Interview 25.1. “One panel lawyer was getting four, five drug cases in one day, and [the FDO wasn’t] getting any. It’s just not functioning the way it’s supposed to.”

420. Interview 19.1. “One of our judges picked somebody who was not on the panel, and who had been practicing law for a very short period of time, and appointed him.”

appeal who continued from the lower court. The court felt that requiring the motion ensured that the attorney wanted to continue and avoided problems of poor performance.<sup>421</sup>

Appeals courts have various processes for appointment if counsel cannot continue from the lower court. Some prefer (sometimes specified in their CJA plan) a default assignment, either the appellate unit of a single FDO<sup>422</sup> or the FDO of the district of origin<sup>423</sup> if there is no conflict. Other courts note a default preference for the panel,<sup>424</sup> with some courts stating the practice is to avoid potential conflicts (likely the reason the FDO is not appointed the district court case).<sup>425</sup> Some courts randomly choose from the panel list until a panel attorney agrees to take the appointment.<sup>426</sup> Other courts match the needs of the case to the skills of the attorney,<sup>427</sup> though without updating attorney qualifications, the task is challenging.<sup>428</sup> One court noted that it would not intervene in continuity of counsel even if the appellate court staff were unsure district court counsel was qualified to handle the appeal.<sup>429</sup> Another court expressed a preference for appointing pro bono firms over institutional defenders or panel attorneys. The court noted that “the people that traditionally often try to get on the CJA list and ask for pay have not complained about [the effort to recruit firms pro bono].”<sup>430</sup> Panel attorneys, who rely on courts for CJA appointments, may not feel they can complain, as described elsewhere in this analysis<sup>431</sup> and in the Cardone Report.

When counsel did not continue, courts without a separate appellate panel relied on the district court to identify replacement counsel,<sup>432</sup> and some courts relied on appeals court staff to ensure continuity of counsel so nothing “fell through the cracks,”<sup>433</sup> regardless of which level of court was responsible for identifying the next appointment.

## Retention

Panel attorney retention and reapplication as discussed by district stakeholders ranged from complex processes—for example, a point system based on reviews from judges, the “reasonableness” of the attorney’s voucher submissions, and the type of cases assigned to the subpanel they are a member of<sup>434</sup>—to unconfirmed “recertification” by panel attorneys who simply state they have completed annual training requirements.<sup>435</sup>

A majority of district court interviewees stated that the retention processes in their courts were managed by a panel administrator (fifty-seven, 53.8%), most often the CJA committee (fifty-six, 89.3%).<sup>436</sup>

421. Interview with 158.1 and 159.1.

422. Interview with 158.1 and 159.1 and Interview 150.1.

423. Interview with 151.1, 152.1, and 89.2 and Interview 88.2.

424. Interview with 90.2, 153.1, 154.1, 155.1 and Interview with 149.1, 148.1, and 87.2.

425. Interview with 149.1, 148.1, and 87.2.

426. Interview with 157.1 and 170.1.

427. Interview with 145.1, 166.1, and 167.1 and Interview with 149.1, 148.1, and 87.2.

428. Interview 88.2.

429. Interview with 162.1 and 163.1.

430. Interview with 145.1, 166.1, and 167.1.

431. *E.g.*, Interview 20.1, Appendix F: Survey of Panel Attorney Experiences with Voucher Review, and Cardone Report, p. 75.

432. Interview with 90.2, 153.1, 154.1, and 155.1; and Interview with 160.1.

433. Interview with 168.1 and 144.1; Interview with 149.1, 148.1, and 87.2; Interview with 145.1, 166.1, and 167.1; and Interview with 162.1 and 163.1.

434. Interview 171.1.

435. Interview 113.1.

436. See Technical Appendix 3: Project Interviews, Attachment, Table 4, Processes as Described by Stakeholder Interviewees.

A plurality (forty-six, 43.4%) of retention processes included judicial input, most often reported as processes where the final decision included CJA committee input to retain attorneys (thirty-four, 73.9%).<sup>437</sup> Twelve interviewees (11.3%) indicated that there was not a process for retention in their court, with one stating, “When a lawyer joins the panel, they are there until they die or resign, or, in the very, very rare case, removed for cause.”<sup>438</sup>

Four appeals courts set a term for panel appointment, allowing for review and reappointment of panel attorneys on a cycle (often three years). Four courts had no set term for panel membership. When asked how the appointing authority matched attorney skill to case needs (described above) if attorney qualifications were not reviewed during reappointment, the court said they relied on the information provided at the time of initial appointment to the appellate panel.<sup>439</sup>

## Removal

Removal processes outlined in district CJA plans often only applied to panel attorneys who had committed serious ethics violations or had been disbarred. Only one of the CJA supervising attorneys specifically acknowledged that removal was part of their position.<sup>440</sup> When we asked district stakeholders about their courts’ process for removing panel attorneys (outside of serious violations or disbarment), half (fifty-three) described processes managed by a panel administrator, and just over half described processes that included judicial input (fifty-four, 50.9%). Many interviewees reported that they considered removal, outside of extraordinary circumstances, to be a part of the retention process.<sup>441</sup> Some instead described the removal process as an informal conversation between the attorney and a federal defender<sup>442</sup> or judge,<sup>443</sup> in which the attorney would be “encouraged” not to reapply. In one district, removal of attorneys from the district CJA panel was a judge-driven process, sometimes without discussion by the larger CJA committee. “We’ve had two lawyers removed from the panel, and both of those were as a result of complaints [from] the judges.”<sup>444</sup> Only one district stakeholder interviewee (0.94%) reported that their court did not currently have a removal process.

437. *Id.*, Attachment Table 5, Judicial Input Inclusion and Mechanism, by Process.

438. Interview 69.1.

439. Interview 88.2.

440. Interview 111.1. “And so [the judges] said, ‘You know, we have some concerns about some of the panel members. And we’re kind of not sure how to go about possibly renewing them or not renewing them.’ It generated discussion. We want a supervising attorney who is someone who will really do a deep dive into this. And so I sort of kept track of all that information and made a presentation to the panel. And we did reviews. And the committee, like I said, voted to recommend [some] of the longstanding members to not be reapproved.”

441. *E.g.*, Interview 24.1, “Because it was easier to do it at the reappointment process than to take the steps under the CJA plan to remove someone because they’re entitled to process”; Interview 204.1, “Some panel attorneys have not been reappointed. Not necessarily because they’re incompetent, but it’s just we have to—it’s got to be a revolving door”; Interview 77.1, “So if it’s something immediate that you need to call people in and ask, then you do. Otherwise, it kind of happens; it sorts itself out when you are reviewing the applications or the renewals anyway”; and Interview 44.1, “The people do rotate off, or they are not renewed for whatever reason.”

442. *E.g.*, Interview 183.1. “And if there’s a consensus that it’s time [to remove the attorney], usually sometimes the public defender will circle back and check with the lawyer to see if they still want to be on the panel.”

443. *E.g.*, Interview 205.1, “If an attorney is having performance issues, like I said, they will generally voluntarily withdraw after a conversation with the chief judge—a difficult conversation”; and Interview 7.1, “We’re all pretty good at being subtle with attorneys who we think are just mailing it in and saying, ‘Look, this is not a matter of right; we’ve been very clear about that: your appointment to our panels is not ... a proprietary right. And, you know, maybe it’s time to give someone else to turn.’ So, we quietly, I think, have thinned the list that way as well.”

444. Interview 19.1.



Some interviewees noted that repeatedly declining appointments could be cause for removing an attorney from the panel.<sup>445</sup> Other districts did not remove attorneys from panel lists because they declined cases but also noted that their panel lists were too large and included attorneys who no longer took appointments at all.<sup>446</sup> Some districts recently culled panel lists because they believed that removing attorneys who didn't take appointments created the opportunity to recruit attorneys willing to do so.<sup>447</sup> As one interviewee noted,

I think a lot of attorneys may take as many [appointments] as they want or what they're comfortable with. I think we've tried—we really have tried to make it a point of making sure that the cases are spread out for people to have a number of these cases, because doing federal work, you just don't want to dabble doing it.<sup>448</sup>

Given the emphasis in some appeals courts on attorney performance evaluation and reappointment (described above), it is not surprising that several of them reported robust attorney removal processes, though, most courts noted that attorneys were rarely removed from the appellate panels. One court reported removing two attorneys in twenty years and that the judges on the appellate panel rarely returned attorney performance evaluations at all.<sup>449</sup> Five courts<sup>450</sup> had specific provisions for removing attorneys, including when performance issues were raised (either as part of routine review or due to specific problems), and they were investigated by the chief circuit judge or CJA committee.<sup>451</sup>

Some courts provide mentorship opportunities to improve performance before removal is considered.<sup>452</sup> One court, after deciding to remove an attorney, changes the attorney's eVoucher status to inactive and adds a termination date for panel membership.<sup>453</sup> Two courts without an appellate panel flag low-performing attorneys in CM/ECF, with notes requesting that the attorney no longer be appointed in the court, or in some cases before a specific judge.<sup>454</sup>

## V. Conclusion

### Recommendation 7

Recommendation 7 has been implemented, and the hourly rate paid to CJA panel attorneys has been raised to the statutory maximum. In at least some jurisdictions, Cardone Report-identified recruiting, retention, and compensation problems remain because the statutory rate is too low.

445. *E.g.*, Interview 41.1.

446. *E.g.*, Interview 29.1.

447. *E.g.*, Interview 83.1.

448. Interview 16.1.

449. Interview 88.2.

450. See Appendix D: Circuit Court CJA Analysis describing processes in the D.C., Fourth, Second, Sixth, and Tenth Circuits.

451. See, *e.g.*, Second Circuit plan, p. 5. "All complaints concerning the conduct of a CJA Panel member shall be forwarded to the Clerk of Court. If the CJA Committee determines that a complaint alleges facts that, if true, would warrant consideration of removal of the CJA Panel member, or that other facts exist potentially warranting removal of a Panel member, the Committee may direct the Attorney Advisory Group to review the complaint, or brief, make such inquiry as it deems appropriate, and issue a report of its findings and recommendations to the Court."

452. *E.g.*, Interview with 151.1, 152.1, and 89.2.

453. Interview with 157.1 and 170.1.

454. Interview with 90.2, 153.1, 154.1, and 155.1, and Interview with 168.1 and 144.1.

## Recommendation 8

JCUS approved a modification of Recommendation 8. Implementation of the recommendation occurred in both national policy (incorporation into the *Guide to Judiciary Policy*, which already details costs that are or are not compensable under the CJA, and modification of eVoucher to require a reason for reduction) and locally (revision of 32% of district court CJA plans). Attorneys continue to reduce their own vouchers by submitting less than the full costs of litigation (44% of attorneys). After submission and during review for payment, reductions occur in 15% of appointments (ranging from near 0% to nearly 72% at the court level and from 0% to over 90% at the reviewer level).

## Recommendation 9

The JCUS approved Recommendation 9 to increase access to case-budgeting attorneys. CBAs assist with budgeting and voucher review in ten of twelve circuits—a number unchanged since publication of the Cardone Report. Though judges report consulting with CBAs when reviewing vouchers, their involvement is at the discretion of the judges, and there is no requirement for consultation with CBAs in most court CJA plans.

## Recommendation 16

After approval of Recommendation 16 by the JCUS, forty-one district court CJA plans (44%) and two circuit court CJA plans (17%) included a process for appealing voucher reductions to someone other than the original reviewer. When vouchers are reduced, fewer than 6% of attorneys appeal the reduction (as reported in a survey of panel attorneys). Attorneys did not appeal reductions because of the burden of doing so and out of concerns that the appeal would affect future appointments negatively.

## Recommendation 15

Recommendation 15 was adopted by the JCUS to address concerns with judicial control of the selection, appointment, and retention of CJA panel attorneys. At the time the Cardone Committee did its work, most district court plans (seventy of ninety-four) already detailed these processes, and sixty-two courts detailed how judges participated in these processes through membership on CJA committees. After JCUS approved the recommendation, thirteen more district courts added processes, and six courts revised their plans to include judicial input in these processes. Because judges were already involved, and because so many courts already detailed panel selection, appointment, and retention, there was little opportunity for change. Some courts continue to report ongoing challenges with judicial control over panel attorney selection, appointment, and retention.

# Chapter 4

## Federal Defender Staffing (Recommendations 10-14)

### I. Introduction

In 1970, six years after the Criminal Justice Act (CJA) became law, the legislation was amended to allow for the creation of institutional defender offices.<sup>455</sup> Like the private panel attorneys originally included in the legislation, federal defender offices (FDOs)<sup>456</sup> were eligible to receive appointments as counsel to represent individuals who are financially unable to pay for their own representation in cases covered by the CJA.<sup>457</sup>

The Cardone Report described the benefits of a hybrid defense model that combines the appointment of private attorneys paid on a case-by-case basis and institutional defender offices.<sup>458</sup> Institutional defenders create consistency by setting the standards for best practices locally and providing access to case resources and training for panel attorneys willing to take CJA appointments. In turn, panels of private attorneys ensure that all defendants can obtain qualified representation as caseloads change and multidefendant cases become more common.

The 1970 amendment to the CJA permitted the creation of two different models for institutional defender organizations—Federal Public Defender Offices (FPDOs) and Community Defender Organizations (CDOs).

- FPDOs are federal entities staffed by federal employees. The chief federal public defender is appointed to a four-year term by the court of appeals of the circuit<sup>459</sup> in which the organization is located and may be—but is not presumed to be—reappointed. The circuit court must also approve the number of litigating attorneys that may serve in the organization. Currently, sixty-five FPDOs serve seventy-two federal districts spanning twelve circuits, with six of the organizations serving more than one district.<sup>460</sup>
- CDOs are nonprofit defense counsel organizations incorporated under state laws. They operate under the supervision of a board of directors and may be a branch or division of a parent nonprofit legal services corporation that provides representation to those who are financially eligible. By statute, the circuit court has no official role in CDO leadership selection and does not approve the number of litigating attorneys that may be on staff. Currently, seventeen CDOs serve nineteen federal districts spanning six circuits, with two organizations serving more than one district.

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455. Pub. L. 91-447, § 1, Oct. 14, 1970, 84 Stat. 916.

456. In this chapter, we use the term FDO to refer to both Federal Public Defender Offices (FPDOs) and Community Defender Organizations (CDOs). If we mean to refer to one or the other separately, we will use their individual designation.

457. 18 USC 3006A, Sec (a)(1). [S. Rep. No. 91-790, 91st Cong., 2d Sess. at 18 \(1970\)](#).

458. The Cardone Report, p. 18. The advantages and disadvantages of institutional defenders are discussed in detail in Dallin H. Oaks, *The Criminal Justice Act in the Federal District Courts*, Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 90th Cong., 2d Sess. 11 (Comm. Print 1969) [hereinafter “Oaks Report”]. A discussion of the findings was included in the Senate Report on the 1970 amendment to the CJA creating institutional defender offices. See, [S. Rep. No. 91-790, 91st Cong., 2d Sess. at 18 \(1970\)](#).

459. The CJA, court CJA plans, and the Cardone Report reference both the court of appeals and the circuit. This analysis maintains consistency with the original source, and thus alternates references.

460. See Table 3 at the end of this chapter for a list of districts by type of defender model.

These two models are similar in that FPDOs and CDOs are not subject to the selection and membership criteria or compensatory review that apply to CJA panel members and are thus structurally more independent of court influence.<sup>461</sup> They differ from one another in that FPDOs are federal agencies managed by federal employees with input from the courts, while CDOs are nonprofit organizations answerable to their boards of directors.<sup>462</sup>

The Cardone Report cites the fact that there are FDOs serving ninety-one of the ninety-four federal districts as one of the “great achievements” of the CJA under judicial leadership.<sup>463</sup> As described below, however, the Cardone Report highlighted several challenges FDOs encounter due to judicial control over their organizational structure, staffing, and funding. This chapter first discusses judicial control over the organizational structures of FDOs (Recommendations 10 and 11), and then addresses the roles of the circuit court and the Judicial Conference-approved work-measurement formula in providing FDO resources (Recommendations 12, 13, and 14).

## II. Judicial Control of Defender Office Creation, Model, and Leadership: Recommendations 10 and 11

### Issues

The Cardone Report identified three elements of judicial control over institutional defenders that present challenges to the independence of the defense function.

1. Judges decide if a district will have an institutional defender at all. In districts that rely exclusively on panel attorney representation, the court controls who may be included in the pool of attorneys eligible for appointment, as well as the appointment in each individual case, making panel attorneys dependent on the court for their appointments.<sup>464</sup> Panel attorneys in these districts lack institutional support,<sup>465</sup> which can, in turn, affect the consistent delivery of quality representation.<sup>466</sup>
2. If an institutional defender is to be established, judges decide which model—FPDO or CDO—the district will adopt. This decision affects the extent to which the circuit court plays a role in FDO leadership and staffing. (See next bullet and Section III.)
3. If the FPDO model is chosen, the circuit court has the authority to appoint the federal public defender (FPD) in each district of the circuit to a renewable four-year term and to preside over the reappointment of FPDs who seek additional terms.<sup>467</sup>

Though the Cardone Report concluded that “[i]n most cases, circuit appointment of FPDs does not significantly hinder the defense function,” the report noted further that this process “can create the perception, whether correct or not, that the judiciary has undue influence over the defense.”<sup>468</sup>

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461. Cardone Report, pp. 159–160.

462. *Id.*, p. 18.

463. *Id.*, p. xx.

464. *Id.*, p. 75. “In districts with judge-managed panels, attorneys often believe they have no avenue to remedy problems in panel administration.”

465. *Id.*, pp. 165–166.

466. *Id.*, p. 168.

467. 18 U.S.C. § 3006A(g)(2)(A).

468. Cardone Report, p. 139.

Vesting appointment authority in the circuit was intended to provide federal public defenders a degree of independence from the district judges before whom they regularly appear. However, some witnesses described circuits as relying “heavily” on comments from district court judges when making reappointment decisions.<sup>469</sup>

Whether or not district judges heavily influence the process, the perception that they do may cause FPDs to “base their decision-making at least in part on the preferences of district court judges, rather than focusing on what is best for their clients,” weighing their self-interest in reappointment against the needs of clients or offices.<sup>470</sup> Unlike the directors of CDOs, some FPDs felt they needed to be responsive to judicial preferences in hiring (generally regarding the number of and types of positions in the office and specifically in who is chosen for litigating attorney positions), the types of case appointments the office takes, and the use of resources in specific appointments such as capital cases.<sup>471</sup>

## Recommendations

The Cardone Report made two recommendations to address these concerns.

### Recommendation 10 (no action)<sup>472</sup>

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.

### Recommendation 11 (approved)<sup>473</sup>

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.

## Implementation and Impact

### Recommendation 11: Establishing Federal Defender Organizations

As shown by Figure 1, FDOs have a long-standing presence in the federal system. At the time the Cardone Report was published, all but three of the ninety-four federal districts were already served by an FDO—and had been for seven years or more.

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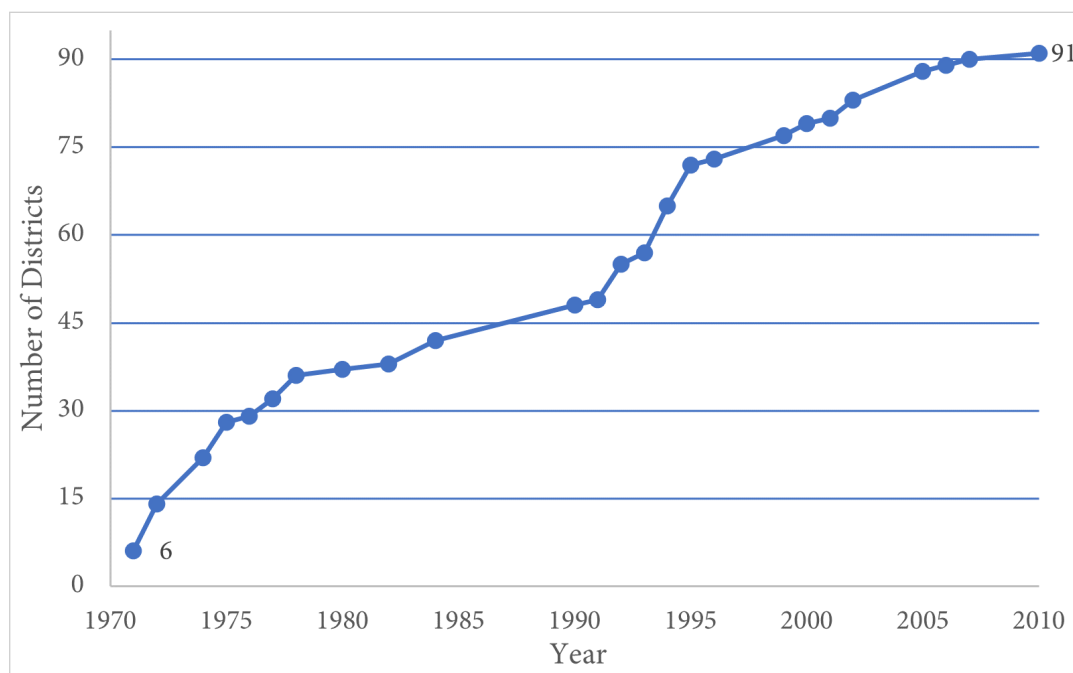
469. *Id.*, p. 140.

470. *Id.*

471. *Id.*

472. The JCUS took no action on this recommendation. See JCUS-SEP 18, p. 7.

473. See JCUS-SEP 18, p. 39. This recommendation, and now JCUS policy (added to the *Guide* February 2019 as § 410.20), is identical to the provisions of what districts may do under 18 U.S.C. § 3006A (g)(1) permitting the creation of institutional defender offices.

**Figure 1.** Districts Served by FDOs Over Time.

Note: Dates are the earliest that a district was represented by either type of FDO, regardless of whether a multidistrict arrangement was later reconfigured (as has happened seven times) or the type of FDO was changed (as has occurred in two districts). The three districts that are not now represented by an FDO are not included. Information provided by the Defender Services Office.

Of the three districts not served by an institutional defender when the Cardone Committee made its recommendation, the caseload in one does not meet the established threshold, leaving two districts as the focus of adopted Recommendation 11. Both districts had established FDOs in the 1970s but disbanded them in the 1980s, with one judge noting that, prior to their service on the bench, the court decided to eliminate the office due to the poor quality and timeliness of its work, as well as scheduling issues.<sup>474</sup>

Both districts without an FDO considered whether to establish one after the start of FY 2017, but each declined to do so. During interviews,<sup>475</sup> judges said that they were pleased with their exclusive reliance on panel attorneys for CJA appointments, with one noting that theirs was a very small district where the district court and magistrate judges have a more “personal relationship” with all of the lawyers throughout the district.<sup>476</sup> Our interviews with district judges, federal defenders, and panel attorney district representatives<sup>477</sup> in districts with FDOs provided more specific information, consistent with the Cardone Report, about the benefits of their institutional defenders. These are some of the benefits that were described:

474. Interview 171.1.

475. See Technical Appendix 3: Project Interviews for information regarding the format, content, and representativeness of the interview material provided in this chapter.

476. Interview 69.1.

477. “The CJA Panel Attorney District Representative (PADR) is a member of the district’s CJA Panel who is selected by the local [federal public defender/community defender], with acquiescence from the chief judge, to serve as the representative of the district’s CJA Panel for the national Defender Services CJA PADR program and local CJA committees.” See *Guide to Judiciary Policy*, Vol. 7A, Appx 2A, p. 13, fn.2. As our interviews show, not all districts follow this procedure. *E.g.*, Interview 172.1.

- FDOs serve as resource points for the entire federal defense bar in a district, providing training and informal advice to panel attorneys, with some going so far as to share sample briefs<sup>478</sup> or hold mock trials to help panel attorneys prepare.
- While issues of funding the defense function as a whole remain,<sup>479</sup> the FDOs are better resourced than individual CJA panel attorneys, having budgets that allow them to hire experts and investigators without having to ask the court for funds that can be denied or reveal litigation strategy.
- FDOs are staffed with attorneys and support staff who specialize in CJA representation, allowing them to develop skills and knowledge that some CJA panel attorneys whose practice also includes non-CJA clients, are not able to develop.<sup>480</sup>
- Because of their greater resources, FDOs in most districts take or are assigned the most difficult cases, committing institutional resources to complex cases, which allows the CJA panel to better allocate their scarcer resources.<sup>481</sup>

In sum, the JCUS-adopted recommendation that eligible districts should establish an FDO has not been implemented in the two districts that meet the target number of CJA appointments. One of the districts indicated it would continue to revisit the issue.

## Recommendation 10: Circuit Court Reappointment of Federal Public Defenders

The Cardone Report recommended that the circuits should adopt a presumption of reappointment for the FPDs in each district to ameliorate the challenges to independence posed by their exercise of this responsibility.

This recommendation was not adopted by the JCUS, but, while most circuits utilize some form of a competitive process for reappointing federal defenders, our interviews identified two circuits with practices closer to the “presumption of re-hire” contemplated by the recommendation.

In one circuit, the presumption of reappointment is long-standing<sup>482</sup> and based on a detailed process. As described by one FPD, after defenders notify the circuit of their interest in reappointment, the circuit surveys various stakeholders in the courts (U.S. attorney, pretrial, probation, etc.) about the performance of the entire defender office. The defender submits a list of achievements, and the circuit decides whether or not to reappoint.<sup>483</sup>

In the other circuit, the process post-dates the Cardone Report and was reportedly adopted due both to the issues raised in the Cardone Report and to frustration with the cumbersome reappointment and background investigation process. As described by one interviewee, the circuit moved to a process that presumes reappointment to conserve court resources when there were no issues with the defender’s work.<sup>484</sup>

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478. *E.g.*, Interview 174.1.

479. See Appendix A: Defender Services Budgeting and Funding Process and Chapter 2: Structural Changes.

480. Interview 180.1, describing a preference by the court for the FDO to take civil commitment and other specific types of appointments.

481. Interview 175.1.

482. Interview 21.1.

483. *Id.*

484. Interview 78.1.

As for the other circuits, information provided during interviews with circuit court stakeholders and FPDs shows that the competitiveness of the process varies in practice.<sup>485</sup>

- One circuit reported that, though there was no presumption of reappointment, concerns about fairness meant a second term was often granted (even over local objections) to give FPDs sufficient time to develop their work.<sup>486</sup>
- Four circuits provide a notice for public comment regarding the potential for reappointment instead of a public call for applications.<sup>487</sup>
- Four circuits create a committee to review the defender and solicit feedback but did not specify if notice of reappointment (or a general job posting) was part of the process.
- One circuit uses its existing CJA committee to review performance and decide if a merit screening committee should be appointed, with high-quality performance resulting in the CJA committee declining to appoint the merit selection committee.<sup>488</sup>

In sum, one circuit changed its process to include a presumption of reappointment at least partly in response to Recommendation 10. Ten circuits require the FPD in their combined forty-eight FPDOs to reapply for their job at varying levels of competition every four years.

To assess the broad impact of the role of the circuit court in reappointing FPDs in practice, we compared the tenure of the FPDs and CDO executives based on their approximate appointment dates.

**Table 1.** Tenure of Current FDO Leadership by Model (as of September 30, 2022).

Model	# Defenders	# Districts	Years in Position		
			Average	Median	Range
Federal Public Defender Offices	64	72	9.9	8.3	<1 - 37
Community Defender Organizations	17	19	11.5	10.3	<1 - 37

Note: Appointment dates were gathered from the federal defender interviews or, if the current defender was not interviewed, from court and FDO websites. FDO websites were also used to confirm dates provided in the interviews.

Table 1 shows both that (1) the majority of districts currently operate under the FPDO model,<sup>489</sup> with one district converting its CDO to an FPDO at the start of the study period,<sup>490</sup> and (2) the FPDs have been overwhelmingly reappointed (the median tenure is more than two terms) and, as a group, have served in their positions, on average, 1.6 years less than the CDO leadership.<sup>491</sup>

Thus, while more courts have opted for the institutional defender model that provides the judiciary with more control over FDO operation—identified as an issue in the Cardone Report—having circuit

485. No circuit CJA plans included information on these processes. See Appendix D: Circuit Court CJA Plan Analysis.

486. Interview with 145.1, 166.1, and 167.1.

487. Interview with 162.1 and 163.1; Interview with 149.1, 148.1, and 87.2; Interview with 151.1, 152.1, and 89.2; and Interview with 160.1.

488. Interview 150.1.

489. The judicial council of the circuit approves the institutional defender model providing services to each district as part of its review and approval of the district court's CJA plan (18 U.S.C. § 3006A (a)).

490. Until then, there had been only one change—also from a CDO to an FPDO—in 1983.

491. The times were also computed looking at the tenure of previous office leaders in those organizations where the current federal defender was appointed during the study period. The median times with those figures were 8.2 and 9.9 years, which is not appreciably different from those reported here.



courts responsible for the reappointment of federal defenders does not by itself create substantial differences in the tenure of FDO leadership.

Tenure, however, is not the only measure of the reappointment issues discussed in the Cardone Report. Our interviews with eighteen FPDs who had been through the reappointment process indicate that the independence-related and office-stability concerns identified in the Cardone Report remain in at least some districts.

The continuing possibility that an FPD may not be reappointed leads to independence-related concerns, such as the pressure some FPDs may feel to please the judges who are involved in their reappointment, rather than make the most vigorous defense for their clients.<sup>492</sup> Relatedly, although placing the reappointment decision with the circuit court was meant to reduce concerns that district judges, before whom the FPD regularly appears, are in control of their job retention, our interviews indicate this goal may not have been universally achieved. Here are some examples:

- FPDs reported pressure to take more cases and specific types of cases.<sup>493</sup>
- One circuit judge noted discomfort with the role district judges have in reappointment decisions, explaining that some district judges have “a preference for FDOs who plea bargain a lot, and sometimes that’s not the best tack for the defender to take.”<sup>494</sup>
- In one district where panel management is the responsibility of the FPDO, an interviewee described pressure from district court judges to remove or reappoint specific panel attorneys.<sup>495</sup>
- When the court asked an FDO to take compassionate release cases arising from the pandemic, the FPD agreed, but so many cases were filed that the office “got swamped immediately.”<sup>496</sup> Though the court was sympathetic to the subsequent request to pause appointments, the FPD remained concerned about the impact of asking for caseload relief.<sup>497</sup>

Of the twenty-seven FPDs interviewed for this project, eighteen had been reappointed, and seven of these specifically discussed the role of the district court in their reappointment. All but one of the seven FPDs who discussed district court involvement in their reappointment thought that the district court judges had too much influence. One interviewee noted that despite the circuit forming a committee to consider the reappointment of a federal defender, the district court judges bypassed the committee and contacted colleagues on the circuit court directly to put forward the names of their preferred candidates.<sup>498</sup> It was not that interviewees thought the district judges should have no input<sup>499</sup> but that the views of other stakeholders—such as clients, FPDO staff, and CJA panel attorneys—should be given at least as much, if not more, weight.<sup>500</sup>

However, some FPDs said that it can be difficult to tell exactly what weight is given to different stakeholders, due to a lack of information about the process for their reappointment, such as who had been interviewed or what was considered. This uncertainty could lead to a perception—valid or not—that district court judges had too much say in their reappointment decision. Of the eighteen FPDs who

492. Interview 175.1.

493. Interview 27.1. “And then maybe somehow we end up in front of the circuit, and the circuit is talking about your job, and you have to [take more appointments].”

494. Interview with 145.1, 166.1, and 167.1.

495. Interview 27.1.

496. Interview 74.1.

497. *Id.*

498. Interview 82.1.

499. The circuit is required to consider the recommendations of the courts to be served (18 U.S.C. § 3006A (g)(2)(A)).

500. Interview 14.1.

had been reappointed, eleven said the process was reasonably transparent, though some were unsure of details, and seven said the process was not transparent. One compared their reappointment to the evaluation of their own staff:

When I do evaluations for people in the office on performance, I have objective indicia that are in writing that people know what they're being judged against. And yet to this day I've never seen such a list or a set of criteria [for my reappointment]."<sup>501</sup>

Some FPDs also questioned the fairness of requiring them, unlike their CDO colleagues, to re-compete for their job. The CDO executives are appointed by the board of directors that oversees their organizations. This board would be responsible for dismissing an executive who was not performing their duties to an acceptable level, but periodic reappointment applications are not required by statute.

Despite the perceived lack of judicial involvement in CDO hiring, our review of the CDO bylaws revealed that district and circuit judges serve on the CDO boards or are otherwise involved in CDO executive hiring decisions to varying degrees.<sup>502</sup> The seven CDO executives we interviewed, however, did not mention this fact and reported that they had more independence than their FPDO counterparts because they did not have to re-compete for their jobs on a regular basis.

These statutory differences between the two types of institutional defenders provide the CDOs more independence as well as more certainty in the continuity of office leadership. The district courts, with approval from their circuit councils, have opted almost 4-to-1 for the FPDO model over which they have more control, and the concerns identified in the Cardone Report regarding circuit reappointment of FPDs have not been addressed for those 48 FPDOs in the ten circuits that use a competitive process every four years.

In summary, though Recommendation 10 was not adopted, one circuit changed its practice to presume reappointment of the FPD. Reappointment processes in other circuits can influence the decisions of FPDs regarding staffing, workload, and other assigned responsibilities, as was detailed in the Cardone Report.

### **III. The Effect of Circuit Court Decisions and Work-Measurement Formulas on FDO Staffing Issues**

Two main issues surrounding the staffing of FPDOs were identified by the Cardone Report: circuit approval of the number of assistant federal defenders (litigating attorneys) and lack of resources allotted by the work-measurement formula to FDOs to provide training and promote diverse hiring and staff development practices.

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501. Interview 26.1.

502. For example, three of the bylaws dictate that vacancies on the board of directors of the CDO will be filled by the district's chief judge or the judges of the district, or that the district's chief judge can veto any appointments; one of these also requires the board to consult with the chief judge when appointing the federal defender. It is not clear to what extent, or how, the judges in these districts exercise this power; nevertheless, it is a fact that they have it, rendering CDOs not as insulated from judicial oversight as they might feel.

The number of full-time-equivalent (FTE) litigating attorney positions that FPDs may fill is limited, by statute, to the number approved by the circuit court.<sup>503</sup> The number of total FTEs that FPDs may fill is limited to the number funded by the Executive Committee's financial plan, approved by the DSC, and is included in the DSO's hiring guidance to each FPD.<sup>504</sup> The circuit court decisions have always been independent of the eventual national hiring guidance provided by the DSO, with both based historically on individual FPD presentations of their needs and priorities as well as DSO-determined metrics such as information about projected caseloads.

Beginning in FY 2016, however, the primary data used for FPD staffing decisions changed to a work-measurement formula created by the Policy and Strategic Initiatives Division of the AO's Human Resources Office (PSID) that assesses the staffing needs of each district based on different metrics.<sup>505</sup> The Cardone Report raised issues with both the circuit court approval and the use of a staffing formula in determining FPD staffing limits and sought to link the two together.<sup>506</sup>

Turning first to circuit influence, the Cardone Report noted:

While local conditions and practices sometimes create different staffing needs across districts, the number of attorneys an office receives should not be determined by the individual philosophies of the various circuit judges tasked with approving attorney levels. Judges play no role in the selection of U.S. Attorneys and their staffs or in CDO staffing. The same independence should apply to federal public defenders.<sup>507</sup>

The Cardone Report further found that some circuits did not consistently approve district requests for litigating attorney positions, even when requests were supported by criteria such as caseload.<sup>508</sup> The Committee also heard testimony indicating that, in some instances, the circuit court was hoping to reduce positions and costs by moving to a formula.<sup>509</sup> The work-measurement study, however, found that many defender offices were understaffed at the time the formula was created.<sup>510</sup>

503. "The Federal Public Defender may appoint ... full-time attorneys in such number as may be approved by the court of appeals of the circuit." 18U.S.C. § 3006A(g)(2)(A). Although FPDs may hire people who are attorneys in other positions, e.g., as research and writing specialists (R&Ws), the only litigating attorney positions are the assistant federal public defenders (AFPDs). For purposes of this analysis, we refer to these positions as "litigating attorneys."

504. See Chapter 2: Structural Changes and Appendix A: Defender Services Budgeting and Funding Process for detail.

505. Cardone Report, pp. 64–67, describing the 2013 work-measurement study, the resulting formula, and the challenges of using a formula to measure defender workload. These formulas were developed at the request of the chairs of the JCUS Budget and Executive Committees which, in 2014, jointly asked that the Judicial Resources Committee accelerate the FPD work-measurement study so that they could be assured that there was an objective measure for determining FPD staffing requirements. The work-measurement study was conducted by the PSID and overseen by the Judicial Resource Committee, and the JCUS approved it for implementation beginning FY 2016. See Appendix A: Defender Services Budgeting and Funding Process and Interview 142.1.

506. See Chapter 2: Structural Changes for a discussion of the ways in which Recommendation 1a was meant to address other issues with FPD staffing driven by the work-measurement formula, including its inflexibility and difficulty in adequately measuring FPDs' representational tasks.

507. Cardone Report, p. 142.

508. *Id.*, pp. 140–142, describing circuit denial of additional AFPD position requests for districts in the Fifth Circuit.

509. Cardone Report, p. 65. See Chapter 2: Structural Changes. The belief was supported by early discussion of the use of a formula for defenders, including "[t]he judiciary cannot expect Congress to continue to provide significant appropriations increases annually. If such increases are provided, it will be at the expense of the Salaries and Expenses account and by extension, the courts. Thus, the judiciary must re-focus its efforts to achieve real, tangible cost savings in this program. We support the efforts of the Judiciary Resources Committee to develop a comprehensive, work-measurement-based staffing formula for the federal defender organizations." Memo, Apr. 2014, on file with FJC.

510. *Id.*, p. 65, citing the testimony of the former chair of the Judicial Resource Committee. "[A]ctually the opposite happened. We ended up with a recommendation that was approved by the Judicial Resources Committee and approved then by the Conference for an increase in 8.6 percent across the board for the defender community."

The Cardone Report recommended that, because the JCUS adopted a work-measurement formula to determine defender staffing, circuits should defer to it.<sup>511</sup> It also identified two specific areas of work performed by FDOs—training and developing a diverse staff—that the Cardone Committee viewed as critical to promote consistent quality of representation, which are not elements of the work-measurement formulas. The recommendations to address these issues are discussed below.

## Recommendations

### Recommendations 12 and 13 (approved as modified)<sup>512</sup>

Circuit court judges should give due weight to Defender Services Office recommendations and Judicial Conference-approved Judicial Resources Committee staffing formulas when approving the number of assistant federal defenders in a district.

### Recommendation 14 (approved as modified)<sup>513</sup>

Modify the work-measurement formulas, or otherwise provide funding to reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and 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.

## Implementation and Impact

### Recommendations 12 and 13: Circuit Approval of Litigating Attorney Positions

Studying the implementation and impact of these recommendations benefits from a comparison between FPDOs and CDOs. Because the circuit influence on litigating attorneys impacts FPDOs but not CDOs, we examined differences in the level and types of staffing in the two types of organizations over time to assess both the effect of this provision historically and whether or not the adopted recommendation had an impact. Crediting that the courts of appeal had always given what they perceived as “due weight” to these considerations in practice, it is the adoption of this standard as JCUS policy in June 2019 that could be expected to make a difference.

Analysis shows that FPDOs are not disadvantaged vis-à-vis CDOs in terms of percent-of-formula staffing.<sup>514</sup> But the hiring caps enforced by the circuits apply only to the litigating attorney positions, not all staff positions. FPDOs, therefore, can and have employed hiring strategies to make up for these restrictions by filling their allotted staff number with more of the positions that are not subject to circuit control.<sup>515</sup> Table 2 compares the percentage of staff who are litigating attorneys in FPDOs (subject to circuit caps) and CDOs (not subject to circuit caps).

511. *Id.*, p. 64.

512. When the JCUS considered Recommendations 12 and 13 for adoption as policy, they combined the two together and modified the text to read as noted above. JCUS-MAR 19, pp. 19–20.

513. JCUS-SEP 18, p. 42.

514. See Appendix B: Defender Services Human Resources, Table 4.

515. Interview 176.1, discussing the use of research and writing positions to fill FTEs because of the number of litigating attorney positions approved by the circuit.

**Table 2.** Percent of FTEs On Board in the “Federal Defender and Assistant Federal Defender” Staff Category, by Organization Type and Circuit, Fiscal Years 2017–2022.

Circuit	Federal Public Defender Offices						Community Defender Organizations					
	Fiscal Year						Fiscal Year					
	2017	2018	2019	2020	2021	2022	2017	2018	2019	2020	2021	2022
DC	56%	54%	56%	60%	61%	52%	-	-	-	-	-	-
1	45%	41%	43%	45%	42%	42%	-	-	-	-	-	-
2	48%	46%	46%	47%	47%	47%	51%	50%	50%	51%	51%	51%
3	44%	48%	47%	47%	48%	43%	40%	39%	42%	45%	48%	46%
4	44%	48%	49%	49%	49%	51%	-	-	-	-	-	-
5	45%	44%	44%	46%	46%	45%	-	-	-	-	-	-
6	41%	40%	40%	41%	41%	41%	45%	43%	45%	46%	48%	45%
7	47%	46%	50%	48%	50%	50%	49%	48%	47%	46%	48%	49%
8	41%	45%	47%	48%	48%	48%	-	-	-	-	-	-
9	39%	41%	42%	42%	43%	42%	43%	43%	43%	44%	42%	41%
10	46%	45%	44%	44%	43%	42%	-	-	-	-	-	-
11	38%	39%	40%	40%	39%	39%	43%	43%	45%	45%	42%	41%
All	42%	43%	44%	45%	45%	44%	44%	44%	45%	46%	45%	45%

The percentage of litigating attorneys in FPDOs overall rose slightly over time. Across circuits, five saw increases of varying sizes in the percentage, five saw decreases, and two were unchanged between FY 2017 and FY 2022. However, there was variation across FPDOs in all years, even if the D.C. Circuit, which varied the most, is excluded.

Looking at patterns in those circuits that have both types of organizations, the differences were relatively small, ranging from one to four percentage points across the six dual-model circuits. CDOs had the higher percentage of litigating attorneys in five of six circuits for the first two years of the study period and in four of the six thereafter.

These findings support what we learned in our interviews with FPDs, very few of whom had difficulty with the litigating attorney caps set by their circuits. Of the twenty-one offices that had asked their circuit courts to raise the caps, only three reported that some of their requests were not granted.<sup>516</sup> The others were successful with each request and saw their circuits as being very receptive. Some FPDs had even asked for and received approval to set caps above their then-current litigation needs, so that they would have the flexibility to move attorney staff around as the need arose.

Two of the FPDs, though, noted that their circuit’s current amenability to raising the caps was a relatively recent development, stemming, at least in part, from adopting the work-measurement staffing formula in 2016 which provided each FDO a total number of positions without distinguishing the number of litigator positions from support staff.<sup>517</sup> Before the staffing formula, the number of FDO support staff was tied to the number of litigators. With the formula, the FDO receives the same number of total positions regardless of how many attorneys the circuit has approved. As one federal public defender said, because the office gets the same amount of money either way, approval of litigating attorney positions has “gotten much easier.”<sup>518</sup>

516. For one of the three requests that was not granted by the circuit, the district received no response. Interview 20.1.

517. Interview 35.1.

518. Interview 25.1.

It is still the case, though, that when FPDOs identify a need for more litigating attorneys, they must ask the circuit for additional positions or request conversion of existing positions. Either way the FPDO must seek circuit approval to have more litigating attorneys.<sup>519</sup>

The circuit courts varied in their responses to the question of how often FPDOs made requests for additional staffing and how often those requests were approved.<sup>520</sup> Some circuits provided exact information on the frequency of requests by district.<sup>521</sup> One circuit did not specify frequency but noted that the defenders were careful in making requests that stayed within formula.<sup>522</sup> A recent request in that circuit tied the additional position request to the Cardone recommendation to increase access to CHUs.<sup>523</sup>

These FPDO requests are ultimately decided by the court of appeals (referred to alternately as court of appeals, full court, or circuit during the interviews)<sup>524</sup> or, specifically, the “active judges” of the court.<sup>525</sup> Only one circuit leaves the decision to the chief judge alone, acting for the court.<sup>526</sup>

The circuits also differ in their approval of the requests. While all make decisions on a case-by-case basis, some circuits approve requests more often than others. Some generally defer to the recommendation of the DSO,<sup>527</sup> others referenced routine approvals,<sup>528</sup> or no denials to the best of their recollection.<sup>529</sup> Specifically:

- One circuit said requests have been routinely approved at the requested level since 2005.<sup>530</sup>
- One circuit said both recent requests were approved.<sup>531</sup>
- Two circuits saw more mixed support for these requests.
- One circuit with eleven requests fully approved four, partially approved five, and denied one (one request was pending).
- One circuit said requests were generally approved, but this was thought to be the result of conservative requesting behavior on the part of the FPDOs.<sup>532</sup>
- One circuit expressed its reluctance to support additional staffing requests, at least for traditional units, because of a skepticism that the resources were needed. That resulted in recent denials and a general feeling among those interviewed that the circuit had not approved many requests in the past.<sup>533</sup>

519. Interview 175.1, noting the differences between FPDO and CDO.

520. Most often requests were described as ad hoc (Interview with 162.1 and 163.1), as needed (Interview with 158.1 and 159.1), infrequently (Interview with 149.1, 148.1, and 87.2 and Interview 88.2), or not on a set schedule (Interview with 151.1, 152.1, and 89.2).

521. *E.g.*, Interview with 90.2, 153.1, 154.1, and 155.1.

522. Interview with 157.1 and 170.1.

523. *Id.*

524. Interview with 149.1, 148.1, and 87.2; Interview with 90.2, 153.1, 154.1, and 155.1; Interview with 145.1, 166.1, and 167.1; Interview with 158.1 and 159.1; Interview with 160.1; Interview with 168.1 and 144.1; and Interview 150.1.

525. Interview with 162.1 and 163.1; Interview 88.2; and Interview with 151.1, 152.1, and 89.2.

526. Interview with 146.1, 169.1, and 147.1.

527. Interview with 149.1, 148.1, and 87.2.

528. Interview 88.2 used the word “often” to describe approvals; Interview with 146.1, 169.1, and 147.1.

529. Interview with 151.1, 152.1, and 89.2 and Interview with 168.1 and 144.1.

530. Interview with 90.2, 153.1, 154.1, and 155.1.

531. Interview 150.1.

532. Interview with 158.1 and 159.1, noting that the circuit does not “micromanage” the FPDO, but the offices were aware that the circuit was concerned about the financial viability of the offices after the problems faced during sequestration.

533. Interview with 145.1, 166.1, and 167.1. “I’m a little skeptical of a request .... I just don’t have a sense of how hard they’re working, to be honest with you.” And, “My sense is we have not approved a lot.” And, “[the circuit] never felt good about figuring out when we’re supposed to do this.”

Two circuits felt that the absence of frequent requests meant that the FPDOs had sufficient resources to manage their caseloads.<sup>534</sup> Others said they simply couldn't say if FPDOs had enough resources and suggested we ask them directly.<sup>535</sup> One interviewee conceded infrequent requests might be a sign of a disconnect between what the process allows FPDOs to request and what they need.<sup>536</sup> Another interviewee, who had long-standing connections with the defense community, was confident that defenders would reach out if they needed resources and was not concerned about an absence of requests.<sup>537</sup>

Overall, our interviews with both federal public defenders and circuit courts indicate that requests to raise the cap on the number of litigating attorneys in FPDOs are usually approved in most circuits.

Regardless of eventual outcome, making each of these requests requires an investment of time and resources, which can be significant. One recent district request, which fell within the number allotted by formula, resulted in the circuit asking the FPDO to submit the following information in addition to the staffing formula support it had already provided with the initial request:<sup>538</sup>

1. why the district's caseload stabilized since a prior request
2. lists of out-of-district cases for the past seven years
3. any formal FDO memorandum for taking out-of-district appointments
4. salary charts, including levels and steps, for research and writing positions and assistant federal public defenders
5. cost projections for five, ten, and twenty years (both position types)
6. cost projections for replacing, if positions were converted
7. resumes/CVs of all applicants for recent research and writing positions
8. resumes/CVs of all current research and writing positions

Despite the specificity of additional requests for information by the circuits, FPDs reported receiving little feedback in return for the circuit's decision,<sup>539</sup> which could make it difficult to tailor their future requests. When the twenty-seven federal public defenders we interviewed were asked on what their circuit relied in coming to a decision on the appropriate number of litigating attorneys, more than half (fourteen) indicated that they did not know what the court relied on.

Our circuit court interviews indicated that the circuits vary as to what information they expect to be included in FPDO requests to raise the litigating attorney cap. These include reasons why the positions are needed (six circuits), formula support (seven circuits), support of the DSO (eight circuits), or all three. Additional information may also be required.

- One circuit requested additional information about staff work experience, staff duties, personnel issues, and "other extenuating circumstances."<sup>540</sup>
- One circuit's process included a conversation between the federal defender and circuit executive, after which the circuit executive wrote a memo used in making the final decision.<sup>541</sup>

534. Interview with 160.1 and Interview with 151.1, 152.1, and 89.2.

535. Interview with 90.2, 153.1, 154.1, and 155.1. *See also* Chapter 2: Structural Changes for discussion of current FDO staffing needs.

536. Interview 88.2.

537. Interview with 168.1 and 144.1.

538. FDO Staffing Letter, Mar. 2022, on file with FJC. R&W refers to research and writing specialists, while AFPDs refers to assistant federal public defenders.

539. *E.g.*, Interview 20.1.

540. Interview with 145.1, 166.1, and 167.1.

541. Interview with 168.1 and 144.1.

- Two circuits required the recommendation of the committee reviewing the request.<sup>542</sup>
- In one circuit the chief judge appointed another circuit judge to review the request and present it to the court.<sup>543</sup>
- One circuit conducted an independent evaluation of the caseload and asked the district court chief judge for their endorsement.<sup>544</sup>
- One circuit requested additional information about the potential use of the positions, including taking out-of-district appointments due to the fact the request involved CHU staffing.<sup>545</sup>
- One circuit required several additional pieces of information, including history of requests, comparative information on the weighted caseloads of other districts, the recommendation of the district chief judge, the number of research and writing attorneys, the number of out-of-district appointments, the number of state court appointments, and the budget.<sup>546</sup>

These examples illustrate that simply making a request to raise the litigating attorney caps continues to impose some level of burden on both the circuit court and the FPDO.

In summary, it appears that Recommendations 12 and 13, in addition to changes brought about by adoption of the staffing formulas, have affected some circuit courts' approach to approving the number of FPDO litigating attorneys. However, judicial control to impose administrative burdens on FPDOs for staffing requests and judicial control over the outcome of those requests remains.

## **Recommendation 14: Provide Resources for Training and Additional FDO Non-Representational Responsibilities**

Revision of the work-measurement formula is underway. Data collection is ongoing, and the expectation is that options for formulas will be developed in 2023.<sup>547</sup>

However, there has already been progress in providing resources for the specific non-representational task areas highlighted by Recommendation 14: the training of panel attorneys, and FDO outreach in hiring and staff development programs to improve office diversity.

### ***Enhanced Resources for Training***

Trainings, both formal and informal, are a common responsibility assigned to FDOs for which they currently receive no work-measurement formula credit.<sup>548</sup> By the end of FY 2021, more than three-quarters of the CJA district court plans assigned the FDO responsibility for providing training to the defender community, and most also charged it with assessing the training needs of both the panel (75%) and their own staff (59%).<sup>549</sup> These are increases over the requirements in the CJA plans that were in effect at the

542. Interview with 146.1, 169.1, and 147.1 and Interview with 160.1.

543. Interview with 90.2, 153.1, 154.1, and 155.1.

544. Interview 150.1.

545. Interview with 157.1 and 170.1.

546. Interview with 160.1.

547. Defender Services Committee Dec. 2022 Agenda Item 1D, p. 1.

548. See Appendix C: District Court CJA Plan Analysis for a discussion of panel attorney training requirements and Appendix A: Defender Services Budget and Funding Process for a discussion of the focus of the formula on weighted case openings and case-related work.

549. The smaller numbers for assessing the training needs of office staff likely reflect a determination that this is a managerial task not suited to inclusion in the CJA plan. See Appendix C: District Court CJA Plan Analysis for details.



start of FY 2017. The changes both comport with adopted Recommendation 14 and reflect wording from the 2016 revision to the JCUS model plan.<sup>550</sup>

In addition to these general training responsibilities, 62% of the plans at the end of FY 2021 tasked the FDO with providing other educational programs and services. While the plans themselves did not dictate what these other programs and services must be, examples of these activities described in our interviews with federal defenders and district panel representatives include:

- brown bags (or “lunch and learns”) or other less formal types of get-togethers open to both FDO staff and panel members<sup>551</sup>
- websites or listservs to provide information about fast-breaking legal issues, available training programs, listings of available experts, etc.<sup>552</sup>
- proactive filings not related to one particular case that respond to Supreme Court decisions and new legislation (e.g., *Johnson v. United States*, the First Step Act, compassionate release)<sup>553</sup> and providing model briefs and pleadings<sup>554</sup> (any type)
- staff attorneys answering panel attorneys’ questions,<sup>555</sup> sharing sample materials, and otherwise providing one-on-one assistance, including (in at least one office) offering moot court for panel attorneys<sup>556</sup> to prepare for an upcoming trial or appellate argument

In sum, although the work-measurement staffing formulas have not yet been revised to support additional work, FDOs have been active in providing both formal and informal educational opportunities for panel attorneys as well as their own staffs. Most of the defenders with whom we spoke felt that they had resources adequate to these tasks. However, the tasks sometimes required substantial investment of time by staff members. Defenders reported staff members making tradeoffs among these additional responsibilities and noted that caseload increases would result in deferring training work to serve clients.<sup>557</sup>

### ***Enhanced Resources to Improve Staff Diversity***

A number of the federal defenders we interviewed had instituted policies or programs aimed at promoting diversity among office staff. Of the thirty-four defenders who discussed these efforts,

- ten (29%) have established hiring practices that require less experience for new attorneys,<sup>558</sup> and eleven (32%) have or are developing associated office mentoring programs to bridge any experience gap—informal programs in five and formal programs in six FDOs

550. *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, App. 2A, model plan for Implementation and Administration of the Criminal Justice Act, <https://www.uscourts.gov/sites/default/files/vol07a-ch02-appx2a.pdf>. In 2016, there was a major update to the model CJA plan that expanded the FDO responsibilities. For a history of changes to Volume 7 of the *Guide* since 2010, see Barbara Meierhoefer, Additions and Significant Changes to the Model Plan for Implementation and Administration of the Criminal Justice Act (Model CJA Plan), draft June 22, 2020, on file with the FJC.

551. *E.g.*, Interviews 25.1, 74.1, 81.1, 175.1, 177.1, and 113.1.

552. *E.g.*, Interviews 181.1, 35.1, 14.1, 50.1, and 178.1.

553. *E.g.*, Interviews 30.1, 177.1, 51.1, 178.1, 79.1, 179.1, 180.1, 74.1, 48.1, 50.1, and 113.1.

554. *E.g.*, Interviews 26.1, 175.1, 28.1, 17.1, and 178.1.

555. *E.g.*, Interviews 76.1, 79.1, 26.1, 51.1, 179.1, 181.1, 48.1, 21.1, 175.1, 31.1, 28.1, 35.1, 174.1, 117.1, 17.1, and 177.1.

556. *E.g.*, Interview 82.1.

557. Interview 51.1, describing the impact of heavy caseloads on training for panel attorneys.

558. As part of its long-standing staffing philosophy, one large district usually hires lawyers right out of law school and provides significant training and mentoring, with the frequent result that, after five or so years, the attorneys leave to serve the larger defender community. Another eight federal defenders said that they sometimes hire right out of law school, and three noted specifically that their movement toward less experienced candidates is a change from their prior practice and is aimed at diversifying the office.

- fifteen (44%) distribute notices of job openings as broadly as possible by advertising in newspapers and on websites and employment apps, attending job fairs and “career days,” and reaching out to historically black colleges and universities and minority bar associations
- four (12%) leave open or extend the hiring period if the initial applicant pool does not meet diversity goals
- six (18%) have a diversity committee or diversity coordinator position in the office to mentor diverse hires, design and provide training, and develop innovative hiring strategies (including, in one district, updating the application materials and, in another, creating an “office philosophy” document to share with potential applicants)
- eight (24%) form hiring committees composed of diverse staff that take the lead in reviewing applications and ranking the applicants for each new hire

The introduction of two fellowship programs has also supported FDO hiring diversity. These programs, approved by the JCUS in September 2020, are designed to diversify and expand the pool of attorneys qualified to provide federal non-capital and capital CJA representation.<sup>559</sup> The non-capital program, which began as a pilot in 2022, places twelve graduating law students and attorneys early in their careers in FDO host offices to serve two-year paid fellowships.<sup>560</sup> The capital program, which began in December 2022, places two attorneys with three to five years of criminal practice experience in FDO host offices, also for two-year paid fellowships.

Despite these efforts, twenty of the thirty-four federal defenders (59%) noted that they still had difficulty attracting a diverse applicant pool. It therefore appears that the call for diversity has been heard and is being actively pursued, but local circumstances present unique challenges to both increasing staff diversity and to hiring in general.

### Location and Cost of Living

The location of districts, and divisions within districts, impacts the types of staffing problems that federal defenders encounter, both with their ability to attract applicants generally and for particular types of positions within the office.

- FDOs in lower cost-of-living locations find that federal salaries and benefits make their support positions among the best jobs in town, but they have trouble attracting attorneys looking for amenities not available in their often more rural areas.<sup>561</sup>
- At the other end of the spectrum, four federal defenders cited the high cost of living in their amenity-packed cities as a barrier,<sup>562</sup> with one finding it almost impossible to attract IT staff at the salaries they are able to offer.<sup>563</sup>

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559. JCUS-SEP 20, p. 32. This proposal was approved by the Defender Services Committee at its meeting in December 2019 and approved for recommendation to the JCUS by the Judicial Resources Committee at its meeting in June 2020. A similar program had been implemented in the Eastern District of Washington and was described in the Cardone Report as a “notable example of local initiatives” (p. 185).

560. JCUS-SEP 20, p. 32. The non-capital fellowship was approved for up to four years to “permit an evaluation of its efficacy based on two full cycles of the fellowship.”

561. Interview 20.1.

562. *E.g.*, Interview 79.1.

563. Interview 51.1.

- A high cost of living in combination with lower-than-market-rate salaries<sup>564</sup> can make it especially hard to recruit young attorneys coming out of school with substantial debt—a situation that can prove problematic as offices seek to improve the diversity of their workforce.<sup>565</sup>

### Smaller Districts

The problems that smaller districts face when hiring can negatively impact diversity. If a vacancy occurs in a small office, it usually needs to be filled right away because there are fewer “others” among whom to spread the work. This means that the office often cannot afford to hire a less experienced attorney, as someone who can tackle cases immediately is needed. Further, a small office does not have the same ebb and flow of staff that enables larger offices to take applications on a rolling basis, creating a ready pipeline of potential hires; as a result, hiring takes longer. Also, smaller offices have fewer vacancies, and because they can’t reliably predict when job openings might occur, their ability to recruit proactively through job fairs or career days is hampered.

In sum, the FDOs continue to face varied challenges to increasing diversity and hiring in general, though efforts continue to be made.

### ***Other Required Non-Representational Tasks***<sup>566</sup>

Begun in 2016, the process of FDO staffing based on work-measurement formulas had been in use only for a short time when the Cardone Committee gathered its data. The Cardone Report singled out training and staff diversification programs as important FDO tasks that the Committee found were not adequately considered by the formulas.<sup>567</sup>

Five years on, we are able to combine our review of the requirements of the district CJA plans in place at the end of the study period with federal defender interview information to highlight other required FDO work elements not addressed by the current staffing formulas. The formulas are currently being revised, so the issues may be addressed when they are finalized. Although these tasks are not referenced in Recommendation 14, they are additional tasks that receive inadequate, or no, credit in the current work-measurement formula. We therefore include them in this report as examples of uncredited work, showing that these issues from the Cardone Report remain ongoing.

Those plans in place at the end of FY 2021 can be described as follows:

- Over 95% of plans require the federal defenders to serve on their district’s CJA Committee, with 21% also to administer or staff these committees. We learned from our interviews that this is often just one of the court committees on which the FDO participates, the criminal law committee, being another example.
- Forty-three percent of plans charged the FDO with maintaining the panel list, and one-third gave it responsibility for panel administration. Panel administration was cited frequently during

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564. Cardone Report, p. 54.

565. Interview 28.1.

566. See Chapter 2: Structural Changes for a discussion of the adequacy of the formula to address FDOs’ representational tasks.

567. Cardone Report, p. 182–188.

interviews<sup>568</sup> as a particularly important and time-consuming task that was not adequately accounted for by the staffing formula.<sup>569</sup>

- Sixty-two percent of the plans assigned FDOs responsibility for assisting defendants with their financial affidavits.
- Sixty percent assigned FDOs responsibility for working with the court and U.S. attorney to ensure timely appointment of counsel.
- Thirteen percent of the plans assigned the FDO primary or shared responsibility for developing a mentorship program for the CJA panel, but federal defenders are actually more involved than this would imply, for two reasons:
  1. Seventy-six percent of plans call for the development of a panel mentoring program, with most assigning this responsibility to the CJA committee—on which the federal defender usually sits.
  2. Half of the federal defenders we interviewed described playing various roles in their panel attorney mentorship programs, including identifying potential mentees (as a part of their role in the panel selection process), providing training, matching mentees with mentors, or providing staff attorney mentors

## IV. Conclusion

### Recommendation 11

The JCUS-adopted recommendation that eligible districts should establish an FDO has not been implemented in the two districts without an FDO that meet the target number of CJA appointments.

### Recommendation 10

The JCUS did not adopt the recommendation, but one circuit changed its practice to presume reappointment of the FPD. Elsewhere, reappointment processes can influence the decisions FPDs in those circuits make regarding staffing, workload, and other assigned responsibilities, as was detailed in the Cardone Report.

### Recommendations 12 and 13

The recommendations, in addition to changes brought about by adoption of the staffing formulas, have affected some circuit courts' willingness to approve FPDO requests for litigating attorneys. However, judicial control to impose administrative burdens on FPDOs for staffing requests and judicial control over the outcome of those requests remains.

568. *E.g.*, Interview 113.1, describing meeting to review applications every two to three months.

569. Recommendation 15 called for districts to form a committee or designate an attorney position to manage the panel, but it did not specify where that position should be located, thus leaving the decision as to who has panel management responsibility, as before, to each district. While not an FDO formula element, there is a small “panel management” add-on that provided approximately eighteen FTEs to those fifteen districts that, at the time of the original work-measurement study in 2013, had responsibility for both managing the CJA panel *and* were to have lost positions under the new formula. These were not tied to an assessment of the number of hours FDO staff allocate to this function, and the factor is not included in the current formula. Additional panel management FTEs have been subsequently approved—for a total of thirty-nine nationwide, distributed based on a time and case assessment performed by DSO.

## Recommendation 14

The process for revising the work-measurement formula is underway. FDOs report continuing their work of training panel attorneys, recruiting a diverse workforce, and other tasks assigned to the office under CJA plans.

**Table 3.** Type of Federal Defender Organizations by District (combined offices noted together).

Federal Public Defender Offices						Community Defender Organizations	
Circuit	District(s)	Circuit	District(s)	Circuit	District(s)	Circuit	District(s)
DC	DC	5th	LAE	9th	AK	2nd	NYE, NYS
1st	ME	5th	LAM, LAW	9th	AZ	3rd	PAE
1st	MA, NH, RI	5th	MSN, MSS	9th	CAC	6th	KYW
1st	PR	5th	TXE	9th	CAE	6th	MIE
2nd	CT	5th	TXN	9th	CAN	6th	TNE
2nd	NYN	5th	TXS	9th	GUAM	7th	ILN
2nd	NYW	5th	TXW	9th	HI	7th	INN
2nd	VT	6th	MIW	9th	NV	7th	INS <sup>+</sup>
3rd	DE	6th	OHN	9th	OR	7th	WIE, WIW
3rd	NJ	6th	OHS	9th	WAW	9th	CAS
3rd	PAM	6th	TNM	10th	CO, WY	9th	ID
3rd	PAW	6th	TNW	10th	KS	9th	MT
3rd	VI	7th	ILC	10th	NM	9th	WAE
4th	MD	7th	ILS	10th	OKE	11th	ALM
4th	NCE	8th	ARE	10th	OKN	11th	ALS
4th	NCM	8th	ARW	10th	OKW	11th	GAM
4th	NCW	8th	IAN, IAS	10th	UT	11th	GAN
4th	SC	8th	MN	11th	ALN		
4th	VAE	8th	MOE	11th	FLM		
4th	VAW	8th	MOW	11th	FLN		
4th	WVN	8th	ND, SD	11th	FLS		
4th	WVS	8th	NE				

**Districts with No Federal Defender Organization:** KYE (6th), GAS (11th), NMI (9th—doesn't meet case appointments standard).

# Chapter 5

## Standards of Practice and Training

### (Recommendations 17-23)

#### I. Introduction

“Testimony,” according to the Cardone Report, “reflected that federal criminal justice has become a three-tiered system. This stratification exists not from lack of talent or commitment but rather from lack of resources and independence.”<sup>570</sup> At the top are the prosecutors with ample funding and training available, then federal defenders with fewer resources and independence, and then CJA panel attorneys with still fewer resources for training and often dependent on the court that appointed them for resources to litigate cases and for future appointments.<sup>571</sup> Even among CJA panel attorneys, independence and case resourcing vary by location.<sup>572</sup> Decisions regarding use of service providers is a crucial part of judicial control that affects the ability of CJA panel attorneys to provide quality representation.

While the Cardone Report was definitive in its concerns that lack of resources and independence affect the quality of representation provided by CJA panel attorneys, testimony before the Cardone Committee was more ambiguous. Some witnesses pointed out other factors contributing to perceived lower quality representation, including a lack of experience for panel attorneys litigating in federal court, which was in part the result of their practices being split between state and federal court.<sup>573</sup> It was thought some attorneys used CJA panels as a way to “practice” federal court litigation before moving into retained work.<sup>574</sup> Other witnesses, however, felt that panel attorneys were well qualified and believed in representing people who could not afford counsel—the pay was unrelated to the work they did.<sup>575</sup>

Assessments from the bench showed less favorable ratings for CJA panel attorneys than federal defenders, though panel attorney favorability ratings had consistently risen since 2003.<sup>576</sup> The lower ratings for panel attorneys, however, may be in part the result of their need to seek resources from the courts, while institutional defenders have some resources available.<sup>577</sup> Seeking these resources requires additional work for CJA panel attorneys, which is itself a form of advocacy. Moreover, it does not always succeed, in which case the attorney can become seriously underfunded relative to prosecutors:

The Committee is concerned about both the perception and realization of unfairness and the legitimacy of outcomes in federal criminal proceedings when there are such clear disparities between the quality of representation and resources the government can bring to bear in a case, as compared to the resources a defendant without financial means can access.<sup>578</sup>

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570. Cardone Report, p. 143.

571. *Id.*, p. 144. “They depend upon the judicial officer presiding over an individual case for any resources and even for their own pay.”

572. *Id.*, p. 144. “Some districts have established local plans that safeguard the independence of panel lawyers . . . In other districts, judges maintain control over the selection, appointment, and compensation of attorneys as well as authorization to use ancillary service providers.”

573. *Id.*, citing testimony from Public Hearing—Miami, Fla., Panel 4, Tr., at 34., p. 144.

574. *Id.*, at 32, p. 145.

575. *Id.*, at 33, p. 145.

576. *Id.*, pp. 145–146, discussing the programmatic surveys conducted by the Defender Services Office.

577. *Id.*, p. 147.

578. *Id.*, p. 148.

One way to overcome these disparities is for defender offices to serve as a resource for panel attorneys, through training and other educational support such as best practices and mentorship programs.<sup>579</sup> Also, judges approving panel attorney resource requests need training to make informed decisions when reviewing them.<sup>580</sup> This chapter discusses the seven recommendations from the Cardone Report regarding the standards of practice and training available for cases litigated under the CJA.

## II. Sharing and Utilizing Best Practices

### Issues

The CJA mandates that each U.S. district court, with the approval of the circuit court, develop and implement a plan for providing representation to any criminal defendant unable to afford an attorney.<sup>581</sup> The CJA also provides that the Judicial Conference of the United States (JCUS) may issue rules and regulations governing the operation of the plans.<sup>582</sup>

Despite the statutory requirement, the Cardone Committee found “districts without CJA plans, districts that have not updated their plans in decades, and districts that do not follow their own plans.”<sup>583</sup> But district plans are “critically important,” as they clarify many essential aspects of CJA administration.<sup>584</sup> To “provide guidance in the implementation and administration of the Criminal Justice Act,”<sup>585</sup> the Defender Services Committee (DSC) and the JCUS have adopted a model plan and have been updating it.<sup>586</sup> The Cardone Committee noted that the most recent model plan incorporated “best practices” recommended by “numerous witnesses” during testimony.<sup>587</sup>

The Cardone Committee emphasized in particular two features of an effective plan: appointing panel attorneys to a “number of cases sufficient for them to remain proficient” and requiring attorneys’ participation in “regular training on topics relevant to CJA practice.”<sup>588</sup>

To defend against skilled government attorneys, panel attorneys must receive enough appointments to remain proficient.<sup>589</sup> The importance of getting a sufficient number of cases was described in attorney testimony.<sup>590</sup> Finding the balance between keeping the size of the CJA panel large enough to manage appointments in multidefendant cases yet small enough to maintain proficiency was a struggle in some courts, according to the Cardone Report.<sup>591</sup>

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579. *Id.*, p. 160. “Both panel attorneys and federal defenders identified insufficient training of panel attorneys as a cause of the quality gap between defenders and the panel.”

580. *Id.*, p. 156, discussing the impact of judicial involvement in managing case resources on the quality of representation provided by CJA panel attorneys.

581. 18 U.S.C. § 3006A(a).

582. 18 U.S.C. § 3006A(h).

583. Cardone Report, p. 71.

584. *Id.*

585. *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, Appx. 2A: Model Plan for Implementation and Administration of the Criminal Justice Act pg. 1 (hereinafter “model plan”).

586. Cardone Report, p. 81.

587. *Id.*, p. 82.

588. *Id.*, p. 79.

589. *Id.*

590. *Id.*, p. 80.

591. *Id.*, p. 79.

The Cardone Committee also found that training should be required for panel membership.<sup>592</sup> There was general consensus that the perceived quality gap between defenders and the panel was at least in part due to insufficient training of panel attorneys.<sup>593</sup> As one federal defender put it, “a lot of the deficiencies ... [were] not for lack of ability, or lack of energy, but simply lack of knowledge.”<sup>594</sup> Since most local training events were either organized or sponsored by the federal defenders (with or without the help of the DSO Training Division), increased training was also expected to improve communication across the defender community.<sup>595</sup>

Training programs provided by federal defender offices (FDOs) not only create opportunities to build a defender community on which CJA panel attorneys can rely for institutional support; they also serve as a tool for recruiting new attorneys to the district’s CJA panel itself.<sup>596</sup> Recruiting new attorneys, especially younger attorneys and people of color, into public defense work adds depth to the bench of people able to take these cases, as well as providing other benefits that diversity brings.

Though most federal defendants are nonwhite young men, the panel attorneys who represent them “tend to be older, white, and male.”<sup>597</sup> According to a survey conducted in 2016 by the Cardone Committee, 80% of responding panel attorneys were male, and more than 60% were age fifty or older.<sup>598</sup> In terms of race, 82% were white, 7% were African American, and 9% were Hispanic.<sup>599</sup> In comparison, federal defenders were slightly more diverse: white, African American, and Hispanic attorneys accounted for 72%, 10%, and 11% of federal defenders, respectively.<sup>600</sup>

The Cardone Committee recognized the difficulty of recruiting diverse attorneys, especially those with fluency in Spanish.<sup>601</sup> Attracting attorneys to remote rural locations was another challenge.<sup>602</sup> Despite the difficulties, a number of local initiatives had been successful in increasing diversity. For example, federal and community defenders had been increasing outreach to minority groups by visiting law schools and attending public interest career fairs.<sup>603</sup> A number of districts had mentorship programs to prepare young and minority attorneys to become CJA panel members.<sup>604</sup>

## Recommendations

The Cardone Report made three recommendations to address these concerns.

### Recommendation 17 (approved)<sup>605</sup>

The Defender Services office (DSO) should regularly update and disseminate best practices.

592. *Id.*, p. 80.

593. *Id.*, p. 160.

594. *Id.*, p. 160, quoting testimony from Public Hearing—Philadelphia, Pa., Panel 6, Tr., at 12.

595. *Id.*, p. 81.

596. *Id.*, pp. 186–187.

597. *Id.*, p. 179.

598. *Id.*, p. 180, citing CJA Review Committee Survey on Use of Service Providers and Survey on Vouchers (June 2016), available at <https://cjastudy.fd.org>.

599. *Id.*, p. 180.

600. *Id.*, p. 181, citing DSC materials, June 2017.

601. *Id.*, p. 183.

602. *Id.*

603. *Id.*, pp. 187–188.

604. *Id.*, pp. 185–186.

605. JCUS-SEP 18.



**Recommendation 18 (approved)<sup>606</sup>**

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.

**Recommendation 19 (approved)<sup>607</sup>**

All districts must develop, regularly review and update, and adhere to a CJA plan as per Judicial Conference policy. Reference should be made to the most recent model plan and best practices. The plan should include:

- a. Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
- b. A training requirement to be appointed to and then remain on the panel.
- c. A mentoring program to increase the pool of qualified candidates.

**Implementation and Impact****Recommendation 17: Updating and Disseminating Best Practices**

Recommendation 17 was adopted by the JCUS in September 2018.<sup>608</sup> Best practices for administering the defense function are generally detailed in the *Guide to Judiciary Policy*. Along with the model plan<sup>609</sup> (discussed below), the *Guide* provides approaches for maintaining high-quality representation under the CJA. Defenders and CJA panel attorneys also have information about criminal defense best practices available through a password protected website, FD.org. Those materials were not evaluated as part of this study.

In addition to this general requirement, the *Guide* also includes specific provisions for CJA administration, ranging from specifications of statutory requirements (e.g., circumstances under which courts are required to appoint counsel<sup>610</sup> and hourly rates of compensation<sup>611</sup>) to what can generally be labeled as administrative best practices, including those adopted as JCUS policy (e.g., use of case budgeting<sup>612</sup> and standards of voucher review<sup>613</sup>).

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606. *Id.*

607. *Id.*

608. *Id.*

609. The model plan is routinely updated, with a major revision in 2016, and subsequent revisions in later years, especially to incorporate recommendations from the Cardone Report after adoption by the JCUS. See [Guide to Judiciary Policy, Vol. 7A, Ch.2, Appx. 2A, Model Plan for Implementation and Administration of the Criminal Justice Act](#). Details of the model plan and local court adherence to the provisions of it are discussed below, as well as in Appendix C: District Court CJA Plan Analysis and Appendix D: Circuit Court CJA Plan Analysis.

610. *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 210.20 Proceedings Covered by and Compensable under the CJA.

611. *Id.* § 230.16 Hourly Rates and Effective Dates for Non-Capital Cases and § 630.10 Hourly Rates and Inapplicability of Compensation Maximums.

612. *Id.* § 230.26 Case Budgeting.

613. *Id.* § 230.33 Review and Approval of CJA Vouchers.

Incorporation of these best practices into CJA administration is discussed throughout this report in sections on appointment of counsel,<sup>614</sup> voucher review,<sup>615</sup> creation of federal defender offices,<sup>616</sup> and many other provisions. This section examines two specific issues: use of expert services and use of interim payments in complex or extended cases.

### ***Service Provider Usage***

The CJA requires use of expert services where “necessary for adequate representation.”<sup>617</sup> The Cardone Report described the importance of using service providers, especially to augment the resources of CJA panel attorneys, who tend to be solo practitioners.<sup>618</sup> Yet the report found “some panel attorneys do not appreciate the value of expert services, [do not] know where to find needed experts, or simply want to log more billable hours themselves,”<sup>619</sup> while some judges were denying requests to appoint experts whom CJA counsel deemed important to the defense. Federal defenders, who have some service providers on staff and who do not need to seek permission from the court to use service providers in their cases, reported usage rates closer to 100% of appointments.<sup>620</sup>

The *Guide to Judiciary Policy* specifies the method by which attorneys may request use of expert service providers from the courts, including the types of service providers typically used (investigator,<sup>621</sup> psychologist/psychiatrist,<sup>622</sup> and interpreters<sup>623</sup>), the waivable statutory case maximums,<sup>624</sup> and the standards under which courts should review and approve any voucher request, including for use of experts.<sup>625</sup>

To determine if the lack of service provider use identified in the Cardone Report continued, we compared service provider use from 2014 and 2015 (shown in the Cardone Report) with those during our period of study (FY 2017 through FY 2022). Figure 1 below shows service provider use as a percentage of appointments across all district and circuit courts.

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614. Chapter 3: Panel Attorney Compensation, Appendix C: District Court CJA Plan Analysis, and Appendix D: Circuit Court CJA Plan Analysis.

615. Chapter 3: Panel Attorney Compensation and Appendix E: eVoucher Review Data Analysis.

616. Chapter 4: Federal Defender Staffing.

617. 18 U.S.C. 3006A.

618. Cardone Report, p. xix.

619. *Id.*

620. *Id.*, p. 152.

621. *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 320.10.

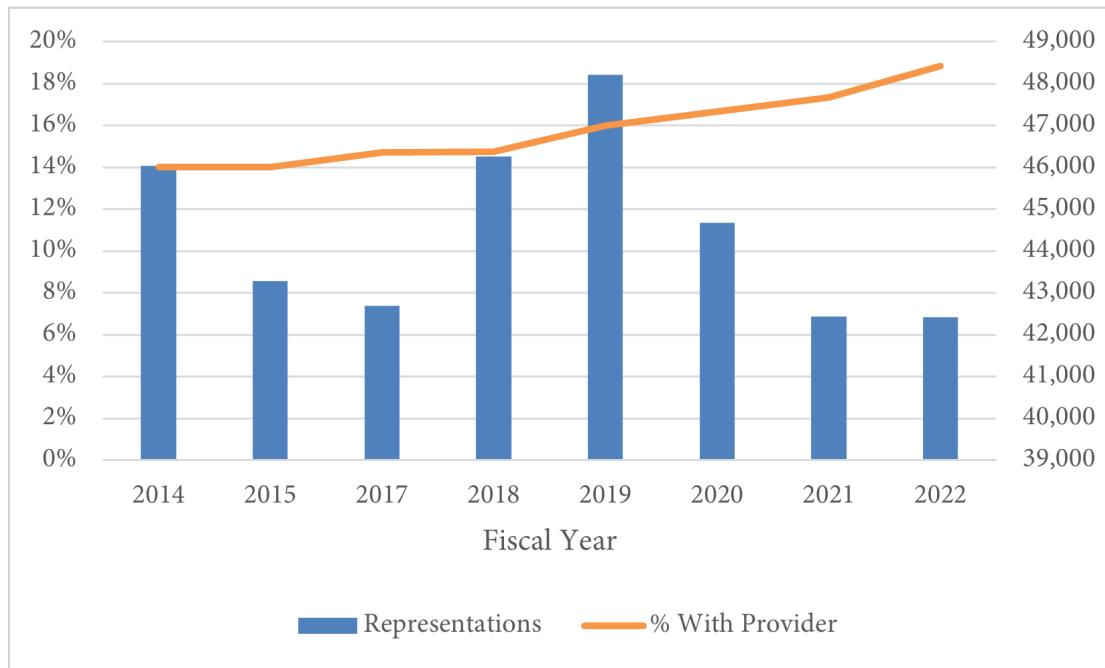
622. *Id.* § 320.20.

623. *Id.* § 320.15.

624. *Id.* § 310.20.20.

625. *Id.* § 230.33.10.

Figure 1. Service Provider Usage Rates by CJA Panel Attorneys, by Fiscal Year.



The figure shows an increase in service provider use over time. There are, however, two caveats to keep in mind. First, the figure is based on vouchers with final payments. Since not all cases commenced in recent years are complete, the percentages are subject to change, more so for the later years. Also, the pandemic reduced the total number of appointments since FY 2020, which might have affected the percentage of cases with expert services during that time. Usage rates in the future might change from what is reported above.

Although service provider use increased, such services are still not common, with the usage rate remaining below 20% on average. Only thirteen courts (district or circuit) had service provider usage rates over 50% at any point in our period of study.<sup>626</sup>

In our CJA panel attorney survey, we asked about requests for service providers and whether courts approved them.<sup>627</sup> A majority of respondents (66%) did not request service providers,<sup>628</sup> and most (81%) of those who did not thought experts were not necessary given the facts of the case.<sup>629</sup> In 1,008 requests for service providers, 937 (93%) were approved by the court.<sup>630</sup> Though some attorneys reported ongoing issues with court approval in specific places or before specific judges, in the aggregate approval was common while requests were infrequent.<sup>631</sup>

626. See Appendix E: eVoucher Review Data Analysis.

627. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

628. *Id.*, Table 19.

629. Technical Appendix 4: Survey of Panel Attorney Experiences with Voucher Review, Table 7 reporting that 81% of attorneys who did not request service providers said they were not necessary given the facts of the case.

630. Appendix F: Survey of Panel Attorney Experiences with Voucher Review, Table 20.

631. Approving experts and paying them in full are different issues. Our analysis of data from the eVoucher payment system finds that claims including vouchers for expert services are more likely to be reduced than those without expert services. See Chapter 3: Panel Attorney Compensation and Appendix E: eVoucher Review Data Analysis.

## Requests for Service Providers

Over half (56%) of district court interviewees<sup>632</sup> who discussed requesting experts indicated that there were barriers to doing so in their district. Many reported that panel attorneys were simply not asking for them (60.9%). As this interviewee noted,

If you ask all of my panel members if they can get any expert they want, they would say probably so. And then if you asked them all, “When was the last time you got an expert?” none of them could recall ever getting an expert.<sup>633</sup>

Some interviewees (17.4%) indicated that finding and hiring the right kind of expert in their district was difficult. As one noted, panel attorneys typically look for litigation specialists and experts with foreign language skills when both are in short supply.<sup>634</sup>

Still others responded that the prevailing CJA rate was simply too low to attract experts (13%), or that they experienced reductions to vouchers (8.7%) as was reported in the CJA attorney survey. These suggest that the critical issue is whether the CJA attorneys get the full approval of, not just mere access to, expert services.

## Perceptions of Approval of Service Providers

An often-cited reason for panel attorneys to decline to ask for expert services is that they believe their requests will be denied, despite approval rates cited above. This belief is often supported by direct or secondhand knowledge of unapproved or drastically reduced expert vouchers, along with more nebulous evidence, such as the current or recent culture of the court. As one interviewee explained,

I’ve never hired an investigator because it’s not going to get approved. It’s just not. One of my new panel members tried to get one and literally got told no, and called me and said, “What do I do about that?” I said, “You go out and interview that witness yourself.”<sup>635</sup>

Of the interviewees who discussed approval of expert billing, 38% stated that they believe that there are barriers to obtaining approval for payment of expert services in their district. Several expressed frustration with the chilling effect of previous denials, such as this interviewee:

Our panel’s use of experts has never been very good. We stress it. . . . and I think some of this goes back to the days of voucher cutting. People just sort of have it in their heads. They don’t even think about what an expert might bring.<sup>636</sup>

Often, the statutory threshold for expert payments, beyond which circuit approval is required, was seen as an uncrossable line, with 16.7% of interviewees stating that one barrier to approval is available experts’ rates exceeding the allowable CJA voucher amount. As one commented, “The rates that the court has set, there’s a maximum cap, so it’s challenging for them to find experts who will take the rate that the court will pay.”<sup>637</sup> Another remarked, “They really need to raise the rates for experts. That is where the problem is. There’s the sense that you can get an expert for 150 or 200 bucks, and [rates for]

632. District court interviewees include district court chief judges (or their designees), federal defenders, and CJA district panel representatives. See Technical Appendix 3: Project Interviews for more detail.

633. Interview 19.1.

634. Interview 71.1.

635. Interview 19.1.

636. Interview 50.1.

637. Interview 17.1.

psychologists and whatnot have really gone up.”<sup>638</sup> One interviewee put requests for experts in particularly vivid terms, stating, “You have a better chance of winning in Vegas at craps than you do getting an investigator if you’re a defendant in (my district). And so the reason they don’t [use experts] is more cultural.... You don’t want to be that CJA lawyer that overspends or overbills.”<sup>639</sup>

### *Interim Payments*

Interim payments offer a way to provide CJA panel attorneys some compensation in cases that may be complex or have an extended duration.<sup>640</sup> This mechanism of payment was designed to strike a balance between the interest of relieving court-appointed attorneys of the financial hardship, common when CJA attorneys must wait to be compensated until a federal case has ended which could be months or years after the work is performed, and the courts’ statutorily-imposed responsibility to meaningfully review vouchers. But interim payments can create problems when judges withhold amounts or reduce payments at the end of high-cost litigation.<sup>641</sup> Additionally, until recently, very few courts had orders permitting the use of interim vouchers making empirical analysis of their impact difficult (*see below*).<sup>642</sup>

During our period of study, the COVID-19 pandemic created additional delays in payments to panel attorneys. As lockdown orders prevented criminal proceedings from moving forward, some courts explored ways to increase the use of interim payments to alleviate the financial hardship of the pandemic on CJA panel attorneys. Panel attorneys are generally permitted to seek authorization to allow for interim payments when judges designate a case as extended or complex. After March 2020, courts began to expand the use of interim payments by issuing orders that more generally permitted attorneys to seek interim payment. Consequently, while only six district courts had orders permitting interim payments pre-pandemic, thirty-seven adopted interim payment orders after the pandemic began.<sup>643</sup>

While thirty-six of the thirty-seven orders were still in effect at the time of the analysis, their language suggests that adopted orders were limited to use during the pandemic.<sup>644</sup> Though courts recognized how circumstances beyond the control of the CJA panel attorney affected the pace of litigation (and attorneys’ ability to get paid for their work), it is unclear at this time if use of these more permissive standards for interim payment will continue post-pandemic, or whether panel attorneys will face payment delays as discussed in the Cardone Report.

As described elsewhere in this report,<sup>645</sup> because of the absence of information on the individual steps of voucher review, we are unable to disentangle the use of interim vouchers on rates of reduction. Still, we found that capital appointments, which by definition are extended and complex and thus more often involve interim vouchers, are more likely to be reduced than non-capital appointments.<sup>646</sup>

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638. Interview 21.1.

639. Interview 49.1.

640. Cardone Report, p. 87, citing *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.73.10(c).

641. *Id.*, pp. 92–102, discussing the various problems created by judges reviewing vouchers, and p. 87, discussing how “district court judges are encouraged to withhold 20 percent of each interim payment. At the end of the case, the attorney submits a final voucher seeking payment of the total amount withheld from the earlier vouchers.” (citations omitted).

642. *See*, [Angelia N. Levy, “Court Orders Issued During the COVID-19 Pandemic on Criminal Justice Act Interim Voucher Payments” \(2023\)](#).

643. *Id.*, [p. 3](#).

644. *Id.*, [p. 4](#), noting that orders used some version of the phrase “until further notice,” suggesting the court might rescind the order after the end of the emergency declaration regarding the pandemic.

645. As described in Chapter 3: Panel Attorney Compensation and Appendix E: eVoucher Review Data Analysis, we compared the total claims to the total payment in part because of the data challenges posed by the eVoucher data.

646. *Id.*

## Recommendation 18: Recruiting New Defense Attorneys

To identify best practices for creating a diversified defense workforce, the DSC and DSO requested two major studies to understand where diversity efforts were not meeting goals.

First, an ongoing assessment of Fair Employment Practices in FDOs found only modest increases in the diversity of FDO workforce composition between 2010 and 2018.<sup>647</sup> By 2018, employees of FDOs were 40% male and 37.5% were nonwhite, small increases over FY 2010 levels. The modest gains were recognized by the DSO, but the office also reiterated a commitment to making more progress,<sup>648</sup> especially at the chief defender and legal professional levels that tended to show the least diversity.<sup>649</sup>

Second, in 2019, the DSC asked the Federal Judicial Center (FJC) to conduct a study of panel attorney diversity.<sup>650</sup> The study provided an opportunity for the DSC to gather information on the demography of CJA panel attorneys and identify panels that might need to increase recruitment efforts. The survey found that 77% of CJA panel attorneys identified as male, over 80% identified as Caucasian,<sup>651</sup> and the median age of panel attorneys was fifty-five.

Together these studies provided baseline information for assessing the impact of efforts to increase diversity and recruit the next generation of federal public defense counsel.

DSO provides several resources for courts and their FDOs to identify best practices for recruiting new attorneys to CJA panels and increasing diversity in the federal defense community. Included among the resources are

- mentorship program resources developed by the Performance Measurement Working Group (PMWG)
- an FDO diversity, equity, and inclusion (DEI) assessment tool also created by PMWG and endorsed by the Defender Services Advisory Group (DSAG)
- a DEI Workbook for CJA Panels created by DSAG
- capital and non-capital diversity fellowship programs for FDOs

The PMWG materials to support creation of mentorship programs for panel attorneys included details of programs in a sample of district courts,<sup>652</sup> sample applications,<sup>653</sup> and curricula for training provided through the mentorship programs.<sup>654</sup> As the materials noted, the most successful mentorship programs are those that pay mentees for their work. To that end, the materials also provided information on funding sources for various programs around the country.<sup>655</sup>

The DEI assessment tool was created by the PMWG specifically to

guide and support FDOs as they define, create, refine, and continually review their DEI practices consistent with the recommendations, findings, and principles found in the *Guide to Judiciary Policy*, the Strategic Plan for the Federal Judiciary (September 2020),

647. CR-DEFSVS-SEP 20 Agenda E-8, p. 16.

648. See DSC June 2020 Agenda 02F-1, p.2.

649. CR-DEFSVS-SEP 20 Agenda E-8, p. 16. “Among chief federal defenders, which is the least diverse occupational category, the percentage of persons identifying as Caucasian has remained relatively constant . . .”

650. Margaret S. Williams, “Criminal Justice Act Attorney 2019 Demographics Survey,” Federal Judicial Center (2020).

651. Margaret S. Williams, “Criminal Justice Act Attorney 2019 Demographics Survey,” Federal Judicial Center (2020), p. 8.

652. Sample CJA Panel Mentorship Programs.pdf. On file with FJC.

653. Sample Mentor Applications & Evaluation Forms.pdf. On file with FJC.

654. Sample Mentorship Program Curricula.pdf. On file with FJC.

655. Funding Sources for Mentorship Programs.pdf. On file with FJC.

The Cardone Report, PMWG and DSAG-endorsed Best Practices, and the Codes of Conduct for federal public defenders (FPDs) and community defender organizations (CDOs), among others.<sup>656</sup>

The tool applies to the administration of the FDO itself and is the result of an effort by both PMWG and DSAG to increase diversity within the FDO.<sup>657</sup> The tool not only provides criteria for assessing the FDO's efforts but also links directly to the resources cited above.

To help diversify CJA panels and to aid districts with complying with the model CJA plan's provisions that the district's CJA committee and/or CJA supervising attorney engage in recruitment efforts to establish a diverse panel, the Defender Services working and advisory groups have developed a DEI workbook for CJA panels. Recognizing that each district has different characteristics, challenges, and opportunities, the DEI workbook offers practical guidance on initiatives and approaches for creating an exemplary and diverse CJA panel and will be discussed at the National CJA Panel Attorney District Representatives conference in February 2023.

Lastly, in an effort to increase diversity in FDOs, the DSC initiated the Defender Services Diversity Fellowship Program. The Fellowship Program was approved by the Judicial Conference in September 2020,<sup>658</sup> upon recommendation by the Judicial Resources Committee (JRC) at the request of the DSC. The goal of the Fellowship Program is to enhance the quality of representation provided under the CJA by increasing the diversity of attorneys who provide representation to CJA clients. The Fellowship Program would achieve this goal by creating a pathway for diverse attorneys qualified to join federal defender organizations (FDOs), CJA panels, and federal capital trial teams after the conclusion of their fellowships.

The Fellowship Program consists of a non-capital component (twelve fellows) and a capital component (two fellows).

Based on the JRC's recommendation, the JCUS approved the non-capital component as a pilot program to operate for up to four years, followed by an evaluation to determine if it should become a permanent program.

The capital component, which was successfully piloted on an informal basis between 2018 and 2020, was approved by the JCUS as a permanent program.

Because the fellowship program was still in development at the time of our interviews with district court stakeholders, it was rarely discussed by interviewees. Other best practices, including the use of mentorship programs, were discussed more often. Our interviews with court stakeholders<sup>659</sup> discussed some specific changes to plans, including changes to mentorship programs that permitted attorney compensation,<sup>660</sup> incorporating the best practice described above.

Some districts saw a lack of follow-through in mentorship program creation:

If you go to our website, it will say that we have a mentor panel. Some of the attorneys that are on there are not even practicing any longer. And the attorneys that are listed are doing no mentoring. We do not currently, to my knowledge, have an active mentor program.<sup>661</sup>

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656. FDO Diversity, Equity, and Inclusion (DEI) Assessment Tool, p. 1. On file with FJC. The 2020 Strategic Plan for the Judiciary is available here: [https://www.uscourts.gov/sites/default/files/federaljudiciary\\_strategicplan2020.pdf](https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf), last accessed Mar. 6, 2023.

657. This position was endorsed by PMWG and DSAG in March 2018. See FDO DEI Assessment Tool, p. 1, fn. 3. On file with FJC.

658. JCUS-SEP 20, p. 32.

659. See Technical Appendix 3: Project Interviews.

660. Interview 117.1.

661. Interview 24.1.

Information on efforts to increase diversity of panel attorneys and FDO staff is part of an ongoing data collection effort within DSO, so the full assessment of the impact of Recommendation 18 on diversifying the workforce must be addressed at a later time.<sup>662</sup> Efforts to increase training and diversity tied to Recommendation 19 are discussed below.

## Recommendation 19: Court CJA Plans

Recommendation 19 was adopted by the JCUS in September 2018 without modification. The Cardone Report's call for courts to develop and update their plans is not new—the model plan calls for creating court plans as well as their updating every five years.<sup>663</sup> Recommendation 19's call for compliance with the model plan and best practices, as well as specifying three criteria to be included in CJA administration, provides the basis for evaluating the implementation and impact of this recommendation.

As discussed in the appendices,<sup>664</sup> we examined district and circuit court CJA plans in effect at the start and end of our study period. Looking at the plans provides information on changes made in light of the Cardone Report recommendations, including Recommendation 19. The district court analysis found the following:

- Seventy-six districts (81%) updated their plans during our study period (FY 2017–FY 2021).
- Eighteen districts (19%) have not updated their plans since before the start of FY 2017.
  - Plans that had not been updated were between six and twenty-two years old in FY 2021.
- Eighty percent of current plans included a requirement that panel attorneys be appointed to sufficient cases to remain proficient—similar to FY 2017 (77%).
- Sixty-one percent of plans included a training requirement (discussed below)—an increase from 46% in FY 2017.
  - Plans rarely distinguished between training requirements for admission to and retention on the panel.
  - Plans required between two and twelve hours of training, with six hours of training required most often.
- Seventy-five percent of plans included a reference to a mentorship program—an increase from 52% in FY 2017.
  - Twenty of the seventy-one plans (28%) that mentioned a mentorship program specifically stated that a goal of the program was to increase diversity among panel members—an increase from 6% of FY 2017 plans.

As summarized above, many district courts made changes to their CJA plans consistent with Recommendation 19. Requiring training to remain on the panel may address some of the issues of quality of representation described in the Cardone Report. Many district courts have the programs in place to recruit new attorneys to the defender community, and they have plans requiring training to keep CJA panel attorneys current on best practices in criminal litigation.<sup>665</sup>

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662. DSO conducts surveys of judges, federal defenders, and CJA panel attorneys to evaluate the defense function. These surveys are currently underway.

663. *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 210.10.10(e).

664. See Appendix C: District Court CJA Plan Analysis and Appendix D: Circuit Court CJA Plan Analysis.

665. Attorneys in FDOs also have opportunities to attend training. See Appendix G: Attorney Training Resources and Challenges.



Courts of appeals also detail the administration of the CJA through plans, local rules, and manuals available to CJA panel attorneys taking cases on appeal. Circuits created their CJA plans without the benefit of a model plan, and Recommendation 19 does not directly apply to appellate courts. However, because circuit judicial councils are required to approve district CJA plans, and therefore are involved in CJA administration generally,<sup>666</sup> and excess compensation voucher review specifically<sup>667</sup> (among other responsibilities), we examined these plans as well. We found:

- Six of twelve circuits revised their plans between FY 2017 and FY 2021.
  - The oldest circuit plan was adopted in 1971.
- Circuit plans did not include formal training requirements for admission to or retention on the panel.
  - The D.C. Circuit reported that it allowed attendance at an FDO-conducted training in lieu of the requirement for years of practice but that it did not otherwise specify a training requirement.
- Circuit plans did not describe mentorship programs to recruit new attorneys to the panel.

Interviews with court stakeholders (district and circuit)<sup>668</sup> provided some context for understanding why courts did or did not recently revise their CJA plans and the role of the Cardone Report in that decision.<sup>669</sup>

Recent changes in district court benches, including chief judges,<sup>670</sup> and potential changes in court personnel highlight the perceived importance of individual court stakeholders in the independence of the defense function. Interviewees felt plans needed to reflect court expectations and practices for CJA-appointed counsel.<sup>671</sup> In one district, which had relied heavily on the work of a long-tenured federal defender, the court began to realize how quickly processes would fail should that individual leave.<sup>672</sup> In another court, recent appointments to the bench in a small court created concern about the impact a few judges could have on CJA administration.

Our plan works with the theory that we're only one bad judicial appointment away from a complete meltdown, because it does all depend a lot on the judges being friendly to the mission [of public defense]. So I definitely tried to think about ways to make it a little bit judge-proof, because we are very much at the mercy of the judges who oversee our process.

666. 18 U.S.C. § 3006A(a). “Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.”

667. *See, e.g.*, 18 U.S.C. § 3006A(d)(3), regarding waivable case maximums. “The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.”

668. *See* Technical Appendix 3: Project Interviews.

669. Reasons included the 2016 model plan revision (Interview 199.1), publication of the Cardone Report (Interview 203.1), DSO review of the district (Interview 29.1), and a goal of increasing the independence of the defense function (*e.g.*, Interview 15.1: “But my understanding is that one of the reasons for not having judges on the committee was to make the committee as independent as possible, so that it would review vouchers and review appointments and review reappointments independent of a particular judge who might like somebody or not like somebody, or a particular judge who might have strong feelings about a voucher. The hope was that the committee could do its work independent of the judge.”).

670. *E.g.*, Interview 24.1.

671. Interview 72.1, noting the recent revision “was an attempt to make sure that the plan reflected some of the ways that they administer their oversight of their CJA panel and also the implementation of eVoucher. So we needed to bring the plan up to speed in that regard.”

672. Interview 8.1, saying the revision “addressed one of the weaknesses in our system—it relies so heavily on the institutional knowledge and experience of [the defender].”

And that's great when we have good judges (and we are fortunate that we do), but—and I know this is part of the whole independence question—it becomes scary if and when that's not the case.<sup>673</sup>

But not all courts felt that plans needed to be revised to implement the adopted recommendations from the Cardone Report. One interviewee remarked that the plan would not be revised in the future because “I think that it's perfectly well implemented. I don't see any need for changes.”<sup>674</sup>

Though only six of twelve circuits had revised their plans at the time of our analysis, others were currently in the process of revision when we spoke with them in 2022. The motivations for revising plans in the appeals courts overlapped the reasons provided by district courts above, with interviewees providing between one and four reasons for the revision.

- Eight circuits said the Cardone Report prompted a revision of their plan.
- Six circuits changed plans to align plan provisions and court practice.
- Four circuits made revisions as part of a cyclical review process.
- Three circuits changed their plans (or were doing so) because of recent court personnel changes.
- One circuit changed its plan to address needs as they arose.
- One circuit said our request to speak with them prompted them to begin a revision process.

Revision of both district and circuit CJA plans was more likely to occur because of exogenous factors, not because of ongoing review of the plan itself. As noted above, when practices and plans were no longer consistent with each other, courts tended to create committees to revise their CJA plans.

Attention to CJA administration by DSO cyclical review, revision of the model plan, and studies such as the Cardone Report generated local interest in CJA plan revision. As discussed above, 81% of district courts and 50% of appeals courts at the time of our study revised their CJA plan, and still more were in the process of doing so when we conducted our interviews. Moreover, the changes made plans consistent with Recommendation 19, especially those setting training requirements to remain on the CJA panel and creating mentorship programs. But as the interviewees described, plan revisions are also necessary to protect existing practices in order to provide a high-quality defense from individual actors who may be skeptical of the defense function.

Court stakeholders reported specific changes intended to address Recommendation 19 and the call for maintaining proficiency and increasing panel attorney diversity and training.

One way courts worked to maintain panel attorney proficiency was to use panel selection and removal processes to change the size of the panel.<sup>675</sup> Most of the interviewees who discussed panel size thought the existing size was about right to meet the caseload needs of the district and allow attorneys to maintain proficiency.<sup>676</sup> Of those who thought the panel size could be adjusted, judges tended to think panels were too small, while panel representatives thought them too large. Lastly, some districts kept additional attorneys on the panel in anticipation of large multidefendant cases, even though not all the panel attorneys routinely received appointments.<sup>677</sup>

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673. Interview 9.1.

674. Interview 12.1.

675. See Chapter 3: Panel Attorney Compensation, Appendix C: District Court CJA Plan Analysis, and Appendix D: Circuit Court CJA Plan Analysis for discussion of changes to panel attorney selection and removal processes.

676. *E.g.*, Interview 182.1.

677. Interview 15.1.

District characteristics affected feelings about the size of the panel as well. Border districts were particularly likely to feel that the panel was too small, though there was some expectation that the change in presidential administration and immigration policies might alleviate some of those concerns.<sup>678</sup> The number of appointments also played a role in feelings about the size of the panel. Several districts noted that the entity making case appointments generally does not face issues finding attorneys, but large, multidefendant cases can make finding counsel more difficult.<sup>679</sup>

Panel lists were sometimes divided by courts based on the types of cases attorneys were assigned, and these assignments promoted attorney training. Twelve districts noted they had more than one type of panel attorney list, such as felony, misdemeanor, complex, etc.<sup>680</sup> Courts appointed new panel attorneys to routine misdemeanor cases to gain experience before being assigned felony cases. Some districts formally referred to the misdemeanor panel as a training panel, noting that attorneys were earning their way onto the felony panel.<sup>681</sup>

One final distinction in panel type was seen in districts that had a general panel and an emeritus panel, discussed by four interviewees.<sup>682</sup> Attorneys on the emeritus panels did not routinely receive appointments, but they were available upon request to mentor new panel attorneys, to take cases that were especially complex, or to serve when multidefendant indictments required more attorneys than were typically available in the district.<sup>683</sup>

Another area of panel administration discussed with our interviewees was panel attorney mentoring. As noted above, mentoring could be provided by an experienced panel attorney serving on the panel (or emeritus panel), by another private attorney in the district (not always a panel attorney), or by an attorney in the FDO.

Twenty-eight districts reported having some type of mentorship program for panel attorneys, though only eleven were formal. Of these twenty-eight districts, three reported increased diversity as a stated goal of the mentorship program, and another ten pursued diversity as a matter of practice with their mentorship program. One interviewee described the mentorship program in the district as a process for training otherwise experienced attorneys on federal court criminal litigation practice.<sup>684</sup>

## III. Improving the Quality of Representation through the Use of Experts and eDiscovery

### Issues

Experts and service providers such as investigators, paralegals, and discovery coordinators are essential for effective representation in many cases.<sup>685</sup> The Cardone Committee found, however, that there was a large disparity between the panel and federal defenders in the use of experts and other service providers.<sup>686</sup> From 2011 to 2014, panel attorneys used service providers in about 15% of cases on average (in less

678. *E.g.*, Interview 175.1.

679. *E.g.*, Interview 15.1.

680. In districts with large capital caseloads, a separate capital panel might exist, but these instances were very rare.

681. Interview 10.1.

682. *E.g.*, Interviews 68.1, 206.1, 61.1, and 50.1 for discussion.

683. *E.g.*, Interview 61.1.

684. Interview 17.1.

685. Cardone Report, pp. 149–150.

686. *Id.*, p. 149.

than 1% of cases in certain districts).<sup>687</sup> In comparison, federal defenders were reported to use service providers in all of their cases.<sup>688</sup>

The Cardone Committee noted that low rates of service provider usage among panel attorneys was in part “a matter of court culture.”<sup>689</sup> A federal defender testified, “I think most people are solo practitioners [who] come out of state court, where they just don’t use experts much.”<sup>690</sup> A judge confirmed this point, saying, “Notwithstanding that this topic is covered in educational seminars, CJA panel attorney members simply may not be aware of the variety of investigative and expert services for which compensation is available under the CJA.”<sup>691</sup>

Additionally, the Cardone Committee found that requiring judicial approval “deters some attorneys from seeking necessary assistance.”<sup>692</sup> Several panel attorneys testified that the current approval process was a “time-consuming [and] cumbersome procedure,”<sup>693</sup> which had a “chilling effect” on the use of experts.<sup>694</sup> Panel attorneys saw not using some service providers (and doing the work themselves) as a way to reduce costs,<sup>695</sup> though they lacked experience with these resources.<sup>696</sup>

In federal criminal litigation, eDiscovery or electronically stored information (ESI) has become standard.<sup>697</sup> But the sheer volume of ESI, as well as the various formats of such records, has made it difficult to access and review the information, especially for panel attorneys with limited resources and training.<sup>698</sup> Although many U.S. attorneys worked with defense counsel to make discovery material “accessible and searchable,” the degree of cooperation varied widely across districts.<sup>699</sup> To “protect the defendant’s rights and the overall integrity of the criminal justice system,” the Cardone Committee found, it is essential for prosecutors, defense attorneys, and the court to “understand the technology involved and work together.”<sup>700</sup>

## Recommendations

The Cardone Report made two recommendations to address these concerns.

### Recommendation 20 (approved)<sup>701</sup>

The Federal Judicial Center (FJC) and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

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687. *Id.*, p. 152.

688. *Id.*

689. *Id.*, p. 154 quoting testimony from Public Hearing—Philadelphia, Pa., Panel 1, Tr., at 24.

690. *Id.*, p. 154 quoting testimony from Public Hearing—Birmingham, Ala., Panel 6, Tr., at 36.

691. *Id.*, p. 154 quoting testimony from Public Hearing—Birmingham, Ala., Writ. Test., at 2.

692. *Id.*, p. 155.

693. *Id.*, p. 155 quoting testimony from Public Hearing—Miami, Fla., Panel 5, Writ. Test., at 6–7.

694. *Id.*, p. 155, quoting testimony from Public Hearing—Portland, Or., Panel 5, Tr., at 41.

695. *Id.*, p. 154.

696. *Id.*, pp. 154–155.

697. *Id.*, p. 226.

698. *Id.*, pp. 227–228.

699. *Id.*, pp. 229–30.

700. *Id.*, pp. 226–227.

701. JCUS-SEP 18.

## Recommendation 21 (approved)<sup>702</sup>

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.

### Implementation and Impact

Recommendations 20 and 21, adopted without modification by the JCUS in September 2018,<sup>703</sup> call for increased training for three target groups—judges, defenders, and panel attorneys—in two specific areas: use of experts, investigators, and other service providers (“use of experts”) and eDiscovery. Also, Recommendation 21 calls for making eDiscovery training mandatory for CJA panel appointment and renewal.

Since the publication of the Cardone Report, progress has been made in the mandatory training requirement. The percentage of district plans requiring eDiscovery training for panel appointment has increased from none to 60%.<sup>704</sup> Still, no plan specifies the training as a requirement to remain on the panel.<sup>705</sup>

DSO’s Training Division provides training for federal defenders and panel attorneys. The main responsibility of FJC Education is training officers of the federal court.<sup>706</sup> In addition, FJC Education collaborates with DSO for training federal defenders and their Capital Habeas Units (CHUs). Local FDO training for staff and panel attorneys is also required under court CJA plans.<sup>707</sup> To assess the changes in training overall, local FDO efforts are discussed as well as implementation by DSO Training and FJC Education.

### DSO Training Division—Federal Defenders and Panel Attorneys

Recommendations 20 and 21 require DSO to “provide” more training on the use of experts and eDiscovery. A natural measure to evaluate the implementation would be the number of programs offered by DSO on these two topics. Ultimately, however, what matters is not the amount of training offered but the amount received by participants. For this reason, we examined attendance as well as the number of offerings to evaluate implementation.

The number of DSO programs planned and held and the number attending from 2017 to 2021 are shown in Table 1. In that time, there was an overall increase in the number of programs and in total attendance. In FY 2021, DSO offered eighty-one programs total, an 80% increase over the 45 programs offered in FY 2017. Attendance, on the other hand, increased 252%, from 5,462 in FY 2017 to 19,200 in FY 2021.

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702. *Id.*

703. JCUS-SEP 18, p. 40.

704. See Appendix C: District Court CJA Plan Analysis.

705. See Appendix C: District Court CJA Plan Analysis and Chapter 3: Panel Attorney Compensation for a discussion of Recommendation 15 on changes to panel attorney selection.

706. The FJC has a statutory authority to provide training to “other persons whose participation in such programs would improve the operation of the judicial branch.” 28 U.S.C. § 620(b)(3). The scope of FJC training has not been extended outside the federal judiciary, however, due to budget limitations. See Appendix G: Attorney Training Resources and Challenges for details.

707. In FY 2021, 78% of plans required FDOs to provide trainings—compared to 40% of plans in FY 2017. See Appendix C: District Court CJA Plan Analysis.

The disproportionate increase in attendance relative to programs scheduled was apparently a consequence of training moving online. In FY 2017, 87% of the programs were in person, but in FY 2021, all of the programs were conducted online. Although online training is not appropriate for all topics or all types of learners, the need to convert to a remote format during the pandemic (and the fact that attorneys had more time for training) had the unexpected benefit of increasing participation. In FY 2020, for example, DSO managed to more than double program attendance over FY 2019, despite having to cancel or postpone nearly half its planned programs.

**Table 1. Number of DSO Programs Planned and Held, Plus Total Attendance.**<sup>708</sup>

Fiscal Year	2017	2018	2019	2020	2021
Programs planned	45	51	49	83	85
Programs held	45	51	49	53	81
In person (%)	39 (87%)	43 (84%)	40 (82%)	19 (36%)	0 (0%)
Attendance	5,462	6,560	5,328	12,383	19,200
In person (%)	4,262 (78%)	4,730 (72%)	4,924 (92%)	2,272 (18%)	0 (0%)

The clear improvements noted above were not matched by programs covering the use of experts and eDiscovery. Table 2 shows the number of DSO programs on the two topics and corresponding attendance. From FY 2017 to FY 2020, the share of programs on the use of experts fluctuated from 6% to 11%, then jumped to 28% in FY 2021. Attendance, which remained below 1,000 in previous years, jumped as well, to 6,473 in FY 2021.

There is no such pattern, however, for the share of programs on eDiscovery. From FY 2017 to FY 2020, a fluctuation of 14% to 20% was seen. Then in FY 2021, the share fell sharply to 1%, and attendance plummeted from 1,810 to 193 in FY 2021. The unusually low FY 2021 numbers are presumably due to changes in the data collection method.<sup>709</sup> If the FY 2021 data are excluded, there is no clear trend over time in the share of eDiscovery programs.

**Table 2. DSO Programs Covering Use of Experts and eDiscovery.**

Fiscal Year	2017	2018	2019	2020	2021
Use of experts					
Percentage of programs	11%	8%	6%	8%	28%
Attendance	650	920	470	887	6,473
eDiscovery					
Percentage of programs	18%	20%	20%	14%	1%
Attendance	1,230	1,660	1,530	1,810	193

708. Constructed from the yearly reports to the DSC. For a breakdown by target audience (defender staff, panel representatives, FDO staff and private CJA attorneys, and death penalty), see Appendix G: Attorney Training Resources and Challenges.

709. See Appendix G: Attorney Training Resources and Challenges for details.

One district court stakeholder described the need for additional panel attorney training, especially with respect to how to request and get approval for expert services.<sup>710</sup> Lack of supporting documentation for requests and problems with voucher submissions generally resulted in reductions in vouchers,<sup>711</sup> and training was thought to address these issues.

## FJC Education—Federal Judges and Federal Defenders

Judicial training provided by FJC Education on eDiscovery and the CJA in general is examined later in the discussion of Recommendations 22 and 23. As detailed below, FJC judicial education on the use of experts has not changed much, excepting the fall 2022 Fourth Circuit conference, which included discussion of the use and approval of experts.<sup>712</sup>

For defender training, FJC Education works with DSO to develop orientation programs for new assistant federal defenders, national seminars for experienced defenders, appellate writing workshops, and national CHU conferences. Each of these programs is offered no more than once per year, and attendance varies year to year. Because these events occur fairly regularly and the need for them is generally constant, there is little incentive to increase the amount of training provided by the FJC under the current MOU and budget. Most programs planned for FY 2020 and 2021 were cancelled due to the pandemic. Table 3 provides information on program offerings and their attendance each year.

Table 3. FJC Education Division Offerings for Federal Defenders.

Fiscal Year	2017	2018	2019	2020	2021
Defender Orientation					
No. Programs	1	1	1	0	0
Attendance	111	111	155	0	0
National Seminar					
No. Programs	1	1	1	0	0
Attendance	550	550	339	0	0
Appellate Writing					
No. Programs	1	1	0	1	0
Attendance	47	47	0	35	0
CHU Conference					
No. Programs	1	1	1	0	0
Attendance	166	166	136	0	0

Though program quantity and attendance may not have changed, use of experts and eDiscovery have been covered more frequently since in-person programming resumed in March 2022. For example, a May 2022 national seminar for federal defenders included a presentation from the National Litigation

710. Interview 671, discussing a need for attorney training on how to request needed case resources.

711. Commonly stated reductions that may be diminished through additional panel attorney training include incorrect billing of administrative costs (reported by 3.7% of respondents) and parking expenses (1.2%), late submission (1.2%), errors and inefficiencies associated with less experienced attorneys (3.7%), and attorneys who consistently submit vouchers that are at the maximum amount allowable (3.7%).

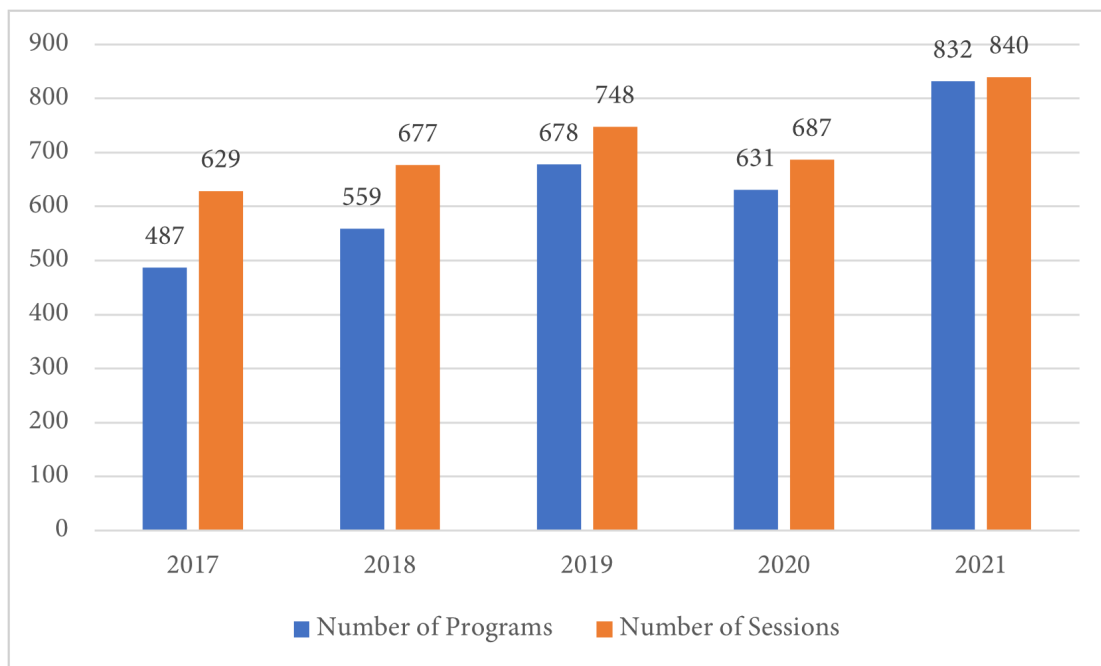
712. See <https://fjc.dcn/content/371101/workshop-judges-fourth-circuit-2022>, last accessed Feb. 9, 2023.

Support Team on eDiscovery.<sup>713</sup> Also, a November 2022 new assistant federal defender orientation program included information both on use of experts and eDiscovery.<sup>714</sup>

## Local FDOs—Federal Defenders and Panel Attorneys

From FY 2017 and FY 2021, FDOs across the country provided training for staff and panel attorneys in 3,187 unique programs.<sup>715</sup> The number of programs offered varied by year, as did the number of sessions (i.e., when the same program is repeated on another day or for another audience). Figure 2 shows the number of programs and the total number of sessions offered during this period.

Figure 2. Local Training Programs and Sessions.



The number of programs generally increased from FY 2017 to FY 2019. There was a slight decline in FY 2020, likely the result of the pandemic, but the number of programs rose again in FY 2021. The same pattern is shown for the number of sessions.

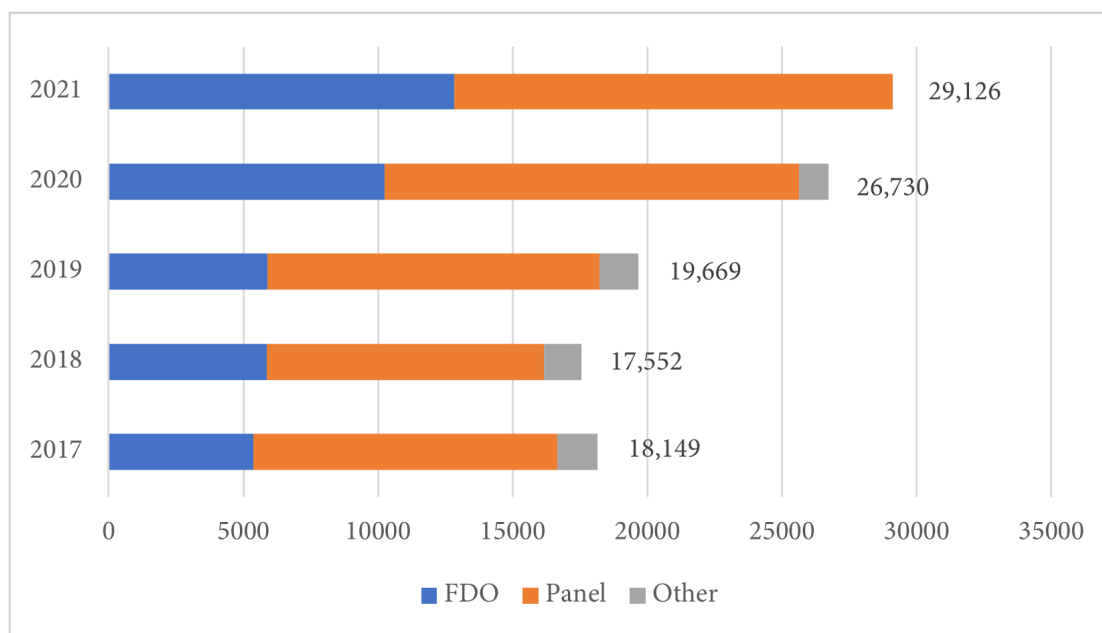
As with the number of events, attendance also changed over the years. FDOs reported attendance for FDO staff, panel attorneys, and “other attendees,” where such information was available. Figure 3 shows attendance by type of attendee for each fiscal year.

713. See <https://fjc.dcn/content/367611/national-seminar-federal-defenders>, last accessed Feb. 24, 2023.

714. See <https://fjc.dcn/content/370858/orientation-seminar-assistant-federal-defenders>, last accessed Feb. 24, 2023.

715. For data collection and quality control method, see Appendix G: Attorney Training Resources and Challenges.



**Figure 3. Attendance by Type of Attendee at Local Training Programs.**

The audience for local training events is generally larger for panel attorneys than FDO staff, which is unsurprising given that panel attorneys are a much larger group. Others (often criminal litigators in the district who are not yet on the CJA panel) make up a small percentage of attendees at local training events.

As was the case with programs offered by DSO, local FDO training programs saw a large increase in attendance from FY 2020 to FY 2021—likely the result of increased participation during the pandemic. Though local programs were 89% to 95% in person in prior years, they dropped to 71% in person in FY 2020. With the move to online training and delays in in-court proceedings, training was simultaneously easier to access and “schedulable” for attorneys confined to their houses. Moreover, the training helped participants stay current on both the effects of the pandemic specifically and changes in criminal litigation generally.

In comparison, the share of programs on the use of experts and eDiscovery in local trainings did not substantially increase or decrease.<sup>716</sup> From FY 2017 to FY 2020, programs on the use of experts hovered around 6% of the total scheduled, while eDiscovery programs ranged from 3% to 7%. Thus, as with DSO training, increased focus on the use of experts and eDiscovery was not driving the rise in attendance at such programs.

716. Though what is reported below is based on specific programs addressing these topics, many FDOs reported that the topics are also covered to some degree in regularly held programs such as orientations for new attorneys (FDO or panel) or annual seminars. The percentages reported in the table are thus a conservative estimate of the actual share of the programs covering the two topics. Such an estimate, however, should still reflect any trend in the coverage.

**Table 4.** Percentage of Local Training Programs on Use of Experts and eDiscovery.<sup>717</sup>

Fiscal Year	2017	2018	2019	2020
Use of experts	6%	5%	7%	6%
eDiscovery	7%	4%	3%	6%

The efforts to increase training on the use of experts and eDiscovery specifically have yet to show substantial gains. As discussed above, most courts did not show increased use of service providers during our study period (though we would expect a lag between training and use). However, the fact that 81% of CJA panel attorneys who did not request the use of service providers did not feel they were necessary given the facts of the case,<sup>718</sup> suggests that the message of using service providers has not been widely adopted as best practice.

Additionally, efforts to increase training staff, both within FDOs and for the NLST, have been slowed by the process necessary to request defender program resources. The ongoing work-measurement study of FDOs may account for non-case-related work conducted by FDO staff (consistent with Recommendation 14) such as training, but it is unclear what the revision will yield even if this work is captured.<sup>719</sup> Similarly, increasing the resources of the NLST (implementing Recommendations 31 and 32) met with delays in the funding process, and FTE approved to implement the recommendation were only included in the FY 2023 financial plan in early calendar year 2023.<sup>720</sup> Given the lack of additional staff and the work increase occasioned by the January 6th litigation (in which NLST staff provide eDiscovery assistance), the reduction in eDiscovery programming offerings and the limited impact of that training are not surprising.

Thus, while some increases in training to implement Recommendations 20 and 21 occurred, the limitations of funding for specific training on experts and eDiscovery resulted in limited reach into the CJA panel attorney communities that continue to need this training.

## IV. Raising Judicial Awareness of Defense Needs and Best Practices

### Issues

Judges only see “what happens in the courtroom” but most of the case “happens outside of the court room, away from the judge’s eyes.”<sup>721</sup> Also, there are certain things that judges should not see even if they could. A judge may not want to know, for example, why an attorney had to spend thirty hours for a document review with a client because the client could have “mental challenge issues” or “education issues,” neither of which the attorney would want to reveal to the judge.<sup>722</sup>

717. FY 2021 numbers are not available because the information is not collected in DSMIS, which is the source for local FDO training data.

718. See Technical Appendix 4: Survey of Panel Attorney Experiences with Voucher Review.

719. See Chapter 4: Federal Defender Staffing and Chapter 2: Structural Changes.

720. See Chapter 7: Litigation Support and Interpreters.

721. Cardone Report, p. 92, quoting testimony from Public Hearing—Santa Fe, NM, Panel 1, Tr. at 18.

722. *Id.*, p. 93, quoting testimony from Public Hearing—San Francisco, Cal., Panel 5, Tr. at 25.

But this need to avoid revealing litigation strategy makes it difficult for judges to decide what services are or aren't reasonable when reviewing vouchers.<sup>723</sup> The problem could be mitigated if a judge had "significant criminal defense experience," but the Cardone Committee noted there were a "limited" number of such judges.<sup>724</sup>

Although "targeted training" for judges was deemed necessary, the Cardone Committee found that judicial training often did not cover "even an introduction to the basics of criminal defense or any discussion of how to evaluate vouchers,"<sup>725</sup> and some previous training programs had been cut due to budget issues.<sup>726</sup> The report concluded there was "broad agreement" that the lack of training "does a disservice to all involved."<sup>727</sup>

## Recommendations

The Cardone Report made two recommendations to address these concerns.

### Recommendation 22 (approved)<sup>728</sup>

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.

### Recommendation 23 (approved)<sup>729</sup>

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.

## Implementation and Impact

### Recommendation 22: Training and Education for Judges

Recommendation 22 was adopted by the JCUS in September 2018.<sup>730</sup>

By statute, the FJC creates and conducts educational and training programs for judges.<sup>731</sup> FJC Education is responsible for this part of the FJC's mission and is the primary source of training for judges within the judiciary, provided through various events and formats, including orientation programs, workshops and special-focus programs, and on-demand resources.<sup>732</sup>

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723. *Id.*, p. 92.

724. *Id.*, p. 93.

725. *Id.*, p. 94.

726. *Id.*

727. *Id.*

728. JCUS-SEP 18.

729. *Id.*

730. *Id.*, pp. 39–40.

731. 28 U.S.C. §§ 620–629.

732. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act for details.

## Orientation Programs

FJC Education holds orientation programs for new district and magistrate court judges consisting of two one-week sessions (Phase I and Phase II) held throughout the year as new judges join the bench. In Phase I, experienced judges serve as mentors and lead discussions built around a series of scenarios and hypothetical situations. The Phase II program, attended by several Phase I classes of judges with less than one year on the bench, focuses on substantive areas of law and skills training provided by experienced judges.<sup>733</sup>

Even before the recommendations were adopted, the orientation programs contained information about the responsibilities of judges under the CJA. The program for district court judges, for example, included “two hypotheticals that deal specifically with CJA attorneys.”<sup>734</sup> To prompt judges’ initial awareness, the program also used a series of “polling questions,” such as, “Who is it in your district who is responsible for appointing attorneys? Do you know how many years [attorneys] serve on a panel? Who conducts the voucher reviews?”<sup>735</sup>

Shortly after the Cardone Report was published, FJC Education staff reached out to Judge Cardone, and she participated as a mentor judge in the Phase I Orientation program for district judges. In February 2020, FJC Education also added a session to the Phase II Orientation Program on the work of the Cardone Committee and the findings of its report.<sup>736</sup> Future programs for the Phase II program will include either a live presentation by Judge Cardone or a recording of the recent FJC podcast “Please Proceed” with her (described below).<sup>737</sup> Judge Cardone participated again at the December 2021 Phase II Orientation.

As with district court judge content, some orientation material for magistrate judges addressed issues raised in the Cardone Report before its publication. A few changes in programming were made after the recommendations, though these were outside of our study period. For example, in November 2021, during an online Phase I/II orientation for magistrate judges, a session on eDiscovery was offered.<sup>738</sup> Also, eDiscovery was covered at the March 2022 and August 2022 Phase I orientations.<sup>739</sup> Voucher review was on the agenda as well.<sup>740</sup>

## Workshops and Special-Focus Programs

FJC Education organizes national workshops and special-focus programs and works with appeals court judges and staff to develop content for circuit workshops. These programs did not include Cardone Report recommendations or the responsibilities of judges under the CJA in general, either before or after publication of the Cardone Report. An exception is a long-standing special-focus program on eDiscovery, though the “focus” tends to be on civil more than criminal litigation. A session of the program scheduled in 2021 would have covered criminal eDiscovery but had to be canceled because of the pandemic.<sup>741</sup> More

733. See <https://www.fjc.gov/education/programs-and-resources-judges>, last accessed Feb. 7, 2023.

734. Interview 98.1.

735. *Id.*

736. See <https://fjc.dcn/content/341627/phase-ii-orientation-district-judges>, last accessed Jan. 21, 2023.

737. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act for details.

738. Email from Interview 96.1, re: Cardone Study Evaluation Follow-Up, Aug. 9, 2022. On file with FJC.

739. Email from Interview 96.1, re: Cardone Study Evaluation Follow-Up, Aug. 9, 2022. On file with FJC.

740. See <https://fjc.dcn/content/366375/phase-i-orientation-seminar-newly-appointed-us-magistrate-judges>, last accessed Feb. 7, 2023.

741. Interview 96.1.

recently, a program for the Fourth Circuit held in fall 2022 included a session on case budgeting.<sup>742</sup> In November 2022, a workshop for Seventh Circuit judges included a session on CJA litigation, including case budgeting and resource request approval.<sup>743</sup>

### ***On-Demand Resources***

On-demand resources, which can be written, audio, or video, offer greater flexibility for creating new content than the orientations and workshops. FJC Education has provided several on-demand offerings since the publication of the Cardone Report, such as the “Please Proceed” podcast with Judge Cardone noted above covering some of the report’s findings.<sup>744</sup> Also, after her participation as a mentor judge at the Phase I Orientation, FJC Education staff worked with Judge Cardone to make her resources available to all judges through the program webpage.<sup>745</sup> In 2019, two case-budgeting attorneys wrote a handbook for judges providing general information on the CJA.<sup>746</sup> FJC Education makes the handbook available on its webpage and provides it to all new district court judges at their orientation.

Overall, despite some notable developments, implementation of Recommendation 22 has been slow. Interviews with FJC Education staff<sup>747</sup> suggest this is in part due to the disruption caused by the pandemic. Many in-person programs, some of which were planned to incorporate additional CJA-related elements, were canceled or rescheduled. Most programs were offered online instead, leading to shorter presentations to “narrow the focus.”<sup>748</sup> Moving a program online meant the amount of time to cover CJA-related issues could be “cut in half or more.”<sup>749</sup>

More importantly, the current pace of implementation likely reflects judges’ assessment of the urgency of the problems reported in the Cardone Report. FJC Education works closely with judges in “developing the topics that they think are most valuable and important to them.”<sup>750</sup> This practice has led, for example, to the inclusion of topics such as workplace conduct,<sup>751</sup> judicial security,<sup>752</sup> and financial disclosures<sup>753</sup> in national workshops. There is no stand-alone session for the CJA, however. As one interviewee explained,

It’s worth a plenary session from time to time, a breakout from time to time, but can I say it’s more critical than judicial security right now? Financial disclosure right now? You know, name your topic. Workplace conduct? So it’s just all of these are going to compete for limited resources.<sup>754</sup>

Observations like these suggest that current coverage of the CJA, or lack thereof, in judicial training programs may reflect the judiciary’s current level of interest in the topic.

742. See <https://fjc.dcn/content/371101/workshop-judges-fourth-circuit-2022>, last accessed Feb. 9, 2023.

743. See <https://fjc.dcn/content/373024/workshop-judges-seventh-circuit>, last accessed Feb. 9, 2023.

744. <https://fjc.dcn/content/350225/please-proceed-chairing-a-judicial-conference-committee-with-judge-kathleen-cardone>, last accessed Mar. 31, 2023.

745. Interview 98.1.

746. Blair Perilman and Cari Dangerfield Waters, *Presiding Over District Court Cases with Appointed Criminal Justice Act (CJA) Counsel: A Handbook for New Judges* (2019).

747. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act.

748. Interview 99.1.

749. *Id.*

750. Interview 173.1.

751. Interviews 97.1 and 96.1.

752. Interview 96.1.

753. *Id.*

754. *Id.*

## Court Stakeholder Interviews

In our interviews with court stakeholders, judges for the most part saw limited utility to increasing training offerings.<sup>755</sup> Table 5 below shows a summary of answers provided by the forty-three chief district judges (or their designees) who discussed training generally and their support for training in these specific areas. Their responses were coded into the categories below.

**Table 5.** Interview Responses Regarding Training for Judges.

Question	Response	Expert Services	eDiscovery
Has your court ever been offered training on any of the following ...?	Training offered	4	13
	Training not offered	15	13
	Unsure	3	2
	No mention	21	15

Training on eDiscovery is offered far more often than training on the use of experts, in part because of the frequency of such training generally by the bar, private organizations, and also by NLST staff. Neither type of training was offered in a majority of sampled districts. A few judges were unsure what training was offered at all, due to the volume of training offerings they receive, but eighteen interviewees were confident that if training was available on these topics, the FJC must have provided it.

We also asked judicial interviewees what training programs they might like to attend. Five said training on use of experts; two said eDiscovery. Four interviewees each said training on sentencing or voucher review would be helpful.

One interviewee thought training about defense best practices, including hearing from a defender, would be helpful to the judges. One interviewee felt judges would benefit from learning about use of virtual hearings. One interviewee wanted training on revising court CJA plans, while another said only “cutting edge” topics were of interest to the judges.<sup>756</sup>

Two interviewees didn’t think any additional training was necessary.<sup>757</sup> Two said judges had no time to attend more training. Judges who had been on the bench for a while, or who had a background in criminal litigation, were especially likely to say training wasn’t necessary.<sup>758</sup> Twenty interviewees did not mention any additional topics.

The interviewees who felt judges would benefit from voucher review training sometimes cited a specific issue in the court that training might address, including this judge,

What I’d really love is for someone to convince my colleague that being a criminal defense attorney is hard work. And that many times some people submit a voucher [for which] they’ve already shaved off some time, and that [the judge] should stop cutting peoples’ vouchers. But I don’t know that there’s any training that’s going to accomplish that. I wish there were a way to impact the attitude of my colleague. Because I don’t know how we’d function without panel attorneys, and I think it’s harmful to the district that there’s one person who there are consistent issues with. But I don’t know how to change that.<sup>759</sup>

755. See Technical Appendix 3: Project Interviews.

756. Interview 8.1.

757. *E.g.*, Interview 41.1, saying they did not feel obligated to attend training.

758. Interview 197.1. “I’ll get the normal notices in the FJC, in terms of some programs, I don’t avail myself of them that much. I’ve tried a lot of cases—it’s not often I feel like I really need to train.”

759. Interview 15.1.

Circuit court stakeholders also discussed training for judges, though some of the focus was on the training for excess compensation review. When asked if training on voucher review was provided to those involved, ten circuits said yes. When asked to clarify who provided such training, the courts reported training by the predecessor of the current voucher reviewer, or the CBA generally. One court had training available through the clerk’s office for technical issues related to voucher review.<sup>760</sup> One interviewee noted a need for more centralized training through the AO exclusively on voucher review, another for training on CJA responsibilities of chief circuit judges through the FJC. As one interviewee noted,

The Criminal Justice Act itself doesn’t explain what the chief circuit judge is supposed to be doing. We’re looking at all the stuff we know nothing about . . . Substantively, what does the Criminal Justice Act require and what does the judiciary policy permit?<sup>761</sup>

Another interviewee said “new chief [circuit] judges would benefit from some early training” on the CJA.<sup>762</sup>

### **Recommendation 23: *The Criminal e-Discovery Pocket Guide***

The *Criminal e-Discovery Pocket Guide*, a combined effort of DSO, the FJC, and DOJ, sent in print to all judges when first published in 2015, is currently available online.<sup>763</sup> Covering common issues of eDiscovery, including volume and formats for production, the pocket guide provides best practices for facilitating discovery between prosecution and defense. (The pocket guide is currently undergoing revision but missed the expected release in 2021.)<sup>764</sup> In addition to the pocket guide, judges can access another resource for eDiscovery best practices through the FJC webpage.<sup>765</sup> The general availability of the pocket guide and the effort to keep it current support Recommendation 23.

## **V. Conclusion**

### **Recommendation 17**

The JCUS adopted Recommendation 17. The model plan in the *Guide to Judiciary Policy* was revised to reflect all adopted Cardone Report recommendations, and other best practices were provided by the DSO, the DSC, and affiliated working groups.

### **Recommendation 18**

The JCUS adopted Recommendation 18. Best practices for creating mentorship programs, a diversity fellowship program, and studies of diversity within FDOs and the CJA panel were conducted to assess needs for increased recruitment and diversity. Best practices on the use of expert service providers and interim payment show more limited success.

760. Interview with 157.1 and 170.1.

761. Interview with 145.1, 166.1, and 167.1.

762. Interview with 168.1 and 144.1.

763. See <https://www.fjc.gov/content/309106/criminal-e-discovery-pocket-guide-judges>, last accessed Feb. 10, 2023.

764. See DSC Dec. 2020 Agenda Item 2G, p. 3, and Interview 59.2.

765. See Douglass Mitchell and Sean Broderick, “Recommended E-Discovery Practices for Federal Criminal Justice Act Cases,” (n.d.), <https://fjc.dcn/content/recommended-e-discovery-practices-federal-criminal-justice-act-cases>.

## **Recommendation 19**

The JCUS adopted Recommendation 19. Eighty-one percent of district courts and 50% of appeals courts revised their plans between FY 2017 and FY 2021. District court plans were revised to include provisions for appointing panel attorneys to a sufficient number of cases to maintain proficiency (a feature also common in early plans), for training to be a member of the CJA panel, and for creating mentorship programs.

## **Recommendations 20 and 21**

The JCUS adopted Recommendations 20 and 21. Training on the use of experts and eDiscovery has seen improvements driven by the surge in attendance at events held online during the pandemic. Training on use of experts has been covered more frequently in training since in-person programming resumed in March 2022. Training on eDiscovery increased steadily until FY 2021.

## **Recommendation 22**

Recommendation 22 was adopted. Despite a few recent developments, incorporating defense best practices and eDiscovery into judicial training programs has been slow, in part due to the disruption caused by the pandemic but also because other issues have higher priority.

## **Recommendation 23**

Recommendation 23 was adopted. The *Criminal e-Discovery Pocket Guide* was distributed to all judges shortly after publication in 2015 and has been available online since then. It is in the process of revision.



# Chapter 6

## Capital Representation

### (Recommendations 24-29)

## I. Introduction

The Cardone Report described how the challenges of litigating and resourcing capital defense highlight the overall problems facing the defense function. Specifically, the report noted the “significant weaknesses in the structure and delivery of federal defense under the CJA. Capital representations put those structural failures in stark relief.”<sup>766</sup> These “structural failures” have the potential to affect the quality of representation for defendants with CJA-appointed counsel.

As the report details, judicial control over the defense function, including the resources available to litigate these cases, distorts the adversarial process.<sup>767</sup> By statute,<sup>768</sup> judges have responsibility for appointing counsel in capital cases and authority to review and approve resource requests, including those over excess compensation limits.<sup>769</sup> Though neither responsibility is unique to capital litigation, the Cardone Report describes how the specialized nature of capital litigation, the insufficient statutory case maximums for litigating capital cases, the complicated procedures to exceed statutory maximums, and the rarity of this type of litigation exacerbate the problems of judicial control over the defense function. The report describes further how geographic variation in the resources available to litigate these cases creates disparities across defendants in federal court.

The Cardone Report discussed how increased use of federal defenders and resource counsel,<sup>770</sup> as well as increased judicial training, could improve the quality of representation in this area of litigation and help judges manage their statutory obligations. This chapter discusses recommendations to increase the independence and effectiveness of the defense function in capital litigation, thereby enhancing the quality of representation.

The information from the chapter is largely drawn from interviews conducted for this analysis. We interviewed:

- 111 district court stakeholders, including chief district judges (or designees), federal defenders, and CJA district panel representatives from a sample of forty districts

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766. Cardone Report, p. 195.

767. *Id.*, p. xxxii, calling for the creation of an independent Defender Commission: “Decisions about the provision of defense services should be made and implemented by those with direct experience and responsibility for the defense function—promoting best practices—and there should be no internal conflict of interest created when requesting funding from Congress,” and p. 92: “[T]he CJA distorts the adversarial process by requiring judges to decide what work panel attorneys can do and what experts they can hire. This problem is structural.”

768. See 18 U.S.C. § 3005 and 18 U.S.C. §§ 3591-3599 for discussion of federal death penalty litigation and statutory requirements for the appointment of counsel in capital litigation.

769. 18 U.S.C. § 3006.

770. Resource counsel is the collective name for the assistance provided by the following projects: the Capital Resource Counsel, Federal Death Penalty Resource Counsel, Capital Appellate Resource Counsel, the 2255 Project, the National Mitigation Coordinator, and national and regional Habeas Assistance and Training Counsel (HAT). Resource counsel is a collection of national and contract positions working in capital litigation. Attorneys serving in national positions are housed in an FDO and take appointments in capital cases, while those who work under contract may not take such appointments as part of their project responsibilities. See Technical Appendix 3: Project Interviews for more detail on the responsibilities of each project.

- twenty-seven circuit court stakeholders, including chief circuit judges (or designees), law clerks, circuit executives, and circuit staff from all twelve circuit courts of appeals
- eleven case-budgeting attorneys
- twenty resource counsel, including national positions and contractors, drawn from a stratified random sample of the five projects

Interviews were coded by FJC research team members for common themes, which are discussed in the analysis along with illustrative examples. Identifying information about interview subjects was redacted or masked to protect the anonymity of interview participants. Where the type of interview respondent (judge, defender, CJA district panel representative, or resource counsel) is relevant to the quote, we provide that information. More information on sample selection, response rates by group, and the questions asked in the interviews is available in the technical appendix at the end of this report.

## II. The Challenges of Litigating and Resourcing Capital Litigation: Recommendations 24-29

### Issues

Due to the rarity and geographic concentration of federal capital cases, judges are unlikely to be familiar with capital litigation practices.<sup>771</sup> “Only a small minority of federal judges have presided over a capital prosecution. And federal judges who work in states without the death penalty may be even less familiar with capital habeas corpus proceedings.”<sup>772</sup> In the period leading up to the Cardone Committee’s work, seven cases were authorized each year on average by the Attorney General to proceed as capital cases.<sup>773</sup> Because these cases are so rare, “judges often struggle” when meeting their statutory obligations to appoint learned counsel<sup>774</sup> and to review and approve requests for case resources (attorney and expert).<sup>775</sup>

### Appointing Counsel in Capital Cases

The Cardone Report identified a number of challenges to appointing qualified counsel to capital cases in a timely manner. To promote appointment of counsel, the statute<sup>776</sup> requires that the court consult with a defense expert—either the federal defender in the district or, if none, the AO’s Defender Services Office (DSO)—but there is no requirement that judges follow the recommendation of either.<sup>777</sup> Resource

771. Cardone Report, p. 195. “Many federal judges are not familiar with the nature of criminal defense and are even less knowledgeable about what it takes to provide a strong defense in a death penalty case, because these cases are relatively rare.”

772. *Id.*

773. *Id.*, fn 922.

774. Cardone Report, p. 195. “Lacking this experience—and/or in some places lack of access to qualified attorneys—judges often struggle with selecting and appointing the learned counsel required in direct death cases and capital habeas cases.”

775. *Id.*, citing testimony from Public Hearing—Birmingham, Ala., Panel 1, Tr., at 3, “Locating an appointed qualified counsel is not always easy, nor [is] reviewing vouchers for reasonableness.”

776. 18 U.S.C. § 3005. “In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts.”

777. See Cardone Report, p. 200, addressing similar issues in the capital habeas context. “Because it is not mandatory, district court judges are under no obligation to accept federal defender, HAT counsel, or Capital Habeas Project’s recommendations for learned counsel, often resulting in the appointment of unqualified counsel and unnecessary delays.”

counsel, working either within FDOs or on contract, provide expertise on appointments and other aspects of capital litigation.

Testimony before the Cardone Committee described the variation among the courts in their willingness to accept the recommendations of federal defenders and resource counsel. In some circuits, there are challenges to effective capital representation because courts vary in “whether the courts listen to or accept our recommendations [as resource counsel].”<sup>778</sup> Other courts don’t accept or reject recommendations, and the delayed decision to appoint counsel creates challenges of its own, especially in capital habeas litigation.<sup>779</sup>

The challenges of appointing counsel are pronounced in districts for different reasons. In some geographic areas, qualified local counsel are not available to meet caseload demands.<sup>780</sup> In other areas, available attorneys who are qualified do not want to take capital habeas cases because they already have a sufficient number of cases<sup>781</sup> or are unwilling to deal with the issues of resourcing these cases.<sup>782</sup> This is especially true in capital habeas litigation, where the duration of the litigation puts private attorneys at risk of financial ruin.<sup>783</sup> The need to find qualified counsel can result in delays in appointment,<sup>784</sup> which “may result in a significantly curtailed investigation and therefore an incomplete habeas petition.”<sup>785</sup>

Appointing local counsel quickly does not ensure quality representation because they may not be qualified to receive such appointments.<sup>786</sup> In particular, judges may prefer local attorneys, but such a reliance on court appointments may result in less than zealous advocacy by attorneys because they are overworked,<sup>787</sup> beholden to courts for their appointments,<sup>788</sup> or insufficiently trained to take such

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778. Cardone Report, p. 197, citing testimony from Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 17.

779. *Id.*, p. 200. “Not only does no reason have to be given for why they are not appointing the team, but they can wait.”

780. *Id.*, citing testimony from Birmingham, Ala., Panel 1, Writ. Test., at 8. “[V]ery few of the attorneys on the CJA panel qualify as ‘learned counsel’ or are willing to accept capital cases.”

781. *Id.*, pp. 200–201, citing testimony from Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 4. “Additionally, it became readily apparent that the number of attorneys who are truly qualified and capable of handling this type of litigation were few and far between and were already burden[ed] with a pending caseload of capital habeas cases and could not take on additional work.”

782. *Id.*, p. 201. “On top of those challenges are the scarce resources granted to post-conviction review, resulting in fewer attorneys willing to accept or become qualified to accept habeas cases.”

783. *Id.*, citing testimony from Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 38. “A couple of the panel attorneys essentially lost their practices because they do capital habeas work.”

784. *Id.*, p. 198. “As mentioned above, judges who lack experience with capital habeas representation often take longer to make crucial decisions, beginning with the appointment of counsel.”

785. *Id.*, p. 195.

786. *Id.*, p. 203, citing testimony from Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 7. “Because there is no centralized office or database to track appointments and caseloads, ‘the courts often appoint lawyers who have little or no capital habeas experience or have such large caseloads that they are unable to give the cases the attention they require.’”

787. Cardone Report, p. 202, citing testimony from Federal Capital Habeas Project Director at Public Hearing—Birmingham, Ala., Panel 3, Tr., at 33. “I literally don’t know where I’m going to go when the next cases come.”

788. *Id.*, p. 75. Not specific to capital litigation, but true generally, “In districts with judge-managed panels, attorneys often believe they have no avenue to remedy problems in panel administration.”

cases.<sup>789</sup> The need to specialize in direct death litigation,<sup>790</sup> and especially capital habeas litigation,<sup>791</sup> as well as a need for regular training on capital litigation,<sup>792</sup> were all described in the Cardone Report.

One solution to ensuring the timely appointment of qualified counsel is to rely on institutional defenders, from both traditional units of FDOs and their CHUs.<sup>793</sup> Such appointments have the added benefit of having other resources, such as investigators, available without the need for them to be individually requested and approved by the court (as discussed in the next section).

Using institutional defenders is not always an available option, however. The Cardone Report found that FDOs and the CHUs are not sufficiently funded to take every case,<sup>794</sup> and conflicts of interest could prohibit such appointments, even if more resources were available. Moreover, some districts refused to permit creation of a CHU within the local FDO, thus limiting the institutional resources available for capital litigation.<sup>795</sup>

Whether it is because of caseload demand, case conflict, or the absence of a local CHU, counsel needs can sometimes be met with out-of-district (OOD) appointments. A protocol for seeking OOD appointments requires offices to contact DSO, which in turn notifies the chief judges of the borrowing and lending circuit(s), before approving such appointment requests.<sup>796</sup> However, because of the requirements of the OOD appointment protocol, OOD appointments can also cause delays that impact the defense function and some judges are unwilling to appoint qualified counsel from outside of their districts.<sup>797</sup>

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789. *Id.*, p. 210, citing a witness who “not only confirmed the lack of adequate training for panel attorneys who work capital habeas corpus cases, he noted a culture in his state of refusing outside assistance.”

790. *Id.*, p. 192. “As noted above, federal capital trials require the appointment of two counsel, one of whom must be ‘learned.’ Judicial Conference policy mandates that such ‘learned counsel’ have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation.”

791. *Id.*, pp. 211–212, citing testimony from Birmingham, Ala., Panel 3, Writ. Test., at 4. “CHU staff must not only become experts at conducting civil discovery, for example, but must also be able to delve into highly sensitive matters such as the client’s family, social, mental health, and other medical history to develop the case in mitigation; reinvestigate the case from the trial level; absorb and synthesize reams of documents pertaining to the client’s life history; and assemble and gain command of a court record that often spans years of prior litigation.”

792. *Id.*, p. 210. “One of the issues with learning this law, he said, was the need for continuous training.”

793. *Id.*, p. 201. “Indeed, the Committee was told that, “most private lawyers at this point won’t take on a case unless they’re accompanied by a Capital Habeas Unit of a federal defender for the reason that ... they’re not going to get the resources paid.” (citations omitted).

794. *Id.*, p. 212, citing Public Hearing—Philadelphia, Pa., Panel 7, Writ. Test., at 4. “A former DSO employee testified that, ‘there are circuit courts ... aggressively limiting the resources made available to counsel appointed in capital cases, and arbitrarily limiting the number of attorney staff in federal defender offices. Whether this is being done for ideological or financial reasons, it is an affront to the right to counsel and the independence of the defense function.’”

795. *Id.*, p. 205, citing testimony from Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 1 (provided to the Committee). “Despite the need for high-quality, cost-effective counsel, ‘some circuits have categorically barred federal defenders [even those within the circuit] from representing any habeas petitioners under any circumstances .... Thus, the community of lawyers with the most federal experience, independence, and access to resources has been excluded from litigating federal habeas issues.’”

796. See Memorandum from Theodore J. Lidz, Assistant Director, Office of Defender Services, to All Federal Public/Community Defenders, Nov. 10, 2008, delineating the process by which FDOs can take appointments out of the designated jurisdictions. On file with FJC.

797. Cardone Report, p. 204. “[T]he Committee heard multiple stories of judges who would not appoint qualified lawyers from outside their districts, even though the lawyers were known to be highly experienced and willing to accept CJA rates substantially below their own.”

## Approving Capital Litigation Resources

The lack of familiarity with capital case needs also manifests when judges must make decisions regarding requests for resourcing these cases with expert services<sup>798</sup> as required under the CJA. Differences in judicial perspective may also lead to capital cases being under-resourced.<sup>799</sup> Those making decisions about resourcing direct death and capital habeas cases differ in their perspectives on the need for case resources, which can also create disparities across jurisdictions and judges in the resources available to defendants with CJA-appointed counsel.<sup>800</sup> These disparities exist not only between institutional defenders and CJA panel attorneys (a problem discussed throughout the Cardone Report)<sup>801</sup> but also within cases represented by CJA panel attorneys, only some of whom receive resources to effectively challenge a client's death sentence.<sup>802</sup>

The Committee concluded that “a person facing a death sentence in one district may have a ‘wildly differently funded defense’ than someone in another district under what should be a national standard of due process and effective Sixth Amendment representation.”<sup>803</sup> Voucher review and approval by judges, thought to be problematic generally,<sup>804</sup> becomes especially problematic in direct death and capital habeas litigation because of the complexity, the stakes of the litigation, and the higher costs compared with non-capital litigation.

The Cardone Report found that the lack of uniformity in these decisions is part of the structural problems of the current system. As one witness before the Cardone Committee described resourcing capital cases, “[W]e’ve got a totally deregulated system that turns on individual judges’ appreciation of the defense function.”<sup>805</sup> The varying perspectives of judges about resource needs can result in denial of requests for resources, and reductions to voucher submissions, some due to formal and informal caps on capital litigation.<sup>806</sup> Though there is no case maximum for attorney compensation in capital

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798. *Id.*, pp. 195–196. “Lacking capital experience, many judges may also be unaware of the need for extensive investigative, mitigation, and other expert assistance in both capital prosecutions and habeas petitions. The same lack of experience also hampers a judge’s ability to evaluate requests to fund these services, sometimes resulting in significant delays.” (citations omitted)

799. *Id.*, p. 197, citing testimony reporting from Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 21, that “the disparity [in] funding between districts in certain regions in this nation versus the funding given in other districts is incredibly dramatic,” and, “[t]he Committee is deeply concerned that sheer geography or judge assignment could prove to be a substantial factor in deciding whether a defendant will be sentenced to death and executed.”

800. *Id.*

801. *Id.*, Sec. 5.

802. Cardone Report, p. 197, citing Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 17. “The level of funding litigants receive for expert and investigative services, as well as the compensation their CJA counsel receive, appears to be an accident of geography, rather than the result of any uniform standard applied across all federal jurisdictions. Certainly, some differences may be expected across the country. But where neither state law concerns nor state practices are legally relevant, the wide variation in the kind of process a federal capital prisoner receives in his collateral proceedings is troubling at best.”

803. *Id.*, citing testimony reporting from Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 21.

804. See Cardone Report Sec. 5 Compensation System Under the CJA and Sec. 6.1 Circuit Review of Panel Attorney Voucher and Ancillary Service Provider Request for discussion of issues identified by the Cardone Committee. See also Chapter 3: Panel Attorney Compensation for ongoing issues identified in this evaluation.

805. Cardone Report, p. 197.

806. *Id.*, p. 198. “Caps in some circuits but not others ensure that defendants within a national federal system receive varying levels of resources and representation.”

litigation,<sup>807</sup> the statute sets rates of compensation,<sup>808</sup> and some courts go a step further and impose caps of their own.<sup>809</sup> Additionally, the statute sets a maximum for expert service provider costs, over which the circuit must approve the expenses,<sup>810</sup> and the amount has not been raised since 1996.<sup>811</sup>

Due to the nature of capital habeas litigation, the Cardone Committee thought caps on capital habeas litigation were especially problematic. By definition, capital habeas litigation requires further investigation not only into the case itself but how the case was presented and tried in the lower courts.<sup>812</sup> Defendants have one year (or less) to file their petition for relief in federal court. Where the state proceedings are historically poor, both the limitations on approving resources and the shortened timeframe for bringing the claim create additional challenges for clients with CJA-appointed counsel.<sup>813</sup> The ability to raise ineffective assistance of counsel claims in federal court is “hollow” if “lawyers bringing those claims in federal court don’t have the resources to mount an effective defense.”<sup>814</sup>

The Cardone Report identified two issues in particular with judicial approval of expert service resources. First, attorneys may reveal their strategy simply by asking for specific resources.<sup>815</sup> Second, in some districts, these requests for expert service resources must be litigated while the one-year statute of limitations for capital habeas cases is running. “This unnecessarily takes time away from a defendant’s ability to have issues adequately investigated and mount a defense,”<sup>816</sup> because if services are approved “they arrive too late” and the statute of limitations expires.<sup>817</sup> The high costs of capital cases and need for excess compensation review of expert service provider requests prompted creation of the case-budgeting attorney program to assist judges facing these resourcing decisions (discussed more below).<sup>818</sup>

807. See [CJA Guidelines, § 630.10.20](#) (citations omitted).

808. 18 U.S.C. § 3599(g)(1) notes that CJA panel attorneys have an hourly rate of compensation. As of the writing of this report, the current hourly rate in capital cases is \$210. See <https://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/cja-rates-case-compensation-maximums/current-criminal-justice-act-cja-rates-and-case-compensation-maximums>, last accessed Feb. 24, 2023.

809. Cardone Report, pp. 197–198, for a discussion of the Fifth Circuit, and pp. 204–206, for a discussion of the Eighth Circuit.

810. 18 U.S.C. 3599(g)(2). “Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed \$7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.”

811. Cardone Report, p. 191. “Although Congress has raised the hourly rate over the years, the presumptive cap on reasonably necessary services has not been increased since 1996.”

812. *Id.* “Habeas corpus is a review of matters collateral to, and thus outside of, the trial record. Development of such claims requires the investigation, or re-investigation, of matters which might have been but were not litigated at trial, on appeal, or even in the initial state habeas petition. This work cannot be done without significant assistance from expert witnesses and other specialized service providers who may or may not have been involved in the original trial.”

813. Cardone Report, p. 198. “The caps for capital representation are onerous ‘especially in Texas, because of the historically poor representation in state habeas proceedings.’”

814. *Id.*, noting the ability to bring such claims was established in *Martinez v. Ryan* 132 S. Ct. 1309 (2012). As discussed elsewhere, this decision was limited by a more recent Supreme Court decision, *Shinn v. Ramirez* 596 U.S. \_\_\_\_ (2022), which raises new challenges for resourcing capital habeas cases.

815. Cardone Report, p. 192, citing, § 3599(f). “This provision may, therefore, require habeas counsel to disclose the theory of the case and defense strategy to both the judge and the government, while also requiring that habeas counsel, if the government objects, be forced to litigate for the funding for any third-party services while the one-year statute of limitations is running.”

816. *Id.*, p. 209.

817. *Id.*

818. See, generally, Margaret S. Williams, Circuit CJA Case-Budgeting Attorney Pilot Project Evaluation (2007–2009), Federal Judicial Center Final Report (2010).

## Recommendations

The Cardone Report made six recommendations to address the challenges judges face when making decisions about appointing counsel and resourcing capital representations.

### Recommendation 24 (approved as modified)<sup>819</sup>

Local or circuit restrictions prohibiting Capital Habeas Unit (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.

### Recommendation 25 (approved)<sup>820</sup>

Circuit courts should encourage the establishment of Capital Habeas Units (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.

### Recommendation 26 (approved)<sup>821</sup>

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 case-budgeting attorneys (CBAs) and/or resource counsel where appropriate.

### Recommendation 27 (approved as modified)<sup>822</sup>

In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so.

### Recommendation 28 (approved)<sup>823</sup>

Modify work-measurement formulas to:

- a. 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.
- b. Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.
- c. Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

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819. JCUS-MAR 19, adopted as modified above.

820. JCUS-SEP 18.

821. JCUS-MAR 19.

822. JCUS-MAR 19, approved as modified. The model plan includes more expansive best practices for consultation with experts in capital litigation. See Appendix C: District Court CJA Plan Analysis for complete details on district court adoptions of each section of the model plan.

823. JCUS-SEP 18.

**Recommendation 29 (approved)<sup>824</sup>**

FJC should provide additional judicial training on:

- a. The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
- b. 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.

**Implementation and Impact****Recommendations 24 and 25: Increasing Access to Capital Habeas Litigation Expertise**

Based on our review of court CJA plans,<sup>825</sup> among all district and circuit courts, only one plan during our period of study referenced a restriction on the appointment of a Capital Habeas Unit (CHU) and that reference indicated removal of a restriction. Consistent with Recommendation 24, the Fourth Circuit plan referenced repeal of Local Rule 113 regarding the appointment of counsel in capital cases, thus allowing for CHUs to be appointed to represent clients in capital habeas litigation.<sup>826</sup> Though repealing the rule does not explicitly specify that cross-jurisdictional representations are permitted, removing the prohibition allowed for cross-jurisdictional appointment until a CHU could be established in the circuit (discussed below).<sup>827</sup>

Where CHUs and capital habeas cases exist, appeals courts varied in their preference for appointing CHUs.

- Two circuits said the preference for appointing CHUs exists at the district court level, and then carries over on appeal.<sup>828</sup>
- Four circuits affirmatively stated a preference within the circuit (district courts or the court of appeals) for appointing CHUs,<sup>829</sup> but at least one described a recent caseload surge creating resource constraints on the CHU and a need to appoint attorneys from outside local CHUs.<sup>830</sup>
- One circuit noted there is not a preference for the CHU, but the appointment of local CHUs is “encouraged.”<sup>831</sup>
- Two circuits reported there was no preference for appointing CHUs.<sup>832</sup>
- One circuit that relied on district court appointment processes noted that the hope was for the CHU to be appointed.<sup>833</sup>

824. JCUS-SEP 18.

825. See Appendix C: District Court CJA Plan Analysis and Appendix D: Circuit Court CJA Plan Analysis.

826. United States Court of Appeals for the Fourth Circuit Judicial Council, Order No. 367, Feb. 27, 2018, repealing United States Court of Appeals for the Fourth Circuit Judicial Council, Order No. 113, Oct. 3, 1996, amended Oct. 1, 2008.

827. Interview with 151.1, 152.1, and 89.2, describing that the Supreme Court has said “death is different” so having a dedicated unit seemed to the circuit to be the best way to meet the needs of these cases. According to the interviewees, the Cardone Report prompted the change, the court and DSO supported it, and JCUS approved.

828. Interview 88.2 and Interview with 157.1 and 170.1.

829. Interview with 158.1 and 159.1; Interview with 146.1, 169.1, and 147.1; Interview with 168.1 and 144.1; and Interview with 151.1, 152.1, and 89.2.

830. Interview with 168.1 and 144.1.

831. Interview with 160.1.

832. Interview with 90.2, 153.1, 154.1, 155.1 and Interview with 145.1, 166.1, and 167.1.

833. Interview with 146.1, 169.1, and 147.1.



Until CHUs are established (or when local CHUs cannot take more appointments), courts may request the appointment of a CHU from outside the jurisdiction through the out-of-district appointment protocol,<sup>834</sup> thereby increasing access to CHUs. As previously noted, the protocol requires FDOs to contact DSO in order to seek the appointment, and for DSO to notify the chief judges of both the borrowing and lending circuit(s). This protocol adds a layer of notice for the appointment of CHUs in these circumstances and may result in delays in CHU appointments.

A look at the out-of-district/out-of-circuit data shows the variation among the courts in their use of these appointments and any delays with this process.<sup>835</sup> Between the start of FY 2017 and the end of FY 2022,

- DSO received 202 requests for out-of-district or out-of-circuit appointments in capital litigation.<sup>836</sup>
  - 156 (77%) were for assistance by the CHU
  - 36 (18%) were for assistance by the trial unit
  - 10 (5%) were for assistance by Capital Resource Counsel and Capital Appellate Resource Counsel.
- DSO approved all requests.<sup>837</sup>
  - On average, seven business days elapsed between FDOs submitting the request to DSO and DSO notifying the circuit.
    - Notification of the circuit occurred within one to thirty business days.
  - On average, eight business days elapsed between DSO notifying the circuit and approving the request to seek appointment.
    - Approval took one to twenty-five business days.

Our interviews with district court stakeholders showed that most of those who had experience working with a CHU generally welcomed their involvement, including those who had received assistance from a CHU outside their district.

But this perspective was not shared by all. One interviewee noted that in the past some judges saw out-of-district attorneys as outsiders, and they were not welcomed.<sup>838</sup> Opposition to out-of-district appointments continued to exist in some districts, with one interviewee, who did not favor out-of-district appointments for capital counsel, indicating that other districts needed to better train locally so that attorneys did not have to leave their home district and travel to another. The interviewee noted that allowing out-of-district appointments can create hardships as well as impact the resources in the home district.<sup>839</sup>

834. See Memorandum from Theodore J. Lidz, Assistant Director, Office of Defender Services, to All Federal Public/Community Defenders, Nov. 10, 2008. On file with FJC.

835. Data on OOD/OOC appointments provided by DSO.

836. Requests for OOD/OOC appointments in non-capital cases, for a § 2241 representation that didn't specify capital or non-capital, and an international extradition case were excluded from this analysis.

837. DSO staff provided information on requests made under the OOD protocol. They noted that while all requests were approved by DSO, the amount of discussion and the additional documentation needed to support some requests could affect the willingness of some FDOs to make additional requests in the future. This process may bias the data, such that the number of requests for OOD appointment (either to lend resources to another district or to seek such help) are not representative of all requests for such assistance.

838. Interview 25.1.

839. Interview 60.1. "I mean, for us the biggest problem is our learned counsel are frequently busy in [other places such as] Texas or Louisiana or Alabama .... I think other districts should get better at [capital litigation], so that we can keep our people close to home."

Using out-of-district appointments for CHU appointments requires notifying both circuits. The Cardone Report found some restrictions in this process. When asked about removing restrictions on out-of-district or out-of-circuit CHU appointments, circuits varied in their practices depending on the caseload and the presence of the resource in the circuit.

- Three circuits reported not experiencing a need to appoint out-of-district or out-of-circuit.<sup>840</sup>
  - Two of the three circuits reported that, though there was no need, non-local CHUs were permitted appointments.<sup>841</sup>
- Eight circuits reported that CHUs from districts in the circuit could be appointed beyond their existing jurisdiction,<sup>842</sup> and often were appointed to manage conflicts or help in places without a CHU, but some limitations existed. Some appeals courts described multiple limitations.
  - One circuit permitted CHUs to take appointments out-of-district but only within the circuit.<sup>843</sup>
  - One circuit noted that these appointments were permitted as long as they did not result in CHUs seeking extensions on their work in the court of appeals.<sup>844</sup>
  - One circuit said out-of-district appointments were a great way to share a resource but noted they didn't want to see the CHU overburdened.<sup>845</sup>
  - Three circuits specifically said the DSO protocol needed to be followed to permit the appointment.<sup>846</sup>
  - Two circuits pointed to recent appointments of CHUs from out of the circuit as evidence that they are permitted at least in some cases.<sup>847</sup>
  - One circuit used out-of-district and out-of-circuit appointments as a criterion for assessing the need for additional assistant federal public defender positions.

## Recommendation 25: Establishing CHUs and Making Resources Available for Capital Habeas Litigation

To understand the implementation of the recommendation, we must first consider where CHUs now exist and their current jurisdiction. From there, we can examine court policies regarding the creation and appointment of CHUs to determine if those policies have changed over our period of study. Lastly, we can examine other resources and training made available for capital habeas litigation.

### *Establishing CHUs*

Looking over time, there has been an increase in the number of districts within the jurisdiction of a CHU.

840. Interview with 149.1, 148.1, and 87.2; Interview with 162.1 and 163.1; and Interview 150.1.

841. Interview with 162.1 and 163.1 and Interview 150.1.

842. Interview 88.2; Interview with 151.1, 152.1, and 89.2; Interview with 90.2, 153.1, 154.1, 155.1; Interview with 145.1, 166.1, and 167.1; Interview with 168.1 and 144.1; Interview with 146.1, 169.1, and 147.1; Interview with 158.1 and 159.1; and Interview with 160.1.

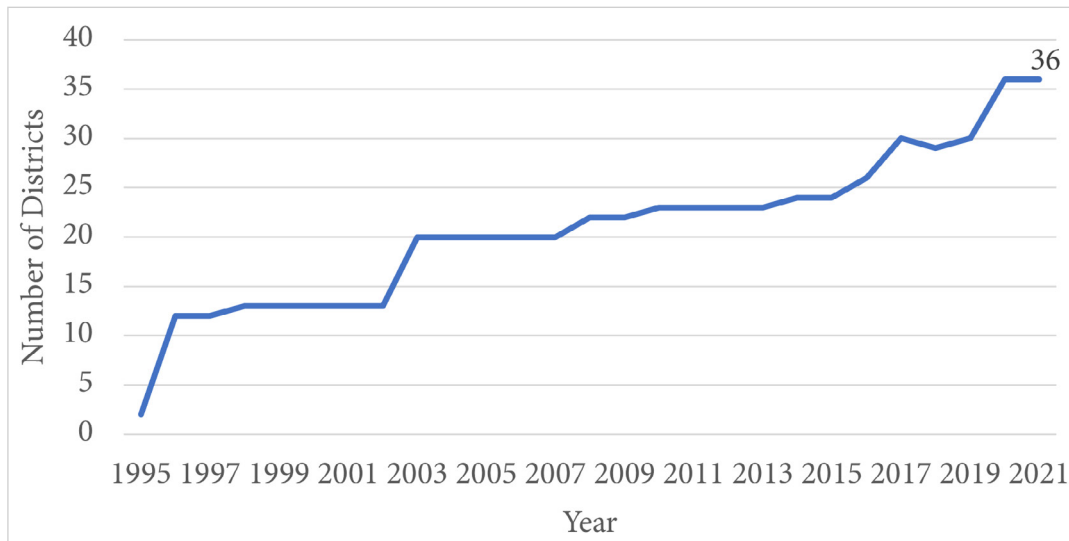
843. Interview with 160.1.

844. Interview with 146.1, 169.1, and 147.1.

845. Interview with 157.1 and 170.1.

846. Interview with 90.2, 153.1, 154.1, 155.1; Interview with 145.1, 166.1, and 167.1; and Interview 168.1 and 144.1.

847. Interview with 90.2, 153.1, 154.1, 155.1 (noting that means there isn't a "blanket prohibition") and Interview with 158.1 and 159.1.

**Figure 1.** Number of Districts within CHU Jurisdiction, 1995–2021.

As Figure 1 shows, the number of districts within the jurisdiction of a CHU has increased over time, a trend that began long before publication of the Cardone Report.<sup>848</sup> Since FY 2017, the number of districts with access to a CHU increased from thirty to thirty-six, not counting the CHU in the Southern District of Indiana, which provides resources nationally.<sup>849</sup> Most of this increase in CHU access was due to the creation of a CHU in the Western District of North Carolina, whose jurisdiction is the entire Fourth Circuit (six judicial districts, two of which did not have the death penalty during this period).<sup>850</sup>

Table 1 shows the CHUs that existed during our period of study, including the year in which the CHU was created and if it had jurisdiction in other judicial districts in the state or circuit.

848. Access to counsel for those in capital post-conviction litigation is an ongoing effort of the Defender Services program. Prior to the creation of CHUs, capital resource centers and, later, Post-Conviction Defender Organizations did this work, and many became the first CHUs created in 1996. For more information about the history of CHUs, see, the Prado Report, at p.17.

849. The jurisdiction of the CHU in IN-S allows it to be appointed in § 2255 cases nationally, meaning it does not have jurisdiction tied to the district where it is located.

850. The number of districts counted in Figure 1 includes the two districts in Virginia, which abolished and then attempted to reinstate the death penalty during the study period.

**Table 1.** CHU Locations, Years of Establishment, and Jurisdictions.

Circuit	CHU Location	CHU Established	CHU Jurisdiction (alphabetical within circuit)
3rd	DE <sup>851</sup>	2010-2018	DE
3rd	PAE	1995	PAE
3rd	PAM	2003	PAM
3rd	PAW	2003	PAW
4th	NCW <sup>852</sup>	2020	NCE, NCM, NCW, SC, VAE, VAW
5th	TXN	2017	TXE, TXN, TXS, TXW
5th	TXW	2017	TXE, TXN, TXS, TXW
6th	OHN	2008	OHN
6th	OHS	2008	OHS
6th	TNE	1998	TNE
6th	TNM	1996	TNM, TNW
7th	INS	2019	§ 2255 clients (nationally)
8th	ARE	2003	ARE, ARW
8th	MOW	2016	MOE, MOW
9th	AZ	1996	AZ
9th	CAC	1995	CAC
9th	CAE	1996	CAE
9th	ID	1996	ID
9th	NV	1996	NV
10th	OKW	1996	OKE, OKN, OKW
11th	ALM	2003	ALM, ALN, ALS
11th	FLM	2019	FLM
11th	FLN	2014	FLN
11th	GAN	1996	GAN

Not every district needs access to a CHU, because some judicial districts are within a state with no death penalty and federal death cases are relatively rare.

Districts in some states that actively pursue the death penalty are not listed in Table 1, and some states that had capital habeas litigation resources in the past (an indicator of need) do not have access to CHUs now. Before the creation of CHUs, capital resource centers were funded in Alabama, Alaska, Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Nevada, North Carolina,

851. The CHU in Delaware closed at the end of FY 2018.

852. The Fourth Circuit CHU, serving the entire circuit but housed in the Western District of North Carolina, was created with the jurisdiction listed in the table. On Feb. 22, 2021, the Virginia General Assembly passed legislation to abolish the death penalty in the state, and the Virginia governor signed it on March 24, 2021. The jurisdiction of the Fourth Circuit CHU thus changed with respect to Virginia, when the sentences of all remaining death row prisoners in Virginia were modified consistent with the new law. In 2022, the state legislature considered a bill to reinstate the death penalty, but the measure was not enacted.

Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.<sup>853</sup> After the centers were defunded, the need remained, and some districts created CHUs to provide ongoing assistance.

Comparing previously available resources with what is currently available through CHUs shows gaps in coverage in Alaska, Florida (the Southern district), Georgia (the Middle and Southern districts), Illinois, Kentucky, Louisiana, and Mississippi. Though Alaska and Illinois no longer have the death penalty, all the other listed states do. Thus, there are now ten judicial districts in five states without routine access to a CHU for § 2254 proceedings that may need them.

Recently created CHUs in the Fourth Circuit and the Middle District of Florida were the result of efforts that began before publication of the Cardone Report.<sup>854</sup>

Our interviews with resource counsel discussed which districts may have an ongoing need for a CHU, and several were identified. One interviewee thought Kansas, Nebraska, and South Dakota might need assistance but recognized that insufficient caseloads prohibited creation of a CHU in each district, and the districts were in different circuits, prohibiting the creation of a circuit-wide CHU.<sup>855</sup>

Another interviewee described a need for CHUs in places that historically benefited from the death penalty resource centers, especially the Southern District of Florida, the Southern District of Georgia, and all three districts in Louisiana.<sup>856</sup> Louisiana and Mississippi were identified as the places most in need of a CHU by two other interviewees, though they noted the challenges of creating a single CHU for both (potentially needed to satisfy caseload requirements), given the differences in state law and the pace of state court litigation in each.<sup>857</sup>

Four interviewees called for increasing resources available to CHUs in Texas<sup>858</sup> to allow the CHUs to take a greater percentage of the available cases, consistent with Recommendation 25.

The district court judges really like the CHU system, and they would like it if the Texas CHUs can take all of the cases because it just solves a headache for them. It's just like they don't have to think about where we're going to get a lawyer. They don't have to deal with a bunch of funding requests. It's just, like, appoint the Texas CHU and forget it.<sup>859</sup>

Comparing resources across CHUs highlights differences in resources available across circuits. One resource counsel noted the CHUs in Texas were small when compared to others, and that Texas was actively executing people, unlike other jurisdictions with more litigating attorneys available.<sup>860</sup> Another resource counsel supported increasing resources for CHUs across the board, describing them as “game changers” and a net gain to death penalty litigation.<sup>861</sup>

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853. Historical information on capital resource centers from Memorandum, Theodore J. Lidz, Chief, Defender Services Division, to Chair and Members, Judicial Conference Committee on Defender Services, Sept. 16, 1994. On file with the FJC.

854. Because of the lengthy budget and appropriations process, resource requests (including creation of CHUs) may take up to twenty-four months, a period of time that does not include hiring staff once the money for the unit has been appropriated. See Chapter 2: Structural Changes and Appendix A: Defender Services Budgeting and Funding Process.

855. Interview 124.1.

856. Interview 122.1.

857. Interview 123.1 and Interview 118.1.

858. Interview 122.1, Interview 125.1, Interview 126.1, and Interview 118.1.

859. Interview 125.1.

860. *Id.*

861. Interview 127.1. The interviewee did not distinguish whether increasing resources of existing CHUs, or creating new CHUs, was preferable.

Many district court stakeholders agreed that appointing CHUs was beneficial. As one judge commented,

There's a huge benefit to having the CHU... You can appoint that unit, and they will assist you. And if they need, a backup counsel, they'll find somebody from a different CHU. And budgeting issues aren't the same problems that they were previously. It has just made ... our life much easier, more straightforward, and I think at the end of the day it provides for better representation for defendants.<sup>862</sup>

One defender noted that having a CHU makes attorneys more knowledgeable and mindful about some of the pitfalls of capital litigation.<sup>863</sup> Similarly, another interviewee noted that districts got a better, more uniform product (regarding the work that went into those cases) through the CHU than any place else.<sup>864</sup> Of course, use of CHUs is limited by resourcing: one interviewee felt more training needed to be done of local counsel, so that the CHU did not “become the go-to representation, and the appointed lawyers in capital habeas cases ... go the way of the retained bar.”<sup>865</sup>

### ***Increasing Availability of Resource Counsel***

In addition to increasing access to CHUs, Recommendation 25 supports increasing the availability of resource counsel. Budget and staffing recommendations for resource counsel are made available through the Defender Services Committee (DSC). The DSC recommendation is included in the overall defender budget submitted to the Budget Committee in July of each year.<sup>866</sup> Additional positions and funding for national projects, including resource counsel, go through the typical twenty-four-month budget process of multiple JCUS committees and competing interests with other judiciary accounts.<sup>867</sup> During our period of study, the FTE for resource counsel increased,<sup>868</sup> but at some delay relative to the need.

One interviewee thought resourcing the projects was problematic. For example, efforts to increase project resources when federal executions resumed resulted in delays. The interviewee said stakeholders in the budget and appropriations process were “moving the goalposts,” requiring multiple requests to approve needed resources despite support by the DSC for increases.<sup>869</sup> The time from request to funding additional resource counsel positions takes years,<sup>870</sup> a timeline considered too long for this type of work.<sup>871</sup> In capital habeas cases, by the time caseload is sufficient to support the request, the cases are already in federal court, and the clock is ticking.

Apart from the specific caseload surge brought by the resumption of federal executions, fourteen out of twenty resource counsel interviewed felt that resources were sufficient to meet current caseload demands for all types of capital litigation. Creation of new CHUs in states with large death row populations

862. Interview 22.1.

863. Interview 35.1.

864. Interview 50.1.

865. Interview 49.1.

866. See Appendix A: Defender Services Budgeting and Funding Process.

867. See Appendix A: Defender Services Budgeting and Funding Process and Appendix B: Defender Services Human Resources.

868. *Id.*

869. Interview 161.1.

870. See Appendix A: Defender Services Budgeting and Funding Process.

871. Interview 161.1.

helped to meet current demand.<sup>872</sup> Interviewees who felt budget and resources were currently sufficient noted they would not hesitate to seek additional funding should caseloads increase.<sup>873</sup>

Some interviewees recognized the limits of focusing on “current caseload” when discussing resource needs. As three resource counsel noted, under current funding they are limited in how many cases they can take,<sup>874</sup> as well as in their ability to be proactive or engage in multiple attempts with litigation teams that did not respond to initial contact.<sup>875</sup> Resource counsel identified specific needs for additional funds based on case facts, including when the state court record was particularly underdeveloped or clients had unrecognized intellectual disability claims (unrecognized because they had been abandoned by prior counsel).<sup>876</sup> Additionally, if one considered the needs of the entire death row population,<sup>877</sup> more resources would be necessary. Resource counsel projects continually received more requests for help than they could meet, even with staff working long hours.<sup>878</sup>

### **Training**

Increasing resources for training for attorneys willing to take these appointments is the final aspect of Recommendation 25 to evaluate. We identified changes in training offerings from reports provided by the DSO Training Division and local FDOs.<sup>879</sup> Our analysis of the data found that the DSO Training Division’s capital litigation training reached more attorneys (both in number and as a percentage of total DSO Training Division program attendance) by the end of FY 2021 than it had in FY 2017.<sup>880</sup>

Local training information did not consistently specify whether or not capital litigation was discussed, so we are unable to report trends in locally available training.

Interviews with court stakeholders did not always support a need for providing more capital litigation training locally. The decline in states having the death penalty, along with so few federal capital prosecutions, means that FDOs sometimes see little benefit in offering general training on capital litigation. Instead, local attorneys rely on the appointment of resource counsel to obtain the necessary expertise and on learned counsel mentoring any other attorneys appointed to the case. At least one district with a surge in federal capital prosecutions has created a capital mentor program focused on preparing more local attorneys to qualify as “learned counsel.”<sup>881</sup>

## **Recommendation 28: Modifying the CHU Work-Measurement Formula**

As discussed above, appointing institutional defenders, including those in capital habeas units, was discussed in the Cardone Report as one approach to securing needed resources in direct death and capital habeas cases. Increased use of institutional defenders requires additional resources, and the Cardone Report recommended specifically increasing resources for CHUs by creating additional units (Recommendation 25), removing restrictions on the appointment of existing CHUs (Recommendation 24), and

872. Interview 124.1.

873. Interview 123.1.

874. Interviews 125.1, 200.1, and 127.1.

875. Interviews 200.1 and 127.1.

876. Interview 127.1.

877. Interview 128.1. Of course, not all interviewees thought it was the role of resource counsel to assist in every case, because the judiciary would never approve the resources sufficient to meet that demand. Interview 122.1.

878. Interview 128.1.

879. See Appendix G: Attorney Training and Resource Challenges for a complete discussion.

880. *Id.*, Table 5.

881. *E.g.*, Interview 177.1. “We’ve been developing a few more folks as learned counsel.”

modifying the work-measurement formula to increase resources to CHUs overall, allowing them to take a larger portion of existing capital habeas cases (Recommendation 28).

As discussed elsewhere,<sup>882</sup> revision of the work-measurement formula is ongoing, and the final approval is not expected until after release of this report. With the ongoing data collection, it is not possible to say if the revised formula will “reflect the considerable resources capital habeas cases require” or what impact the revision will have on the ability of CHUs to handle a greater percentage of cases in the district. Neither implementation nor impact of Recommendation 28 can be evaluated at this time.

Despite the inability to assess formula changes, our interviews with court stakeholders and analysis of court CJA plans suggest an ongoing need to increase CHU funding called for in Recommendation 28. In districts with access to CHUs, for example, we found district plans including a preference *in favor of* appointing CHUs in capital habeas litigation. In FY 2021, 36% of plans in districts with a CHU included a preference for appointing the CHU,<sup>883</sup> which may increase their work as caseloads change.

Appointing CHUs is not the default in one district court, even though the resource is local. Some judges expressed concerns about the qualifications of the CHU assistant federal defenders seeking appointment and required them to amend their motions seeking appointment to include details of their qualifications under 18 U.S.C. § 3599.<sup>884</sup>

## Recommendation 26: Removing Caps on Capital Litigation and Using Case Budgeting Resources

The Cardone Report recommendations called not only for increases in the institutional defender resources brought to assist with capital litigation, but also those available in cases represented by CJA panel attorneys. Recommendation 26 called for courts to eliminate formal and informal caps on capital litigation<sup>885</sup> and to use case-budgeting attorneys (CBAs) when courts are reviewing resource requests. By statute, there is no cap on attorney fees in capital litigation, unlike non-capital litigation, but informal caps on attorney fees or formal caps on expert services should be examined as well.

As with the restriction on CHUs discussed above, evidence related to eliminating formal or informal non-statutory budgetary caps for capital litigation may not be reflected in court plans. Recommendation 26’s reference to “formal or informal non-statutory budgetary caps” suggests that court practices,

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882. See Chapter 4: Federal Defender Staffing.

883. See Appendix C: District Court CJA Plan Analysis.

884. *Shanklin v. Dunn*, No. 6:20-mc-1535-AM, the petitioner sought to appoint two CHU lawyers under § 3599, Doc. 1, N.D. Ala., Oct. 2, 2020, ordering counsel to supplement the motion for appointment to explain the credentials of CHU attorneys; *George v. Dunn*, No. 1:21-cv-0325-LCB, Doc. 6, N.D. Ala., Mar. 19, 2021, noting that the two CHU counsel seeking appointment, “do not specify their qualifications or suggest whether their experience is consistent with § 3599(c), (d), or both;” and *Van Pelt v. Dunn*, No. 3:16-cv-1849-MHH, Doc. 6, N.D. Ala., June 19, 2017, requiring counsel seeking appointment (one of whom worked at a CHU in another district) to supplement their motion for appointment to “to include specific information indicating whether they meet the requirements for appointment under 18 U.S.C. § 3599.”

885. As described in the Cardone Report, informal caps are the result of voucher reductions based on a judge’s belief about what cases “should” cost (p. 101) and when districts impose “artificial limits on the work panel lawyers can do on behalf of their clients (p. 144). In the capital context, “formal and informal policies” included both presumptive caps and actually capping attorney fees during voucher review and approval. See Cardone Report, pp. 197–198. Both presumptive and actual limits are included in this analysis of informal and formal caps.



not plans, created such limits.<sup>886</sup> Modification of court plans nonetheless provides a starting point for examination, including changes regarding the use of case budgeting.

Of the ninety-four district court CJA plans in effect in FY 2021, seventy-six (81%) included either a separate section on capital litigation or separate discussion of capital litigation in sections throughout the plan. We found that

- 19% of FY 2021 plans included a statement that there should be no caps on capital litigation—an increase from 5% of plans in FY 2017
- 30% of FY 2021 plans included a requirement that capital cases be budgeted with a case-budgeting attorney—an increase from 4% of plans in FY 2017

Circuit plans also separately addressed compensation in capital litigation. Most plans included a reference to the higher hourly rate for capital litigation,<sup>887</sup> and some discussed the rates and fees for expert services.<sup>888</sup> Specifically, we found that

- two circuits explicitly said case maximums do not apply in capital cases<sup>889</sup>
  - one circuit recently revised its plan and left in a section prohibiting caps on capital litigation to combat the ongoing belief of judges and attorneys that such a cap existed<sup>890</sup>
- one circuit’s CJA manual listed case maximums for non-capital cases only<sup>891</sup>
- one circuit noted that “different limits” for attorney compensation applied to death penalty petitions<sup>892</sup>
- one circuit referenced “special rates” of compensation for capital cases<sup>893</sup>
- one circuit had a detailed letter for attorneys in capital cases but didn’t explicitly say there was no maximum for capital cases<sup>894</sup>
- one circuit, at the end of FY 2021, stated the “maximum total compensation allowed for death penalty proceedings, including interim payments but excluding approved expenses” was “\$50,000 for representing one appellant in a capital murder direct appeal, or \$15,000 for representing one

886. Very few cases before the Supreme Court each term involve CJA-appointed counsel. However, Supreme Court Rule 39.7 “provides that an attorney may be appointed under the CJA in a case in which certiorari was granted or the case was otherwise set for oral argument, where the party is financially unable to afford an attorney.” Appointment of counsel by the court is often a formality, but the practical effect of this appointment is to permit payment. The hourly rate (capital and non-capital) is the same as used in the lower courts. Since 2009, capital cases litigated before the Supreme Court are subject to an overall limit of \$10,000 in hourly fees per case. See Memorandum from Scott S. Harris, Clerk of Court, re: Practices under the Criminal Justice Act, May 5, 2021. On file with the FJC.

887. See, e.g., D.C. Circuit plan, p. 7. “The presumptive rate of compensation in a capital case in which the death sentence was imposed shall be the same as the current CJA capital rate. Cases in which the client was eligible for a death sentence, but it was not imposed, shall be treated as non-capital cases for the purpose of determining the rate of compensation for counsel on appeal. Counsel in such cases may file a motion for a higher rate should this be necessary to ensure fair compensation.”

888. See, e.g., First Circuit Manual, p. 16.

889. See, e.g., First Circuit Manual, p.15 and 4th Circuit plan, p. 6.

890. Interview with 151.1, 152.1, and 89.2.

891. We can infer this is not a mere omission, because a table listing statutory maximums for expert services did include capital litigation as having a maximum amount. Ninth Circuit Manual, p. 38.

892. Second Circuit plan, p. 9.

893. Eleventh Circuit plan, p. 6.

894. See Tenth Circuit Capital Letter, available at: <https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/adv30-mod.pdf>

petitioner or movant in a death penalty habeas case at the appellate level.”<sup>895</sup> Requests over the total or stated rates were “presumptively excessive” and required review.<sup>896</sup> Outside of our study period, this circuit revised its plan to eliminate the cap, but the presumption about reasonable amounts and the additional review of requests in exceeding these amounts remains<sup>897</sup>

- two circuits required additional review of vouchers in capital cases based on hours expended<sup>898</sup> or dollars requested<sup>899</sup>

### ***Use of Case-Budgeting Attorneys in Capital Litigation***

Recommendation 26 not only called for the removal of caps, but also the use of case-budgeting attorneys (CBAs) in capital cases.

As discussed above, 30% of district court plans included provisions for using case budgeting. Both court stakeholders (district and circuit) and the CBAs<sup>900</sup> themselves described the frequency with which they were called upon to assist judges, especially in capital litigation.

We asked eleven CBAs to describe how capital cases are funded early in the litigation. All but one noted that the circuit uses seed budgeting in capital cases,<sup>901</sup> though some had only recently moved to this process.<sup>902</sup> Seed budgets contain funds for a variety of experts to assist in preparing the case in the first six months, generally the pre-authorization stage of capital litigation.<sup>903</sup> The purpose of the seed budget is to help attorneys harness resources to understand the litigation at the start of the case and develop a budget for future needs. The use of seed budgets was generally viewed as beneficial because the process moved the resource requests to a standardized form, making both review and approval easier for judges.<sup>904</sup>

As for removing caps on capital litigation, one CBA noted that soon after starting in the position, the circuit rescinded a presumptive cap,<sup>905</sup> while another reported that an upcoming revision to the circuit CJA plan would eliminate a non-statutory cap.<sup>906</sup>

Several CBAs noted that, while there were not caps, there were presumptive rates for service providers in capital litigation and that going beyond those rates required additional work for attorneys making

895. Fifth Circuit plan, pp. 5–6. This provision was not included in the plan adopted in FY 2022, but other limitations on compensation in capital litigation remain. See, Plan for the Representation on Appeal Under the Criminal Justice Act, Judicial Council of the Fifth Circuit, Oct. 7, 2021.

896. *Id.*

897. Plan for the Representation on Appeal Under the Criminal Justice Act, Judicial Council of the Fifth Circuit, Oct. 7, 2021, Sec. 7.B.2.

898. Fifth Circuit plan, Sec. 7.B.2.a.

899. Interview with 160.1.

900. See Technical Appendix 3: Project Interviews.

901. Interview 92.1 reported seed budgets were not used, noting that doing so would run contrary to the circuit’s cultural values.

902. Interview 88.1 reported that the circuit used seed budgeting to manage the increase in capital authorizations and the resulting appointment of more out-of-district counsel to manage the caseload, which exacerbated issues of accessing clients and families during the pandemic.

903. Interview 87.1. “The experts in the seed budget are going to be somewhat limited to a mitigation expert, an investigator, a paralegal and an associate, as well as obviously learned and lead counsel ...” and the number of hours authorized is generally between 100 and 150 per expert, depending on the expert and the nature of the litigation.

904. Interview 95.1.

905. Interview 89.1.

906. Interview 90.1.

the requests.<sup>907</sup> This additional work was required even when attorneys struggled to find help because existing experts were already overworked or professionals did not want to work for the available rates. One example was the struggle to find paralegals trained to assist in discovery review.<sup>908</sup>

The approach of the bench to capital litigation matters a great deal in decisions about resourcing capital cases. As one CBA noted, judges in the circuit take a hands off approach when reviewing requests because they “view the capital cases as radioactive .... Unless something is very bizarre,” the resource requests are approved in the circuit.<sup>909</sup> Seven other CBAs reported no caps on capital cases in their circuits,<sup>910</sup> but five still answered questions from judges skeptical about the use of resources in these cases.<sup>911</sup> One CBA indicated that when faced with skepticism from the bench when reviewing budgets in capital cases, the CBA reminded them of the costs of going to trial in capital cases.<sup>912</sup>

Removing limits on resources available in capital cases was not true in all circuits. In one circuit, staff<sup>913</sup> reported that the recent change of presidential administration prompted a judge to push back on requests for capital litigation resources because they thought the new administration would never authorize cases for death, so there was no need to commit resources. This resistance continued throughout the pre-authorization stage of the case, despite the absence of a decision by DOJ to seek the death penalty or not.<sup>914</sup>

Additionally, one interviewee described another presiding judge who questioned the number of in-person attorney visits made to a defendant whose mental health was deteriorating during detention. As the CBA noted, the difference of a few thousand dollars to visit the client paled in comparison to the millions of dollars in case costs to that point. Despite this point of comparison, counsel were required to write a memo explaining the situation. In the memo, they emphasized the importance of spending a small amount of money to visit the client in order to save the greater cost of the defendant having a mental health crisis during the litigation.<sup>915</sup>

Thus, even though CBAs worked with judges making decisions about resourcing cases, some judges remained reluctant to approve resources for capital cases, creating informal caps on the litigation costs.

### ***Resource Counsel Working with CBAs***

Interviews with resource counsel also discussed the role of CBAs in getting resources to direct death and capital habeas cases. Ten of twenty resource counsel interviewees said capital and other high-cost cases were budgeted with a CBA, and many had direct experience working with the CBA on their direct representations (often outside the scope of their resource counsel work). One interviewee said case budgeting wasn't consistently done, and the remaining interviewees either didn't know, were not sure, or were not asked the question (because of the nature of their work).

Interviewees who felt case budgeting was followed generally praised the work of CBAs. Praise was especially likely for CBAs hired in circuits that historically had been reluctant to approve funding requests, but one interviewee noted that, while the CBA made funding easier, the bar for improving the

907. Interviews 95.1, 87.1, and 86.1.

908. Interview 87.1.

909. Interview 92.1.

910. Interviews 87.1, 88.1, 89.1, 91.1, 94.1, 95.1, and 86.1.

911. Interviews 87.1, 88.1, 89.1, 91.1, and 86.1.

912. Interview 88.1.

913. Interview 91.1. The issue was reported by two resource counsel interviewees as well. Interview 133.1 and Interview 161.1.

914. Notice of intent to seek the death penalty is required under 18 U.S.C. § 3593, P.L. 103-322, P.L. 105-6, and P.L. 107-273.

915. Interview 91.1.

situation was “low.”<sup>916</sup> Interviewees in circuits without a CBA expressed frustration, with one interviewee saying the absence of a CBA meant it was challenging to get cases funded at the appropriate level.<sup>917</sup>

Two concerns raised by resource counsel merit closer attention. First, the change in the law brought by the Supreme Court decision in *Shinn v. Ramirez*<sup>918</sup> prompted discussion between resource counsel and CBAs about whether funding should be approved for investigations into ineffective assistance of counsel claims if new facts couldn’t be developed in federal court under the recent decision. No definitive answer had been reached at the time of these interviews, but resource counsel expressed concern.

*Shinn*-related funding concerns tie into a second larger concern about CBAs and to whom they report. As one interviewee noted, CBAs work for the circuit, not the defenders.<sup>919</sup> This could create challenges with CJA panel attorneys seeking case funding when courts reduce their budgets below the amount necessary for a service without denying the service itself.<sup>920</sup> By reducing the available funding in the budget without denying authorization to use the expert, resource counsel was left without recourse: “I can’t now litigate that or create any law on that or demonstrate that that is a reasonably necessary expense because it’s entirely opaque, and you can’t get anywhere.”<sup>921</sup> Two other interviewees recognized the challenging position of CBAs who stand between attorneys seeking resources and courts approving the use of resources.<sup>922</sup>

### ***Resource Counsel and Removing Caps***

Resource counsel working in direct death and capital habeas litigation have an on-the-ground perspective for any ongoing caps (formal or informal) on capital litigation. Twelve of twenty interviewees said they were aware of caps on capital litigation. Interviewees did not always identify formal caps such as a limit written down in local rules or CJA plans, instead discussing how the appointment process can set informal caps on capital litigation.

When it comes to case budgeting ... these are CJA lawyers who are working these cases, and they are reliant upon the courts to continue to give them CJA cases. And if judges show a reluctance to fund the case, these lawyers will start to censor themselves in what they ask for so they don’t upset the court .... I don’t think there are hard caps so much as there are what I would call soft caps.<sup>923</sup>

916. Interview 125.1.

917. Interview 122.1.

918. 596 U.S. \_\_\_\_ (2022) (the court held that under 28 U.S.C. § 2254(e)(2) a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state post-conviction counsel).

919. Interview 130.1.

920. Interview 118.1. When seeking funding for an investigator to be present in the courtroom, one interviewee was told by a CBA, “We don’t fund that, and we’ll only fund that when doing an actual task.” The interviewee replied that this policy wasn’t written down anywhere, and so, despite the warning, the interviewee did not remove the amount from the budget request. Ultimately, the approved budget reflected a reduced amount but did not specifically deny the service of the investigator or limit what services the investigator could provide.

921. Interview 118.1.

922. Interview 121.1, noting CBAs “can make things very easy, or they can make things very hard .... I’m sure it’s very difficult to be a bridge between people who want and need money and people who decide whether you get it. And so that’s probably a difficult place”; and Interview 130.1, “[C]ase budgeting attorneys are in a tricky position themselves—they work for the judges. The judge says I’m not going to pay they’re not going to pay, right? So they can be helpful and supportive and still the judge says no, that’s it.”

923. Interview 121.1.

Other interviewees, however, described formal caps, including eleven of the twelve interviewees discussing caps specifically pointing to those in the Fifth Circuit (including the circuit's recently rescinded CJA plan cap). Caps on attorney fees and some experts, such as mitigation,<sup>924</sup> were reportedly common, increasing the challenge of finding experts to work on cases in the circuit.<sup>925</sup> Two interviewees noted that the longstanding Fifth Circuit limit on dollars cut into attorney hours as CJA rates increased over time.<sup>926</sup> Interviewees were aware of a recent change in the Fifth Circuit's plan but noted that a presumptive cap on hours under the new plan still required additional review by the circuit.

Using hours instead of dollars in the Fifth Circuit was thought to be an improvement among interviewees, though the limit might still be problematic in some cases.<sup>927</sup> The cap was said to be problematic "where the state court record was inadequately developed ... [or] hardly any mitigation had been done. And they're trying to gather records and talk to trial counsel."<sup>928</sup>

The change in the Fifth Circuit plan, however, did not address all the challenges identified in the Cardone Report. Despite the removal of formal caps on capital litigation, two resource counsel interviewees described ongoing informal caps in the Fifth Circuit. "I think in the Fifth Circuit you've got a lot of unwritten caps, and that's part of the reason why they routinely cut vouchers."<sup>929</sup> As one interviewee described, the word cap was no longer used to reduce vouchers, with courts instead telling attorneys, "This is what you get," without explanation as to why.<sup>930</sup>

Five resource counsel interviewees described the arbitrary nature of voucher review continuing in the Fifth Circuit.<sup>931</sup> Some interviewees reported the problems with arbitrary limits and voucher reductions they currently experienced were at the district court level—and the circuit was reluctant to step into voucher disputes in the lower courts. Arbitrary decisions by voucher reviewers, including death penalty law clerks, who were drafting orders on behalf of judges reviewing resource requests from resource counsel, resulted in reductions and funding denials.<sup>932</sup>

Moreover, appealing voucher reductions through available processes could make the situation worse. Three interviewees described attorneys in the Fifth Circuit seeking reconsideration of a voucher reduction and being granted reconsideration only to have the court further reduce the voucher.<sup>933</sup>

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924. Interviews 133.1, 130.1, and 161.1.

925. Interview 119.1.

926. Interviews 125.1 and 123.1.

927. Interview 123.1. "Sometimes 500 hours in a particular case might not be enough especially over the course of the case."

928. Interview 123.1. Another interviewee suggested that a lack of familiarity among judges about the challenges of requesting information from state and local governments was especially problematic when reviewing such requests for case resources, and thought training for judges on the topic may help address the problem. Interview 125.1. As discussed elsewhere, not all interviewees thought increased access to training would be helpful for increasing resources available.

929. Interview 130.1.

930. Interview 126.1.

931. Interviews 125.1, 126.1, 122.1, 127.1, and 118.1, who described the process as "ridiculously burdensome" and asked the court to "stop the nitpicking unless it's clear that the work wasn't done or is excessive."

932. Interviews 126.1, 125.1, and 200.1 all discussed the role of death penalty law clerks in resourcing capital cases. Interview 200.1 noted, "I could count on one hand the federal judges who really seemed to care about the quality of work done in the trial and who are doing something more than just signing off on the recommendations of their death penalty law clerk, or hell, I mean, draft orders" and noting that death penalty law clerks "have an inordinate amount of decision-making power. No, they don't make the decision, but the judges sign what they write."

933. Interviews 130.1, 118.1, and 125.1.

While denying resources outright can be litigated under current case law,<sup>934</sup> interviewees reported ongoing issues of securing resources for experts in district and circuit court litigation.<sup>935</sup> Two interviewees discussed a recently argued case in the Fifth Circuit that illustrated ongoing challenges with resourcing capital habeas cases.<sup>936</sup>

Resource counsel described issues of voucher reduction, arbitrary decision making about case resources, and informal caps in other circuits as well. One resource counsel reported voucher reductions continued in the Eighth Circuit (also detailed in the Cardone Report).<sup>937</sup> It was noted by another resource counsel that the variation among judges in the Eighth Circuit when reviewing vouchers and determining limits on resources created horizontal inequities in the system, both within and between circuits. Defendants whose cases were before judges willing to fund cases at the necessary level saw different results in their cases than defendants whose cases were not.<sup>938</sup> Appellate courts typically provided no mechanism for appealing voucher reductions,<sup>939</sup> so attorneys were unable to get relief.<sup>940</sup>

Likewise, resource counsel described ongoing funding issues in districts of the Seventh Circuit, where mitigation funding was limited until after the government's ninety-day deadline to enter notice to seek a death sentence.<sup>941</sup>

One interviewee, describing the various issues with caps on capital litigation and voucher reductions, summed up the experiences of attorneys seeking funding for cases under the CJA like this:

So whether it's because we don't think people are going to be executed, or we don't think mitigation, investigation, is necessary prior to a case being authorized .... There can be different reasons given, but it continues to be a challenge in some districts.<sup>942</sup>

### ***eVoucher Data Findings***

The interview detail provided above suggests that not all courts changed plans and practices to remove formal and informal caps on capital litigation costs, which would have increased the resources available for litigating these cases. But do the data reflect this mixed support?

934. See, e.g., *Ayestas v. Davis* 138 S. Ct. 1080 (2018).

935. E.g., Interview 126.1.

936. E.g., Interviews 129.1 and 126.1 discussing *Nelson v. Lumpkin*, 17-70012, 5th Cir.

937. Interview 124.1 said that funding is dependent on the judge you get: one judge may approve over seven figures for habeas, while another judge won't go over six figures. There is no formal hard cap. The issue is judicial discretion, and because of it you can have real funding issues.

938. Interview 120.1.

939. Cardone Report, p. 116. "Circuit courts have agreed uniformly that the decision to deny or reduce a voucher is an administrative act that cannot be appealed. Voucher reductions at the district level are final, and panel attorneys are without recourse to judicial review." (citations omitted)

940. Interview 122.1.

941. Interview 133.1 "There's ... an understanding that has now been adopted that when the government comes to court having indicted somebody for the possibility of death as a sentence in a complaint indictment, if the government comes in and says they're going to request that the authorization not proceed, what we would call a no seek, they're not going to fund mitigation, and they're going to give the government ninety days to figure out that that, in fact, is true, that it won't be a death case. Well, that's ninety days lost to the client." See, also, *U.S. v. Morgan*, 1:19-cr-00641, N.D. Ill., Docket Entry No. 249, Sep. 7, 2021. "The monetary costs for capital mitigation investigation are enormous. The mitigation process also takes the time of counsel for both the government and defendants better spent preparing for trial. These costs of money and time are wasteful if the Attorney General is unlikely to authorize seeking the death penalty" and ordering the U.S. attorney to file a status report regarding the position of DOJ within three weeks of the docket entry.

942. Interview 130.1.

Using data from eVoucher, we explored the approval of funding (attorney and experts) in capital cases<sup>943</sup> in district and appellate courts with CJA-appointed counsel. As discussed elsewhere,<sup>944</sup> in nearly 400,000 appointments with a final payment since FY 2017 analyzed for this study, less than 1% (2,774) were appointments in capital cases.<sup>945</sup>

The 106 district and appellate courts had widely varied experiences with CJA appointments to direct death and capital habeas cases, which, as discussed in the Cardone Report, affects review of vouchers<sup>946</sup> and reduction practices.<sup>947</sup> During our period of study,

- fourteen courts had no capital appointments (13% of all courts)
- twenty-seven courts had five or fewer capital appointments
- ninety-two courts had at least one capital appointment

Overall, appointments in capital cases were reduced more often than non-capital appointments (30% versus 15%).

The frequency of voucher reductions in direct death and capital habeas cases varied widely by both court and individual reviewer. In the ninety-two district and appellate courts with at least one capital appointment,

- twenty-two courts never reduced payment in a capital appointment
- forty-eight courts reduced payment in fewer than 50% of capital appointments
- twenty-two courts reduced payment in 50% or more of capital appointments

Across the 505 individual reviewers—85% of whom were judges,<sup>948</sup>

- 62% reduced payment for 30% or fewer of capital appointments
  - 49% never reduced payment for a capital appointment
  - 13% reduced payment in 1% to 30% of capital appointments
- 18% reduced payment in 31% to 60% of capital appointments
- 8% reduced payment in 61% to 90% of capital appointments
- 13% reduced payment in over 91% of capital appointments

As discussed in the Cardone Report, familiarity with capital litigation affects decision making in these cases, so we looked at the number of appointments and the percentage of appointments with reductions. In the group of reviewers with the highest rate of reduction, the number of appointments ranged from one to nine, with a median of one and a mean of two appointments. In the group reducing total claims the least often, the number of appointments ranged from one to thirty-three, with a median of two and a mean of five appointments. Overall, the mean number of appointments was five and the median was two, and the relationship between experience and reduction practices was weak and statistically insignificant.<sup>949</sup>

943. Capital appointments were identified through the use of CJA-30 and CJA-31 vouchers.

944. See Chapter 3: Panel Attorney Compensation *and* Appendix E: eVoucher Review Data Analysis.

945. See *id.* for a discussion of the cases considered capital for this analysis.

946. Cardone Report, pp. 195–196.

947. *Id.*, p. 196.

948. See Chapter 3: Panel Attorney Compensation *and* Appendix E: eVoucher Review Data Analysis for a detailed analysis of voucher review in capital appointments.

949. See Appendix E: eVoucher Review Data Analysis.

Though some court plans call for case budgeting and discourage caps on capital litigation, our analysis finds ongoing problems resourcing capital cases. Caps, both formal and informal, were reported by interviewees, and voucher reductions are more common in capital appointments than non-capital appointments. Though CBAs play an active role in matching resources to cases, they are not available in all circuits, and their recommendations are not always followed. Resource counsel reported ongoing issues of funding capital cases, especially in some specific districts and circuits.

## Recommendation 27: Appointing Counsel in Capital Cases

The JCUS approved Recommendation 27 in March of 2019 as modified above, and the recommendation was incorporated into Chapter 6 of the *Guide to Judiciary Policy* and its model plan.<sup>950</sup> The revision to the model plan went further than Recommendation 27, increasing access to capital litigation expertise by recommending that the federal defender notify resource counsel about capital cases, that courts weigh the recommendations of resource counsel, that courts utilize expert services in capital litigation, and that appointed counsel consult with resource counsel. The adoption of Recommendation 27 and the revision to the model plan provide a template for courts seeking to revise their local CJA plan to reflect the Cardone Report recommendations.

We examined district<sup>951</sup> and circuit<sup>952</sup> court CJA plans to determine whether changes were made to incorporate recommendations from the Cardone Report, including Recommendation 27 and the expanded language of the model plan. Plans varied across courts, and over time, in the level of deference for consultation with federal defenders and resource counsel, ranging from the permissive “may consult” to the more affirmative requirement that consultation “will, must, or shall” occur. Some courts also adopted the model plan’s additional requirements for consulting experts in capital litigation. Specifically, our analysis of district court CJA plans found the following with respect to plans in effect in FY 2021:

- 46% of district plans included a provision regarding courts weighing the recommendation of resource counsel in capital appointments—an increase from 2% in FY 2017.<sup>953</sup>
  - 25% of plans required that the court *will, must, or shall* weigh the recommendation of resource counsel—an increase from 1% of plans in FY 2017.
- 77% of district plans included a provision regarding court consultation with federal defenders in capital appointments—an increase from 50% in FY 2017.<sup>954</sup>
  - 57% of plans required that courts *will, must, or shall* consult with the federal defender when appointing counsel in capital cases—an increase from 36% of FY 2017 plans.
- 57% of district plans included a provision that the federal defender consult with or notify resource counsel in capital litigation—an increase from 3.2% in FY 2017.<sup>955</sup>
  - 16% of plans required that federal defenders *will, must, or shall* consult with resource counsel—an increase from 2% of plans in FY 2017.

950. *Guide to Judiciary Policy*, Vol. 7A (“the Guide”) details the guidelines for administering the CJA, including providing a model plan in the Appendix for districts to use as a template for their own CJA plans, should they choose to do so. No model plan for circuit courts is available.

951. See Appendix C: District Court CJA Plan Analysis for details on the results of this analysis.

952. See Appendix D: Circuit Court CJA Plan Analysis for details on the results of this analysis. Circuit court plans did not include provisions specific to Recommendations 27 and 29, but the plans do speak to Recommendations 24–26 discussed above.

953. See Appendix C: District Court CJA Plan Analysis, Table 16.

954. *Id.*, Table 19.

955. *Id.*, Table 15.



- 56% of district plans included a provision that courts utilize the expertise of the AO and resource counsel in capital litigation—an increase from 1.1% of plans in FY 2017.<sup>956</sup>
  - 51% of plans required that courts *will, must, or shall* utilize expert services in capital litigation—no plans included this provision in FY 2017.
- 53% of district plans included a provision that appointed counsel consult with resource counsel in capital litigation—an increase from 1.1% of plans in FY 2017.<sup>957</sup>
  - 4.3% of plans required that courts *will, must, or shall* consult with resource counsel—no plans included this provision in FY 2017.

In our interviews with the 111 district court stakeholders (some of whom were interviewed while they were in the process of revising their plans), we asked about the changes that were made and the changes that were under consideration at the time of the interview. Interviewees most often discussed court consultation with federal defenders and resource counsel when making appointments in capital cases.<sup>958</sup>

Beginning with the court’s consultation with federal defenders when appointing counsel, some defender interviewees reported positive experiences and believed that the court respected their expertise, experience, and recommendation.<sup>959</sup> Typically, judges contacted defenders because they lacked experience with this type of litigation,<sup>960</sup> because it was a requirement in the district’s CJA plan,<sup>961</sup> or because of a specific district practice.<sup>962</sup>

Judges typically reported a high degree of confidence<sup>963</sup> and reliance on defenders who had extensive experience with capital litigation.<sup>964</sup>

Both defender and judge interviewees offered a range of reasons regarding why a defender was not consulted when appointing counsel in capital litigation, including,

- preferences to appoint known attorneys<sup>965</sup>
- preferences against consulting with federal defenders, despite familiarity with statutory requirements<sup>966</sup>
- unfamiliarity with the statutory requirements to appoint learned counsel<sup>967</sup>
- local practice or culture<sup>968</sup>

956. *Id.*, Table 17.

957. *Id.*, Table 18.

958. For this discussion, we exclude the appointment of CHUs in capital habeas litigation (discussed more below).

959. *E.g.*, Interview 196.1, speaking about appointing counsel in direct death cases. “Every time there is a need for, you know, second counsel, learned counsel, the court has come to me. And they want the FPD recommendation.”

960. *E.g.*, Interview 113.1, a defender discussing judges seeking assistance from the FDO about a potential capital case.

961. Interview 197.1.

962. Interview 198.1.

963. *E.g.*, Interview 34.1.

964. *E.g.*, Interview 199.1. “So we rely on the recommendation of the public defender .... We rely on their expertise .... You need someone who’s been around the block doing those cases.”

965. *E.g.*, Interview 30.1. “Their tendency is to try to appoint the local people.”

966. *E.g.*, Interview 55.2, with a defender who said, “I don’t work on any appointment counsel issues .... They don’t let me near that.... We’ll have death penalty cases, and we’ll find out about the appointment after the appointment is made.”

967. *E.g.*, Interview 113.1. “I think actually a lot of the judges aren’t necessarily—at least initially when they get on the bench—aren’t aware that we’re supposed to be making those recommendations.”

968. *E.g.*, Interview 14.1. “On numerous occasions I’ve recommended people for appointment who courts have not selected, primarily I think because they are not from the division where the case is pending.”

As described by one interviewee, consulting the defender about appointment did not always result in the court adopting the defender's recommendation.<sup>969</sup>

We found that when district court stakeholders were asked about the decision to consult with resource counsel, some were unfamiliar with their plan requirements for doing so.<sup>970</sup> While some interviewees did not know whether it was required or recommended to consult with resource counsel, they reported that it was common practice to do so.<sup>971</sup> Judges also noted the value of consulting resource counsel<sup>972</sup> and indicated that they encouraged appointed counsel to consult with them as well but did not require it.

Judges and defenders who had interactions with resource counsel, whether because it was a plan requirement or advisory, had a positive experience.<sup>973</sup> Some of the comments used to describe the assistance provided by resource counsel included "awesome,"<sup>974</sup> "very helpful,"<sup>975</sup> "exceptional,"<sup>976</sup> and "invaluable."<sup>977</sup> One defender commented that he had resource counsel on speed dial.<sup>978</sup> Others noted that their familiarity with experts commonly used in capital cases was very helpful and welcomed.<sup>979</sup>

However, a few district court stakeholders described less-than-positive experiences with resource counsel, including personality conflicts<sup>980</sup> and issues of workload.<sup>981</sup>

Appointment of counsel for appellate litigation differed from district court processes. Some appeals courts described their process as "ad hoc,"<sup>982</sup> others described a process for capital cases different from appointing counsel in other appeals,<sup>983</sup> while others noted the processes were the same,<sup>984</sup> especially when the appellate court relied on district court appointments to remain on appeal,<sup>985</sup> though not all appellate courts were satisfied that lower court counsel continued on appeal.<sup>986</sup>

969. *E.g.*, Interview 172.2.

970. *E.g.*, Interview 198.1. "I don't think that's required .... I think people are certainly aware of resource counsel."

971. *E.g.*, Interview 35.1. "There isn't really anything in there about the Resource Counsel. But in practice, they know that they're supposed to be consulting with Resource Counsel.... Even though it's like one of those things, of course we all do that."

972. Interview 6.1. "I would take advantage of all the resources. There is no doubt whatsoever. And I'm grateful that it is available, if and when that happens. And I have no doubt that my colleague would also take advantage of the resources."

973. *E.g.*, Interview 196.1, saying resource counsel were "quick to try and hook me up with really qualified counsel for either the lead attorney or penalty phase and help me get CVs, make recommendations, sort of do an initial vetting that gives me a certain comfort level, and then connect me with the attorneys."

974. Interview 18.1.

975. Interview 24.1.

976. Interview 12.1.

977. Interview 82.1.

978. Interview 21.1.

979. *E.g.*, Interview 77.1. "There is a shortage of mitigation people. So you can use them as suggestions for mitigation people on a nationwide scale. Experts in intellectual disability is another area we use them a lot."

980. *E.g.*, Interview 29.1. "Sometimes they can be a little bit abrasive, and they give off the aura that they are coming in to save the day and that only they know how to handle the case."

981. Interview 77.1, describing how resource counsel were busy with their own cases and could be difficult to contact.

982. Interview with 168.1 and 144.1.

983. Interview with 162.1 and 163.1; Interview 88.2; Interview with 151.1, 152.1, and 89.2; and Interview 150.1.

984. Interview with 158.1 and 159.1.

985. Interview with 146.1, 169.1, and 147.1; Interview with 160.1; Interview with 90.2, 153.1, 154.1, 155.1; Interview with 145.1, 166.1, and 167.1; and Interview with 157.1 and 170.1.

986. Interview with 145.1, 166.1, and 167.1. "Good though these lawyers are, they might benefit from a young lawyer that could maybe bring a new perspective on it. So, I wish it would happen more. It doesn't happen often."

Two circuits collected information about the experience of attorneys with direct death<sup>987</sup> or capital habeas<sup>988</sup> litigation when people were added to the panel, but both noted the information might be outdated by the time appointments were made.

When asked whether the court of appeals consults with the federal defender or resource counsel in making appointments in capital cases (when lower court counsel does not continue on appeal), seven circuits replied that they did (at least sometimes), including those who said they would but had not had any cases where counsel needed to be appointed. One circuit recently eliminated its separate capital panel and now consults with resource counsel.<sup>989</sup> One circuit reported requesting resource counsel assistance (as they routinely do), only to experience substantial delay in getting a response and giving up.<sup>990</sup>

Of the five circuits that did not affirmatively say they consult,

- one circuit said there was no need because counsel always continued from the lower court<sup>991</sup>
- one circuit left the issue to the district courts appointing counsel<sup>992</sup>
- one circuit said they did not believe such consultations occurred<sup>993</sup>
- two circuits did not know<sup>994</sup>

In addition to speaking with court stakeholders, we also interviewed twenty resource counsel about their experiences working with courts in capital litigation.<sup>995</sup> Nineteen highlighted the importance of the judge's willingness or unwillingness to consult with federal defenders and resource counsel when making appointments in capital cases (district or circuit).<sup>996</sup> Overall, regarding Recommendation 27,

- three resource counsel interviewees said the recommendation was consistently followed
- one said it was consistently followed but that there were “aberrations” when a specific court or judge refused to consult or appoint recommended counsel<sup>997</sup>
- ten said it was not followed consistently
- five said they did not know

In jurisdictions not following the recommendation, five resource counsel interviewees described a preference by judges to appoint attorneys with whom they were already familiar. One interviewee said,

The courts tended to appoint people they knew, and because federal district courts are trial courts, they tended to appoint people who were trial lawyers, who may or may not have done capital cases ever in their lives.<sup>998</sup>

987. Interview 88.2.

988. Interview with 168.1 and 144.1.

989. Interview with 151.1, 152.1, and 89.2.

990. Interview with 90.2, 153.1, 154.1, 155.1.

991. Interview with 145.1, 166.1, and 167.1.

992. Interview with 146.1, 169.1, and 147.1.

993. Interview with 160.1.

994. Interview with 149.1, 148.1, and 87.2 and Interview with 157.1 and 170.1.

995. See Technical Appendix 3: Project Interviews for details.

996. One resource counsel interviewee did not comment due to the nature of their work.

997. Interview 161.1.

998. Interview 200.1.

Two resource counsel interviewees described challenges in making recommendations for appointed counsel. One interviewee described “pushback” on recommended appointments,<sup>999</sup> and another detailed the high cost that could result in not following recommendations of attorneys more experienced with capital litigation.<sup>1000</sup> If the docket did not reflect the defender’s objection to appointed counsel, there was no way to follow-up on the issue, such as on appeal.<sup>1001</sup> One interviewee reported the court and the FDO becoming defensive when successor counsel (suggested by resource counsel) raised questions about the original appointment and that attorney’s qualifications.<sup>1002</sup>

Regardless of the merits of appointment decisions, interviews indicated defenders’ awareness of denials can have a chilling effect on their asking for resources. For example, in one instance, the judge removed the appointed FDO attorney from a case after the FDO attorney requested appointment of additional counsel (a request supported by resource counsel) citing the request as evidence of the FDO’s inability to manage the case.<sup>1003</sup> The judge then appointed a local attorney who frequently received appointments from that same judge.<sup>1004</sup>

As one resource counsel interviewee said, a preference for local counsel was problematic because non-capital trial work and capital work, including capital habeas work, were “two universes that do not intersect.”<sup>1005</sup> This preference, combined with a lack of experience with capital litigation in some localities, meant courts sometimes appointed attorneys who were not considered qualified for appointment by resource counsel, even when the attorney might have experience litigating capital cases in the past,<sup>1006</sup> because a lot of experience did not necessarily mean good experience if attorneys did not consult with experts in capital cases.<sup>1007</sup> Capital litigation is challenging, and the work must be done consistently to be done well, but specialization is hardly possible with the demands of private practice.<sup>1008</sup>

Other barriers to consistent implementation of Recommendation 27 existed as well. Three interviewees mentioned the role of a death penalty law clerk in a specific district where capital litigation was common.<sup>1009</sup> Lengthy orders denying appointment of recommended counsel, including personal attacks on the suggested attorney, were thought to be common in the district, yet judges were unaware the statements were in the orders they had signed.<sup>1010</sup> Resource counsel reported courts did not provide a reason for non-recommended counsel<sup>1011</sup> suggesting Recommendation 27 is not followed consistently.

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999. *E.g.*, Interview 131.1.

1000. Interview 200.1, describing a circumstance when the FDO recommended against a specific panel attorney, the court appointed the attorney anyway, and the result was poor quality representation and at a high financial cost.

1001. Interview 200.1.

1002. Interview 131.1.

1003. *USA v. Strickland et al.*, E.D. Ark., 4:19-cr-00580, Docket Entry No. 33, Mar. 17, 2020, relieving the federal defender of the appointment.

1004. Interview 161.1. It should be noted that the plan in the district court where this occurred gives judges wide authority to make case appointments, including in capital cases.

1005. Interview 200.1.

1006. Interview 120.1.

1007. *Id.*, discussing the role of experience litigating direct death and capital habeas cases.

1008. Interview 128.1.

1009. Interview 126.1, Interview 125.1, and Interview 118.1.

1010. Interview 125.1. In another district, the death penalty law clerk didn’t authorize appointment of recommended counsel because they believed the lawyer said that increasing the costs of capital litigation would discourage prosecutors from seeking the death penalty. The interviewee did not know the attorney’s perspective on the issue, but noted that, either way, “an attorney can’t make a judge approve a voucher.” Interview 123.1.

1011. Interview 127.1 and Interview 130.1.

## Recommendation 29: Training for Judges on Capital Litigation

Recommendation 29 was approved by the JCUS in September 2018. To understand the implementation of recommendations specific to judicial training, we interviewed staff from the Federal Judicial Center (FJC),<sup>1012</sup> who by statute create and conduct educational and training programs for judges.<sup>1013</sup> The Education Division (FJC Education) is responsible for this part of the FJC’s mission and is the primary source of training for judges within the judiciary.

Before publication of the Cardone Report, FJC Education offered a special-focus program on capital and capital habeas litigation (available to all judges),<sup>1014</sup> but no new sessions of the program had been held during our period of evaluation, and none were planned for the near future.<sup>1015</sup>

FJC Education offers some on-demand resources for judges regarding management of capital cases. These include

- two print resources for judges, one providing resources for death penalty trials (dated 2004)<sup>1016</sup> and the other for managing capital habeas cases (dated 2010)<sup>1017</sup>
- a Managing Capital Cases special-topics page<sup>1018</sup> that includes
  - links to the print publications noted above
  - contact information for federal death penalty resource counsel<sup>1019</sup>
  - a link to habeas assistance training<sup>1020</sup>
  - a pocket guide on § 2254 litigation<sup>1021</sup>
  - a habeas review of state capital convictions video<sup>1022</sup>

These resources have been available since before publication of the Cardone Report, and no changes were made to the above specific to the Cardone Report or its recommendations.<sup>1023</sup>

1012. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act for full results and Technical Appendix 3: Project Interviews.

1013. Under 28 U.S.C. §§ 620–629, “The Center shall have the following functions ... to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government and other persons whose participation in such programs would improve the operation of the judicial branch, including, but not limited to, judges, United States magistrate judges, clerks of court, probation officers, and persons serving as mediators and arbitrators.”

1014. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act.

1015. *Id.*

1016. See <https://www.fjc.gov/content/resource-guide-managing-capital-cases-volume-i-federal-death-penalty-trials>, last accessed Jan. 21, 2023.

1017. See <https://www.fjc.gov/content/resource-guide-managing-capital-cases-volume-ii-habeas-corpore-review-capital-convictions-0>, last accessed Jan. 21, 2023.

1018. See <https://www.fjc.gov/content/managing-capital-cases>, last accessed Jan. 21, 2023.

1019. See <https://www.fjc.gov/content/managing-federal-death-penalty-trials-federal-death-penalty-resource-counsel-assistance>, last accessed Jan. 21, 2023.

1020. See <https://www.fjc.gov/content/managing-habeas-corpore-review-capital-convictions-capital-defense-network-assistance>, last accessed Jan. 21, 2023.

1021. See <https://www.fjc.gov/content/capital-%C2%A7-2254-habeas-cases-pocket-guide-judges-no-visibility-flag-review-dup>, last accessed Jan. 21, 2023.

1022. See <https://www.fjc.gov/content/managing-habeas-corpore-review-capital-convictions-additional-resources>, last accessed Jan. 21, 2023.

1023. The most recent material is dated 2010. See <https://www.fjc.gov/content/managing-capital-cases>, last accessed Jan. 21, 2023.

FJC Education also provides updates on changes in capital litigation through webinars, podcasts, guides, and breakout sessions at training programs, such as at the orientation programs for district and magistrate judges, but no such sessions were held during this period of evaluation, and no new webinars or podcasts on capital litigation were created.<sup>1024</sup>

District and circuit court stakeholder interviewees had varying perceptions of a need for judicial training on direct death and capital habeas litigation.<sup>1025</sup> Some district court stakeholders suggested training on case management; others made more general comments about the need for training on resourcing these cases. For example, one defender said, “[Judges] need to understand that when these folks are appointed, it does not come out of their budget .... The issue of money should not really enter into [the appointment process]. It should be who is best qualified.”<sup>1026</sup> District court stakeholders also suggested specific training for judges, such as the importance of mitigation in capital litigation.<sup>1027</sup>

Circuit court stakeholders were asked about the availability of training on capital litigation and whether appellate court judges needed training on any topic. No training was reported, and interviewees differed in their perception of the need for judicial training. Five circuits said there was no need for additional training for judges at all, and, among those who saw a need for more judicial training, no one specified capital litigation.

Resource counsel also discussed how training could help judges make decisions in capital cases, especially if they were unfamiliar with this type of litigation and the resource needs involved. Some resource counsel favored a flexible training approach that would allow judges to receive training when assigned the case,<sup>1028</sup> while others supported routine training on capital litigation because receiving it after case assignment was too late.<sup>1029</sup>

Overall, eighteen of twenty resource counsel interviewees agreed judges would benefit from training on capital litigation, including use of experts, or general habeas training, with a specific focus on mitigation.

Resource counsel suggested training to address resource challenges in capital litigation that remain despite case budgeting. For example, one interviewee stated that judges needed a better understanding of the types of experts and the costs of these experts so they were not surprised by a request to spend \$150,000 on an investigator.<sup>1030</sup> Recent developments in forensic evidence (and the unreliability of some prior types of forensic evidence, such as bite marks),<sup>1031</sup> mental health issues,<sup>1032</sup> trauma,<sup>1033</sup> including race-related trauma and its epigenetic effects,<sup>1034</sup> changes in the law such as those brought by the decision in *Shinn*,<sup>1035</sup> and clemency<sup>1036</sup> were also recommended by resource counsel.

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1024. Appendix H: Training and Education for Federal Judges on the Criminal Justice Act.

1025. See Technical Appendix 3: Project Interviews.

1026. Interview 20.1.

1027. Interview 34.1.

1028. *E.g.*, Interview 161.1.

1029. *E.g.*, Interview 131.1.

1030. Interview 34.1. Similarly, the interviewee commented that judges “also need to know what the expected size of a budget is in these cases and that it can be in the range of X and Y and further, that the amount is reasonable and common.”

1031. Interview 123.1.

1032. *Id.*

1033. Interview 200.1, Interview 127.1, and Interview 134.1.

1034. Interview 127.1.

1035. Interview 118.1.

1036. *Id.*

Training on habeas litigation was supported by resource counsel because judges might lack familiarity with this type of litigation,<sup>1037</sup> creating

- unreasonable expectations regarding what tasks could be completed given case timeframes and budgetary constraints<sup>1038</sup>
- difficulty for some judges to imagine that by the time a case got to habeas that there had been some miscarriage of justice<sup>1039</sup>
- insufficient understanding of the work necessary to represent clients in habeas litigation<sup>1040</sup>

Often on habeas petitions, attorneys are making funding requests of the trial judge in order to prove prejudice—essentially asking judges to admit their own error. Though this can be explained in training, it can be challenging to address and overcome.<sup>1041</sup>

Another interviewee suggested training on habeas was especially important given recent decisions by the Supreme Court. Even before the *Shinn* decision, judges questioned resource requests for fact development:

The judges would point out cases and say, you know, “Why should we give funding for fact development when these claims might be procedurally barred, or we might have to rely only on the state court records, so why should we approve of all this other stuff?” And so that kind of makes it hard to get off the ground to build a case.<sup>1042</sup>

One interviewee, who was otherwise reluctant to train judges on specific methods used by capital litigators, favored general training on habeas.<sup>1043</sup>

Despite perceiving a need for training, some resource counsel felt it wasn’t the absence of available training but reluctance by judges to participate in training that made resourcing decisions problematic. One interviewee said, “Are [judges] ignorant of the ABA guidelines and the mitigation, the supplementary guidelines, and the mitigation function? Absolutely. Are they receptive? You know, that would be a different question.”<sup>1044</sup> The interviewee went on to say that “some people, you just can’t reach,” and that this would be particularly true of judges who relied on staff (including death penalty law clerks) to review vouchers or make case appointments.<sup>1045</sup>

Six of twenty resource counsel interviewees felt training on mitigation was particularly important.<sup>1046</sup> As one interviewee noted, it is easy for people to become cynical, especially when they don’t

<sup>1037</sup>. Interviews 122.1 and 127.1.

<sup>1038</sup>. Time constraints are particularly challenging when counsel need to request documents from state and local governments. Interview 125.1.

<sup>1039</sup>. Interview 127.1. The interviewee did not blame the judges for such an assumption but noted the challenges this perspective created, saying it was “quite frustrating” to be fighting the assumption or posture that resource counsel are making things up.

<sup>1040</sup>. *Id.*, noting that judges do not understand the need to talk with people to determine if trial counsel should have done so in the prior case. Sometimes the work is “very subtle.” Judges ask whether it was “reasonable” to talk to a person multiple times to get information, but it took that many attempts to build the relationship.

<sup>1041</sup>. *Id.*

<sup>1042</sup>. Interview 123.1.

<sup>1043</sup>. Interview 122.1.

<sup>1044</sup>. Interview 125.1. Interview 129.1 also supported training but was unsure if judges were, “a reachable audience.”

<sup>1045</sup>. Interview 125.1.

<sup>1046</sup>. Interviews 125.1, 120.1, 134.1, 135.1, 133.1, and 126.1.

see the outcome of these investigations and the role mitigation plays in the outcome of the case.<sup>1047</sup> Similarly, another interviewee echoed the importance of training on mitigation, especially in light of empirical research highlighting the impact of resources for mitigation on the probability of a death sentence.<sup>1048</sup> One interviewee felt that training judges on why funding mitigation was important would help eliminate the arbitrariness of decision making, and it was thought that newly appointed judges would be receptive to the training.<sup>1049</sup>

As one interviewee said, some judges feel that mitigation experts are “nothing more than private investigators that are getting an enhanced rate for mitigation.”<sup>1050</sup> Speaking specifically about the need for mitigation, another interviewee said,

I think people don't understand how labor and time intensive these investigations are .... In our circuit, mitigation has been devalued a lot .... It would be nice to train the judges, or at least the death clerks, but ... if you were able to, like, organize a training and have the judges sit down and listen to it ... who would they even listen to?”<sup>1051</sup>

### III. Conclusion<sup>1052</sup>

#### Recommendation 24

The one plan that included a provision restricting CHUs from engaging in cross-district or cross-circuit representation was amended, in compliance with Recommendation 24. In practice, the majority of circuits reported that CHUs from districts in the circuit could be appointed beyond their existing jurisdiction, with some limitations. CHUs are appointed out-of-district and out-of-circuit under the appointment protocol. Following the protocol to appoint cross-district or cross-circuit causes some delay in appointing counsel.

#### Recommendation 25

The JCUS-approved recommendation that circuit courts should encourage establishment of CHUs where they do not already exist and make resource counsel and other resources as well as training opportunities more widely available to attorneys who take these cases saw mixed implementation. Eleven districts in states with the death penalty gained access to a CHU after the start of FY 2017. However, currently ten districts in five states do not have routine access to a CHU for § 2254 proceedings that may need them.

1047. Interview 120.1. Interviewee 135.1 made a similar comment: “Judges may know the law, but they don't have experience of conducting mitigation investigation themselves .... Appellate judges have only seen cases that end in death sentences. So their universe of experience doesn't include cases where mitigation was well-investigated and well-presented at trial .... I found some judges very receptive [to hearing about mitigation from practitioners.]” Of course, not all resource counsel thought judges would be willing to receive training for mitigation experts. Interview 133.1.

1048. See James R. Spencer, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States (1998), and Jon B. Gould and Lisa Greenman, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, Report to the Committee on Defender Services, Judicial Conference of the United States (2010).

1049. Interview 126.1.

1050. Interview 83.1.

1051. Interview 125.1.

1052. The recommendations are listed in the order they were discussed in the chapter.



Most resource counsel felt that they had sufficient funding and staff to manage their current work. They also recognized that some needs remain unmet due to limits on the number of cases they can take and their ability to be proactive.

The number of DSO and local FDO training programs and attendance at those programs increased between FY 2017 and FY 2021. Training reached a wider audience due to the move to online training.

## **Recommendation 28**

The JCUS-approved recommendation to modify the work-measurement formula to increase resources to CHUs overall, specifically allowing them to take a larger portion of existing capital habeas cases, cannot be assessed at this time, as the work-measurement formula is currently being revised. Resource needs for CHUs are ongoing.

## **Recommendation 26**

The JCUS-approved recommendation to eliminate any formal or informal non-statutory budget caps on capital cases was difficult to capture from our review of district court CJA plans. However, our interview data showed that, in practice, both formal (i.e., found in local rules or CJA plans) and informal (e.g., presumptive limits about how much cases should cost and what services should be resourced) continue to exist but appear to be improving in some circuits.

Despite working with CBAs to budget capital cases and make decisions about case resourcing, payment reductions were more likely to occur in appointments in capital cases than in non-capital appointments.

## **Recommendation 27**

The JCUS-modified approved recommendation that in appointing counsel judges should give due weight to the recommendations by federal defenders and resource counsel and articulate the reasons for not doing so was not implemented across all districts. Specifically, our review of district court plans showed that 77% of plans included a provision regarding court consultation with federal defenders, an increase from 50% in FY 2017 plans. However, despite the statutory requirement, about a quarter of plans (23%) do not have such a provision. In addition, we found that 46% of plans included a provision regarding courts weighing the recommendation of resource counsel, an increase from 2% of FY 2017 plans. Data from our interviews indicated that courts do not always provide a reason for declining the recommendations of defenders and resource counsel.

## **Recommendation 29**

The JCUS-approved recommendation that the FJC provide additional judicial training on the requirement of § 2254 and § 2255 appeals and best practices on the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment was not implemented. On-demand resources are offered and have been since before the Cardone Report was published. No changes were made to those resources, and no additional training for judges was held on capital litigation. Some district court judges as well as federal defenders and resource counsel reported ongoing training needs, especially regarding the use of mitigation.

# Chapter 7

## Litigation Support and Interpreters (Recommendations 31-33)

### I. Introduction

The Cardone Report identified a need for greater use of expert service providers generally<sup>1053</sup> but focused specifically on the rising need for two types of experts: litigation support for eDiscovery<sup>1054</sup> and interpreters.<sup>1055</sup> All defense counsel need to be able to access these resources in at least some cases, but the Cardone Report identified specific limitations for CJA counsel due to both issues of supply and the limitations of resourcing the defense function generally. The differences in the types of CJA counsel appointed—federal defenders or panel attorneys—and in the resources they have readily available mean that the problems involved in obtaining these resources are felt disproportionately by the panel attorneys, who typically have less routine access and must seek court approval to obtain case litigation support and interpreters.

As described below, the Cardone Report highlighted several challenges related to obtaining expert services for CJA appointed counsel, especially CJA panel attorneys. This chapter first discusses the rising need for expert services to manage eDiscovery (Recommendations 31 and 32) and then turns to the need for certified interpreters to assist in communicating with clients (Recommendation 33).

### II. Rising eDiscovery Needs and Insufficient Resources: Recommendations 31 and 32

#### Issues

The Cardone Report described issues confronting the defense due to the rise in electronically stored information (ESI). To access ESI for discovery in a case, defense attorneys must have the proper software—sometimes multiple software packages for different kinds of ESI—and they must be trained to use it. Lack of such access and training could impact the quality of representation provided to clients with CJA appointed counsel. “As sophisticated electronic devices become cheaper and hold more data, and as networks become faster, the sheer amount of e-discovery will continue to increase exponentially. Unless steps are taken, ESI will negatively impact both the cost and quality of indigent defense.”<sup>1056</sup>

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1053. Cardone Report, section 7.1.2, pp. 149–156.

1054. *Id.*, section 11, pp. 226–235.

1055. *Id.*, section 7.3.1, pp. 170–173.

1056. *Id.*, p. 235 (citations omitted).

As the Cardone Report detailed, the increased volume of discovery,<sup>1057</sup> the many types of ESI,<sup>1058</sup> and the differences in discovery formats<sup>1059</sup> plague districts where prosecutors do not consider the needs of defenders (both institutional and CJA panel attorneys)<sup>1060</sup> and where courts do not require them to do so.<sup>1061</sup> Prosecutors have substantially greater resources for managing eDiscovery (the process and tools for reviewing ESI) than defenders,<sup>1062</sup> and the decisions of law enforcement and prosecutors regarding collection, format, availability and access to ESI impact the eDiscovery needs of defenders. Even when ESI is provided by the prosecution in readily reviewable formats, defense counsel need assistance to manage eDiscovery due to the evolving nature of technology and the resources for capturing information stored electronically. “Without adequate training, support, and financial assistance for defenders and panel attorneys grappling with e-discovery, defendants will not receive effective representation.”<sup>1063</sup>

The National Litigation Support Team (NLST) helps manage the eDiscovery needs of defense counsel. The NLST provides several types of assistance:<sup>1064</sup>

- serving as a general resource and consultant for CJA panel attorneys and federal defenders concerning critical eDiscovery issues in their case, including facilitating and providing direct case assistance for CJA panel attorneys
- educating and training CJA practitioners on eDiscovery review strategies, practices, and litigation support technology
- managing national software contracts,<sup>1065</sup> coordinating discovery attorney (CDA) contracts (*see below*), and litigation support service contracts that can benefit both federal defenders and CJA panel attorneys
- providing ongoing outreach and coordination with the Department of Justice (DOJ) regarding national ESI production practices
- working with the Defender Services Office (DSO), various DSO working groups, and the judiciary on long-range planning regarding future eDiscovery needs

1057. *Id.*, p. 227. “As one witness explained, ‘It is not uncommon in this district to have fraud cases where three [terabytes] of information have been provided to counsel. [That comes out to] 6,000 filing cabinets ... Imagine the CJA lawyer who’s a solo practitioner who has to make sense of 6,000 file cabinets and not have the support staff.’”

1058. *Id.*, p. 226. “Even in cases that are not ‘extended or complex,’ the government may have computer and smartphone files, information from social media accounts like Facebook and Twitter, hours of video surveillance, wiretaps, and GPS tracking information.”

1059. *Id.*, p. 228, citing testimony from Public Hearing—Miami, Fla., Panel 6, Tr., at 28.

1060. *Id.*, p. 230, citing testimony from Public Hearing—San Francisco, Cal., Panel 5, Tr., at 12.

1061. *Id.*, p. 232. “There are judges, however, who believe it is inappropriate to become involved in document and ESI discovery altogether. One judge explained that the process relies on the ‘goodwill of the U.S. Attorney’s Office. We can only push so far ... I am not sure that I agree it would be appropriate for the court, with the state of the law as it is now, providing almost no rights to discovery for the defendant, for the court to step in ...,” citing testimony from Public Hearing—Portland, Or., Panel 3, Tr., at 26.

1062. *Id.*, p. 227. “To meet their ethical obligations and mount a zealous defense to charges brought by a government with considerably more resources and institutional support for the management of electronic evidence, defense attorneys face a number of hurdles.”

1063. *Id.*, p. 226.

1064. Interview 85.1.

1065. The ten software tools available to all FDO attorneys have limited availability to panel attorneys. *See* Table 1 at the end of this chapter for a list of programs and their availability. As one interviewee noted, though the NLST creates economies of scale that can reduce the cost of eDiscovery review tools, they are limited in their ability to negotiate lower prices for panel attorneys to purchase the software for themselves, and the costs for purchasing such tools are not reimbursable under the CJA if the software is something that the attorney or firm would be expected to have as a matter of regular business practice. Interview 85.4.

At the time the Cardone Report was issued, only four people worked for the NLST: the National Litigation Support administrator, an Assistant National Litigation Support administrator, and two National Litigation Support paralegals.<sup>1066</sup> The Cardone Report concluded that “the budget and staff of the NLST was ‘woefully inadequate’”<sup>1067</sup> to assist the entire federal defense community, consisting of (at that time) eighty-one FDOs and nearly 10,000 CJA panel attorneys.<sup>1068</sup>

The CDA program, one subset of the NLST’s work, was called out specifically as lacking appropriate staffing and funding. CDA contracts are managed by the NLST, and CDAs provide support to a limited number of cases each year that have been identified by the NLST as requiring assistance.<sup>1069</sup> This assessment is based on the complexity of the matter, the number of parties involved, or the nature or volume of the discovery. Multidefendant cases with high-volume discovery needs are one type of case that can benefit from a CDA. In these cases, CDAs create cost efficiencies by organizing discovery for the multiple attorneys representing clients in the case and providing a discovery review tool that is appropriate for the case. Because they are on contract, CDAs represent no additional costs (such as salary and benefits) if the demand for their services does not exist.

Like the NLST overall, the CDAs were insufficiently funded and staffed to support the entire defense function according to the Cardone Report. When the CDA positions were initially created, it was contemplated that each CDA would work on up to ten cases at a time. However, by the time the Cardone Report was written, they were handling double that load.<sup>1070</sup> The Cardone Report concluded that the CDA program was “simply inadequately staffed to address the problems raised by electronic discovery.”<sup>1071</sup>

The Cardone Report found that the limited number of resources available to assist defense counsel with eDiscovery needs was especially a problem for CJA panel attorneys. Panel attorneys are often solo practitioners, without additional staff available (such as a full-time paralegal) to help manage discovery issues.<sup>1072</sup> Moreover, the software used in eDiscovery changes quickly,<sup>1073</sup> and training is necessary to successfully use these tools,<sup>1074</sup> but not all attorneys want to learn how to use them or have time to do so.<sup>1075</sup> These facts about the individual capacity of panel attorneys help clarify the need for greater national support from experts already trained in these tools. Even in those cases where individual panel attorneys want to manage eDiscovery for a complicated case on their own, they must still seek approval from the court to access either additional staff or the necessary software tools, many of which involve contracting separately with external providers. The Cardone Report found both that CJA panel attorneys faced challenges making effective requests and that some courts showed reluctance to approve these requests. This reluctance stems in part from a lack of familiarity with these tools by the judges reviewing the requests<sup>1076</sup> and from “sticker shock” at their costs.<sup>1077</sup>

1066. Cardone Report, p. 232. The NLST had been approved for an additional paralegal for FY 2018 when the report was issued, but the position was not on board when the Cardone Committee evaluated the defense program. See below for more information about changes to NLST staffing.

1067. *Id.*, citing the testimony from Public Hearing—San Francisco, Cal., Panel 2, Tr., at 4.

1068. *Id.*

1069. “If the court, a CJA panel attorney or federal defender organization is interested in using the services of a CDA, one of the CJA attorneys in the case would first communicate with the NLST. After an initial consultation with the NLST, and a second one with one of the CDAs, a decision would be made about the use of the CDA’s services ....” DSC June 2021 Agenda Item 4A, p. 2, n.3.

1070. Cardone Report, p. 233.

1071. *Id.*

1072. *Id.*, p. 228.

1073. *Id.* “One witness described instances where the software needed to read those files is now obsolete; panel attorneys don’t have those older programs and operating systems.”

1074. *Id.*, pp. 227–228.

1075. *Id.*, pp. 232–233.

1076. *Id.*, p. 229.

1077. *Id.*, p. 231.

## Recommendations

The Cardone Report made two recommendations to address these concerns.

### Recommendation 31 (approved)<sup>1078</sup>

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.

### Recommendation 32 (approved)<sup>1079</sup>

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.

## Implementation and Impact

Recommendations 31 and 32 were both adopted by the JCUS in September 2018 without modification. Implementing both of these recommendations requires increases in funding to create new positions to provide litigation support. Unlike the FDOs, the NLST does not use a staffing formula, so increases in workload are not automatically calculated to support increases in staffing. The ability to grow the program depends solely on increases in the budget requested through the judiciary's budget process. These requests for increased funding must be made through the judiciary's budget process, requiring the support of the Defender Services Committee (DSC), the Judicial Resources Committee (JRC), the Budget Committee, the Executive Committee, and available funding from Congress. Requests made through this process take at least two years from request to available funding, and (as described elsewhere in this report) the process offers limited opportunity for defense attorneys to advocate for the needs of the program.<sup>1080</sup>

Since FY 2017, the NLST budget has increased to fund three new positions (one position approved in FY 2017 and two new positions in FY 2021), increasing total resources from four at the time of the Cardone Report to seven positions available by the end of FY 2021. The most recent requested increase in FY 2023 included eight new positions for the NLST. These eight positions were recommended by the DSC in 2019. The positions were approved by the JRC in June 2021, and then by the Judicial Conference in September 2021. The FY 2023 appropriation was enacted in December 2022, and the spending plan included funding for these eight positions.<sup>1081</sup>

The eight new positions for the NLST in FY 2023 are part of the effort to implement Recommendations 31 and 32, which call for increased litigation support and the creation of litigation support positions in each district or at the circuit level to assist with discovery and evaluation of forensic evidence. The funding of these eight positions combined with existing resources would result in approximately one position for each circuit, consistent with the lower limit of Recommendation 32. The new positions

1078. JCUS-SEP 18, p. 41.

1079. *Id.*

1080. See Chapter 2: Structural Changes for detail on the Cardone Report recommendations to increase defender advocacy through modifications to the budget process.

1081. Email from Interview 190.1 regarding FY 2023 appropriation and spending plan. On file with FJC.

would be assigned a primary geographic region (though they may not be physically located in that region) but could be assigned to work outside their primary region to address workload fluctuations that might occur.

Although the number of positions available to assist with rising eDiscovery needs increased during our study period, the positions were only recently approved and have not yet been hired. The eight positions for NLST were approved in the FY 2023 financial plan, created by the Executive Committee on January 25, 2023,<sup>1082</sup> nearly halfway through the fiscal year, and will likely not be filled for several additional months (based on historic patterns).<sup>1083</sup> The budget and hiring processes are slower than the rising needs of the defense (discussed more below), meaning that by the time a request is finally filled, it is already outstripped by the increased—and ever increasing—need. Further slowing hiring are the challenges of finding job candidates with the skill sets to assist in eDiscovery when the technology changes rapidly.<sup>1084</sup>

Recommendation 31 also called for increased funding for the CDAs. At the time of the Cardone Report, three CDAs and their staff assisted with eDiscovery needs in CJA representations across the country. At the June 2021 DSC meeting, the NLST submitted a request for an increase in CDA contracts.<sup>1085</sup> The request, which DSC approved, called for an increase in the hourly rates for CDAs and their staff, as well as a concomitant increase to their overall contract limit (to offset the increase in hourly rate). This request was the first increase in hourly rates since the national CDA contracts were established in 2011.

In addition to the increase in hourly rates and contract limits for CDAs, in early 2018, DSO obtained permission and funding through the budget process to increase the number of CDA contracts from three to five, an effort that started in the various working groups of DSO in spring 2016. This was the first time DSO requested an increase in the number of CDA contracts and the only increase during our study period. The increase in the number of contracts expanded the CDAs' capacity to provide direct case assistance in cases with CJA appointed counsel. While the change occurred during our study period, it began before the publication of the Cardone Report. No further requests for increases in the number of CDA contracts have been made since FY 2017.

To assess the ongoing eDiscovery needs in criminal litigation and the resources necessary to address these needs, we interviewed eDiscovery experts for the prosecution and the defense.<sup>1086</sup>

The number of requests for assistance the NLST receives illustrates the rising need for eDiscovery assistance. Before the pandemic, the NLST received approximately 400 requests for assistance each fiscal year.<sup>1087</sup> During the pandemic, the number of these requests increased to 700. Even without increased staff, the NLST met the increased demand because of the reduced number of in-person trainings during the pandemic.<sup>1088</sup> However, when in-person trainings resumed in FY 2022, NLST staff were again trying to meet the needs for in-person training and the increased demand for all other types of service (such as direct case assistance) that they provide.

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1082. [Memorandum from Arabella F. Littlepage, Judiciary Budget Officer re: Fiscal Year 2023 Final Allotments and Related Information, Feb. 7, 2023.](#)

1083. While historically hiring took several additional months after positions were allocated, the number of positions approved and the skills necessary to fill and train these positions will likely result in even greater delays for bringing additional help on board.

1084. Interviews 103.1, 104.1, 105.1, and 85.3, regarding the challenge of hiring these positions using existing position descriptions. The salaries are too low for the skills needed, and the position descriptions don't fit the responsibilities of the jobs. Changing position descriptions through human resources office rules further delays hiring.

1085. DSC June 2021 Agenda Item 4A, Coordinating Discovery Attorney Contracts.

1086. See Technical Appendix 3: Project Interviews.

1087. Interview 85.1.

1088. Interview 85.1 and see Appendix G: Attorney Training and Resource Challenges.

One factor adding to the increased demand for NLST and CDA services are the more than 900 cases related to the events at the U.S. Capitol on January 6, 2021.<sup>1089</sup> Most of the cases are against individual defendants connected to alleged criminal acts and conspiracies occurring over a period of hours in and around the U.S. Capitol, and approximately half the defendants are represented by counsel appointed under the CJA.<sup>1090</sup> The events of January 6 resulted in the accumulation and creation of a massive volume of electronic data that may be relevant to many defendants.<sup>1091</sup> Besides the immense volume of discovery, the complexity of the investigation, and varied types of data (CCTV, social media, cell phone, and GPS data, etc.) present challenges.

Despite the increase in demand, no additional support (staff or technical resources) was provided to assist with the eDiscovery needs of the defense surrounding the January 6 litigation.<sup>1092</sup> Due to the unprecedented volume of eDiscovery and the compressed trial schedules due to several clients asserting their speedy trial rights, efforts to create an online review database ran into barriers that could not be overcome, leaving court-appointed defense counsel without any discovery review functionality for this high-profile litigation.<sup>1093</sup> Through an agreement with DOJ, defenders were eventually given access to an online review database created for prosecutors.<sup>1094</sup> NLST staff and FDO staff are managing discovery review,<sup>1095</sup> but the search functionality for defenders in the DOJ database is more limited than if they created their own database.<sup>1096</sup> NLST staff meet biweekly with DOJ representatives to coordinate eDiscovery, adding to their existing workload.<sup>1097</sup>

DOJ referred to January 6 as the largest criminal investigation in history,<sup>1098</sup> one that highlights the ongoing difference in resources available to defenders and prosecutors described in the Cardone Report. These differences encompass not only the number and scope of resources available but also the flexibility of their use. Prosecution resources include the following:

- Investigations are open in fifty-five of the fifty-six FBI field offices.<sup>1099</sup>
- U.S. attorneys from as far away as Alaska are prosecuting cases filed in Washington, D.C.<sup>1100</sup>

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1089. A list of all cases filed in conjunction with the events of Jan. 6, 2021 is available on the DOJ webpage at: <https://www.justice.gov/usao-dc/capitol-breach-cases> (last accessed Feb. 8, 2023).

1090. Email from 58.2, June 24, 2022. On file with FJC.

1091. DSC June 2022 Agenda Item 2A, Att. 2, p. 13.

1092. Email from 58.2, June 24, 2022. On file with FJC.

1093. Interview with 59.3. *See also* Spencer S. Hsu, *As Mount of Video Evidence Grows, Capitol Riot Trials are Pushed to 2022 and Beyond*, Wash. Post, July 16, 2021.

1094. DSC June 2022 Agenda Item Handouts, p. 576.

1095. *Id.*, Item 2B, Attachment 3, pp. 3–4. “On behalf of all defense teams representing hundreds of defendants, the NLST and the Federal Public Defender Office for the District of Columbia (DC FPDO) are serving as discovery liaisons to DOJ. The NLST and its contractors are managing a Relativity e-discovery review database for the defense teams, and an Evidence.com database with over 24,000 video files totaling more than 9 terabytes of data (primarily body worn camera footage and U.S. Capitol Police closed circuit video footage).”

1096. Interview 85.4.

1097. DSC June 2022 Agenda Item 2B, Attachment 3, p. 3.

1098. Hsu, *supra* note 1093.

1099. United States’ Memorandum Regarding Status of Discovery, Case No. 21-CR-68 (TNM), D.D.C., July 13, 2021, Docket Entry 54.

1100. John Gerstein & Kyle Cheney, *Capitol Riot Cases Strain Court System*, Politico, Mar. 10, 2021. “‘It is 5:03 a.m. in the morning,’ the Anchorage-based assistant U.S. attorney replied cheerfully via Zoom. Although he was 3,300 miles away and dawn had yet to break, Alexander was on hand for the arraignment of James Mels, a Michigan man charged with breaching the Capitol in what he said was an attempt to protest certification of the presidential election results and share his copy of the Constitution with police,” and “A POLITICO review of the more than 250 (and climbing) cases related to the Capitol breach shows that federal prosecutors from Fort Lauderdale to Wichita to San Francisco have heeded that call. So far, over 30 cases are assigned to attorneys who appear to be outside the staff of the U.S. Attorney’s Office in Washington.”

- DOJ created an eDiscovery team staffed by federal prosecutors who have experience managing complex investigations with a substantial volume of material, by DOJ experts in project management and eDiscovery, and by a lead discovery agent from the FBI.<sup>1101</sup>
- DOJ procured an online cloud-based document review platform and outside expert assistance from a contractor who could provide “litigation technology support services to include highly technical and specialized data and document processing and review capabilities.”<sup>1102</sup> Bids for this work were solicited through their Mega V Contract.<sup>1103</sup>
- Separate litigation support services contracts for between twenty-one and thirty-eight positions for eDiscovery support, including one lead project manager, fifteen document management analysts, one senior data specialist, and two courtroom presentation specialists. If additional staffing support is needed, they may obtain the staffing assistance of an additional lead project manager, seven law clerks, five document management analysts, one data specialist, and three courtroom presentation specialists.

As the Cardone Report described, defense needs are driven by prosecutors who have far more resources to manage eDiscovery. The flexibility of staffing and the avenues for procuring needed eDiscovery resources available to the prosecutors, of which the January 6 prosecution serves as a visible example, outpace what is available to defenders. In the same time period in which DOJ pulled together the above resources, defenders received access to eDiscovery materials only through the agreement with DOJ to share their database, despite similar eDiscovery needs. Even the additional NLST positions expected to be hired in FY 2023 were requested before January 6 occurred. These positions were required to address the level of need identified years ago and do not anticipate the increase seen from just this set of litigation.

Outside of the unprecedented scope of the January 6 litigation, the modest increases in routinely available eDiscovery resources for defenders have not kept pace with increases in resources available for prosecutors. During the period of study in which defenders requested eight additional NLST and two CDA contracts to add to the seven NLST staff and three CDA contracts, the DOJ budget requests included:

- 115 positions to support an eLitigation initiative to improve training (\$20 million)<sup>1104</sup>
- 52 positions (51 attorneys) for eLitigation modernization (\$26.8 million)<sup>1105</sup>

These budget requests made during our study period by prosecutors are much greater than requests made by defenders, and as the Cardone Report discussed, prosecutors had more resources at the start of our study period. In the U.S. Attorney Office FY 2023 budget request, current services for eLitigation were reported to be 275 positions (six attorneys) and nearly \$67 million, and this does not account for litigation support and training resources available locally through litigation support units (LTUs)

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1101. *Supra* note 1099.

1102. *Id.*

1103. The contract vehicle was awarded in December 2020, and it provides five companies (CACI International, Deloitte, Leidos, Pacific Architects and Engineers (PAE), and Ernst & Young (EY)) with the opportunity to receive work orders through this contract. The contract runs for 6.5 years. Current funding available is \$1.5 billion. See “Mega 5: Description” CACI. On file with FJC. The contract is funded through fines collected in civil and criminal cases, estimated to be about 3% of the total amount collected. Interview 103.1.

1104. See U.S. Attorneys (USA) [FY 2022 Budget Request At A Glance](#).

1105. See U.S. Attorneys (USA) [FY 2023 Budget Request At A Glance](#). On file with FJC.



housed within individual offices.<sup>1106</sup> Interviewees reported that approximately half of all U.S. attorney offices have LTUs,<sup>1107</sup> and the units provide one-on-one case training using material from cases prosecutors are actively litigating.<sup>1108</sup> Leadership of LTUs also provide efficiencies for their offices by setting priorities for resource allocation when cases have competing needs.<sup>1109</sup>

In addition to LTU support, prosecutors also have litigation support available through the Litigation Technology Services Center (LTSC)<sup>1110</sup> that creates Relativity<sup>1111</sup> databases for prosecution teams. The LTSC creates approximately 1,500 databases per year, though not all are used in active litigation. The LTSC is available to any prosecutor seeking the resources, without additional cost, but the capacity is limited by staffing. One interviewee reported that the LTSC included a staff of thirty-five to forty contractors supervised by three government employees.<sup>1112</sup> The LTSC is managed by an attorney, but no paralegals or attorneys are otherwise on staff. No one on staff sets priorities—requests are first-come, first-served.<sup>1113</sup> The NLST would like to be able to create a similar, centralized place to provide technological support and training for defense attorneys, but that suggestion has not been requested due to funding issues.<sup>1114</sup>

U.S. attorney offices also have several litigation support tools routinely available to prosecutors and two ways to secure additional resources for extraordinary cases.<sup>1115</sup> Beginning with the tools themselves, available through the Bulk Purchase Agreement, all attorneys in the USAO have routine access to fourteen different vendors' litigation support products, including tools such as Relativity for individual office use beyond the LTSC. The resources are funded centrally from an amount withheld from every USAO budget allocation, and the contracts are managed through the DOJ's chief information officer.

To pilot test new tools or to address resource needs unique to a single USAO, unused end-of-year funds create a pool of resources that local offices can bid on through a competitive funding process.<sup>1116</sup> Funding decisions are made by a committee within the Executive Office of the U.S. Attorney. The committee ranks proposals and awards funds to the highest ranked programs until available funding is

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1106. Litigation Support Units (LSUs) or Litigation Technology Units (LTUs) exist to increase productivity, improve work product, avoid errors in meeting discovery obligations, and decrease stress associated with the increasing complexity of ESI in litigation. The units standardize best practices across an office and provide litigation support and consultation on all stages of a case. To achieve these support and standardization goals, the units typically use Ipro Eclipse, Relativity, CaseMap, or Trial Director. The units work with a member of each USAO case team (often a paralegal) designated as the discovery point of contact on the case, logging incoming and outgoing discovery. Other members of the unit vary by office, based on need. See Lisa Dunn & Laura L. Hall. *Building a Successful eLitigation Practice and the Case for an AUSA Leading the Charge*, DOJ J. Fed. Law & Prac. (May 2020), p. 7.

1107. Interviews 103.1, 104.1, 105.1, and 85.3.

1108. *Id.*

1109. *Id.*

1110. Created in 2013 by the DOJ chief information officer, the initial purpose of the LTSC was to convert paper documents and evidence into digital formats. Interview 103.1.

1111. Relativity is an online eDiscovery review database where the software and data live on a remote computer. Services both for processing the information and for hosting it are managed by the third-party vendor. LTSC staff upload the information to a database created through and hosted by Relativity.

1112. Interview 85.2.

1113. Interviews 103.1, 104.1, 105.1, and 85.3.

1114. One interviewee suggested creating a Litigation Support Discovery Center that would provide resources to address all eDiscovery and litigation needs, streamlining discovery organization and management for the defense. The idea would be to have all necessary hardware, technology, and trained staff in one place to receive any form of discovery and prepare it so that the FDO or CJA panel attorney could effectively review and use the material. This resource, like the currently available eDiscovery resources, would be managed by the NLST. Interview 85.2.

1115. Interviews 103.1, 104.1, 105.1, and 85.3.

1116. *Id.*

exhausted. One local USAO used the money to procure a litigation tool, called Palantir, that captures social media posts. Additionally, for truly exceptional requests, the Mega V Contract (discussed above) is available to simplify procurement.

The Cardone Report made clear that it was not only the absolute level of litigation support available to the defense that was problematic, but the differential in resources between defense and prosecution resources. This review of prosecution resources highlights that the problem has continued since the Cardone Report was issued. Compared to what is available for prosecutors, eDiscovery resources for defense counsel continue to lag behind. Recent staffing increases for defense assistance are a fraction of requests made by prosecutors. Existing resources do not compare either. The NLST created a list of paralegals with experience and interest in assisting CJA panel attorneys with eDiscovery needs,<sup>1117</sup> but attorneys must still request, and courts must still approve, their use—a process that takes time and resources for not only defense attorneys but also the court. CJA panel attorneys are also unable to access all the software tools routinely required,<sup>1118</sup> and they cannot purchase them on their own because the costs are not compensable under the CJA if they are routinely expected to have the software as a matter of practice.<sup>1119</sup> Even among institutional defenders, securing additional resources for exceptional cases is challenging, and defense counsel continue to rely on prosecutors to access eDiscovery.

Reliance on the prosecutors to provide defenders with eDiscovery material is limited and considered problematic for the following reasons:

- Sharing resources may reveal defense strategies.
- Not all panel attorneys are trained to use the material in the format provided by the prosecution, nor do they have access to the software necessary to view the discovery in the case,<sup>1120</sup> leaving prosecutors to troubleshoot IT and training challenges for defense counsel. Having an eDiscovery expert on each side to resolve issues is preferable, but such resources are not always requested by the defense or approved by the courts.<sup>1121</sup>
- While sharing document review databases saves money for the judiciary, search functionality may be limited for defense counsel, as with the January 6 litigation, limiting its usefulness.
- Though DOJ leadership promotes the goal of producing discovery in usable formats for defense counsel,<sup>1122</sup> challenges may arise locally.<sup>1123</sup> Local discovery protocols, developed by the combined effort of prosecutors and defenders, can address some of these challenges, but they do not exist everywhere.<sup>1124</sup>

The limited resource increases to implement Recommendations 31 and 32 have not adequately addressed the ongoing needs of eDiscovery for the defense. Recommendation 32 explicitly contemplates a continuous process of increased support by noting that increases should be made “as needed.” Prosecutors continue to litigate these cases with considerably more resources to manage eDiscovery, and the small increases in defense resources have not offset these disparities, especially for CJA panel attorneys.

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1117. DSC June 2022 Agenda Item 2B, Att. 2, p. 5.

1118. See Table 1 for a list of programs.

1119. Interview 85.2.

1120. Interviews 103.1, 104.1, 105.1, and 85.3.

1121. *Id.*

1122. *Id.*

1123. One example is 1:18-CR-00108 EAW, W.D.N.Y., discussed in detail here: <https://nlsblog.org/2022/01/14/u-s-v-morgan-et-al-know-what-you-dont-have/>, last accessed Feb. 13, 2023.

1124. Interviews 103.1, 104.1, 105.1, and 85.3.

## III. The Rising Need for Certified Interpreters: Recommendation 33

### Issues

The Cardone Report identified the importance of using certified interpreters to ensure defendants understand the case against them. “Many attorneys testified about their need for interpreters to effectively communicate with their clients, even when the attorney has some ability to speak the client’s language.”<sup>1125</sup> One defender testifying before the Cardone Committee described the importance of using certified interpreters to ensure accuracy.<sup>1126</sup> This is especially important when reviewing plea agreements.<sup>1127</sup>

Testimony before the Cardone Committee noted that finding certified interpreters to assist defense counsel is challenging. An initial problem is that there is a shortage of supply,<sup>1128</sup> especially for some foreign languages less commonly encountered in the United States, as well as languages of indigenous people.<sup>1129</sup> The shortage of supply may be related to the low rates of compensation available for interpreters.<sup>1130</sup>

Additionally, like all other experts, panel attorneys must seek approval from the court to use experts, including interpreters. One panel attorney expressed concerns that judges would not approve interpreters if the attorney spoke the language.<sup>1131</sup> Even if such an interpreter has been found and approved, remote detention of defendants only increases the challenges of getting the interpreter to them.<sup>1132</sup> Further, the case caps requiring prior authorization are for the entire case and are easy to exceed if interpreters are needed. Panel attorneys consider the overall needs of the case when making decisions about using an interpreter.<sup>1133</sup>

### Recommendation

The Cardone Report made one recommendation to address these concerns.

#### Recommendation 33 (approved)<sup>1134</sup>

Develop a national policy requiring the use of qualified interpreters whenever necessary to ensure defendants’ understanding of the process.

1125. Cardone Report, p. 170.

1126. *Id.*, pp. 170–171.

1127. *Id.*, p. 170, citing the testimony from Public Hearing — Santa Fe, N.M., Panel 5, Tr., at 20.

1128. *Id.*, p. 171. “Other panel attorneys reported difficulties even finding interpreters to assist them, either because of the low compensation rate or a shortage of qualified interpreters.”

1129. *Id.* p. 172. “A district judge testified that Arizona faces similar difficulties with indigenous language interpretation.”

1130. *Supra* note 1128.

1131. Cardone Report, p. 171, with one panel attorney explaining “that he and other panel attorneys fear judges will not understand how necessary a trained interpreter is when the attorney can speak conversational Spanish.”

1132. *Id.*, p. 172. “Remote detention of defendants located long distances from their attorneys can also compound this problem [of finding available interpreters].”

1133. *Id.* “Additionally, panel attorneys have to balance their need for other experts or service providers for their cases, when considering whether to seek funding for an interpreter. The \$800 limitation applicable to experts and other service providers, without judicial approval, is the ‘aggregate for the whole case,’ so if an interpreter is hired, that could easily deplete the entire service provider allowance.”

1134. JCUS-SEP 18, p. 41.

## Implementation and Impact

Recommendation 33 was adopted by the JCUS at the September 2018 meeting. No national policy requiring the use of qualified interpreters has been developed yet. DSO staff indicated that the AO is in the process of defining what “qualified” means when referring to an interpreter. Interpreters can obtain different levels of certification, and the AO is working to determine how best to incorporate those levels into a national policy.<sup>1135</sup> Some work has been done towards increased training for interpreters and creating a list of interpreters who have regularly worked with FDOs, so that panel attorneys would have a resource when selecting an interpreter. But more work remains.<sup>1136</sup> Thus, currently, Recommendation 33 has not been implemented.

## IV. Conclusion

### Recommendation 31

The JCUS-adopted recommendation to increase staff and funding for the NLST and CDA contracts was implemented. Eight additional positions for the NLST and two additional CDA contracts were approved during this study period. The resources are modest increases relative to the demand and in relation to eDiscovery resources for prosecutors.

### Recommendation 32

The JCUS-adopted recommendation to create new litigation support position(s) in each district or at the circuit level was implemented by the newly approved positions described above. This recommendation’s language contemplates continued increases “as needed.”

### Recommendation 33

The JCUS-adopted recommendation to develop a national policy requiring the use of qualified interpreters has not been implemented, though related work is underway.

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1135. Interview 56.3.

1136. Interview 59.2.

**Table 1.** eDiscovery Software Resources for Defense Counsel.

Type	Current Tool(s)	FDO Access	Panel Access	Panel Discounts
PDF editor tool	Adobe Acrobat Pro	Enterprise licensing	None	Not Available
Search and retrieval tool	dtSearch	Enterprise licensing	Enterprise licensing	No Cost
Fact analysis and eDiscovery review database	LexisNexis CaseMap, TimeMap, DocManager	Enterprise licensing	Software maintenance included after Panel purchase	50% off retail
Private cloud repository	Box.com	Enterprise licensing for unlimited space	Enterprise licensing for unlimited space	No Cost
Online eDiscovery review database	Casepoint	Enterprise license for limited space; discounted pricing for larger volumes	Enterprise license for limited space; discounted pricing for larger volumes	No Cost
Network eDiscovery review database	Ipro Eclipse	Limited licenses	Not Available	Not Available
Computer forensics software	AccessData Forensic Toolkit (FTK) and Magnet Axion	Limited licenses for both	Not Available	Not Available
Mobile forensics software	Cellebrite UFED	Limited licenses	Not Available	Not Available
Social media capture tool	Pagefreezer WebPreserver	Limited licenses	Not Available	Not Available
Trial presentation tool	Ipro TrialDirector	Enterprise licensing	Not Available	50% retail price

Note: "Enterprise licensing" means the program is available to everyone in that group. "Limited licenses" means there is not sufficient coverage for everyone in that group. Depending on the program, one instance of the program may be available for each office, but FDO employees must share its use. "Not available" means the software is not available through national contracts.

# Chapter 8

## Legislative Changes

### (Recommendations 34-35)

## I. Introduction

Advocating for the legislative needs of the defense function has two components: securing the funding needed to maintain high-quality representation from the congressional appropriations committees and pursuing the program's substantive legislative goals.

As described in the Cardone Report, the majority of the interaction between the judiciary and Congress, including pursuit of legislative and policy goals, is through the Administrative Office of the U.S. Courts (AO).

The AO performs administrative functions for the federal judiciary and oversees the expenditure of appropriated funds. Its mission is to serve and support the federal judiciary pursuant to the policies, guidance, and direction of the Judicial Conference. The AO provides the working staff for all JCUS committees and so plays an important role in JCUS policymaking. It assists in creating the judiciary's budget, maintains a legislative office that has contacts with Congressional staffers to track and offer comment on legislation affecting the judiciary, and provides auditing services and financial accountability for court entities, among other tasks.<sup>1137</sup>

The AO considers work on substantive legislation as separate from the work on appropriations<sup>1138</sup> and has separate processes for pursuing each. The AO Budget Division and Financial Liaison and Analysis Staff (FLAS) help navigate the process of funding the judiciary,<sup>1139</sup> while authorizations (how the money is spent) and other substantive legislation are the work of staff in the Office of Legislative Affairs (OLA).<sup>1140</sup> Because we address the budget process in detail in Chapter 2: Structural Changes, we focus here on pursuing defenders' substantive legislative goals.<sup>1141</sup>

The Cardone Report made recommendations both as to specific legislative changes to achieve defender goals (Recommendations 34 and 35) and for more active involvement of defenders in pursuing substantive legislative goals (Recommendations 5 and 6, as endorsed by the JCUS).<sup>1142</sup> Both are discussed below.

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1137. Cardone Report, p. 20.

1138. Interview 138.1.

1139. See Chapter 2: Structural Changes and Appendix A: Defender Services Budgeting and Funding Process for a discussion of pursuing appropriations goals.

1140. "Office of Legislative Affairs staff provide support to the Judicial Conference Committee on the Judicial Branch's efforts to improve communications and relations between Congress and the Judiciary and can answer questions about activities and programs courts can organize to engage with their local member(s) of Congress." <https://jnet.ao.dcn/resources/service-finder/legislative-affairs-contacts>, last accessed Jan. 4, 2022.

1141. See Chapter 2: Structural Changes and Appendix A: Defender Services Budgeting and Funding Process.

1142. As stated, the recommendations in the Cardone Report called for DSO representation on the Legislative Council to consult on federal legislation (Recommendation 5) and for representatives of the Defender Services program to be involved in the congressional appropriations process (Recommendation 6). Modifications of the recommendations when adopted by the JCUS (discussed below) combine legislative and appropriations goals, so we evaluate them together.

## II. Paths for Pursuing Defender’s Unique Legislative Goals: Recommendations 5 and 6

### Issues

Pursuing substantive legislative goals is a combined effort of the JCUS, its Executive, Budget and Defender Services Committees, and the AO’s Defender Services Office (DSO) and OLA. The jurisdiction of the Defender Services Committee (DSC) includes monitoring “legislation affecting appointment and compensation, assuring adequate and appropriate training, and determin[ing] long range goals of the program.”<sup>1143</sup> DSC can recommend legislation or legislative changes, but JCUS must adopt them, a process that can be complicated by competing considerations within the judiciary, including differences within the AO.<sup>1144</sup>

The Cardone Report found that those working within the AO, including those within OLA, “focus their efforts on support of the judiciary as a whole .... Specifically, OLA develops, presents and promotes legislative initiatives endorsed by the Judicial Conference,”<sup>1145</sup> sometimes over the interests of the defense function. For this reason, the defender perspective may not be carried to Congress by OLA because it does not match adopted JCUS policy or was not prioritized or promoted to Congress in OLA’s outreach to the Hill.<sup>1146</sup> Defender opposition to the JCUS-supported Probation Officer Protection Act is one example included in the Cardone Report where OLA advocacy reflected the JCUS, not the defender’s, position.<sup>1147</sup>

As described in the Cardone Report, although individual defenders may contact their members of Congress through personal relationships, they lack official access other than through OLA.<sup>1148</sup> Thus, when the JCUS does not adopt policy that the DSC and defender community have advocated for, or the adopted policy is not promoted by OLA, defenders have no official avenues to pursue those goals. While personal appeals have been successful in the past—indeed, these personal attempts to seek legislative changes were the paths for securing defender funding during sequestration—they are not a solution for routine advocacy for the entire defense function.<sup>1149</sup> The general conclusion of the Cardone Report was that defenders should have an independent path to meaningfully advocate for their legislative goals. “If we are committed to structural independence within the judiciary . . . there must be a defender voice, and a DSO voice, on legislative decisions . . . .”<sup>1150</sup>

### Recommendations

To address the lack of avenues available to advocate for defender needs, the Cardone Committee made two recommendations, one of which was modified<sup>1151</sup> before the JCUS took action.

1143. Cardone Report, p. 19.

1144. *Id.*, p. 27, “the distinct missions of DSO ... and the AO ... are not aligned.”

1145. *Id.*, p. 26.

1146. *Id.*, p. 29–30.

1147. *Id.*, pp. 69–70.

1148. Speaking about budget requests, “[o]ne federal defender told the Committee he believed that defenders needed legislative access through official channels that wasn’t informal or ‘by virtue of personal relationships.’” Cardone Report, p. 50.

1149. “Facing significant consequences for the program, some federal defenders made the decision to reach out to Congress directly to request emergency funding to preserve the program. Ultimately, Congress was responsive.” Cardone Report, p. 51.

1150. Cardone Report, p. 50.

1151. Modification of Recommendations 5 and 6 was a joint suggestion of the Judicial Branch Committee and the DSC. See JCUS-MAR 19, p. 24.

**Recommendation 5 (endorsed)**<sup>1152</sup>

DSO should be made a member of the AO Legislative Council to consult on federal legislation.

**Recommendation 6 (endorsed as modified)**<sup>1153</sup>

Representatives of the Defender Services program should be involved in pursuing Defender Services related legislative and appropriations priorities, provided such involvement is consistent with the judiciary's overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress.

**Implementation and Impact**

The AO director acted in September 2018 to include DSO staff in the Legislative Council.<sup>1154</sup> This action was endorsed by the JCUS in March 2019.<sup>1155</sup>

In the JCUS report endorsing the AO director's action, Recommendation 5 is tied to implementing Recommendation 6.<sup>1156</sup> The Legislative Council not only provides a mechanism for AO staff to learn about ongoing legislative activity but was also considered by the Cardone Committee to be where defenders, through DSO staff, could advocate for legislation affecting their program. The JCUS report endorsing Recommendation 6 as modified supports this argument.

1152. JCUS-SEP 18, pp. 10–11, noting that the recommendation was within the AO director's jurisdiction, and he made DSO a member of the AO Legislative Council. The action of the director was endorsed by the JCUS in the next meeting. *See* JCUS-MAR 19, p. 18. The recommendation uses "Legislative Counsel," but the name of the group is "Legislative Council." We have corrected it throughout this report.

1153. JCUS-SEP 18, pp. 10–11, noting that this recommendation was also within the AO director's jurisdiction, and he made DSO a member of the AO Legislative Council, which decision was believed to address both Recommendations 5 and 6. The action of the director was endorsed by the JCUS in the next meeting, after modification of Recommendation 6, as noted in the text. *See* JCUS-MAR 19, pp. 20 and 24.

1154. JCUS-SEP 18, p. 10, noting that the AO director, "also made DSO a member of the AO Legislative Council in response to interim recommendations 5 and 6."

1155. "[O]n the joint recommendation of the Committees on the Judicial Branch and Defender Services related to interim recommendations 5 and 6 of the Ad Hoc Committee to Review the Criminal Justice Act Program, the Judicial Conference endorsed the involvement of representatives of the Defender Services program in pursuing Defender Services-related legislative and appropriations priorities, provided such involvement is consistent with the judiciary's overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress." JCUS-MAR 19, p. 24.

1156. *See* JCUS-MAR 19. "The Committees on Defender Services and the Judicial Branch also asked the Judicial Conference to take action on a joint recommendation related to interim recommendations 5 and 6." (p. 18). "Finally, on the joint recommendation of the Committees on Defender Services and the Judicial Branch with respect to interim recommendations 5 and 6 (and with the support of the Cardone Committee), the Judicial Conference endorsed the involvement of representatives of the Defender Services program in pursuing Defender Services-related legislative and appropriations priorities, provided such involvement is consistent with the judiciary's overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress." (p. 20) (Citations omitted).



## Developing Legislative Goals

Recommendation 6 discusses the pursuing of substantive legislative goals within the judiciary, from development within the judiciary to advocacy before Congress, a process that did not itself change from what was described in the Cardone Report. Though the process has always included paths for defenders to participate, JCUS endorsement of Recommendations 5 and 6 codifies defenders' ability to pursue those paths.

Here is how one interviewee described the process:

The way our positions are generally developed is very localized at the sort of - our grass-roots levels, it starts with something that either members of the committees are interested in themselves, or more often something that the staff has developed and presented to the committee . . . . Then the committee votes to recommend the position to the conference and to propose legislation . . . . And then the conference votes."<sup>1157</sup>

Because of the committee cycle, the effort can take several months as staff develop the issue, the committee reviews materials at the June or December meeting, and the issue is presented to the JCUS at its next meeting.<sup>1158</sup> The Executive Committee, the committee with jurisdictional responsibility for coordinating the judiciary's legislative agenda,<sup>1159</sup> can choose to expedite the process.<sup>1160</sup>

Once positions are adopted by the JCUS, the Executive Committee requests that the committee with substantive jurisdiction reevaluate those positions every two years as the judiciary prepares to interact with a newly incoming Congress.<sup>1161</sup> The legislative goals of DSC may conflict with those of another JCUS committee; thus, the Executive Committee must balance the conflicting priorities.<sup>1162</sup> Though the Executive Committee consults with the committee retaining substantive jurisdiction, it is the Executive Committee that makes the final decision, resolving differences between committees and deciding which legislative goals to pursue.<sup>1163</sup>

## The Role of OLA

OLA is responsible for managing the consistency of the judiciary's legislative approach. OLA "represents the Judicial Conference and the whole Judiciary on the Hill," serving, as one interviewee described, as the eyes, ears, and mouthpiece of the judiciary to Congress.<sup>1164</sup> This work involves presenting and promoting the legislative requests of the judiciary and advocating for and against legislation affecting the courts.<sup>1165</sup> Promoting the interests of the judiciary occurs through informal methods, such as email,

<sup>1157</sup> Interview 137.1.

<sup>1158</sup> *Id.*

<sup>1159</sup> See [Executive Committee Jurisdictional Statement](#). "Coordinate legislative liaison on behalf of the Judicial Conference and maintain and improve relationships between the judiciary and the legislative and executive branches. However, each committee will continue to be responsible for developing for Judicial Conference consideration substantive positions on legislative matters within its area of assigned responsibility."

<sup>1160</sup> Interview 137.1.

<sup>1161</sup> DSC Dec. 2022 Agenda Item 7A, p. 1. "To ensure that Judicial Conference legislative positions remain current, the Executive Committee has asked each conference committee to review, at its winter meeting preceding the first session of a new Congress, all outstanding Judicial Conference-approved legislative proposals that fall within its jurisdiction to determine whether any position not enacted previously should continue to be sought, or whether they should be modified or rescinded."

<sup>1162</sup> Interview 136.1.

<sup>1163</sup> Interview 138.1.

<sup>1164</sup> Interview 137.1.

<sup>1165</sup> *Id.*

phone calls, and conversations with congressional staff, and more formal methods, such as letters from the Office of the Conference Secretariate and congressional testimony by the AO director and judges (often JCUS committee chairs).<sup>1166</sup>

In the past, the JCUS-adopted positions were each presented in separate letters to Congress from the AO director.<sup>1167</sup> Recently, instead of individually presenting JCUS-adopted positions related to criminal justice, OLA developed a Wishlist to present a more comprehensive criminal justice legislative agenda.<sup>1168</sup> In 2021, the Wishlist included defender-related JCUS-adopted positions for subsistence of indigent defendants (discussed below in Recommendation 34), compassionate release, and sentencing reform.<sup>1169</sup>

OLA helps to determine which, if any, AO staff members should be present when meeting with congressional staff and when members of the judiciary should testify before Congress.<sup>1170</sup> There are no set rules; the situation determines the participants, and this is where OLA has the most discretion.<sup>1171</sup> As one interviewee noted, “Defenders are particularly sensitive to be included,” so OLA staff often err on the side of their inclusion. Meeting attendee decisions are based on OLA’s expertise in the dynamics of the legislation.<sup>1172</sup>

To successfully navigate the process of promoting judiciary interests before Congress, OLA staff must follow congressional activity, including following legislation and the activity surrounding it.<sup>1173</sup> “The goal here is to see if there’s a conference position on this legislation, for or against, or to see if we want to go through the elaborate process of developing a Conference position, which takes like a year at least,” unless the Executive Committee prioritizes doing so.<sup>1174</sup>

All committees, including the DSC, have plenary power to recommend to the JCUS legislation on budgetary and nonbudgetary matters.<sup>1175</sup> However, pursuing legislative goals is logistically complicated and can be confusing to even well-informed committee members. One interviewee described attending a committee meeting where the policy recommendation process was explained by OLA and the Office of the Conference Secretariat because it was not clear that the committee chair understood the committee’s power.<sup>1176</sup> DSC-recommended legislation goes through the process described above and, as required by Recommendation 6, needs to be consistent with the approach of the rest of the judiciary to become policy.

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1166. Interviews 137.1 and 138.1.

1167. Interview 137.1.

1168. See [Judiciary Criminal Justice Legislative Wishlist](#), May 2021, last accessed Feb. 15, 2023.

1169. See [Judiciary Criminal Justice Legislative Wishlist](#), May 2021, last accessed Feb. 15, 2023.

1170. Interviews 137.1 and 138.1.

1171. Interview 138.1.

1172. In some instances, especially when the political situation is complicated, bringing a subject matter expert to a meeting with congressional staff could result in a worse outcome. As one interviewee noted, OLA would not want to put the subject matter expert in a difficult position, such as having to admit gaps in knowledge or uncertainty about the information, which could be used to help legislators score political points. When the purpose of the meeting is more collaborative, the subject matter expert can more easily add value to the conversation. OLA’s job is to understand the congressional process, what opportunities exist to promote judiciary positions, and the interest of an AO division in participating. Interview 138.1.

1173. Interview 137.1.

1174. *Id.*

1175. Interview 138.1.

1176. *Id.*

## Legislative Council

To successfully implement Recommendation 6 allowing Defender Services program representatives to pursue the goals of the defense function through existing judiciary processes, they must be kept apprised, in a timely manner, of all relevant legislative information OLA learns from following congressional activity. One way of disseminating relevant information to judiciary audiences is through the Legislative Council, which is why Recommendation 5 requires DSO's membership in that group and why the JCUS saw these two recommendations as related. The Legislative Council's purpose "is to have a regular routinized means of communication from OLA and the appropriations folks on a regular basis, to keep people at the senior level of various components of the judiciary aware of what's happening or what's coming up."<sup>1177</sup> The agenda for the meeting is determined through a combined effort of OLA staff (who are responsible for the meeting) and the offices of the AO.<sup>1178</sup> AO staff may request that OLA include items on the agenda, allowing OLA to determine if the item is appropriate for discussion, or they may appeal directly to the AO deputy director's support staff, who create and distribute the agenda for the Legislative Council meetings. In those instances, OLA responds to the issue during the meeting.<sup>1179</sup> Often the focus of the discussion is the budget, but substantive legislation may be discussed as well.<sup>1180</sup>

One interviewee thought including DSO staff was "a good thing" but said that "the substance or process of the [Legislative Council] meeting has not changed except to include [defender interests]" more often.<sup>1181</sup> The interviewee noted that DSO "probably should have been included all along" and did not know why they historically were not.<sup>1182</sup> Two interviewees noted that DSO staff were invited to attend in the past when defender issues were included on the agenda but that DSO previously could not place items on the agenda, nor were DSO staff present if matters of the defense function arose spontaneously during the meeting.<sup>1183</sup> With the implementation of Recommendations 5 and 6, defenders can place items on the agenda by directly asking the AO deputy director's support staff to include issues they would like to discuss and by regularly attending the meeting.

Interviewees did not think that implementing Recommendation 5 to include DSO in the Legislative Council sufficiently enhanced the ability to advocate for Defender Services program needs (implementing Recommendation 6).<sup>1184</sup> Indeed, one interviewee thought the recommendation for including DSO staff on the Legislative Council reflected a misunderstanding of AO process because the Legislative Council is not the appropriate venue to advocate for the legislative positions affecting the defense function.<sup>1185</sup> Despite the importance ascribed to the Legislative Council in the Cardone Report recommendation,<sup>1186</sup> this interviewee described it as an informal group within the AO, noting that inclusion in the meeting was ad hoc (depending on the agenda) and that the Legislative Council had no charter and no decision-making authority.<sup>1187</sup> Advocating through the Legislative Council was considered to be misplaced effort and even unhelpful given the nature of the meeting<sup>1188</sup> and the fact that "the decisions

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1177. Interview 137.1.

1178. *Id.*

1179. *Id.*

1180. *Id.*

1181. *Id.*

1182. *Id.*

1183. Interviews 137.1 and 138.1.

1184. *Id.*

1185. Interview 138.1.

1186. Cardone Report, p. xxxvii.

1187. Interview 138.1.

1188. *Id.*

have already been made” by the time the meeting is held.<sup>1189</sup> Instead, the Executive Management Group (EMG) would be a more appropriate place to advocate defender interests.<sup>1190</sup> Because DSO was moved outside the Department of Program Services, however, DSO has no path to advocate to the EMG.<sup>1191</sup>

Thus, though the implementation of Recommendation 5 has been a step forward, this move is not on its own sufficient to achieve the goals of Recommendation 6. In addition, the Legislative Council was dissolved in early 2023.

## Legislative Proposal for Opening FDOs

The inability of implementing Recommendations 5 and 6 to sufficiently affect defender advocacy is illustrated by recent efforts to establish FDOs in eligible districts where they do not exist. As discussed in other chapters of this report,<sup>1192</sup> creating these offices benefits panel attorneys who may be solo practitioners and otherwise lack a network of support.<sup>1193</sup> Creating new institutional defender offices was itself the subject of Recommendation 11 in the Cardone Report,<sup>1194</sup> which was adopted by the JCUS.<sup>1195</sup> Moreover, adopting Recommendation 11 reaffirmed existing JCUS policy to require opening offices in districts where the caseload supported an institutional defender.<sup>1196</sup>

To prompt district action, the Access to Justice Act of 2022 was introduced in the Senate by Sen. Jon Ossoff,<sup>1197</sup> with companion legislation introduced in the House of Representatives by Rep. Hank Johnson.<sup>1198</sup> The Act’s introduction coincided with media reports of ongoing challenges finding quality representation in the Southern District of Georgia, one of the two districts that meet eligibility requirements for, but do not have, an FDO.<sup>1199</sup> This legislation presented an opportunity for the JCUS to express support for legislation consistent with its own policy.<sup>1200</sup>

Discussion of opening FDOs was ongoing. The Executive Committee discussed it in early 2022, and then the March 2022 report of the JCUS notes DSC’s request for JCUS to encourage the remaining districts meeting the caseload threshold to open offices.<sup>1201</sup> The September 2022 report of the JCUS goes further, stating, “The Committee urged the Judicial Conference to continue to support compliance with

1189. *Id.*

1190. *Id.*

1191. *Id.*

1192. See Chapter 4: Federal Defender Staffing.

1193. Cardone Report, p. 157. “Most panel attorneys are sole practitioners or members of small firms and cannot easily access [the] type of collective knowledge” offered by a defender office.

1194. See Chapter 4: Federal Defender Staffing.

1195. JCUS-SEP 18, p. 39.

1196. “The Judicial Conference adopted the following resolution proposed by the Committee on Defender Services.... Those districts not currently served by a defender organization are urged to give consideration to the feasibility of establishing a district federal defender organization or joining with an adjacent district to establish a federal defender organization to serve both districts.” JCUS-MAR 93, p. 14. See also *Guide to Judiciary Policy*, Vol. 7A, § 410.20.10.

1197. S. 3878, the “Access to Justice Act of 2022,” introduced on Mar. 17, 2022.

1198. H.R. 7160, introduced on Mar. 18, 2022.

1199. See Charles Bethea, *Is This the Worst Place to Be Poor and Charged with a Federal Crime?*, *The New Yorker*, Nov. 5, 2021.

1200. *Guide to Judiciary Policy*, Vol. 7A, § 410.20.10 and § 410.20.2.0.

1201. See Materials Prepared for Executive Committee Meeting, Feb. 10-11, 2022 and JCUS-MAR 22, p. 16. “The Committee on Defender Services reported that it discussed efforts to establish federal defender organizations (FDOs) in all districts with sufficient caseload and agreed to continue to encourage the establishment of FDOs in those districts that currently operate without an FDO to support high-quality representation under the Criminal Justice Act (CJA), consistent with Judicial Conference policy.”

its policy that an FDO should be established in every such district.”<sup>1202</sup> Despite the request by the DSC for action by the JCUS, no further steps (such as inclusion on the Wishlist or a letter supporting the JCUS-adopted position from the AO director) were taken to support the proposed legislation.

Moreover, one interviewee described that when the Ossoff legislation arose in a Legislative Council meeting, the discussion was tabled by OLA.<sup>1203</sup> As noted above, the judiciary engaged in no further advocacy on this issue before the end of the congressional session. Thus, DSO’s effort to follow judiciary procedure for legislative advocacy (as endorsed by the JCUS) failed to result in conveying support to Congress, even in this case when Congress was already acting.

This example illustrates that defenders do not have effective paths for pursuing legislative goals within the judiciary or through the judiciary’s congressional outreach process. The judiciary received questions about opening FDOs from congressional delegations in Georgia and Kentucky,<sup>1204</sup> the two states that currently have districts not supported by an FDO, after media reports discussed the issue. The judiciary coordinated the response to these inquiries; DSO was not invited to participate directly in discussions with congressional staff; and the avenue intended to allow defender advocacy, the Legislative Council, prematurely cut off discussion.

OLA staff discussed the importance of local judges’ support for opening an office to the legislative process.<sup>1205</sup> Our own interviews with court stakeholders confirm that the relevant districts currently do not support establishment of FDOs,<sup>1206</sup> and the proposed legislation only had sponsors from one of two eligible districts (Georgia, not Kentucky).

Though this was not the first time local judges opposed legislation endorsed by the JCUS,<sup>1207</sup> the implications for the defense function are notable. When local judges want to retain control over administration of the CJA,<sup>1208</sup> even in contradiction to JCUS policy and to the potential detriment of the defense function overall,<sup>1209</sup> there is little to be done.<sup>1210</sup> Moreover, existing avenues for DSO staff to advocate for defender interests, including through the Legislative Council, are not sufficient to achieve those goals.

While the judiciary did not act to support the legislation,<sup>1211</sup> Congress has taken other action to address the issue. The Senate report to the Consolidated Appropriations Act of 2023 included a provision

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1202. JCUS-SEP 22, p. 13.

1203. Interview 143.2.

1204. Interview 137.1.

1205. *Id.*

1206. Interviews 70.1, 52.2, and 69.1.

1207. See Peter Graham Fish, *The Politics of Federal Judicial Administration* (1973), chapters 9 and 10, for several historical examples.

1208. Interview 137.1.

1209. See Cardone Report, pp. 157–158, for a discussion of the importance of institutional defender support, and *supra* note 1199, for a specific discussion of the issues identified in one district without such institutional support.

1210. By statute, the JCUS has authority to enforce conference policy in three areas: financial disclosures under 5 U.S.C. app. § 111 (detailed in the *Guide to Judiciary Policy* Vol. 2D), and codes of conduct and disability under 28 U.S.C. §§ 332(d)(1), 351–364 (detailed in the *Guide to Judiciary Policy* Vol. 2A and Vol. 2E, respectively). Otherwise, each circuit judicial council “has broad authority to ‘make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.’” See <https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability>, citing, 28 U.S.C. § 332(d)(1), last accessed Mar. 13, 2023.

1211. Developing the judiciary’s legislative goals for the 118th Congress is underway, and it is unclear at this time if amending the CJA to require districts to open FDOs where the caseload supports the office will be included.

requiring the AO to report specific information about appointment of counsel under the CJA in districts without FDOs and tied reporting to judiciary funding.<sup>1212</sup>

Overall, while Recommendation 5 was implemented, and strides are being made to implement Recommendation 6, these recommendations fall short of achieving their goal of providing defenders greater avenues for advocacy. That is, the adoption and implementation of Recommendation 5 (when it was available) did not, in and of itself, ensure the implementation of Recommendation 6 as envisioned by the JCUS, and neither recommendation provides an independent path for advocating defender interests described as necessary in the Cardone Report.

### III. Providing Subsistence to CJA-Eligible Defendants: Recommendation 34

#### Issues

While Recommendations 5 and 6 address the process of legislative advocacy generally, the Cardone Report also made recommendations about specific legislation. Recommendation 34 addresses the lack of funding provided to CJA-eligible non-custodial defendants brought into court by the Marshals Service for food and lodging during the court proceeding and for return travel. By statute, the Marshals Service can only provide funding for the defendant to get to the proceeding. As the Cardone Report described, defendants were forced to stay in vehicles, homeless shelters, or with their attorneys, assuming attorneys weren't paying out of pocket to feed and house their clients.<sup>1213</sup>

Providing subsistence for CJA-eligible defendants would require amending 18 U.S.C. § 4285, an action supported by JCUS policy since 1993, when the legislative change was first recommended in the Prado Report.<sup>1214</sup> This change would require the Marshals Service to furnish transportation and subsistence to non-custodial defendants during the proceeding and when returning home.

Past efforts to amend 18 U.S.C. § 4285, either on its own<sup>1215</sup> or as part of the Judiciary Improvements Act,<sup>1216</sup> did not succeed due to opposition from the Marshals Service over incurring the additional costs.<sup>1217</sup> In 2002, the Congressional Budget Office (CBO) estimated the cost of the amendment at just below \$600,000 annually, which would have required sponsors to provide an offset through cuts to other spending or tax increases.<sup>1218</sup> For these reasons, despite ongoing JCUS support, the legislation was not enacted prompting the Cardone Committee's recommendation.

1212. See [Consolidated Appropriations Act of 2023, P.L. 117-328](#), especially, [Congressional Record Senate Dec. 20, 2022, p. S8484](#). "The bill provides \$1,382,680,000 for Defender Services, of which \$8,042,000 is for cybersecurity and IT modernization . . . . The AO is directed to collect data and report to the House and Senate Committees on the Judiciary and Committees, no later than 180 days after enactment of this Act, on specific criteria about each district that currently lacks a Federal Public or Community Defender. The Judiciary shall consult with the Committees regarding the specific criteria required in the report . . . . The AO is strongly encouraged to work with judicial districts lacking a federal defender office to establish one."

1213. Cardone Report, pp. 236–239.

1214. JCUS-MAR 93, p. 28. See Cardone Report, p. 236, ft. 1095, citing Prado Report, Recommendations D-2 at 70–71.

1215. First called for as a stand-alone bill in 1993—see CR-DEFSVS-MAR 93, App. 1, p. 24—the bill was introduced again in 2020 in the Criminal Judicial Administration Act of 2020 by Representatives Hakeem Jeffries and Martha Roby. See DSC Dec. 2020 Agenda Item 1B, p. 4. Despite a similar name to the legislation introduced in the 116th Congress, the bill in the 117th Congress focused on fewer legislative goals of the judiciary than the prior effort. Interview 137.1.

1216. First included as part of a larger bill in 2002—see CR-DEFSVS-SEP 02, pp. 31–32—the amendment was introduced as a single bill as recently as 2019 in the Criminal Justice Administration Act in the 116th Congress. The proposed bill did not generate congressional interest. See DSC Dec. 2020 Agenda Item 1B, p. 4.

1217. Interview 138.1.

1218. CR-DEFSVS-SEP 02, pp. 31–32.

## Recommendation

The Cardone Report made one recommendation to address the above issue.

### Recommendation 34 (approved)<sup>1219</sup>

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.

## Implementation and Impact

Recommendation 34 was adopted by the JCUS in September 2018.<sup>1220</sup> A bill amending 18 U.S.C. § 4285 was introduced recently in Congress and had sponsors.<sup>1221</sup> The recent bill's CBO score estimated the change would cost less than \$100,000 annually, subject to appropriated funds—an amount well below the threshold required to offset the increase by cuts elsewhere or to raise additional revenue.<sup>1222</sup>

Interviewees agreed the legislation was unlikely to pass but disagreed as to why. One interviewee described the recent bill as having “a fair head of steam” but noted that opposition from the Marshals Service continued to be a problem because the president can veto legislation and marshals are “closer to the president.”<sup>1223</sup> The expectation was that the proposed bill would not make it out of congressional committee.<sup>1224</sup>

One AO staff member discussed the importance of DSC support for legislative advocacy<sup>1225</sup> and, on this issue, DSC support was ongoing. DSC recommended continued support for the amendment in December 2020,<sup>1226</sup> discussed supporting the amendment in June 2021 (as part of the strategic plan of the Defender Services Program),<sup>1227</sup> and also discussed it in a letter to the Deputy Attorney General in July 2021, cross-referenced in DSC materials in December 2021,<sup>1228</sup> and again discussed in June 2022.<sup>1229</sup> The DSC again supported the position in December 2022.<sup>1230</sup> But despite ongoing DSC support and adoption by the JCUS, the judiciary did not advocate in favor and the legislative proposal expired at the end of the session. Thus, Recommendation 34 remains unimplemented.

1219. JCUS-SEP 18, p. 41.

1220. *Id.*

1221. Interview 138.1. *See also* H.R. 2694 Criminal Judicial Administration Act of 2021.

1222. Congressional Budget Office Cost Estimate, H.R. 2694, Criminal Justice Administration Act of 2021, June 22, 2021. On file with FJC.

1223. Interview 138.1.

1224. *Id.*

1225. Interview 137.1. The interviewee also felt there was no advocacy against the bill either.

1226. DSC Dec. 2020 Agenda Item 1B, p. 5.

1227. DSC June 2021 Agenda Item 2B, p. 10.

1228. DSC Dec. 2021 Agenda Item 2C, Long Range Planning Memorandum.

1229. DSC June 2022 Agenda Item Legislative Update, p. 2.

1230. DSC Dec. 2022 Agenda Item 7A, Biennial Review of Conference-Approved Legislative Proposals, p. 17.

## IV. Circuit Review and Approval of Excess Compensation Vouchers: Recommendation 35

### Issue

Under the CJA, the circuit court must review and approve any vouchers submitted by CJA panel attorneys that exceed the waivable caps set by statute. The Cardone Report described this process as “inconsistent, inefficient, and burdensome.”<sup>1231</sup> Because circuit judges are removed from the minutiae of criminal litigation, they may lack familiarity with the defender case-related needs they are responsible for evaluating under the CJA.<sup>1232</sup> As one judge testified before the Cardone Committee, having a background in criminal defense was essential when evaluating these claims,<sup>1233</sup> and many judges lack such experience.<sup>1234</sup>

As described in the Cardone Report, circuit review of excess vouchers creates a burden for district court judges, already busy with caseloads, to “draft a document to the approving circuit judge describing the case and explaining in detail why the excess cost should be approved.”<sup>1235</sup> Panel attorneys are also burdened by the excess voucher review process, as they expend time gathering information to support these requests but cannot be compensated for this preparation work.<sup>1236</sup>

Given the time it takes for district judges to draft supporting memoranda, circuit judges to review costs in unfamiliar litigation, and panel attorneys to justify costs to those unfamiliar with their work, delays are inevitable.<sup>1237</sup> These delays will only become more common, as cases exceed the waivable statutory maximums more often now than in the past.<sup>1238</sup> Delays resulting from circuit review prompt attorneys to reduce their vouchers below the statutory limits so they can avoid the time-intensive circuit review process.<sup>1239</sup>

Delays were not the only issue related to circuit review identified in the Cardone Report. Circuit review was also a source of voucher reduction, sometimes as the result of “inappropriate” cost-containment practices,<sup>1240</sup> as in the Eighth Circuit, where reductions were common because CJA representation was considered “public service,” and due to an ongoing effort to reduce costs from the CJA account.<sup>1241</sup>

1231. Cardone Report, p. 134.

1232. *Id.*, p. 135. “Few circuit judges have previously worked in federal criminal defense. One exception is Judge Luis Felipe Restrepo of the Third Circuit. . . . Judge Restrepo believes his experience with criminal defense work is essential to his ability to perform his role in reviewing excess vouchers.”

1233. Cardone Report, p. 135.

1234. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act *and* Chapter 3: Panel Attorney Compensation, note 266.

1235. Cardone Report, p. 136.

1236. *Id.*

1237. *Id.* “One district CJA representative surveyed panel attorneys in his district about circuit review and reported that, in the best case scenario, an attorney’s voucher is ‘found to be reasonable’ and is ‘paid anywhere from three months . . . to six months later’ than when the attorney would have otherwise been paid.”

1238. In 2008, the CJA was amended to tie case maximums to a percentage change in the General Schedule. Pub. L. 110-406, §§ 11-12(b), Oct. 13, 2008, 122 Stat. 4293, 4294; Judicial Administration and Technical Amendments Act of 2008. In 2010, the CJA was amended again to raise compensation maximums for expert services. See Pub. L. 111-174, § 7, May 27, 2010, 124 Stat. 1217. Federal Judiciary Administrative Improvements Act of 2010. As described in the Cardone Report, neither increase has kept pace with the rising costs of litigation (p. 134).

1239. This practice was described not only in the Cardone Report, in Section 5.3.1, pp. 104–107, but was also in our survey of panel attorneys. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

1240. Cardone Report, p. 137.

1241. *Id.*



## Recommendation

To address the challenges resulting from circuit court review of excess compensation, the Cardone Committee made one recommendation to amend the CJA.

### Recommendation 35 (deferred)<sup>1242</sup>

Congress must amend the Criminal Justice Act to eliminate circuit court review of attorney and expert fees exceeding current statutory caps.

## Implementation and Impact

Despite the problems described in the Cardone Report, and past JCUS support for amending the CJA to allow greater delegation of voucher review at the circuit (*see below*), the JCUS deferred action on Recommendation 35.<sup>1243</sup> While it is not clear whether the JCUS will return to this issue, our interviews shed some light into the ongoing discussions surrounding the issue of circuit court review of excess compensation vouchers.

One interviewee thought there was no support in the Executive Committee for taking action on Recommendation 35.<sup>1244</sup> When asked about the decision of the JCUS to defer action, when a similar position seeking to amend the same statute was adopted in September 2003,<sup>1245</sup> one interviewee highlighted differences in the two proposals. The prior JCUS position would change the nature of the reviewer but keep review of excess compensation vouchers at the circuit.<sup>1246</sup> Adopting Recommendation 35 would have eliminated circuit involvement entirely. While the amendment proposed by the Cardone Committee was specific, one interviewee believed that pushing it forward may have raised questions about making further changes to the CJA aimed at increasing the independence of the defense function.<sup>1247</sup>

Efforts at amendment aside, interviews with circuit court stakeholders found that the issues of chief circuit judges' unfamiliarity with defense needs<sup>1248</sup> and the substantial amount of time review takes<sup>1249</sup> are ongoing. Likewise, an analysis of eVoucher data for this study found reductions inconsistent with the continuing of JCUS-adopted voucher review policies.<sup>1250</sup> Because these issues persist, as recently as December 2022, the DSC stated its ongoing support to amend the legislation to expand circuit judge delegation of review responsibilities to non-judicial staff.<sup>1251</sup>

1242. JCUS-MAR 19, p. 6. "On the recommendation of the Defender Services Committee, the Executive Committee deferred consideration of interim recommendation 35 until the Conference considers the Cardone Committee's final recommendation to create an independent defender commission."

1243. *Id.*

1244. Interview 141.1.

1245. JCUS-SEP 03, p. 26.

1246. The position of the JCUS was to allow "senior circuit judges and appropriate non-judicial officers qualified by training and legal experience to perform those tasks." JCUS-SEP 03, p. 26.

1247. Interview 138.1.

1248. Interview with 144.1 and 168.1, regarding the availability of training on voucher review for circuit chief judges, "There is not. And to clarify, I had to learn this myself. There was no training here, and until I settled on my own system for handling these, it was learn as you go. . . . The new chief judges would benefit from some early training."

1249. Interview with 145.1, 166.1, and 167.1. "I agreed my first year as chief judge to do this . . . . It became almost a full-time job for [my clerk] to look at these things carefully."

1250. *See* Appendix E: eVoucher Review Data Analysis and Appendix D: Circuit Court CJA Plans.

1251. DSC Dec. 2022 Agenda Item 7A, Biennial Review of Conference-Approved Legislative Proposals, pp. 12–14.

Even without JCUS adoption, some chief circuit judges are less involved in excess compensation review today than they were in the past, an important change in practice even if not spurred by a change in policy. One interviewee noted that ongoing delegation of excess compensation review offered the best option for updating the current process to address burdensome review and inappropriate reductions.<sup>1252</sup>

This expanded delegation is the result of several factors. As noted above, the JCUS supported revising the CJA to permit greater delegation of circuit review of excess compensation requests,<sup>1253</sup> and in 2008, the CJA was amended to permit delegation to senior circuit judges,<sup>1254</sup> and some circuits have done so.<sup>1255</sup>

Additionally, creating the case-budgeting attorney positions (the same positions discussed in the JCUS-adopted Recommendation 9<sup>1256</sup>) meant that circuits now have a staff member with the expertise to assist judges in excess voucher review.<sup>1257</sup> Chief judges in some circuits have also delegated authority to review or approve the excess compensation vouchers to other judges or circuit staff.<sup>1258</sup> An opinion by the AO general counsel supported the delegation of approval authority to people other than the chief circuit judge contingent on their review.<sup>1259</sup> So despite deferral of Recommendation 35, some circuits have independently changed practices to delegate excess compensation review or approval but the authority to approve excess vouchers remains with the circuit.

## V. Conclusion

### Recommendations 5 and 6

The AO director's action to implement Recommendation 5 was endorsed by the JCUS, and the JCUS Report noted that the adoption of Recommendation 5 allowed DSO staff to pursue legislative goals (thus partially implementing Recommendation 6).<sup>1260</sup> Though DSO staff were added to the Legislative Council, implementing Recommendation 5, advocating for legislative goals is not the purpose of the Legislative Council<sup>1261</sup> and thus only begins to implement Recommendation 6. DSO staff could present their positions in meetings they regularly attended when the Legislative Council existed,<sup>1262</sup> and while this is a meaningful change from past years when they participated by invitation only,<sup>1263</sup> their impact is limited because the Legislative Council had no decision-making authority.<sup>1264</sup> Recommendation 11, discussed above, illustrates this dynamic.

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1252. Interview 141.1.

1253. JCUS-SEP 2003, pp. 20–21.

1254. See Judicial Administration and Technical Amendments Act of 2008 (JATAA), Pub. L. No. 110-406, 122 Stat 4291.

1255. See Chapter 3: Panel Attorney Compensation and Appendix D: Circuit Court CJA Plans.

1256. JCUS-MAR 19, p. 19.

1257. See Chapter 3: Panel Attorney Compensation and Appendix D: Circuit Court CJA Plans.

1258. *Id.*

1259. Letter from Sheryl Walter, general counsel, to Chief Circuit Judge Sidney R. Thomas (Ninth Circuit), re: Delegation of Voucher Review Authority, May 4, 2018. On file with FJC.

1260. JCUS-MAR 19, p. 20.

1261. Interviews 136.1 and 138.1.

1262. *Id.*

1263. Interview 137.1. “The substance or process of the meeting has not changed except to include [defender] stuff”

1264. Interview 138.1.

### **Recommendation 34**

Recommendation 34 was adopted by the JCUS. Despite the JCUS support (ongoing since 1993), and despite many proposed bills (individually and combined with other judiciary efforts), courts have no authority to order the Marshals Service to provide transportation and subsistence or return travel, and no separate funding source has been enacted. 18 U.S.C § 4285 was not amended.

### **Recommendation 35**

The JCUS deferred action on Recommendation 35 and no legislative effort to amend the CJA has been expended in Congress to achieve greater delegation of excess compensation voucher review. Some individual circuits have nonetheless made changes to delegate review of excess compensation vouchers to non-judicial staff while the circuit retains the authority to approve the voucher.

# Appendix A

## Defender Services Budgeting and Funding Process

This appendix describes the judiciary’s budget and funding process under which the Defender Services program is resourced. It includes information relevant to this report’s discussion of the current status of problems identified by the Cardone Report involving inefficient program administration and of the conflicting priorities of the judiciary and the Defender Services program. Staffing federal defender organizations (FDOs), resourcing national projects such as national litigation support and death penalty resource counsel, and funding training for federal defenders and panel attorneys are only some of the recommendations whose implementation requires an understanding of the budget and funding process described here. The information was gathered from interviews with staff of the Defender Services Office (DSO), Budget Division, and Financial Legislation and Analysis Staff of the Administrative Office of the U.S. Courts (AO), as well as from material gathered for various committees of the Judicial Conference of the United States (JCUS).

### A. Appropriations Sequence

The process of formulating the judiciary’s congressional appropriation request and approval of the final financial plan can take up to two years (*see* Attachment 1). The process involves Congress, the JCUS, including various JCUS committees,<sup>1265</sup> and several offices within the AO.

To begin the budget formulation process, each year in January the JCUS Committee on the Budget (Budget Committee) begins preparing guidance for the JCUS program committees that oversee resource requirements. This guidance is based largely on input from the Budget Committee’s long-range planning meeting and includes a percentage increase target (from the previous year’s assumed funding level), to which program committees are asked to limit their budget requests.<sup>1266</sup> The targets are not binding, and the program committees can submit requests that exceed them. Requests over targets must be listed in order of priority.

Each spring, approximately eighteen months before the start of the associated fiscal year, DSO begins to formulate the Defender Services budget request. DSO estimates resource requirements based on JCUS-approved staffing formulas, historical spending patterns, workload projections provided by the AO’s Judiciary Data and Analysis Office (JDAO), and the Defender Services Committee (DSC) priorities. DSO uses various statistical projection approaches (described below) to formulate the request.

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1265. For more information about the Judicial Resources Committee, the Budget Committee, and the Defender Services Committee, *see* the committee jurisdictional statements, available at <http://jnet.ao.dcn/judicial-conference/jurisdictional-statements>.

1266. In 2015, the JCUS established average annual growth rates for the four judiciary accounts. (JCUS Sept. 2015, pp. 8–9.) These are still in place and are used as starting points, adjusted each year as the new budget guidance is being developed. The JCUS average annual growth rate for Defender Services was established at 4.0% per year. This is lower than the permissible growth rate for the judiciary’s other accounts—which ranged from 4.9 to 5.2 percent—but specifically excludes increases in panel attorney rates above inflation. This exclusion was adopted to avoid putting any barrier in the way of the JCUS achieving its goal of setting the CJA attorney fee cap at the maximum permitted by statute, a goal that has now been achieved.

Before presentation to the DSC, DSO circulates the budget request through the AO for comment by the Budget Division; the Financial Liaison and Analysis Staff, liaison to Congress regarding funding requests; and the Judicial Conference Secretariat (JCS), which reviews all items proposed for a JCUS committee agenda.

If additional DSO reimbursable positions are needed,<sup>1267</sup> the request must also be coordinated with the AO's deputy director and the budget officer in the Office of the Director.<sup>1268</sup>

Once cleared through these offices, the budget request is added to the agenda for DSC's June meeting. The request may be discussed beforehand in a teleconference with the Budget Committee's Economy Subcommittee, generally held one week before the DSC meets.<sup>1269</sup> This meeting is attended by the chair of the Economy Subcommittee, the subcommittee's DSC judge liaison, the DSC chair, and the chair of the Defender Services Budget and Data Subcommittee. Its purpose is to "discuss the budget request and cost-containment initiatives."<sup>1270</sup> The Budget Committee representatives provide the DSC representatives with feedback to take to the DSC's June meeting, at which the DSC votes on its recommendations to the Budget Committee.

The full Budget Committee meets in January and July each year. During the July meeting, chairs of program committees with budget responsibility, including the DSC chair, present their request and answer questions from Budget Committee members in an open exchange with all chairs present throughout. The discussion explores the justification and prioritization of new program requests and addresses any Budget Committee concerns about how Congress may react to the judiciary's overall funding request in the current economic and political climate.

The Budget Committee reviews all of the program committee requests and adjusts the requests as necessary based on considerations such as the extent to which the Budget Committee views the request as essential to the core mission of the judiciary (as opposed to something that would just be beneficial), how well the request has been developed and justified, and the extent to which the associated tasks can be executed during the fiscal year. The committee then makes its budget recommendations for consideration at the JCUS September meeting. The JCUS may modify the Budget Committee recommendations, but absent compelling circumstances, the Budget Committee's recommendations are typically adopted as submitted.<sup>1271</sup>

In October, the AO director transmits the JCUS-approved budget request to the Office of Management and Budget (OMB) (28 U.S.C. § 605), which must submit the judiciary's budget request without change (31 U.S.C. § 1105(b)) as part of the President's budget request to Congress. The budget request transmitted to OMB may not be identical to what the JCUS approved if, in the interim, the Executive Committee has approved modifications based on such circumstances as new legislation and changes in standard inflation factors or funding assumptions.

Early the following February, the President submits the unified federal budget request to Congress, and the judiciary submits its updated congressional appropriation request, including a detailed budget justification. The detailed language in each chapter is developed by the Budget Division in coordination

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1267. "Reimbursable Positions" are initially funded from the AO's appropriation and subsequently "reimbursed" to the AO from the Defender Services appropriation. For example, Program Operations and Training Division staff positions that perform critical administrative and management support for local defender programs are reimbursable.

1268. The AO Budget Officer is different from the Judiciary Budget Officer in the Department of Administrative Services.

1269. The Economy Subcommittee is described as "promoting and monitoring judiciary-wide, cost-containment initiatives with program committees, AO offices and divisions, and court entities." See AO Manual at Ch. 3 of Volume 1, Sec. 340.10.30 (b)(8).

1270. See Attachment 1A.

1271. Reportedly, the budget has been on the JCUS consent agenda rather than its discussion agenda for the last twenty years. Interviews 139.1, 140.1, and 141.1.

with each AO office supporting that part of the request—e.g., with DSO for the Defender Services appropriation. This “Yellow Book” (so-called because of its yellow cover) contains a budget message to Congress that is signed by the chair of the Budget Committee and by the director of the AO in the role of secretary of the Judicial Conference. Congress does allow for technical adjustments to the budget request at this stage to reflect new projections. Consequently, the Yellow Book amount will often differ from the amount approved by the JCUS or submitted through OMB.<sup>1272</sup>

The following spring (typically in May), after the appropriation hearings but before the House and Senate markups of the budget request, the judiciary provides Congress with a re-estimate of its budget request based on the most current data available. In the fall (September, typically), the judiciary provides Congress with another re-estimate meant to be delivered before the conferencing of the two respective bills.<sup>1273</sup> After the fall re-estimate, the judiciary may also submit appeals, if necessary, to emphasize the importance of its re-estimated needs.

Depending on circumstances, Congress either approves the judiciary’s annual appropriation for the upcoming fiscal year or adopts a “Continuing Resolution” (CR) by October 1 to allow operations to continue at the prior year’s rate of expenditures.<sup>1274</sup> Once the process has reached this stage, the Executive Committee develops the specific financial plans for the available funds.

If operating under a CR, the Budget Division works with the appropriate AO program offices to develop a proposed interim financial plan,<sup>1275</sup> which is submitted to the AO’s Executive Management Group (EMG) for review and approval for submission to the Executive Committee. Once the interim plan is adopted, the Executive Committee approves Federal Public Defender Office (FPDO) allotments and Community Defender Organization (CDO) grants to support operations during the CR. As is true throughout the judiciary, when under a CR, program increases may not be undertaken. DSO therefore monitors obligations to ensure they are consistent with the rate of operations indicated under the financial plan. FDO hiring may continue only if it falls within the limitations of the interim financial plan.

After a final appropriation is received, DSO works with the Budget Division to develop a proposed final Defender Services financial plan for presentation to the Executive Committee through the EMG. In the event of disagreement between DSO and the Budget Division regarding the plan, the Budget Division presents the alternatives to the Executive Committee. (As with all other AO program committee staff, DSO staff do not attend this presentation.) The Executive Committee selects and approves a final financial plan, which is then reported to the congressional appropriation committees. Subsequent to approval of the final financial plan, DSO updates FPDO allotments and CDO grants (*see* Section D), based on available funding in accordance with the DSC-approved budgets.

If it is necessary to move funds between budget organization classification codes (BOCs) during the course of a fiscal year, DSO must submit a request through the AO’s Change in Acquisition or Budget system. Depending on the amount of the change, the request must be routed through various AO offices. Requests to move funds over \$1 million must be approved by the AO director.

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1272. Interviews 139.1 and 140.1.

1273. Markups are usually completed in June or July of the year following the Budget Committee meeting but are sometimes delayed. For example, the FY 2021 Senate markup was not received until November 2020.

1274. Congress did not pass the final judiciary appropriation before the start of any of the fiscal years from 2017 through 2022, leading to one government shutdown (in FY 2019) and operation under CRs for parts of all of the study years. The time that the judiciary operated under a CR during the study period years ranged from just under three months in FY 2019 and FY 2020 to just over seven months in FY 2017. The government shutdown ran from December 22, 2018, until January 25, 2019, with the judiciary able to maintain operations using fees and no-year appropriations included in the financial plan.

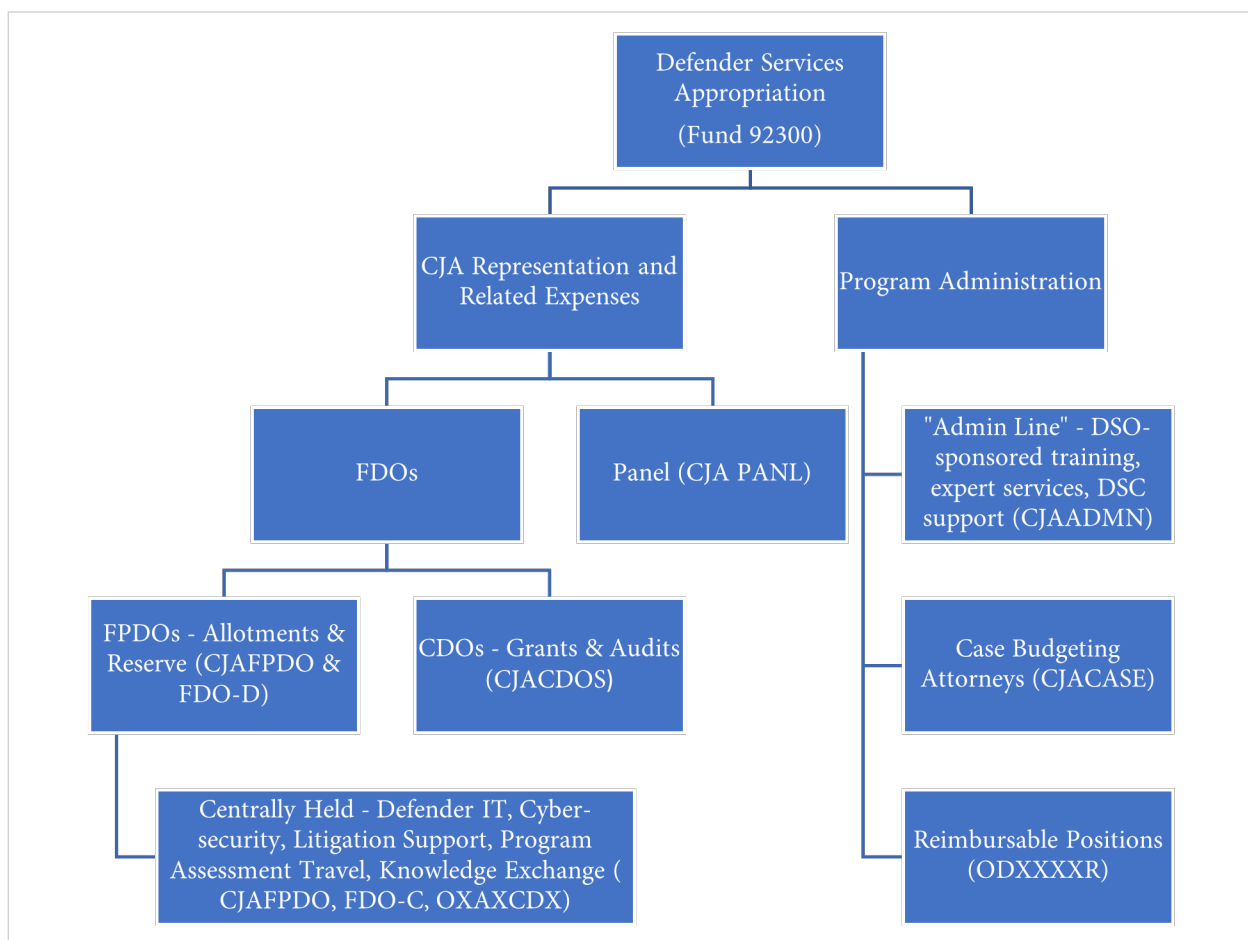
1275. Throughout the budget process the Budget Division keeps track of all of the funding requirements as determined by allotment formulas, court-identified event-driven needs, and input from court advisory groups and councils. When developing financial plans, it balances these requirements against the available funds.

In addition, DSO may not move money that exceeds statutory limits between the two budget activities within the Defender Services appropriation (see Section B) without notifying Congress of the intent to shift the funding. The relevant limits are (1) augmentation of existing programs, projects, or activities in excess of \$5 million or 10%, whichever is less, and (2) reductions of existing programs, projects, or activities by \$5 million or 10%, whichever is less. The judiciary is prohibited from transferring more than 5% of one judiciary appropriation to another, even with congressional approval.<sup>1276</sup>

## B. Budget Activities

The two activities within the Defender Services appropriation are “CJA representation and related expenses” and “program administration.”<sup>1277</sup> As shown in Figure 1, the “representation” activity includes payments to private attorneys and experts under the Criminal Justice Act (CJA) of 1964<sup>1278</sup> and funding for FDOs,<sup>1279</sup> capital habeas units (CHUs), and national projects. The program administration activity supports DSO-sponsored FDO and panel attorney training, expert services, DSC meeting support, reimbursable positions, and case-budgeting attorneys.

Figure 1. Activities Funded by the Defender Services Appropriation.



1276. Pub. L. No. 116-93, Sec. 302, 604, 608 (Dec. 19, 2019).

1277. Original chart provided by Defender Services Office. On file with the FJC.

1278. [Pub. L. 88-455 \(Aug. 20, 1964\)](#).

1279. “Federal defender organizations” include both federal public defender offices and community defender organizations.

## C. Calculating the Panel Attorney Appropriation Requirements

The national panel attorney budget request is based on (1) the AO's JDAO statistical caseload projections for that year, (2) DSO analysis of non-capital payment trends, (3) a DSO capital payment trend analysis, and (4) panel attorney rate increases due to cost-of-living adjustments (COLAs) or any above-COLA change to the panel attorney hourly rate.

Inflationary adjustments to both capital and non-capital panel attorney rates are incorporated into the Defender Services annual budget request as “adjustments to base” (see below) and do not require specific congressional direction to implement, assuming sufficient funding is available to do so.<sup>1280</sup> But the judiciary does not implement above-inflation rate adjustments unless the congressional appropriations committee reports include specific language as to what, if any, above-inflation increases can be implemented. As of 2021, both the capital and non-capital panel attorney hourly rates are at the statutory maximum.

## D. Calculating the Federal Defender Organization Appropriation Requirements

As with all segments of the judiciary's discretionary budget request, calculation of the FDO appropriation is in two parts: “adjustments to base” and “program increases.”

### 1. Adjustments to Base

Based on guidance from the AO's Budget Division, DSO uses the prior year's assumed funding and staffing levels as a base (or starting point) from which to calculate the next year's appropriation request. DSO then adjusts this base for projected pay and other inflationary increases—adjustments to base—to determine the amount of funding needed to maintain the same level of staffing and service in the next year. Adjustments to base include increases for the next year's pay, annualization of prior-year pay adjustments and new positions assumed approved in the prior year, promotions and within-grades, benefits, and GSA rent.

The combination of the prior year's base plus the adjustments needed to maintain the same staffing and service level in the next fiscal year is called a “current services budget.”

### 2. Program Increases

Program increases are requests for new funding that were not included in the previous year's funding request. Examples of recent program increases for the defense function include requests for additional staffing formula positions, national positions, panel management positions, information technology requirements, and the diversity fellowship program.

The first step in determining the funding associated with any new staffing formula positions is to calculate the difference between full staffing formula requirements to address projected workload in the next fiscal year and the assumed staffing level in the previous year. (See Sections F1a

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1280. These inflationary adjustments to hourly rates are equal to the across-the-board pay adjustment for federal civilian workers (referred to as an Employment Cost Index adjustment).



and F1b for how the formula is calculated for the traditional and CHU units.) The next step is to calculate any new required funding by computing the inflation-adjusted average yearly cost per full time equivalent (FTE) positions and multiplying by the number of staff needed to reach 100% of formula. Because the newly approved positions are assumed to be filled for only six months during the first year, 50% of the funding for new staff is requested in the first year, and the remaining 50% is requested in the next year.

Typically, 100% of the full staffing formula requirements are presented to the DSC at its June meeting. Based on the guidance letter from the Budget Committee, feedback from the Budget Committee's Economy Subcommittee meeting, and its own discussions, the DSC then determines the percent of staffing formula to request the Budget Committee to consider.

The requested budget will also include funding (at the inflation-adjusted cost per FTE) associated with additional FTEs related to (1) the panel management formula, (2) the national information technology program (NITOAD) formula, or (3) other new national program positions approved by the Judicial Resources Committee (JRC).

- Beginning with the FY 2022 appropriation request, the requirements for NITOAD, hosted by the Western District of Texas, are being determined using a work-measurement formula recommended by the JRC and approved by the JCUS.
- There currently are no staffing request formulas for other national programs. Instead, these requests go through a process, shown in Attachment 3, involving multiple layers of repeating review and the input of four JCUS committees, several units within DSO, and many other specific AO offices. It takes at least six months longer to resolve these staffing requests than is true for formula-based requests.

Staffing for new initiatives—such as the fellowship programs or a staffing reserve—may also be requested, with the projected cost based on the best information available to estimate requirements.

## **E. Calculating Program Administration and FDO Centrally Held Requirements**

Before development of the annual appropriation request, the DSO Supervisory Program manager requests that the program administrators within each activity submit estimates and justifications of their beyond-inflation funding requirements (e.g., program administration activity requirements for training or centrally held representation activity requirements for information technology). Those justifications may include factors such as changing workloads, new or anticipated changes to statute or case law, or JCUS-approved policies to expand programs such as national litigation support.

## **F. Calculating Individual Federal Defender Organization Budgets**

Most FDO units are funded according to formulas and spending patterns (described below) in eleven general categories: Salaries, Benefits, Expert Services, Travel, RCU (Rent, Communications, and Utilities), Other Services, Office Space, Office Equipment, Training, Books, and Furniture. The budget levels are driven primarily by the number of FTEs calculated in accordance with the staffing formulas.

## 1. Salaries

Staffing formulas have been used to determine levels of staffing for federal defender organizations since FY 2016. They were developed by the AO's Policy and Strategic Initiatives Division (PSID), in partnership with working and advisory groups, and approved by the JCUS upon the recommendation of its Committee on Judicial Resources, with the concurrence of the DSC.

### a. Traditional units in FDOs

The formulas that determine the number of FTEs for each FDO's traditional unit are based on (1) the five-year average of weighted cases opened (WCO),<sup>1281</sup> (2) cohort weighted cases opened per FTE,<sup>1282</sup> and (3) constants and scaled variables.

The first two elements combine to produce the number of staff required to handle the district's weighted caseload (shown below as "Workload-Based FTEs"); the last provides FTEs for management, administration, and technology, as well as additional FTEs to run staffed branch offices.<sup>1283</sup>

Workload-Based FTEs = Five-year average WCO / Cohort WCO per FTE<sup>1284</sup>

#### Constants

- 1 federal defender
- 1 administrative officer
- 1 computer systems administrator

#### Scaled

- .05 assistant computer system administrator FTE per FTE served (i.e., 1 additional ACSA per 20 other office FTEs)<sup>1285</sup>
- 0.5 FTE for each staffed branch office

1281. When the initial appropriation request is developed, there are only four years of actual data. For the fifth year, DSO uses the projections from JDAO. Once the fifth year is known, actual caseload is used to determine full formula requirements, and the request to Congress is adjusted as appropriate in either the spring or fall re-estimate.

1282. There are eleven cohorts that group together districts with similar FTE-to-caseload ratios based on the time records kept by all office staff (not just attorneys) during a four-week period (captured at two different intervals) before initial approval of the FDO formulas. These cohorts are primarily circuit based, with one composed of the combined First, Second, and Third circuits, and one for each of the other circuits. The staff hours per weighted case opened for the circuit cohorts ranges from 32.5 to 62.2 for the original formula. The eleventh cohort is "Metropolitan Offices," made up of large, concentrated districts (at least 8 million residents with a density of at least 400 per square mile) that have FTE-to-caseload ratios significantly higher than their circuit calculations. Eight other districts in which staff hours per weighted case differed significantly from the other districts in their circuit (significantly higher or lower) are excluded from the cohort and provided with FTEs based on their historical staffing (from 2010 through 2014), unless projections indicate that they will be above their historical "high" or below their historical "low."

1283. There is also a small "panel management" add-on that provided approximately eighteen FTEs to those fifteen districts that, at the time the new formula was to be implemented, had responsibility for both managing the CJA panel *and* were to have lost positions under the new formula. These were not tied to an assessment of the number of hours FDO staff allocate to this function, and the factor is not included in the current formula. Additional panel management FTEs have been subsequently approved—for a total of thirty-nine nationwide in FY 2021, distributed based on a time and case assessment performed by DSO.

1284. "Cohort WCO per FTE" was derived during the formula development process and is the same for all FDOs within a cohort. Hours per weighted case was calculated by dividing the annualized number of staff hours recorded on time records for the FDOs in the cohort by 1,763.041 hours, the federal standard for the number of hours an employee is available to work each year, and comparing that number to weighted caseload. The WCO-per-FTE ratio is roughly inversely proportional to the hours per weighted case metric, and it was derived from historical caseload analysis.

1285. The "assistant computer system administrator" scaled variable was determined at the time the initial staffing formula was implemented in FY 2016, and the number of FTEs provided has not changed since that time.

The formula implementation process incorporates a two-year stabilization factor requiring two consecutive years of an increase or decrease in the five-year average weighted caseload before changing the number of budgeted FTEs.

To determine the projected salary to include in an individual FDO's traditional unit budget, DSO follows these steps:

1. Compute the average salary cost of existing on-board staff (excluding the federal defender/executive director).
2. Multiply the average salary by the staff on board (excluding the federal defender/executive director) to calculate a "base" salary amount, then add standard increases, including inflationary increases, projected cost-of-living adjustments (COLAs), health benefits changes, and Federal Employee Retirement System (FERS) agency contribution rate changes.
3. Determine the difference between the on-board FTE and the formula FTE for the next year.
4. Multiply the FTE difference (between on-board and staffing formula FTE) by the cohort average salary, and add that to (or subtract it from) the base salary amount as previously calculated.
5. Add the salary of the federal defender/executive director to determine the total salary required.

#### **b. CHUs in FDOs**

The CHU formula has one workload-based element, one constant, and one scaled variable:<sup>1286</sup>

- 1 assistant federal public defender (AFPD) FTE for every 4.84 weighted clients served
- 1 CHU supervising attorney/CHU chief
- 1.604 non-AFPD FTE for each AFPD FTE (including the management position)

To determine the projected salary cost to include in an individual FDO's CHU, DSO follows these steps:

1. Compute the average salary cost of existing on-board CHU staff.
2. Multiply the average salary (adjusted for inflation) by the staff on board (excluding the federal defender/executive director) to calculate a base salary amount, then add standard increases, including inflationary increases, projected COLAs, health benefits changes, and the FERS agency contribution rate changes.
3. Determine the difference between the on-board CHU FTE and the formula FTE for the next year.
4. Multiply the FTE difference (between on-board and staffing formula FTE) by the CHU national average salary, and add that to (or subtract it from) the base salary amount as previously calculated to determine the total salary required.

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1286. Although the CHU formula calculates the number of CHU attorneys and non-attorneys, each defender has the discretion to develop a staffing plan that represents the most effective way to address their demonstrated workload needs, subject to budget constraints, and, for FPDOs, the number of AFPDs approved by their circuit.

## 2. Benefits

The benefit amount for each FDO is determined by multiplying the unit's total projected salary amount by that unit's actual benefit rate from the latest complete fiscal year. For example, for the FY 2021 FDO budgets (which were calculated in May 2020), the FY 2019 actual benefit rate for each organization was used to determine its total FY 2021 benefits.

## 3. Recurring Cost Categories

Funding for travel, RCU, experts, training, books, and other services is based on each FDO unit's average actual expenditures in the category for the last complete fiscal year, adjusted for inflation. Office space is calculated by annualizing the latest monthly rent cost available.

## 4. Non-Recurring Cost Categories

Funding for the equipment and furniture budget categories is based on the national average actual cost per FTE from the most recently completed fiscal year, adjusted for inflation, and provided to individual offices based primarily on authorized FTEs.

# G. Distribution and Use of FDO Funding

DSO sends a preliminary budget to each FDO for review. An amount is listed for each BOC and is summarized into the eleven categories discussed previously. The FDOs may appeal the amount (providing a justification), and DSO incorporates these appeal levels in the FDO budgets as appropriate. This process allows for the FDOs to indicate special circumstances that could have a significant impact on their resource needs. Once the FDO budget requests are finalized, DSO sends them to the DSC's Defender Services Budget and Data Subcommittee for consideration and recommendation to the DSC for final approval.

Before the start of each fiscal year, the FDOs are notified of their DSC-approved budgets. The DSC has authorized federal defenders to reprogram funds *within* any of the eleven budget categories without limit and, with one exception (training), to reprogram funds *between* the eleven budget categories, provided that the cumulative sum of the amounts transferred in a given fiscal year does not exceed 15% of the organization's total DSC-approved budget for that year. Advance written approval from the DSO is required to reprogram any funds out of the training BOC (which was established in FY 2021) or funds in excess of 15% of the DSC-approved budget from other categories.

Units may also request increases to their allotment levels during the fiscal year. These requests are reviewed and approved by DSO based on an assessment of the justification submitted against the competing needs of all other offices and on the availability of funds in the financial plan. Funding requests that exceed \$500,000 of an FDO's DSC-approved budget must be presented to the DSC for its consideration. (This stipulation excludes funding requests exceeding \$500,000 that are incidental to the acquisition of space, and other funding requests exceeding \$500,000 for which DSO or the chair of its Budget Subcommittee has been delegated authority to increase FDO budgets beyond \$500,000.)

Additionally, in response to an Executive Committee directive that the AO improve the ability of DSO to respond to unanticipated or uncontrollable caseload circumstances, on November 23, 2016, the AO director delegated to the DSO chief the authority to fund temporary FTEs above an individual FDO staffing formula level that equals no more than one percent of the total DSC-approved FDO budgets.<sup>1287</sup> These positions are not separately funded and are therefore only available if they fit within the existing appropriation, and any FTE pursuant to this authority must be reported annually to the DSC.<sup>1288</sup>

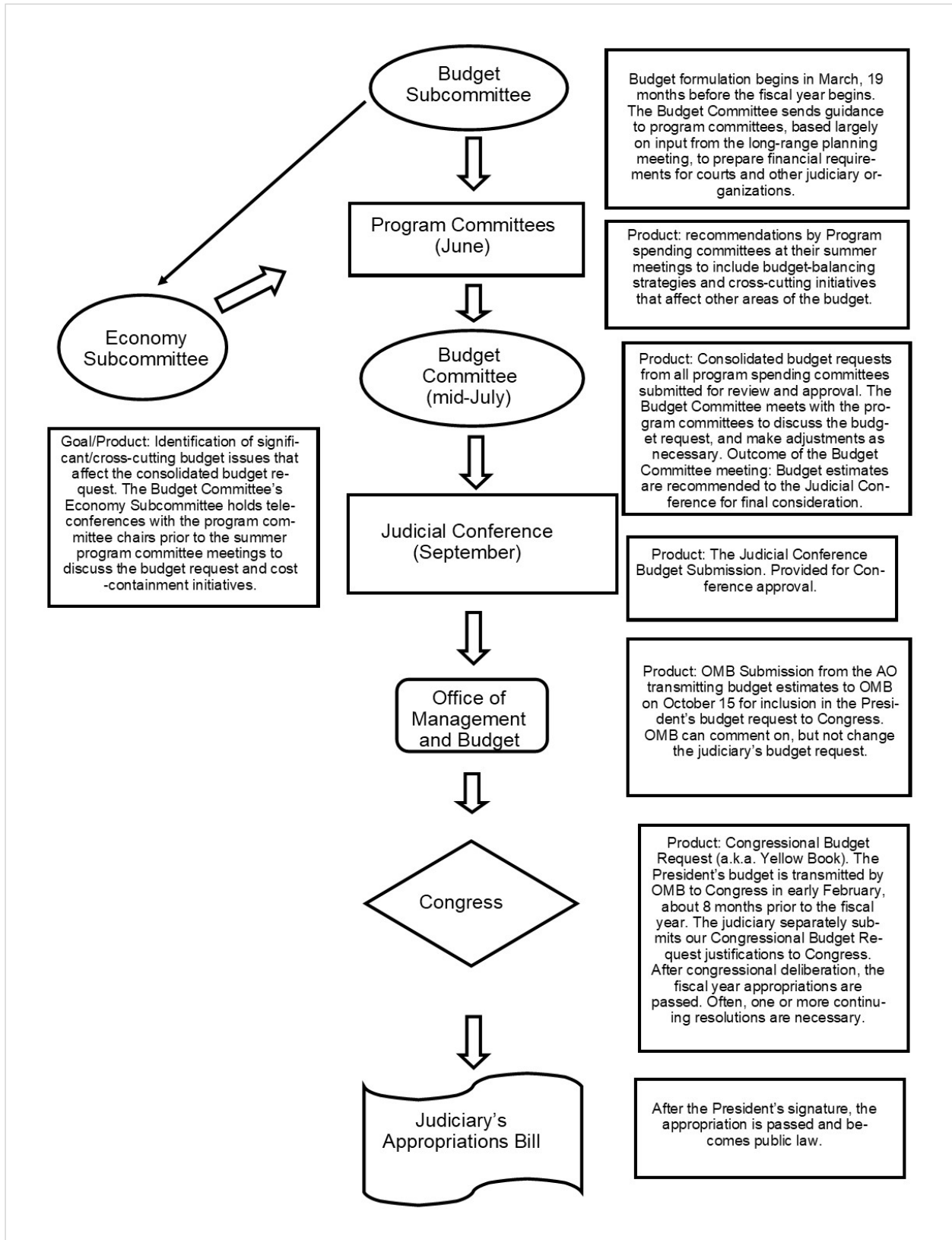
1287. See DSC Dec. 2017 Agenda Item 2A, p. 5.

1288. See, e.g., DSC Dec. 2020 Agenda Item 2A, Attachment 2.

# Attachment 1A

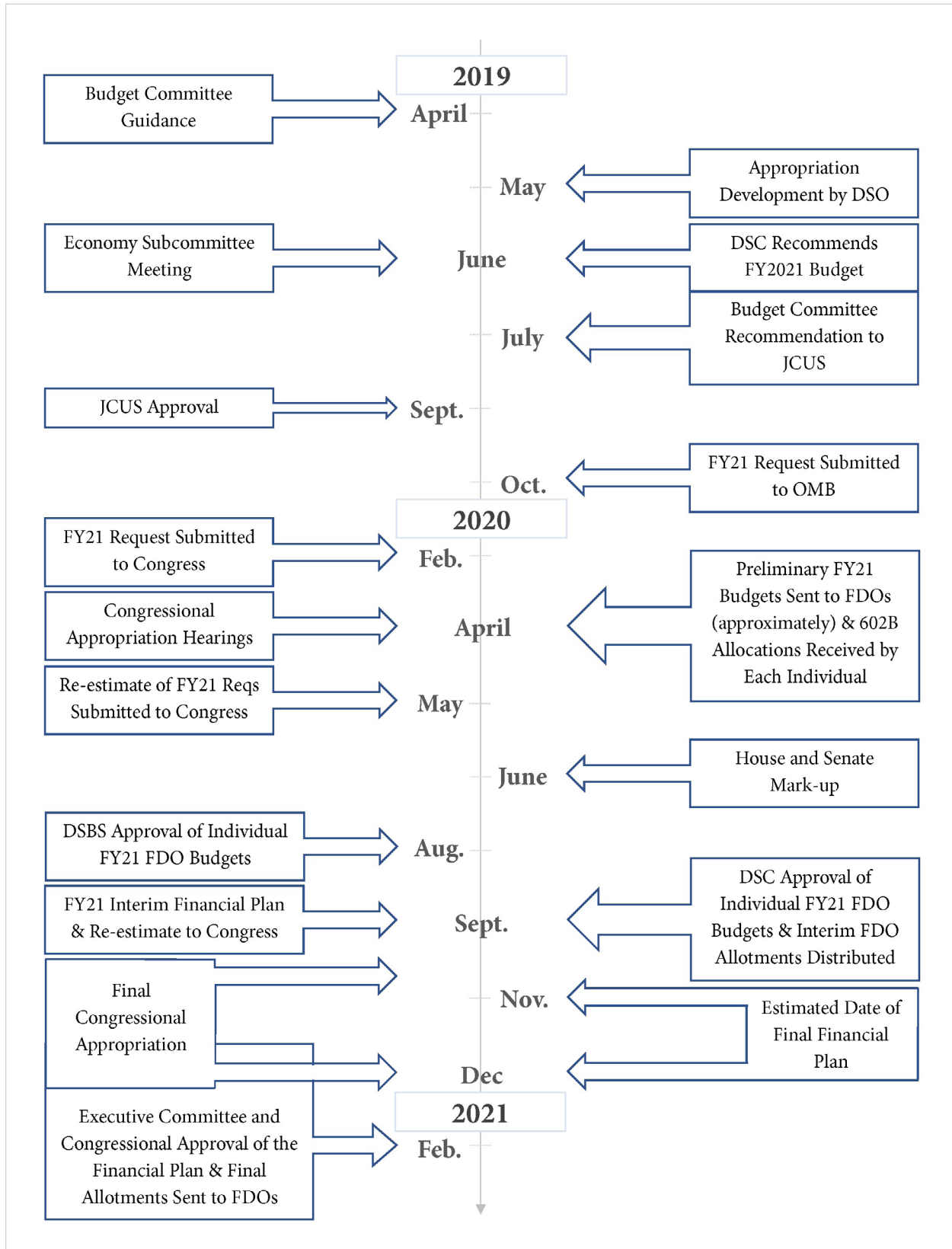
## Judiciary’s Budget Formulation Process

(provided by Budget Division staff)



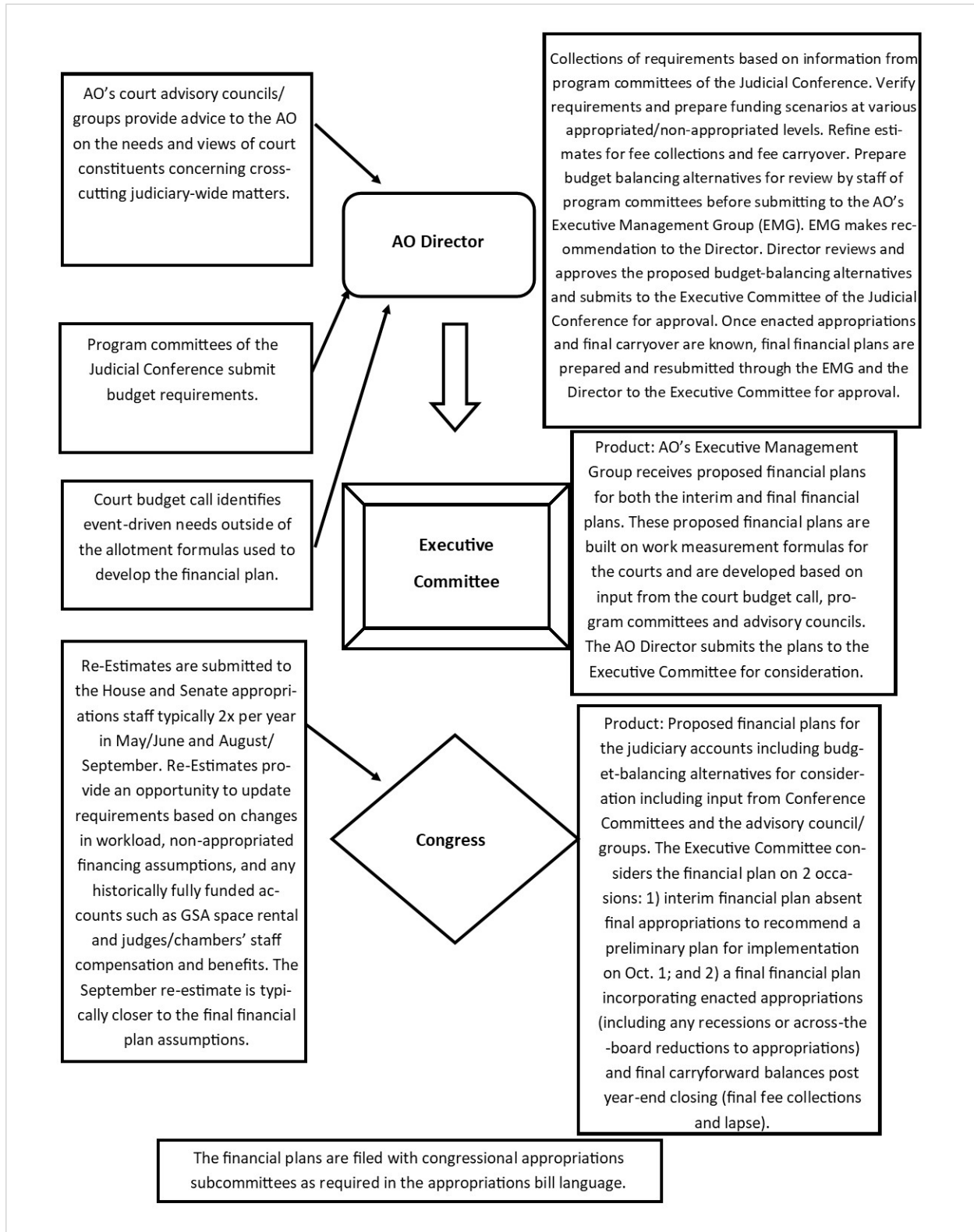
## Attachment 1B

### Sample Appropriation Timeline (provided by DSO staff)



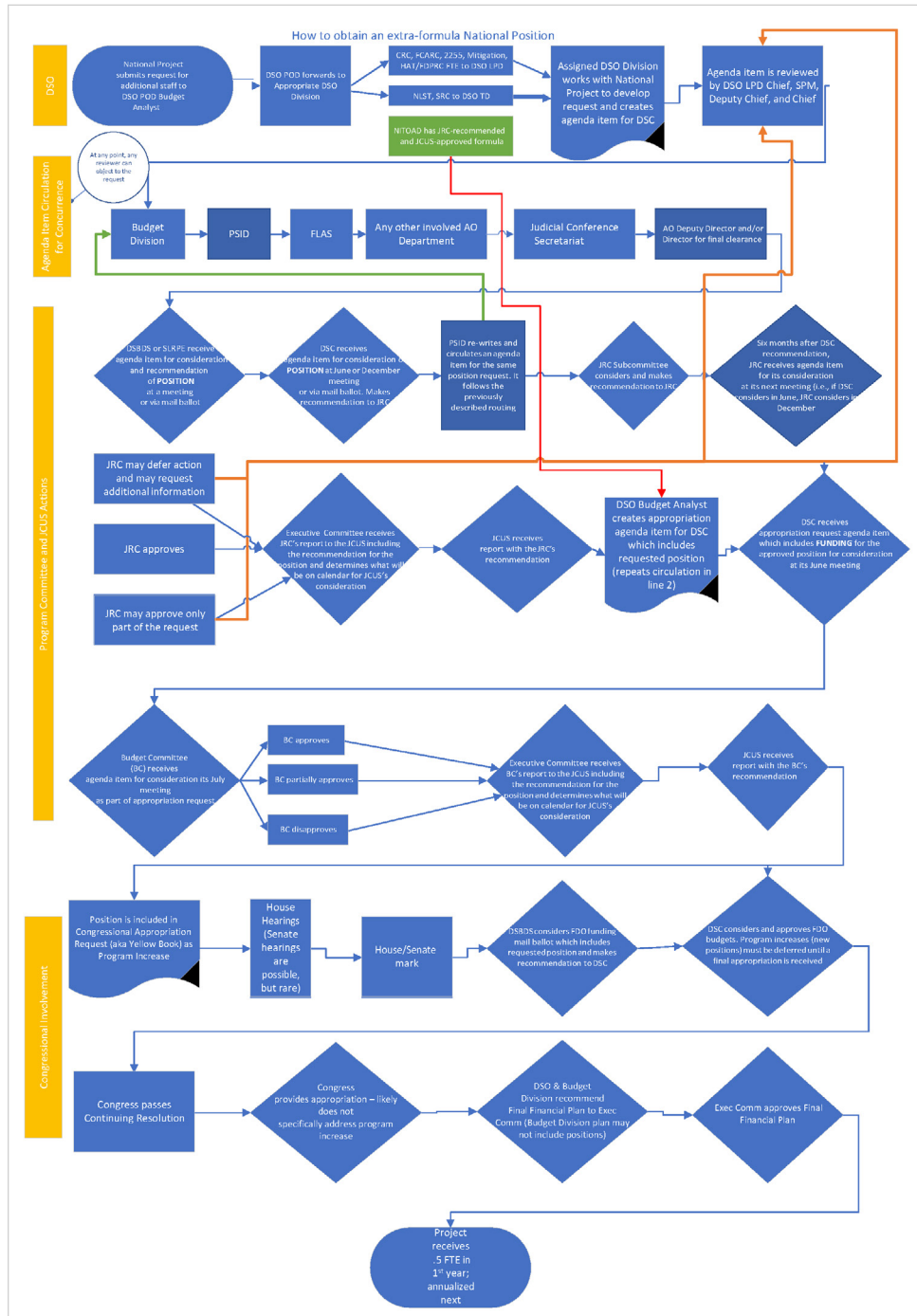
## Attachment 2

# Judiciary’s Financial Plan Development Process (provided by Budget Division staff)



# Attachment 3

## How to Obtain an Extra-Formula National Position (provided by DSO staff)



- |           |   |       |   |
|-----------|---|-------|---|
| 2255      | 2255 Project  | JRC   | Judicial Resources Committee  |
| BC        | Budget Committee  | LPD   | Legal and Policy Division   |
| CRC       | Capital Resource Council  | NLST  | National Litigation Support Team                                    |
| DSBDS     | Defender Services Budget and Data Subcommittee                        | POD   | Program Operations Division   |
| DSC       | Defender Services Committee   | PSID  | Policy and Strategic Initiatives Division                           |
| Exec Comm | Executive Committee   | SLRPE | Defender Services Subcommittee on Long-Range Planning and Education |
| FCRC      | Federal Capital Appellate Resource Council                            | SPM   | Supervisory Program Manager   |
| FLAS      | Financial Liaison and Analysis Staff                                  | SRC   | Sentencing Resource Council   |
| HAT/FDPRC | Habeas Assistance and Training/Federal Death Penalty Resource Council | TD    | Training Division   |



# Appendix B

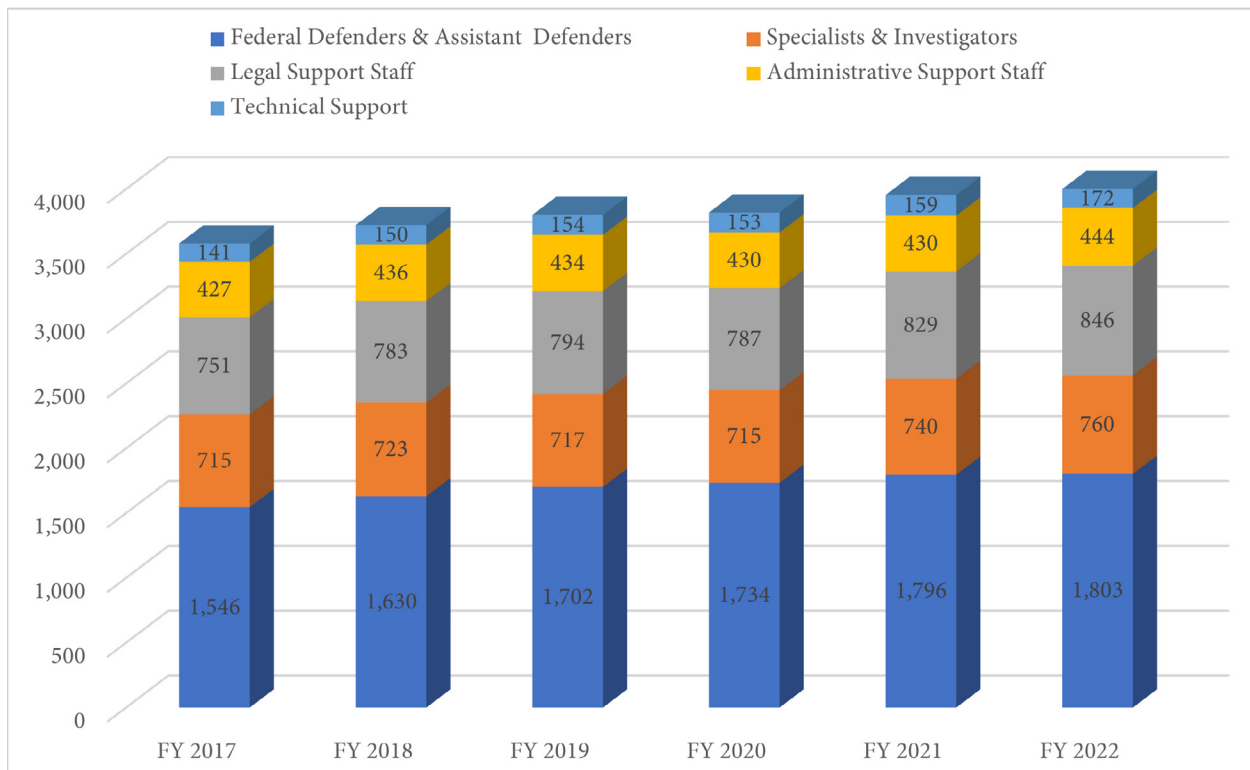
## Defender Services Human Resources

This appendix presents trends in the human resources available to carry out the mission of the Defender Services program for fiscal years 2017 to 2022. It includes information relevant to the report’s discussion of the current status of problems identified by the Cardone Report involving inefficient program administration, the comparative resources available to the prosecution and the defense, the role of circuit courts in the staffing of federal public defender offices (FPDOs),<sup>1289</sup> and the under-resourcing of national programs involving technology, litigation support, and capital cases. These issues are discussed across multiple chapters.

### 1. Defender Organization Staffing Trends

We examined data provided by the AO Office of Defender Services (DSO) on the number and type of full-time equivalent staff positions (FTEs) on board in FDOs as of the end of each fiscal year between 2017 and 2022. As shown by Figure 1, the overall number of on-board FTEs increased by 12% over this five-year period, with the number increasing each year.

Figure 1. Federal Defender Organization Staffing, FY 2017–FY 2022.



Note: National Positions are not included in the figure.

1289. In this appendix, we use the term FDO to refer to both federal public defender organizations (FPDOs) and community defender organizations (CDOs). Where we refer to one or the other separately, we use their individual designation. For definitions, see Chapter 4: Federal Defender Staffing.

Fiscal Year:	2017	2018	2019	2020	2021	2022	5-year % Change
Total FTEs:	3,579.6	3,722.4	3,800.7	3,818.8	3,954.2	4,025.0	12.4%
% Change from Previous Year:		4.0%	2.1%	0.5%	3.5%	1.8%	

In addition to the overall growth, staff increases were larger for some position types than others (see Table 1).<sup>1290</sup>

**Table 1.** Change in FDO FTEs by Position Grouping, FY 2017–FY 2022.

By Position Grouping	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
Federal Defenders & Assistant Defenders	1,545.9	1,629.8	1,702.0	1,734.2	1,795.6	1,803.0	16.6%
Specialists & Investigators	714.9	722.9	717.2	714.7	740.2	760.1	6.3%
Legal Support Staff	751.0	783.4	794.0	787.3	829.4	846.1	12.7%
Administrative Support Staff	426.6	436.3	433.6	429.8	429.8	444.3	4.1%
Technical Support	141.2	150.0	153.8	152.8	159.1	171.5	21.4%

Note: Because the Cardone Report included a recommendation that FDOs be staffed adequately to provide more training for defenders and panel attorneys (Recommendation 14a), we also examined the list of FDO position titles to see if we could identify any that specifically mentioned “training,” but there were none.<sup>1291</sup>

Table 2 shows the changes in FTEs between fiscal years 2017 and 2022 by 1) type of defender organization (federal public defender office or community defender organization), 2) type of unit (traditional or capital habeas), and 3) circuit. As with type of position, the number of FTEs increased within each level of every category.

- Community defender organizations had a slightly higher increase in staff than did federal public defender offices (13% vs. 12%).
- Almost half of the increase for capital habeas unit (CHU) staff is accounted for by the creation of six new CHUs that were not fully operational for the entire study period. Excluding these from consideration, the staffing increase in CHUs was five percentage points higher than in traditional units.<sup>1292</sup>

The range in the percentage of staffing growth across circuits increased over time. FDO FTEs grew by more than 6% in all circuits, but by close to 30% in the Tenth Circuit in response to the decision in the *McGirt* case, which shifted jurisdiction for many current and past “Indian country” crimes in Oklahoma from state to federal court.<sup>1293</sup>

1290. See Attachment 1 for a crosswalk of job title categorizations.

1291. Although there are no such position titles in FDOs, the responsibility for training is included in the job descriptions of several positions including supervisory attorneys and paralegals.

1292. The following CHUs were not fully operational during the full study period: Missouri Western (est. 2016), Texas Northern and Western (est. 2017), Florida Middle (est. 2019), Indiana Southern (est. 2019), North Carolina Western (est. 2020) and Delaware (closed at the end of FY 2018).

1293. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

**Table 2.** Change in FTEs by Organization, Unit, and Circuit, FY 2017–FY 2022.

	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
<b>By Organization Type</b>							
Community Defender Organization	767.6	787.0	813.5	809.9	842.8	866.7	12.9%
Federal Public Defender Office	2,812.0	2,935.4	2,987.2	3,008.9	3,111.4	3,158.2	12.3%
<b>By Unit Type</b>							
Traditional	3,152.3	3,254.9	3,310.0	3,304.1	3,417.7	3,471.8	10.1%
CHU (All)	427.3	467.5	490.7	514.6	536.5	553.2	29.5%
CHU (Fully operational only) <sup>1294</sup>	416.6	442.8	443.0	464.6	472.9	478.5	14.9%
<b>By Circuit</b>							
D.C.	25.0	24.1	27.4	27.3	27.8	28.4	13.8%
First	104.9	106.4	108.7	111.9	118.0	115.8	10.4%
Second	182.9	184.1	189.0	190.9	190.9	195.5	6.9%
Third	282.8	286.6	298.7	300.8	304.0	300.5	6.3%
Fourth	313.2	321.1	326.5	328.0	337.2	342.5	9.4%
Fifth	378.4	409.4	419.6	419.1	418.3	429.1	13.4%
Sixth	266.2	276.3	289.9	292.3	295.7	307.1	15.3%
Seventh	136.7	140.0	147.4	144.4	149.8	156.3	14.3%
Eighth	242.5	259.5	267.6	272.2	275.8	288.8	19.1%
Ninth	1,004.2	1,034.2	1,027.6	1,040.2	1,088.1	1,089.7	8.5%
Tenth	249.0	263.4	268.6	270.1	296.9	322.7	29.6%
Eleventh	394.0	417.4	429.8	421.7	451.8	448.5	13.8%

Staffing trends also varied by FDOs. Of the 81 FDOs operating during the study period,<sup>1295</sup> staffing decreased or remained the same in 10, increased by less than 10% in 28, and increased by 10% or more in the remaining 43 organizations.<sup>1296</sup>

1294. See *supra* note 1292 for a list of the excluded CHUs.

1295. Until the last fiscal year of the study period, 81 districts had an FDO, nine of which served ten other districts. Effective November 8, 2021, Oklahoma Eastern, which had been served by the FDO in Oklahoma Northern, opened a separate office, so as of the end of FY 2022 there are now 82 FDOs. We have kept the Oklahoma Northern and Oklahoma Eastern numbers combined for our purpose of comparing staffing levels over the years because the new FDO is not yet fully staffed. Three districts do not have an FDO. Northern Marianna Islands has never had one due to its limited number of cases, and Kentucky Eastern and Georgia Southern disbanded their FDOs in the 1980s.

1296. See Attachment 2.

**Table 3.** Change in FTEs by FDO, FY 2017–FY 2022.

Change	Federal Defender Offices	
	Number	Percent
Decrease	8	9.9%
No Change	2	2.5%
Increase less than 10%	28	34.6%
Increase 10% to less than 25%	27	33.3%
Increase 25% or more	16	19.8%

The range across FDOs was from a 45% decrease to 293% increase.<sup>1297</sup> The range stems from the closing of the CHU in one district in 2018—with its accompanying loss of FTEs—and, at the other end, the need to address the extraordinary effect of the Supreme Court’s *McGirt* decision affecting the FDO caseload in Oklahoma.<sup>1298</sup> The next largest increase—76%—was in the district that opened its CHU unit in 2019 to serve as a resource in federal capital habeas petitions across the country.<sup>1299</sup> When these districts are excluded, the range narrows to 76 percentage points, from a 14% decrease to a 62% increase.

## 2. Comparison of FDO On-Board Staff to Staffing Formula Requirements

Table 4 shows the number of FTEs on board at the end of each fiscal year as a percentage of the FTE staffing formula requirements for that year.

- Actual staffing was less than the formula-determined level in all years for all types of organizational units, ranging from 82% to 96%.
- FPDO units fared better than their CDO counterparts, with consistently higher “percent of formula” on board.
- Both types of traditional units (FPDO and CDO) had higher on-board-to-formula percentages than did the CHUs, a finding that held whether CHUs that were not fully operational during the entire study period were included or excluded from the analysis.<sup>1300</sup> Despite lower staffing levels than the traditional units, CHUs experienced a noticeably larger *growth percentage* over the study period (see Table 2).

1297. See Attachment 2.

1298. DSC Dec. 2021 Agenda Item 1E, states, “Data from the AO’s Judiciary Data and Analysis Office (JDAO) indicates that in the twelve-month period following the *McGirt* decision (August 2020–July 2021), felony filings in OK-E increased by 265% and in OK-N by 196% when compared to the same period one year earlier (Aug. 2019–July 2020).” We consider a 200% increase in caseload in 12 months to be extraordinary.

1299. Four of the other districts with double-digit staff increases also opened new CHUs that were not fully operational in fiscal year 2017: Missouri Western, Texas Northern and Western, and Florida Middle.

1300. The percentages of on-board-to-formula staff differed by more than one point in only one year, 2019, when the percent of formula was 89% for all CHUs vs. 87% when excluding the CHUs that were not fully operational during the full study period. See *supra* note 1292 for list of districts.

**Table 4.** Formula and On-Board FTEs, FY 2017–FY 2022.  
A: Federal Public Defender Organizations

FY	Traditional Units			Capital Habeas Units			All
	Full Formula	On Board (end of year)	% Formula On Board	Full Formula	On Board (end of year)	% Formula On Board	% Formula On Board
2017	2,715	2,515	93%	349	296.9	85%	92%
2018	2,731	2,603	95%	370	332.56	90%	95%
2019	2,747	2,642	96%	387	345.02	89%	95%
2020	2,782	2,638	95%	404	371.28	92%	94%
2021	2,842	2,718	96%	432	393.61	91%	96%
2022	2,913	2,752	94%	451	406.24	90%	94%

## B: Community Defender Organizations

FY	Traditional Units			Capital Habeas Units			All
	Full Formula	On Board (end of year)	% Formula On Board	Full Formula	On Board (end of year)	% Formula On Board	% Formula On Board
2017	700	637	91%	156	130	84%	90%
2018	712	652	92%	157	135	86%	91%
2019	730	668	91%	167	146	87%	91%
2020	752	666	89%	172	143	83%	88%
2021	774	700	90%	174	143	82%	89%
2022	784	720	92%	178	147	83%	90%

Note: Excludes national positions and fellowships that are housed in FDOs

Further, as shown by Table 5, the plurality of FDOs fall into the 90%–98% range of on-board to formula staff, but there is variation.<sup>1301</sup> This variation reflects primarily the staffing challenges faced by individual FDOs and the hiring philosophies of the federal defender, but it also reflects the results of the DSO and DSC review of any FDO requests for additional staff to meet unanticipated emergencies.<sup>1302</sup>

**Table 5.** Number of FDOs by Category of On-Board FTES to Staffing Formula FTES.

Fiscal Year	Rounds to at least 99%	90%–98%	Under 90%
2017	15	41	25
2018	23	37	21
2019	23	46	12
2020	22	39	20
2021	24	39	18
2022	26	38	18

Note: Out of 82 FDOS in fiscal year 2022; 81 FDOs in all other years.

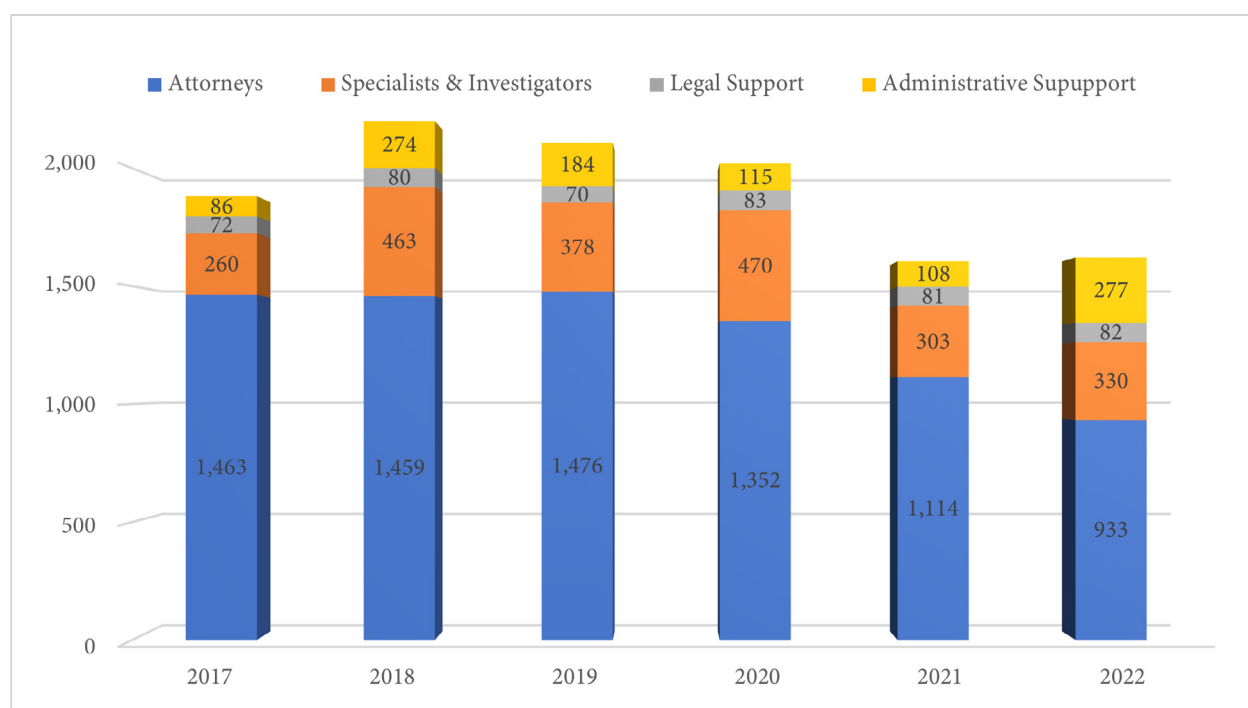
<sup>1301</sup> See Attachment 3.

<sup>1302</sup> See Chapter 4: Federal Defender Staffing and Appendix A: Defender Services Budgeting and Funding Process.

### 3. Trends in Estimated Panel Attorney and CJA-Funded Expert FTEs

The defense function is performed by both institutional defenders in FDOs and private attorneys paid with CJA funds. Understanding the work of the defense function overall means accounting for hours contributed by both groups. The estimated FTEs provided to the defender program by panel attorneys was calculated by dividing the total of their in-court plus out-of-court hours (as reported on their CJA-20 or CJA-30 vouchers) by 1,763.04 hours--(the federal standard for the number of hours an employee is available to work each year).<sup>1303</sup> A similar calculation was performed on the total expert service provider hours claimed on CJA-21 or CJA-31 vouchers.<sup>1304</sup>

Figure 2. Estimated Panel Attorney and CJA-Funded Expert FTEs, FY 2017–FY 2022.



Fiscal Year	2017	2018	2019	2020	2021	2022	Change
Estimated FTEs	1,881.6	2,275.1	2,108.0	2,020.5	1,605.6	1,622.2	-13.8%
% Change from Prior Year		20.9%	-7.3%	-4.2%	-20.5%	1.0%	

1303. The data on hours were provided by the AO’s Judiciary Data and Analysis Office from its eVoucher system. The divisor is the standard used by the AO in developing the FDO staffing formulas for FDOs. See Appendix A: Defender Services Budgeting and Funding Process.

1304. Identifying changes in the use of service providers speaks to the implementation of recommendations calling for additional training of the panel attorneys making such requests and the judges who review them.

As shown in Figure 2<sup>1305</sup> and Table 6, defender program resources available through the CJA panel attorney and expert appointment processes declined by 14% over the study period. This trend was due entirely to a decrease in the number of attorney FTEs, which dropped by double-digit percentage points in each of the last two years, likely due to the larger drop in traditional CJA caseloads during the pandemic.

**Table 6.** Change in CJA Appointment FTES by Appointment Type, FY 2017–FY 2022.

By Service Category	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
Attorneys	1,463	1,459	1,476	1,352	1,114	933	-36.3%
% Change from Prior Year		-0.3%	1.2%	-8.4%	-17.6%	-16.2%	
Specialists & Investigators	260	463	378	470	303	330	26.9%
% Change from Prior Year		77.8%	-18.3%	24.3%	-35.5%	9.0%	
Legal Support Staff	72	80	70	83	81	82	14.1%
% Change from Prior Year		11.0%	-12.4%	19.3%	-2.9%	1.2%	
Administrative Support Staff	86	274	184	115	108	277	221.9%
% Change from Prior Year		218.2%	-32.9%	-37.3%	-6.3%	156.6%	

The pattern of declining panel attorney FTEs is true across most courts, with only 13 of the 94 district courts, plus the 12 courts of appeals, *not* losing estimated panel attorney FTEs between fiscal years 2017 and 2022.<sup>1306</sup> Of those 13 districts with increases, all but one also experienced an increase in FDO resources over this period, meaning that a rise in caseload prompted increases in both institutional and panel attorney work<sup>1307</sup> and not that one type of defender work replaced the other.

## 4. Trends in the Number and Type of Defender Program Human Resources

As can be seen from Table 7, when the two sources of FTEs—FDO and CJA panel attorneys and experts—are combined, there was a slight uptick in available staffing resources during the study period. This results from a 10% increase in fiscal year 2018 followed by slight decreases during the next three years, and then a small increase in fiscal year 2022. There was, however, a 7% decrease in the number of litigating attorney positions available to the program, with the percentage of decline growing over the last three years.

The pattern of consistently increasing FDO attorney FTEs and declining CJA panel attorney FTEs has resulted in a steady reduction in the percentage of attorney FTEs attributed to the CJA panel, with the majority of the decrease coming after the pandemic.<sup>1308</sup>

1305. The administrative category includes services classified in the eVoucher system as CALR (Westlaw/Lexis, etc.), Duplication Services, Contract Reporter, or Court Reporter. The legal support category is for paralegal services. All other services are categorized as “Specialists & Investigators,” except for “Interpreters” and “Translators,” which are excluded.

1306. See Attachment 4. The large increase in administrative support staff was due primarily to the change in one district where over 200,000 hours of duplication services were accrued in one case.

1307. Perhaps the best examples of this event are from the Eastern and Northern Districts of Oklahoma.

1308. See Attachment 5 for this information by district, with the panel attorney FTEs combined for those districts that share an FDO.

**Table 7.** Defender Program FTEs, FY 2017–FY 2022.

Source	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
All FDO FTEs	3,579.6	3,722.4	3,800.7	3,818.8	3,954.2	4,025.0	12.4%
All Estimated Appointment FTEs	1,881.6	2,275.1	2,108.0	2,020.5	1,605.6	1,622.2	-13.8%
All FTEs	5,461.2	5,997.5	5,908.7	5,839.3	5,559.8	5,647.2	3.4%
Change from Preceding Year		9.8%	-1.5%	-1.2%	-4.8%	1.6%	
FDO <i>Litigating Attorney</i> FTEs	1,545.9	1,629.8	1,702.0	1,734.2	1,795.6	1,803.0	16.6%
Estimated Panel Attorney FTEs	1,311.8	1,309.9	1,346.1	1,216.5	1,012.4	858.2	-34.6%
All <i>Litigating Attorney</i> FTEs	2,857.7	2,939.7	3,048.1	2,950.6	2,808.1	2,661.2	-6.9%
Change from Preceding Year		2.9%	3.7%	-3.2%	-4.8%	-5.2%	
							<b>Point Difference</b>
Panel as % of All Attorney FTE	45.9%	44.6%	44.2%	41.2%	36.1%	32.3%	-13.7%

The takeaway is that the human resources available for direct representation of CJA-eligible defendants has decreased over the study period. But given that the percentage of on-board FDO staff compared to formula requirements remained fairly steady, this decrease most likely reflects the temporary falling of the traditional panel attorney caseload due to the pandemic. As some case types decreased, the pandemic resulted in increases in other case types—e.g., jail conditions, compassionate release—which were handled by FDOs more often because institutional defenders are more familiar with the policies and personnel of the Federal Bureau of Prisons (BOP) institutions (and their contract jails) in the jurisdiction.

## 5. National Positions

In addition to defender resources from FDOs and panel attorneys and appointed experts, eight national defender services programs staffed with federal employees provide support services to all districts.<sup>1309</sup>

1. National Information Technology Operations and Applications Development (NITOAD) unit staff: Responsible for the support, administration, security, and maintenance of all national information technology applications and systems for the FDOs.
2. National Litigation Support Team (NLST, began December 2007): Focuses primarily on developing and implementing national litigation support strategies to address eDiscovery, including the efficient and cost-effective management of discovery and case materials.
3. Sentencing Resource Counsel (authorized 2003): Help defense counsel understand and navigate the federal sentencing guidelines, procedures and case law.
4. Capital Resource Counsel Project (CRC, authorized 2001): Works hand in hand with the Federal Death Penalty Resource Counsel (below) to provide assistance to defense teams representing a federal death-eligible defendant in the country. Counsel help judges recruit qualified defense counsel for federal capital trials, provide key training and consultation to appointed counsel, and undertake direct representation in a limited number of cases.

<sup>1309</sup> There is a ninth program, Habeas Assistance and Training (HAT), staffed exclusively by part-time contractors rather than federal employees. It provides training and other educational resources to defense counsel on the essential principles of capital habeas defense and the status of case law and key legal issues. There is one national HAT (authorized 1995) and four regional HATs (authorized 1998). The regional HATs also help recruit counsel.



5. Federal Death Penalty Resource Counsel (FDPRC, authorized 1992): A National Contract Administrator administers the national and regional FDPRC contracts.
6. Federal Capital Habeas (§ 2255) Project (authorized 2004): Provides assistance in post-conviction litigation of federal death sentences pursuant to 28 U.S.C. § 2255. The project focuses on recruitment of counsel, consultation, training, case monitoring, and some direct representation.
7. Federal Capital Appellate Resource Counsel Project (FCARC, authorized 2008): Helps courts and federal defenders identify qualified counsel for federal death-penalty appeals, consults with assigned counsel, participates in training, and provides some direct representation.)
8. National Mitigation Coordinator (authorized 2004): Provides mitigation assistance in capital cases to CJA panel attorneys, the courts, and federal defenders. Identifies mitigation specialists, provides referrals to capital counsel in capital habeas and capital prosecution cases, participates in mitigation training programs, and consults with defense teams who need guidance in relation to mitigation.

As shown by Table 8, the number of on-board FTEs in the national programs has increased. The number of national program FTEs on board at the end of the year rose from 37 to 59, a 59% increase of 22 positions between fiscal years 2017 and 2022. The new CHU added eight more positions, for an overall 30-FTE increase in national positions. Percentage-wise, the increase in staffing for the national programs is considerably larger than the more modest increases of 12% for FDO staff and 4% for combined FDO and estimated appointment FTEs over the same time period (see Table 7). While the percentage increase in national position FTEs is substantial, the total additional support of 30 FTEs reflects the low level of FTEs at the start of the study period.

**Table 8.** Change in National Position FTEs On Board by Program, FY 2017–FY 2022.

Program	Fiscal Year						# Additional FTEs
	2017	2018	2019	2020	2021	2022	
<b>Technology (NITOAD)</b>	12.0	13.3	14.0	17.0	20.0	20.6	8.6
<b>Litigation Support</b>							
National Litigation Support	4.0	4.0	5.0	5.0	5.2	6.6	2.2
Sentencing Resource Counsel	4.4	4.0	6.0	6.0	6.0	6.0	1.6
<b>Capital Cases</b>							
Capital Resource Counsel	4.0	6.0	7.0	7.0	7.0	9.2	5.2
National Federal Death Penalty Contract Administrator	1.0	2.0	2.0	2.0	2.0	2.0	1.0
§ 2255 Project	8.0	8.3	9.0	9.0	9.0	9.0	1.0
Federal Capital Appellate Resource Counsel	2.3	3.0	4.0	4.0	4.0	4.0	1.7
National Mitigation Coordinator	1.6	1.6	1.6	1.6	1.6	1.6	0.0
<b>Total Programs</b>	<b>37.4</b>	<b>42.2</b>	<b>48.6</b>	<b>51.6</b>	<b>54.8</b>	<b>59.5</b>	<b>22.2 (59.1%)</b>

# Attachment 1

## Crosswalk of FDO Position Titles and Staffing Categories

Group	Title
1-Federal Defenders & Assistant Defenders	Federal Public Defender
1-Federal Defenders & Assistant Defenders	Interim Federal Public Defender
1-Federal Defenders & Assistant Defenders	Assistant Federal Public Defender
1-Federal Defenders & Assistant Defenders	Assistant Federal Public Defender (CHU)
1-Federal Defenders & Assistant Defenders	First Assistant Federal Public Defender
1-Federal Defenders & Assistant Defenders	First Assistant Federal Public Defender (CHU)
1-Federal Defenders & Assistant Defenders	Second Level Supervisory AFPD
1-Federal Defenders & Assistant Defenders	Second Level Supervisory AFPD (CHU)
1-Federal Defenders & Assistant Defenders	Third Level Supervisory AFPD
1-Federal Defenders & Assistant Defenders	Third Level Supervisory AFPD (CHU)
1-Federal Defenders & Assistant Defenders	Senior Litigator AFPD
1-Resource Counsel	Capital Resource Counsel Attorney (ORX only)
1-Resource Counsel	Federal Capital Appellate Resource Counsel Attorney
1-Resource Counsel	Federal Capital Habeas (2255) Attorney (MDX only)
1-Resource Counsel	Federal Capital Habeas (2255) Project Director (MDX only)
1-Resource Counsel	Sentencing Resource Counsel Attorney (AZX only)
2-Specialists & Investigators	Capital Mitigation Specialist
2-Specialists & Investigators	National Mitigation Coordinator (CAN only)
2-Specialists & Investigators	Non-Capital Mitigation Specialist
2-Specialists & Investigators	Chief Investigator
2-Specialists & Investigators	Chief Investigator (CHU)
2-Specialists & Investigators	Assistant Chief Investigator
2-Specialists & Investigators	Assistant Investigator
2-Specialists & Investigators	Assistant Investigator (CHU)
2-Specialists & Investigators	Investigator
2-Specialists & Investigators	Investigator (CHU)
2-Specialists & Investigators	Investigator/Interpreter
2-Specialists & Investigators	Investigator/Paralegal
2-Specialists & Investigators	Research & Writing Specialist
2-Specialists & Investigators	Research & Writing Specialist (CHU)
2-Specialists & Investigators	Research & Writing Specialist/Panel Administrator
2-Specialists & Investigators	Research and Writing Specialist

Group	Title
2-Specialists & Investigators	Research and Writing Specialist (CHU)
2-Specialists & Investigators	Sentencing Resource Counsel Research/Writing Specialist
2-Specialists & Investigators	Federal Capital Habeas (2255) RWS (MDX only)
2-Specialists & Investigators	CJA Resource Attorney (Position in AK; AO had classified as Research & Writing Specialist)
3-Legal Support Staff	Chief Interpreter
3-Legal Support Staff	Interpreter
3-Legal Support Staff	Chief Paralegal
3-Legal Support Staff	Chief Paralegal (CHU)
3-Legal Support Staff	Paralegal
3-Legal Support Staff	Paralegal (CHU)
3-Legal Support Staff	Paralegal/Legal Asst
3-Legal Support Staff	Paralegal/Legal Secretary
3-Legal Support Staff	Paralegal/Librarian/Case Mgmt Asst
3-Legal Support Staff	Paralegal/Panel Administrator
3-Legal Support Staff	Paralegal/Personnel Administrator
3-Legal Support Staff	Paralegal/Secretary to FPD
3-Legal Support Staff	Paralegal/Senior Legal Assistant
3-Legal Support Staff	Paralegal/Senior Legal Secretary
3-Legal Support Staff	Assistant Paralegal
3-Legal Support Staff	Assistant Paralegal (CHU)
3-Legal Support Staff	Assistant Paralegal/Interpreter
3-Legal Support Staff	Assistant Paralegal/Legal Assistant
3-Legal Support Staff	Assistant Paralegal/Panel Administrator
3-Legal Support Staff	Asst Paralegal/Administrative Assistant
3-Legal Support Staff	Asst Paralegal/Branch Administrative Assistant
3-Legal Support Staff	Asst Paralegal/Legal Secretary
3-Legal Support Staff	Capital Resource Counsel Paralegal (ORX only)
3-Legal Support Staff	Federal Capital Habeas (2255) Paralegal (MDX only)
3-Legal Support Staff	National Litigation Support Paralegal
3-Legal Support Staff	National Mitigation Paralegal (CAN Only)
3-Legal Support Staff	Sentencing Resource Counsel Paralegal (AZX only)
3-Legal Support Staff	Legal Secretary/Administrative Asst
3-Legal Support Staff	Legal Secretary/Interpreter
3-Legal Support Staff	Secretary to First Asst FPD
3-Legal Support Staff	Secretary to FPD/Paralegal
3-Legal Support Staff	Secretary to the First Assistant / Assistant Paralegal
3-Legal Support Staff	Secretary to the FPD

Group	Title
3-Legal Support Staff	Secretary to the FPD/Administrative Assistant
3-Legal Support Staff	Senior Legal Assistant
3-Legal Support Staff	Senior Legal Assistant (CHU)
3-Legal Support Staff	Senior Legal Assistant/Assistant Paralegal
3-Legal Support Staff	Senior Legal Assistant/Assistant Investigator
3-Legal Support Staff	Senior Legal Assistant/Librarian
3-Legal Support Staff	Supervisory Legal Assistant
3-Legal Support Staff	Legal Assistant
3-Legal Support Staff	Legal Assistant (CHU)
3-Legal Support Staff	Legal Assistant/Administrative Asst
3-Legal Support Staff	Legal Assistant/Receptionist
3-Legal Support Staff	Legal Asst/Paralegal (CHU)
3-Legal Support Staff	Legal Intern
3-Legal Support Staff	FPD Intermittent
3-Legal Support Staff	Law Clerk (Cir) Capped @ 13
3-Legal Support Staff	Law Clerk (Mag) Capped @ 13
4-Administrative Support Staff	Admin Secretary/Receptionist
4-Administrative Support Staff	Administrative Assistant
4-Administrative Support Staff	Administrative Assistant (CHU)
4-Administrative Support Staff	Administrative Assistant /Case Management Asst
4-Administrative Support Staff	Administrative Assistant/Paralegal
4-Administrative Support Staff	Administrative Assistant/Senior Legal Assistant
4-Administrative Support Staff	Administrative Officer
4-Administrative Support Staff	Administrative Secretary
4-Administrative Support Staff	Administrative Secretary/Assistant Investigator
4-Administrative Support Staff	Assistant National Litigation Support Administrator
4-Administrative Support Staff	Branch Administrative Assistant
4-Administrative Support Staff	Branch Administrative Assistant (CHU)
4-Administrative Support Staff	Case Management Assistant
4-Administrative Support Staff	Case Management Assistant—Property & Procurement Administrator
4-Administrative Support Staff	Case Management Assistant/Paralegal
4-Administrative Support Staff	Case Management Assistant/Paralegal (CHU)
4-Administrative Support Staff	Case Management Assistant/Personnel Administrator
4-Administrative Support Staff	Case Management Asst/Legal Asst
4-Administrative Support Staff	Case Management Specialist/Clerical Asst
4-Administrative Support Staff	Case Manager/Legal Secretary
4-Administrative Support Staff	Case Manager/Secretary to FPD

Group	Title
4-Administrative Support Staff	Clerical Assistant
4-Administrative Support Staff	Clerical Assistant (CHU)
4-Administrative Support Staff	Federal Capital Habeas (2255) Administrative Assistant
4-Administrative Support Staff	Financial Administrator
4-Administrative Support Staff	Financial Administrator (CHU)
4-Administrative Support Staff	Financial Administrator/Paralegal
4-Administrative Support Staff	National Litigation Support Administrator
4-Administrative Support Staff	Panel Administrator
4-Administrative Support Staff	Panel Administrator / Financial Administrator
4-Administrative Support Staff	Panel Assistant
4-Administrative Support Staff	Personnel Administrator
4-Administrative Support Staff	Personnel Administrator/Supervisory Administrative Assistant
4-Administrative Support Staff	Property & Procurement Administrator
4-Administrative Support Staff	Property & Procurement Administrator (CHU)
4-Administrative Support Staff	Property & Procurement Specialist / Paralegal
4-Administrative Support Staff	Property and Procurement Administrator
4-Administrative Support Staff	Receptionist
4-Administrative Support Staff	Receptionist/Case Management Assistant
4-Administrative Support Staff	Supervisory Administrative Assistant
4-Administrative Support Staff	Operations Administrator
4-Administrative Support Staff	Operations Administrator/Case Management Specialist
5-Technical Support	Supervisory Computer Systems Administrator
5-Technical Support	Computer System Administrator
5-Technical Support	Computer Systems Administrator
5-Technical Support	Assistant Computer Systems Administrator
5-Technical Support	Assistant Computer Systems Administrator (CHU)
5-Technical Support	NITOAD—Domain Administrator
5-Technical Support	NITOAD—Network Administrator
5-Technical Support	NITOAD—Programmer
5-Technical Support	NITOAD—Project Manager
5-Technical Support	NITOAD—Property and Procurement Administrator
5-Technical Support	NITOAD Chief
5-Technical Support	NITOAD Deputy Chief
5-Technical Support	NITOAD—Operating Systems Administrator (TXW Only)

## Attachment 2

### Change in FDO FTEs by District, FY 2017–FY 2022

District	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
AK	17.9	17.7	19.0	20.0	21.8	22.2	24.2%
ALM	33.0	33.8	33.8	32.9	36.0	35.9	8.8%
ALN	20.7	24.4	28.0	28.0	32.0	33.4	61.6%
ALS	15.7	16.0	15.0	16.7	17.0	16.9	7.4%
ARE	30.8	31.8	30.2	32.8	32.4	35.0	13.6%
ARW	14.0	13.7	15.0	15.0	15.0	16.0	14.3%
AZ	164.9	177.0	171.1	189.6	199.4	191.2	15.9%
CAC	194.4	197.6	202.3	196.6	210.0	219.9	13.1%
CAE	91.3	91.0	87.3	82.3	83.0	78.2	-14.3%
CAN	63.4	62.7	62.4	63.8	65.2	62.9	-0.8%
CAS	130.3	133.6	134.3	136.8	144.8	156.3	20.0%
CO (WY)	48.5	51.4	51.7	53.0	51.7	57.9	19.5%
CT	19.0	21.8	21.9	22.0	24.0	25.8	36.0%
DC	25.0	24.1	27.4	27.3	27.8	28.4	13.8%
DE	19.2	15.0	14.8	13.0	11.0	10.6	-44.7%
FLM	109.3	121.5	125.3	120.7	125.5	121.5	11.1%
FLN	32.7	36.0	38.7	38.0	40.3	42.6	30.4%
FLS	102.6	105.0	105.3	104.6	107.6	101.6	-1.0%
GAM	22.0	21.1	20.4	19.7	22.5	22.6	2.9%
GAN	58.0	59.7	63.3	61.2	70.9	74.0	27.6%
GUAM	6.0	5.0	5.7	6.0	6.0	6.0	0.0%
HI	13.3	15.0	15.0	15.0	15.9	17.0	27.5%
IAS (IAN)	30.0	31.8	33.9	33.9	34.0	33.4	11.4%
ID	28.0	30.0	32.0	30.2	33.4	36.0	28.6%
ILC	23.3	23.3	24.7	25.0	24.2	25.6	9.7%
ILN	40.8	42.7	40.5	38.7	40.8	42.7	4.7%
ILS	19.3	19.9	19.3	18.7	17.9	20.0	3.6%
INN	16.0	15.0	16.0	16.0	16.0	16.2	1.4%
INS	16.0	17.0	24.0	23.0	27.0	28.2	75.9%
KS	39.3	43.6	43.0	40.8	43.1	39.6	0.7%
KYW	13.0	13.0	14.0	16.0	15.0	17.0	30.8%
LAE	14.1	15.0	16.1	16.0	15.0	14.0	-0.9%
LAW (LAM)	19.7	20.6	20.6	22.0	22.0	20.8	5.7%

District	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
MA (NH, RI)	48.9	47.4	47.1	48.3	51.0	51.2	4.6%
MD	53.1	52.8	54.5	54.3	53.8	52.6	-1.0%
ME	6.6	6.6	6.6	7.6	8.6	8.6	30.3%
MIE	42.5	44.0	42.7	40.0	44.0	42.8	0.6%
MIW	19.7	20.4	21.0	21.0	20.7	22.0	11.9%
MN	20.0	21.0	21.7	22.0	21.0	21.0	5.0%
MOE	39.0	42.0	46.0	46.0	50.0	54.0	38.5%
MOW	41.4	48.2	48.9	51.2	52.0	54.8	32.5%
MSS (MSN)	22.0	22.0	22.7	25.0	25.0	25.8	17.3%
MT	29.0	31.0	31.0	29.3	31.7	31.5	8.6%
NCE	52.0	54.0	56.7	55.4	55.8	59.1	13.6%
NCM	22.0	24.0	25.2	25.0	25.0	23.6	7.3%
NCW	38.8	38.5	39.8	40.8	45.8	51.0	31.2%
NE	25.0	25.0	27.0	25.6	25.6	27.0	8.0%
NJ	44.8	44.5	47.8	48.8	52.0	53.6	19.6%
NM	75.0	79.4	83.1	85.6	87.2	87.0	16.0%
NV	95.3	97.8	95.5	99.1	102.8	98.6	3.4%
NYN	23.3	21.5	23.0	23.0	24.0	24.6	5.8%
NYS (NYE)	98.2	98.8	101.7	103.5	101.5	102.7	4.6%
NYW	31.6	30.9	31.6	31.6	31.6	32.4	2.5%
OHN	38.0	40.0	41.0	43.0	43.7	45.0	18.4%
OHS	43.0	43.1	46.8	48.8	49.0	50.8	18.1%
OKN (OKE)	15.6	17.4	17.8	19.4	41.8	61.2	292.9%
OKW	30.3	30.0	30.0	29.0	29.0	32.2	6.2%
OR	79.8	86.1	80.8	80.7	83.5	82.7	3.6%
PAE	126.1	131.3	136.3	136.8	134.1	129.2	2.5%
PAM	41.0	44.3	45.1	47.0	48.0	47.6	16.1%
PAW	43.7	43.9	46.8	47.8	50.0	50.8	16.2%
PR	49.3	52.4	55.0	56.0	58.4	56.0	13.5%
SC	36.0	37.0	37.0	37.0	38.6	37.1	3.1%
SD (ND)	42.3	46.0	45.0	45.8	45.8	47.6	12.4%
TNE	41.3	41.8	47.5	47.5	46.7	52.5	27.3%
TNM	47.0	47.0	49.0	48.0	49.6	48.0	2.1%
TNW	21.8	27.0	28.0	28.0	27.0	29.0	33.0%
TXE	20.0	20.0	22.0	22.0	24.0	24.2	21.0%
TXN	53.0	63.5	68.0	71.1	73.1	81.2	53.2%
TXS	132.7	135.5	134.7	131.0	129.0	132.7	0.0%
TXW	116.8	132.7	135.6	132.0	130.2	130.4	11.6%

District	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
UT	40.3	41.7	43.0	42.3	44.1	44.8	11.2%
VAE	56.0	58.0	58.0	57.9	59.2	58.2	3.9%
VAW	23.0	22.0	22.0	23.0	24.3	24.0	4.3%
VI	8.0	7.7	8.0	7.4	9.0	8.7	8.7%
VT	10.9	11.1	10.8	10.8	9.8	10.0	-8.0%
WAE	36.5	36.3	38.0	38.6	37.5	38.7	6.0%
WAW	54.0	53.5	53.1	52.2	53.2	48.6	-10.0%
WIE (WIW)	21.2	22.1	23.0	23.0	24.0	23.6	10.9%
WVN	17.9	18.9	19.2	19.7	19.9	21.0	17.2%
WVS	14.3	16.0	14.0	15.0	15.0	16.0	11.7%
<b>All</b>	<b>3,579.6</b>	<b>3,722.4</b>	<b>3,800.7</b>	<b>3,818.8</b>	<b>3,954.2</b>	<b>4025.0</b>	<b>12.4%</b>
% Change from previous year		4.0%	2.1%	0.5%	3.5%	1.8%	

Note: The CHU in DE closed at the end of fiscal year 2018. Other districts served by the organization are noted in parentheses.



## Attachment 3

### Percent On-Board to Formula FTEs by District and Fiscal Year

#### A. Traditional Units

District	Fiscal Year					
	2017	2018	2019	2020	2021	2022
AK	83%	84%	91%	85%	93%	94%
ALM	101%	101%	94%	82%	85%	88%
ALN	88%	104%	92%	84%	85%	89%
ALS	76%	74%	68%	74%	75%	74%
ARE	96%	98%	95%	93%	89%	91%
ARW	97%	92%	98%	98%	93%	100%
AZ	95%	100%	99%	98%	105%	101%
CAC	95%	95%	98%	92%	95%	100%
CAE	90%	98%	93%	96%	97%	90%
CAN	102%	98%	98%	100%	100%	95%
CAS	90%	93%	93%	89%	88%	94%
CO (WY)	94%	99%	93%	94%	89%	98%
CT	89%	99%	92%	89%	94%	99%
DC	93%	88%	101%	100%	101%	94%
DE	94%	102%	137%	127%	105%	101%
FLM	95%	104%	98%	91%	94%	91%
FLN	81%	75%	86%	82%	82%	79%
FLS	94%	91%	91%	88%	90%	85%
GAM	102%	98%	99%	96%	94%	92%
GAN	77%	75%	74%	70%	82%	86%
GU	76%	63%	79%	84%	82%	82%
HI	73%	89%	98%	100%	107%	107%
IAN (IAS)	95%	94%	97%	93%	87%	83%
ID	93%	95%	97%	83%	93%	100%
ILC	93%	93%	98%	99%	89%	88%
ILN	88%	94%	91%	87%	92%	96%
ILS	91%	99%	99%	96%	88%	92%
INN	104%	96%	95%	95%	95%	92%
INS	101%	105%	100%	96%	104%	97%

District	Fiscal Year					
	2017	2018	2019	2020	2021	2022
KS	89%	97%	99%	95%	101%	93%
KYW	77%	77%	83%	86%	77%	83%
LAE	92%	98%	105%	103%	96%	90%
LAW (LAM)	93%	96%	93%	100%	93%	88%
MA/NH/RI	96%	92%	91%	93%	91%	92%
MD	96%	93%	96%	95%	94%	92%
ME	62%	65%	70%	83%	99%	94%
MIE	91%	94%	91%	88%	99%	94%
MIW	87%	89%	97%	101%	99%	99%
MN	100%	103%	96%	98%	93%	93%
MOE	96%	100%	103%	96%	101%	102%
MOW	99%	95%	93%	93%	92%	96%
MSS (MSN)	99%	99%	102%	101%	95%	94%
MT	93%	100%	100%	94%	102%	98%
NCE	95%	97%	97%	91%	87%	89%
NCM	81%	89%	93%	92%	85%	80%
NCW	81%	87%	96%	101%	102%	99%
NE	98%	98%	106%	100%	97%	98%
NJ	80%	82%	88%	83%	83%	83%
NM	95%	95%	97%	98%	95%	93%
NV	98%	96%	99%	98%	106%	96%
NYN	101%	95%	102%	98%	100%	98%
NYS (NYE)	92%	93%	92%	91%	90%	91%
NYW	92%	93%	97%	98%	101%	101%
OHN	99%	99%	108%	108%	95%	98%
OHS	97%	100%	100%	100%	101%	103%
OKN (OKE)	75%	83%	88%	96%	194%	128%
OKW	88%	92%	87%	80%	81%	89%
OR	97%	108%	102%	104%	107%	99%
PAE	95%	98%	97%	97%	99%	87%
PAM	89%	97%	96%	99%	98%	94%
PAW	92%	93%	104%	103%	106%	106%
PR	85%	85%	89%	89%	93%	89%
SC	98%	101%	101%	101%	97%	93%
SD (ND)	93%	99%	97%	99%	96%	99%
TNE	91%	88%	98%	94%	90%	99%
TNM	118%	101%	107%	107%	100%	99%

District	Fiscal Year					
	2017	2018	2019	2020	2021	2022
TNW	76%	89%	91%	87%	84%	90%
TXE	77%	83%	92%	92%	98%	99%
TXN	100%	100%	98%	100%	95%	101%
TXS	95%	97%	96%	94%	92%	95%
TXW	88%	97%	95%	91%	90%	90%
UT	108%	105%	103%	98%	98%	99%
VAE	82%	90%	90%	90%	92%	91%
VAW	96%	89%	97%	102%	101%	99%
VI	95%	85%	89%	84%	103%	100%
VT	100%	100%	104%	104%	94%	96%
WAE	100%	94%	96%	93%	90%	92%
WAW	98%	96%	96%	94%	96%	85%
WIW (WIE)	97%	98%	100%	95%	97%	91%
WVN	85%	87%	88%	90%	94%	100%
WVS	90%	103%	90%	97%	94%	101%
<b>All Traditional</b>	<b>92%</b>	<b>95%</b>	<b>95%</b>	<b>93%</b>	<b>95%</b>	<b>94%</b>

## B. Capital Habeas Units

District	Fiscal Year					
	2017	2018	2019	2020	2021	2022
ALM	94%	98%	87%	83%	89%	81%
ARE	80%	85%	77%	82%	79%	86%
AZ	90%	98%	87%	120%	114%	99%
CAC	94%	97%	96%	93%	96%	97%
CAE	89%	92%	90%	72%	79%	75%
DE	75%	33%	N/A	N/A	N/A	N/A
FLM	N/A	N/A	96%	100%	94%	83%
FLN	73%	89%	76%	67%	72%	82%
GAN	65%	68%	61%	53%	52%	52%
ID	85%	90%	92%	94%	93%	91%
INS	N/A	N/A	118%	77%	100%	108%
MOW	19%	77%	88%	91%	94%	96%
NCW	N/A	N/A	N/A	N/A	96%	108%
NV	85%	99%	89%	95%	91%	91%
OHN	90%	95%	87%	94%	86%	78%

District	Fiscal Year					
	2017	2018	2019	2020	2021	2022
OHS	90%	78%	88%	91%	83%	80%
OKW	67%	63%	66%	65%	59%	63%
PAE	86%	88%	90%	89%	84%	85%
PAM	88%	93%	90%	95%	93%	95%
PAW	94%	82%	80%	88%	98%	95%
TNE	76%	76%	78%	77%	74%	85%
TNM	86%	96%	101%	97%	102%	99%
TXN	N/A	103%	98%	86%	81%	100%
TXW	N/A	120%	128%	90%	85%	90%
<b>All CHU</b>	<b>85%</b>	<b>89%</b>	<b>89%</b>	<b>89%</b>	<b>88%</b>	<b>88%</b>

Note: The “over 100 percent” in traditional units include those that were provided with additional temporary FTE positions to address emergency situations using authority delegated by the AO director to the DSO chief. It also includes those units for which this was the first year of their having more staff on board than required by the formula and so not yet meeting the “two-years in a row” requirement for implementing either increases or reductions in approved staffing levels. See Appendix A: Defender Services Budgeting and Funding Process. Table excludes national positions and fellowships that are housed in FDOs.

## Attachment 4

### Change in Estimated Panel Attorney FTEs by Appointing Court, FY 2017–FY 2022

Court	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
<b>U.S. District Courts</b>							
AK	4.9	6.4	7.8	7.9	7.6	6.3	28.3%
ALM	4.4	4.5	3.9	1.8	2.4	2.2	-49.1%
ALN	4.0	4.4	4.7	6.0	4.4	3.5	-11.7%
ALS	3.5	3.4	4.3	4.4	4.6	4.6	29.1%
ARE	5.5	5.0	5.0	6.1	6.5	6.5	17.9%
ARW	3.2	2.7	3.3	2.9	1.7	1.1	-66.5%
AZ	69.9	69.4	65.5	55.4	45.6	37.1	-47.0%
CAC	40.8	39.1	43.5	36.9	34.2	34.0	-16.5%
CAE	20.5	26.4	23.8	25.5	20.3	16.1	-21.4%
CAN	22.9	24.6	28.0	26.9	20.8	17.5	-23.6%
CAS	52.3	63.1	67.2	55.9	43.9	34.4	-34.2%
CO	17.9	20.6	20.4	19.5	17.4	14.4	-19.6%
CT	15.8	15.1	16.6	15.4	15.2	10.7	-32.2%
DC	12.5	11.2	15.0	11.3	8.1	8.3	-33.6%
DE	1.7	1.5	2.3	2.0	2.0	2.8	69.3%
FLM	20.8	20.5	21.6	18.0	14.8	12.1	-41.7%
FLN	3.7	4.3	3.4	4.1	2.7	1.7	-55.7%
FLS	35.4	31.1	27.7	15.2	12.3	12.1	-65.7%
GAM	5.8	4.8	5.2	4.6	3.0	4.1	-29.3%
GAN	12.3	9.4	12.3	8.8	7.3	7.4	-39.7%
GAS	9.8	9.4	12.8	9.6	10.1	7.5	-23.5%
GU	0.3	1.0	0.6	1.1	1.4	0.2	-39.7%
HI	4.4	5.0	8.3	6.3	7.1	4.9	11.2%
IAN	7.1	6.9	7.4	6.7	6.8	4.6	-34.6%
IAS	7.4	8.8	10.2	9.9	10.8	6.4	-12.6%
ID	5.3	5.7	7.5	9.3	12.5	11.2	112.1%
ILC	2.7	3.9	4.9	7.8	2.8	2.9	5.0%
ILN	28.0	24.5	25.7	22.4	18.9	16.5	-41.1%
ILS	4.5	3.5	4.0	3.3	3.1	3.4	-24.7%
INN	6.1	8.9	9.1	7.8	5.8	4.9	-19.9%
INS	8.5	10.3	11.2	12.5	10.4	7.0	-18.6%

Court	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
KS	14.0	12.2	10.8	12.4	10.1	7.5	-46.5%
KYE	16.0	13.5	15.1	16.9	14.4	14.5	-9.3%
KYW	2.6	2.5	2.7	2.5	2.1	1.7	-34.3%
LAE	9.1	9.1	6.8	6.9	4.7	4.3	-52.8%
LAM	3.5	3.7	4.2	3.9	2.3	1.2	-64.5%
LAW	4.1	3.9	6.0	4.0	3.5	2.9	-28.7%
MA	27.9	26.1	22.0	21.5	16.3	12.7	-54.5%
MD	20.1	23.3	22.3	20.8	14.7	13.8	-31.4%
ME	8.0	6.6	7.2	8.4	5.4	3.6	-55.2%
MIE	30.7	30.4	28.5	22.2	14.9	15.5	-49.3%
MIW	9.5	9.8	8.1	6.7	10.5	8.0	-15.3%
MN	15.1	9.4	10.8	10.0	8.8	6.7	-55.5%
MOE	13.0	10.9	11.5	11.4	10.5	8.5	-34.6%
MOW	17.5	14.5	15.4	14.0	10.4	10.8	-38.3%
MP	0.9	0.9	0.6	0.5	1.6	0.8	-14.3%
MSN	2.5	2.1	2.2	1.4	0.8	0.9	-63.2%
MSS	4.5	3.6	3.9	4.4	2.4	2.8	-37.6%
MT	7.6	6.5	7.4	8.3	5.9	5.2	-31.3%
NCE	15.4	13.2	15.9	15.5	13.5	12.0	-21.9%
NCM	7.2	6.8	7.7	8.4	6.7	6.2	-14.4%
NCW	13.7	14.6	9.8	9.7	6.9	4.9	-64.3%
ND	8.0	8.5	7.7	7.3	7.9	8.8	9.5%
NE	6.6	5.6	6.2	5.8	4.1	4.1	-37.6%
NH	3.4	4.5	5.6	5.9	3.7	3.1	-9.1%
NJ	24.3	23.0	19.3	19.2	18.7	12.4	-48.8%
NM	29.8	40.9	27.5	23.5	18.2	13.9	-53.5%
NV	16.4	16.3	18.5	16.9	9.5	8.3	-49.0%
NYE	27.9	23.8	26.5	26.8	21.4	18.7	-33.0%
NYN	4.7	6.1	5.4	4.8	3.1	3.6	-22.8%
NYS	86.5	84.4	83.7	71.0	53.0	43.0	-50.3%
NYW	18.6	15.6	15.3	11.7	9.5	6.2	-66.9%
OHN	12.8	16.2	17.7	15.4	15.1	16.7	30.3%
OHS	12.8	11.3	13.2	13.0	9.9	8.2	-35.7%
OKE	1.4	1.8	2.6	3.4	6.7	5.4	292.3%
OKN	3.8	4.4	6.1	7.4	11.8	9.5	149.8%
OKW	7.7	8.4	11.0	11.7	7.2	6.1	-20.2%
OR	23.7	19.7	21.7	21.8	19.5	17.3	-26.8%
PAE	22.9	16.3	21.3	13.1	9.7	7.2	-68.7%

Court	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	% Change
PAM	12.4	12.8	12.9	11.5	7.6	8.3	-32.7%
PAW	9.3	8.6	10.3	13.6	10.5	8.9	-4.7%
PR	22.3	26.2	22.1	16.0	12.7	7.4	-66.7%
RI	1.5	1.7	2.2	1.8	1.1	1.4	-9.3%
SC	15.6	13.9	12.3	9.4	9.5	7.2	-53.5%
SD	9.6	9.5	10.9	9.6	9.3	7.6	-21.3%
TNE	13.5	11.5	16.3	17.4	12.1	11.2	-17.5%
TNM	16.7	18.6	18.8	17.2	13.4	13.2	-21.1%
TNW	11.5	14.6	11.6	7.8	4.9	5.2	-55.1%
TXE	12.6	15.1	10.2	9.9	7.9	6.9	-45.6%
TXN	27.2	21.3	21.7	21.0	19.3	15.0	-45.1%
TXS	31.3	28.7	32.3	30.5	29.3	28.7	-8.3%
TXW	37.0	41.5	47.3	43.0	35.1	30.3	-18.0%
UT	9.6	10.4	10.4	8.3	7.4	4.8	-50.2%
VAE	22.4	24.8	20.9	21.6	18.9	19.4	-13.2%
VAW	7.4	7.9	16.4	12.2	4.9	3.8	-48.5%
VI	3.7	3.1	2.5	2.5	2.3	1.7	-55.6%
VT	9.7	7.5	8.2	7.6	5.1	3.4	-65.3%
WAE	7.3	8.4	8.4	6.9	4.6	4.2	-42.4%
WAW	12.1	13.2	12.2	11.5	14.6	8.4	-30.4%
WIE	8.7	6.2	6.2	6.6	5.1	3.5	-59.7%
WIW	2.3	2.6	3.5	2.2	2.6	2.5	7.8%
WVN	4.3	6.1	7.1	5.7	7.8	5.0	14.9%
WVS	4.9	5.9	6.5	5.8	3.3	4.0	-17.9%
WY	3.0	3.7	3.4	3.1	3.4	2.8	-4.3%
<b>All District Courts</b>	<b>1,311.8</b>	<b>1,309.9</b>	<b>1,346.1</b>	<b>1,216.5</b>	<b>1,012.4</b>	<b>858.2</b>	<b>-34.6%</b>
<b>Other Appointing Courts</b>							
Supreme Court	0.0	0.1	0.4	0.0	0.0	0.0	0.0%
DC Circuit	3.3	3.3	1.9	1.2	0.8	0.6	-81.1%
1st Circuit	12.4	11.1	8.6	9.8	7.6	5.5	-55.6%
2nd Circuit	15.0	16.0	16.6	19.7	12.2	7.9	-47.6%
3rd Circuit	5.8	4.0	4.0	5.6	4.4	2.1	-62.8%
4th Circuit	11.3	11.2	12.2	11.9	9.3	7.4	-34.3%
5th Circuit	15.3	13.0	13.9	14.3	11.4	12.4	-18.7%
6th Circuit	12.0	12.5	11.6	11.7	9.0	6.6	-44.9%
7th Circuit	5.5	6.2	2.5	2.9	1.7	2.2	-59.8%
8th Circuit	7.4	8.4	6.8	8.0	6.2	4.6	-37.8%

<b>Court</b>	<b>FY 2017</b>	<b>FY 2018</b>	<b>FY 2019</b>	<b>FY 2020</b>	<b>FY 2021</b>	<b>FY 2022</b>	<b>% Change</b>
9th Circuit	39.5	39.3	33.4	29.4	21.0	15.4	-61.0%
10th Circuit	5.1	3.9	4.0	4.7	3.7	1.9	-63.0%
11th Circuit	19.0	19.5	14.5	16.3	13.8	7.8	-59.2%
<b>All Other Courts:</b>	<b>151.7</b>	<b>148.8</b>	<b>130.2</b>	<b>135.4</b>	<b>101.1</b>	<b>74.5</b>	<b>-50.9%</b>
<b>All Courts</b>	<b>1,463.5</b>	<b>1,458.7</b>	<b>1,476.3</b>	<b>1,351.9</b>	<b>1,113.5</b>	<b>932.7</b>	<b>-36.3%</b>
<b>% Change from Prior Year</b>		<b>-0.3%</b>	<b>1.2%</b>	<b>-8.4%</b>	<b>-17.6%</b>	<b>-16.2%</b>	



## Attachment 5 Total FDO Litigating Attorney and Panel Attorney FTEs and Percentage Provided by Panel Attorneys

Federal District Courts FY 2017–FY 2022

District	All FDO and Estimated Panel Attorney Litigating Attorney FTEs							% Change	Percent Panel Attorney FTEs						Point Change
	2017	2018	2019	2020	2021	2022	2017		2018	2019	2020	2021	2022		
AK	10.9	12.1	13.8	14.9	16.6	15.3	40.2%	45.2%	53.0%	56.7%	52.9%	46.1%	41.4%	-3.8%	
ALM	17.4	17.5	17.9	15.6	16.4	16.2	-6.5%	25.1%	25.6%	22.0%	11.2%	14.8%	13.7%	-11.4%	
ALN	11.7	14.4	16.8	19.0	17.4	15.7	34.8%	34.2%	30.5%	28.2%	31.5%	25.4%	22.4%	-11.8%	
ALS	10.5	11.4	12.3	11.4	12.1	12.6	19.3%	33.6%	30.0%	34.8%	38.6%	38.2%	36.4%	2.8%	
ARE	16.5	17.0	16.0	20.1	20.5	19.7	19.3%	33.4%	29.2%	31.0%	30.4%	31.8%	33.0%	-0.4%	
ARW	9.2	9.7	10.3	9.9	8.7	9.1	-1.7%	35.1%	27.8%	32.0%	29.0%	19.8%	12.0%	-23.2%	
AZ	140.6	147.7	140.7	135.9	134.7	117.7	-16.3%	49.7%	47.0%	46.5%	40.8%	33.9%	31.5%	-18.2%	
CAC	115.4	117.4	129.4	121.8	125.7	123.4	6.9%	35.3%	33.3%	33.6%	30.3%	27.2%	27.6%	-7.7%	
CAE	53.8	60.3	57.8	59.5	55.3	48.1	-10.5%	38.1%	43.7%	41.2%	42.9%	36.7%	33.5%	-4.6%	
CAN	50.0	54.4	59.2	57.7	50.9	45.7	-8.7%	45.8%	45.2%	47.4%	46.6%	40.8%	38.3%	-7.5%	
CAS	111.5	125.4	127.5	118.2	106.2	100.1	-10.3%	46.9%	50.3%	52.7%	47.3%	41.4%	34.4%	-12.5%	
CO (WY)	45.2	51.6	50.4	48.6	45.4	45.4	0.6%	46.2%	47.2%	47.1%	46.5%	45.7%	37.9%	-8.3%	
CT	23.8	24.9	26.9	25.4	26.8	22.5	-5.2%	66.4%	60.5%	61.6%	60.6%	56.8%	47.5%	-18.9%	
DC	26.5	24.3	30.4	27.5	25.0	23.1	-12.7%	47.2%	46.3%	49.2%	41.1%	32.5%	35.9%	-11.3%	
DE	9.8	8.5	9.3	9.0	8.0	7.8	-20.4%	17.0%	17.7%	24.5%	22.4%	25.2%	36.2%	19.2%	
FLM	53.8	59.8	66.3	60.6	56.8	55.5	3.2%	38.6%	34.3%	32.7%	29.7%	26.0%	21.8%	-16.8%	
FLN	15.7	16.3	15.4	16.1	15.7	14.7	-6.8%	23.7%	26.5%	22.0%	25.5%	17.0%	11.3%	-12.4%	
FLS	83.0	80.2	79.1	63.8	63.3	60.1	-27.6%	42.6%	38.7%	35.1%	23.8%	19.4%	20.2%	-22.4%	

District	All FDO and Estimated Panel Attorney Litigating Attorney FTEs						% Change	Percent Panel Attorney FTEs						Point Change
	2017	2018	2019	2020	2021	2022		2017	2018	2019	2020	2021	2022	
GAM	14.8	13.8	14.2	13.6	13.0	14.1	-4.7%	39.1%	34.8%	36.7%	33.8%	22.9%	29.0%	-10.1%
GAN	39.3	35.9	41.8	38.3	37.8	38.3	-2.5%	31.3%	26.2%	29.5%	23.0%	19.2%	19.4%	-11.9%
GAS	9.8	9.4	12.8	9.6	10.1	7.5	-23.5%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	0.0%
GU	2.3	3.0	3.2	4.1	4.4	3.2	38.6%	12.7%	33.0%	18.3%	26.5%	31.6%	5.5%	-7.2%
HI	9.8	12.0	15.3	13.3	15.0	12.9	32.4%	45.5%	41.7%	54.3%	47.3%	47.5%	38.2%	-7.3%
IAN (IAS)	26.4	28.7	31.6	30.7	31.6	26.0	-1.4%	54.6%	54.7%	55.8%	54.3%	55.7%	42.4%	-12.2%
ID	15.3	16.7	20.5	21.3	25.5	25.2	65.0%	34.6%	34.2%	36.5%	43.8%	49.1%	44.5%	9.9%
ILC	14.7	15.9	16.9	19.8	14.8	15.9	7.7%	18.5%	24.5%	29.1%	39.3%	18.9%	18.0%	-0.5%
ILN	48.0	45.0	45.7	40.3	39.9	38.4	-20.0%	58.3%	54.4%	56.2%	55.7%	47.3%	42.9%	-15.4%
ILS	12.5	11.5	13.7	12.3	12.1	13.0	3.9%	36.1%	30.6%	28.8%	26.9%	25.9%	26.2%	-9.9%
INN	13.1	14.9	16.1	14.8	12.8	12.1	-7.5%	46.5%	59.9%	56.5%	52.7%	45.1%	40.2%	-6.2%
INS	15.5	18.3	22.2	22.5	22.4	20.5	32.1%	55.0%	56.3%	50.4%	55.5%	46.4%	33.9%	-21.1%
KS	31.0	29.2	27.8	28.5	28.1	24.5	-21.0%	45.1%	41.9%	38.9%	43.4%	35.9%	30.6%	-14.6%
KYE	16.0	13.5	15.1	16.9	14.4	14.5	-9.3%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	0.0%
KYW	7.6	7.5	8.7	9.5	9.1	8.7	14.7%	34.0%	33.1%	31.4%	26.2%	22.7%	19.5%	-14.5%
LAE	16.5	17.1	14.8	14.5	12.7	12.3	-25.3%	55.5%	53.3%	46.0%	47.4%	36.9%	35.0%	-20.5%
LAW (LAM)	16.3	16.7	19.2	18.8	16.8	15.0	-8.0%	46.7%	46.0%	53.0%	41.6%	34.5%	27.8%	-18.8%
MA/NH/RI	55.8	53.6	52.8	53.2	45.1	41.2	-26.2%	58.8%	60.1%	56.5%	54.9%	46.8%	41.7%	-17.1%
MD	43.3	52.6	53.5	51.0	46.5	46.4	7.1%	46.4%	44.4%	41.7%	40.7%	31.7%	29.7%	-16.7%
ME	11.0	9.6	10.2	12.4	9.4	7.6	-31.1%	72.7%	68.6%	70.7%	67.8%	57.3%	47.3%	-25.5%
MIE	52.7	51.4	48.5	42.2	36.9	35.3	-33.0%	58.2%	59.1%	58.8%	52.6%	40.5%	44.0%	-14.2%
MIW	16.5	17.3	16.1	14.7	18.5	16.0	-2.7%	57.5%	56.8%	50.2%	45.6%	56.7%	50.0%	-7.4%
MN	23.1	18.4	22.5	22.0	19.8	17.7	-23.3%	65.4%	51.1%	48.1%	45.5%	44.4%	37.9%	-27.5%
MOE	31.0	32.6	36.5	37.4	38.5	39.5	27.5%	41.9%	33.6%	31.5%	30.5%	27.2%	21.5%	-20.4%
MOW	36.8	38.1	39.7	39.6	36.0	38.0	3.2%	47.6%	38.1%	38.8%	35.3%	28.8%	28.5%	-19.1%

District	All FDO and Estimated Panel Attorney Litigating Attorney FTEs						% Change	Percent Panel Attorney FTEs						Point Change
	2017	2018	2019	2020	2021	2022		2017	2018	2019	2020	2021	2022	
MP	0.9	0.9	0.6	0.5	1.6	0.8	-14.3%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	0.0%
MSS (MSN)	16.0	14.6	15.0	15.8	13.1	13.7	-14.3%	43.9%	38.5%	40.2%	36.8%	23.9%	27.3%	-16.6%
MT	19.6	19.5	20.4	20.8	18.9	18.2	-7.0%	38.7%	33.3%	36.4%	39.9%	31.3%	28.6%	-10.1%
NCE	38.4	37.2	43.6	41.9	40.7	40.9	6.5%	40.2%	35.5%	36.4%	37.0%	33.2%	29.4%	-10.7%
NCM	17.2	17.8	19.7	20.4	18.7	16.8	-2.5%	41.9%	38.3%	39.1%	41.3%	36.0%	36.8%	-5.1%
NCW	29.5	32.0	27.6	28.4	28.6	27.7	-6.2%	46.6%	45.6%	35.5%	34.0%	24.0%	17.8%	-28.9%
NE	16.6	15.6	20.2	18.4	16.1	16.1	-3.0%	39.9%	35.9%	30.7%	31.5%	25.6%	25.7%	-14.2%
NJ	45.1	50.1	48.1	48.0	49.5	41.8	-7.2%	53.9%	45.9%	40.1%	40.0%	37.8%	29.7%	-24.1%
NM	63.8	76.0	63.7	60.1	54.9	49.9	-21.9%	46.7%	53.9%	43.2%	39.1%	33.2%	27.8%	-18.9%
NV	62.4	64.6	66.6	67.9	66.1	63.7	2.1%	26.2%	25.2%	27.7%	24.9%	14.3%	13.1%	-13.1%
NYN	17.7	18.1	18.4	17.8	16.1	18.2	3.1%	26.4%	33.9%	29.4%	27.1%	19.3%	19.8%	-6.6%
NYS (NYE)	164.1	157.5	161.3	150.8	126.2	113.9	-30.6%	69.7%	68.7%	68.4%	64.8%	58.9%	54.1%	-15.6%
NYW	34.6	31.6	31.3	27.7	25.5	22.2	-35.9%	53.7%	49.4%	48.9%	42.2%	37.2%	27.8%	-26.0%
OHN	29.5	32.2	33.7	32.4	32.1	33.7	14.3%	43.4%	50.3%	52.5%	47.5%	47.1%	49.5%	6.1%
OHS	30.8	29.3	34.2	35.0	31.9	32.8	6.6%	41.5%	38.6%	38.5%	37.1%	31.0%	25.1%	-16.5%
OKN (OKE)	13.3	15.2	17.1	19.9	34.5	36.1	170.3%	38.8%	40.9%	51.2%	54.7%	53.6%	41.2%	2.5%
OKW	20.7	20.4	24.0	24.7	18.2	19.3	-6.5%	37.1%	41.2%	45.9%	47.4%	39.6%	31.6%	-5.4%
OR	48.5	46.9	47.9	49.3	48.2	45.2	-6.9%	48.8%	42.1%	45.3%	44.2%	40.5%	38.4%	-10.4%
PAE	72.9	67.3	78.7	74.1	73.5	66.8	-8.4%	31.4%	24.2%	27.1%	17.7%	13.1%	10.7%	-20.7%
PAM	27.9	29.8	29.6	28.5	24.6	24.3	-12.7%	44.4%	42.9%	43.8%	40.4%	30.8%	34.2%	-10.2%
PAW	29.3	27.6	30.8	33.6	33.5	30.9	5.3%	31.8%	31.2%	33.5%	40.6%	31.3%	28.7%	-3.0%
PR	43.6	45.2	43.2	38.0	34.7	29.4	-32.5%	51.1%	58.0%	51.3%	42.1%	36.6%	25.3%	-25.9%
SC	34.6	32.9	31.3	29.4	29.5	28.2	-18.3%	45.0%	42.2%	39.4%	32.1%	32.3%	25.7%	-19.4%
SD (ND)	32.7	38.0	37.6	36.9	37.2	39.0	19.3%	54.1%	47.4%	49.5%	45.7%	46.3%	42.0%	-12.1%
TNE	30.4	28.5	37.3	38.4	33.3	35.2	15.5%	44.4%	40.6%	43.7%	45.3%	36.2%	31.7%	-12.7%

District	All FDO and Estimated Panel Attorney Litigating Attorney FTEs						% Change	Percent Panel Attorney FTEs						Point Change
	2017	2018	2019	2020	2021	2022		2017	2018	2019	2020	2021	2022	
TNM	34.7	35.6	36.8	35.2	31.4	31.2	-10.2%	48.1%	52.3%	51.0%	48.9%	42.6%	42.3%	-5.9%
TNW	21.5	26.6	23.6	20.8	16.9	19.0	-11.7%	53.4%	54.8%	49.0%	37.6%	28.9%	27.2%	-26.2%
TXE	20.6	23.1	20.2	19.9	18.9	17.5	-15.3%	61.2%	65.4%	50.6%	49.7%	41.7%	39.3%	-21.9%
TXN	56.6	54.8	56.7	60.0	58.6	56.0	-1.1%	48.1%	38.8%	38.2%	35.0%	32.9%	26.7%	-21.4%
TXS	95.2	93.0	96.6	96.5	92.3	90.5	-5.0%	32.9%	30.8%	33.5%	31.6%	31.7%	31.7%	-1.1%
TXW	85.7	97.5	102.0	99.0	94.1	88.5	3.3%	43.1%	42.6%	46.4%	43.4%	37.3%	34.3%	-8.9%
UT	28.3	28.0	28.7	26.6	27.7	24.4	-13.9%	33.7%	37.2%	36.4%	31.2%	26.8%	19.5%	-14.2%
VAE	49.6	54.8	51.9	52.6	48.8	51.4	3.7%	45.2%	45.3%	40.3%	41.0%	38.8%	37.8%	-7.4%
VAW	18.4	17.9	26.4	23.2	16.1	15.8	-14.0%	40.1%	44.1%	62.0%	52.7%	30.1%	24.0%	-16.1%
VI	7.7	7.4	6.5	6.8	7.3	6.7	-14.0%	48.4%	41.8%	38.2%	36.2%	31.7%	25.0%	-23.4%
VT	14.7	12.5	13.2	12.6	10.1	8.4	-43.0%	65.9%	59.8%	62.2%	60.4%	50.6%	40.2%	-25.7%
WAE	21.8	21.7	23.4	22.9	19.4	19.9	-8.9%	33.5%	38.7%	35.8%	30.1%	23.7%	21.2%	-12.3%
WAW	33.1	33.2	31.6	31.5	34.8	24.9	-24.8%	36.5%	39.8%	38.8%	36.6%	41.9%	33.8%	-2.7%
WIW (WIE)	23.0	20.8	21.6	20.8	20.7	19.0	-17.4%	47.8%	42.4%	44.5%	42.4%	37.1%	31.5%	-16.2%
WVN	11.2	14.3	15.9	14.3	16.7	15.0	33.2%	38.7%	42.9%	44.9%	39.6%	46.9%	33.4%	-5.3%
WVS	11.2	13.9	12.5	12.8	10.3	12.0	7.1%	43.5%	42.5%	51.9%	45.5%	31.8%	33.4%	-10.2%
<b>ALL</b>	<b>2,857.7</b>	<b>2,939.7</b>	<b>3,048.1</b>	<b>2,950.6</b>	<b>2,808.1</b>	<b>2,661.2</b>	<b>-6.9%</b>	<b>45.9%</b>	<b>44.6%</b>	<b>44.2%</b>	<b>41.2%</b>	<b>36.1%</b>	<b>32.3%</b>	<b>-13.7%</b>
% change prior year		2.9%	3.7%	-3.2%	-4.8%	-5.2%			1.3%	-0.4%	-2.9%	-5.2%	-3.8%	

# Appendix C

## District Court CJA Plan Analysis

### Introduction

Under the Criminal Justice Act (CJA), district courts are to “place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation.”<sup>1310</sup> The legislation includes specific requirements for administration of the CJA (such as maximum rates and the types of representations eligible for CJA appointment), and the model plan, included in the *Guide to Judiciary Policy*,<sup>1311</sup> provides a template for courts to use in creating their plans. Yet, within these parameters, administration of the CJA is inherently local and varies. District courts create, and judicial councils approve, CJA plans, and approved plans are publicly available.

In early 2020, the FJC research team undertook an analysis of district CJA plans to 1) explore the variation in districts’ policies for implementing the CJA and 2) begin to understand the policies affecting CJA administration across the district courts. We reevaluated the information from the district plans at the end of FY 2021. This analysis compares district plans in effect at the start of FY 2017 to those in place at the end of FY 2021, with early plans providing baseline policies for CJA administration and later plans showing the changes made after the recommendations in the report of the Ad Hoc Committee to Evaluate the Criminal Justice Act (hereinafter the “Cardone Report”) were adopted by the Judicial Conference of the United States (JCUS). Other changes may still be in progress, as revision of district CJA plans continued after our analysis period concluded.

The plans detail court policies for how the CJA functions in the district. Though the defense function as described in the CJA plan may not reflect exactly how it functions in practice,<sup>1312</sup> the plans provide a starting point for understanding how the CJA is expected to work in each district, how the districts vary, whether changes to policy were made over time to implement the adopted recommendations, and the current state of district court plan compliance with the recommendations. This analysis reflects the changes made to district CJA plans between FY 2017 and FY 2021, comparing the first group of plans and the last. We did not code any plan modifications in the intervening period between FY 2017 and FY 2021 (i.e., 2018, 2019, and 2020) if they were overwritten by a later revision.

After gathering all district CJA plans in effect, we developed and executed a coding scheme to capture the major elements of the CJA plans with respect to the relevant adopted recommendations.

The coding scheme can be grouped into the following topics:

- panel administration
- compensation
- capital representation
- federal defender organization responsibilities<sup>1313</sup>

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1310. 18 U.S.C. § 3006(a).

1311. *Guide to Judiciary Policy*, Vol. 7A (“the *Guide*”) details the guidelines for administering the CJA, including providing a model plan in the appendix for districts to use as a template for their own CJA plans, should they choose to do so.

1312. Some interviews we conducted with judges and other stakeholders made clear that variations from the exact written word are fairly common, though the degree of this variation is inconsistent. The results of our interviews are described elsewhere in this report.

1313. In this report, federal defender organizations (FDOs) refer to both federal public defender organizations (FPDOs) and community defender organizations (CDOs).

Within each topic, several specific items were coded. For example, when looking at the provisions of the plan related to panel administration, we coded whether judges were members of the CJA committee, if there were divisional CJA committees, who maintained the panel list, and what, if any, were the training and experience requirements for panel membership. Examining these specific provisions allows us to address how courts responded to the recommended changes to panel administration from the Cardone Report, such as moving panel management from courts to CJA supervising attorneys and including training requirements to serve on CJA panels. The methodology section and Attachments 1 through 3 describe in detail the data elements coded, coding rules, and intercoder reliability estimates for each element and district plan.

Discussed below are the findings from our analysis of CJA plans in effect in each district at the start and end of the study period, sorted by the four topic areas.<sup>1314</sup> Before discussing each topic area, we review the age of the CJA plans, as this is relevant to Recommendation 19 and likely affects other topic areas and opportunities to implement the adopted recommendations.

## Age of CJA Plans

Districts have long been required to have a CJA plan, a policy contemplated since before the CJA itself was enacted.<sup>1315</sup> The plans are created by districts (sometimes by a committee of the court, other times by the entire court) and sent to their respective circuit judicial councils for approval. As shown by Figure 1, the age of district CJA plans varies.<sup>1316</sup> At the start of FY 2017, the oldest district CJA plan was adopted in 1985. By the end of FY 2021, the oldest CJA plan was adopted in 1999. The average age of district plans decreased between FY 2017 and FY 2021, meaning more district court plans were updated, so they were, on average, newer in FY 2021 than they were in FY 2017. In FY 2017, the average age of plans was 6.4 years, while in FY 2021 the average age was 3.9 years.

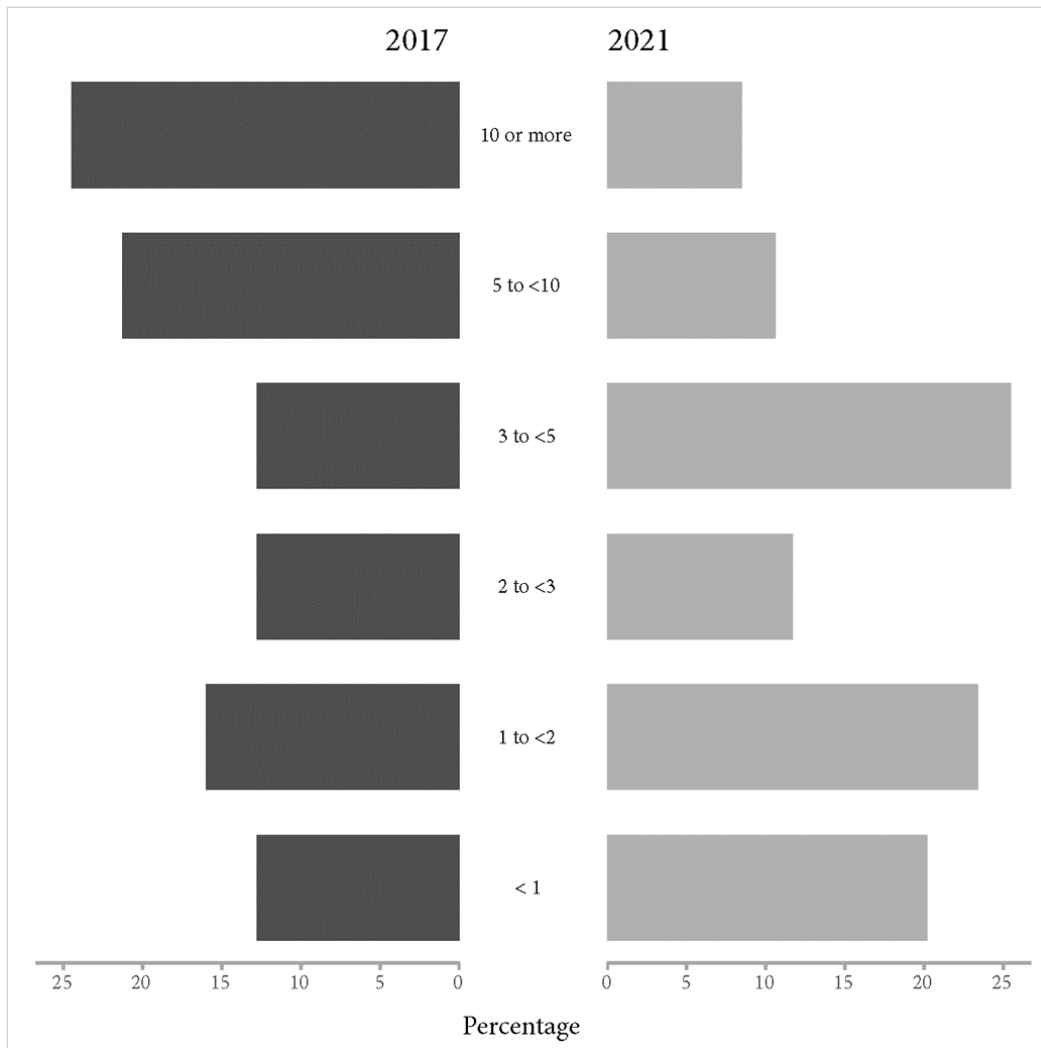
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1314. This analysis examines the 188 plans in effect during our review period, comparing plans from the beginning of FY 2017 to those at the end of FY 2021. The differences between plans varied by court. Some courts made wholesale revisions, while others made modest changes. One plan, though reviewed by the district, did not appear to change at all between versions other than the date adopted. Eighteen courts made no changes to their CJA plan during this period. The process for revising their CJA plans was a topic discussed in our interviews with court stakeholders and is reported elsewhere.

1315. The requirement of a district CJA plan was discussed in the Report of the Attorney General's Committee on Poverty and the Administration of the Federal Criminal Justice (the Allen Report) in 1963 and has existed since the CJA was passed in 1964. See 18 U.S.C. § 3006A and The Allen Committee, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, submitted to the Attorney General on February 25, 1963.

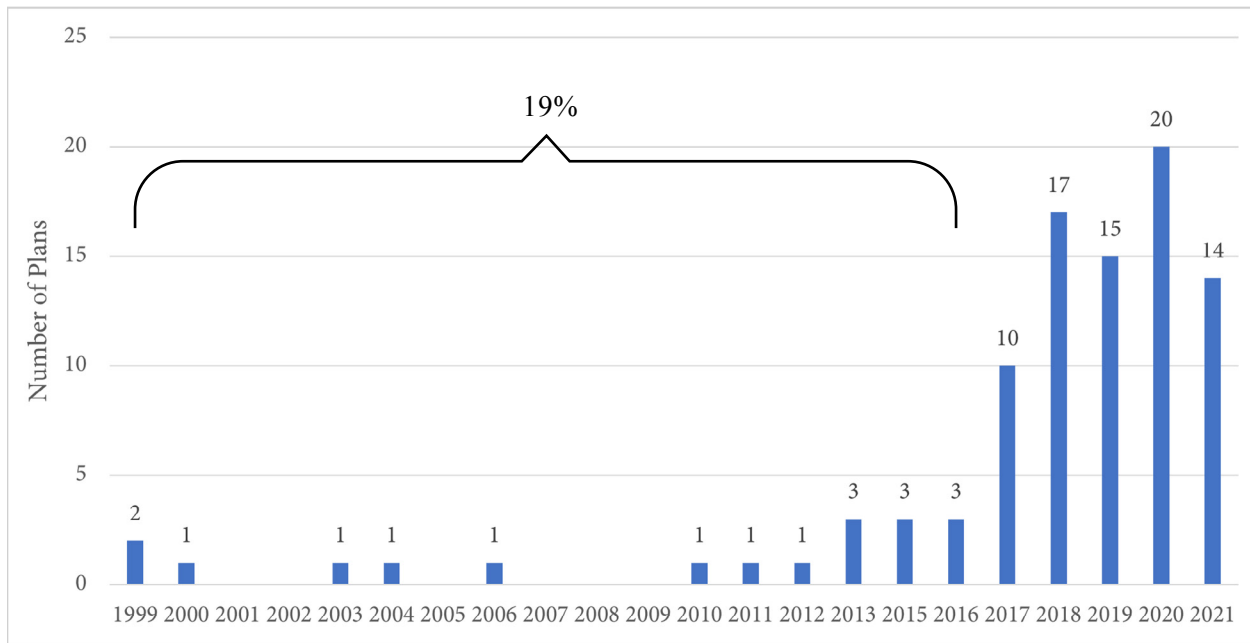
1316. There were four plans for which we know the year of adoption but not the specific date. A date of June 15 of the plan year was used for the "plan age" calculation.

Figure 1. Percentage of Plan by Number of Years Old.



Looking at the most recent district plans collectively, Figure 2 shows the year in which the CJA plan in effect in FY 2021 was adopted.

Figure 2. Year of Adoption for District CJA Plan in Effect at the End of FY 2021.



Taken together, Figures 1 and 2 highlight two related points about district CJA plans. Most districts (81%) have a CJA plan that was updated since the beginning of our study period in FY 2017, meaning revisions could reflect the adopted recommendations because revisions were made after publication of the Cardone Report and may have been made because of it. While most districts updated their plans during the 2017 to 2021 study period, 19% of districts did not. Older plans may not comply with the 2016 revised model plan or the 2018 and 2019 adopted recommendations from the Cardone Report.

## Panel Administration

**Recommendation 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.

With the adopted recommendations as guidance, we coded the presence of district or division CJA committees, if judges serve on those committees, who was responsible for administering the committee and the panel, who maintains the panel list, the number or percentage of cases panel attorneys are to be assigned, training requirements for appointment to and retention on the panel, and provisions for a mentorship program. CJA plans differed substantially on these elements.

- 98% of districts have a CJA committee or a supervising attorney (or both).
  - 72% of FY 2021 plans listed judge members of the CJA committee, an increase from 66% in FY 2017.
- Both the federal defender organization (FDO) and the clerk/court are more likely to be assigned panel administration responsibilities under FY 2021 plans than in FY 2017 plans.

Table 1 below lists the different types of administrative structures districts created to assist with management of the CJA.



**Table 1.** Administrative Structures in CJA Plans (by frequency).

Administrative Structure	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
District CJA Committee Only	69	73.4%	72	76.6%
Both District and Divisional Committees	6	6.4%	9	9.6%
Both District Committee and CJA Supervising Attorney	1	1.1%	4	4.3%
Divisional CJA Committee Only	13	13.8%	6	6.4%
District Committee, Divisional Committees, and CJA Supervising Attorney	0	0%	1	1.1%
<i>No Administrative Structure</i>	5	5.3%	2	2.1%
<b>Total</b>	<b>94</b>	<b>100%</b>	<b>94</b>	<b>100%</b>

Note: In some courts, CJA administrative responsibilities are given to CJA resource counsel or a CJA panel administrator. For simplicity, the table refers to all such positions as CJA supervising attorneys.

District plans generally favored creation of a CJA committee over other administrative structures, and this was true both at the beginning and end of the study period. Six districts revised plans to place administration exclusively within the domain of a CJA committee (either district or district and divisional), and three more district plans place administration with a CJA committee working with a CJA supervising attorney.

The adopted recommendation also specifically states that panel administration should incorporate judicial input.<sup>1317</sup> As shown in Table 2, nearly three-quarters of the plans called for judicial membership on CJA committees. Judicial CJA Committee membership is more common in the newer plans (72%) than the older plans (66%), but some districts with recently revised plans have chosen not to include judges on their CJA committees.

**Table 2.** Judicial Participation on CJA Committees.

Judicial Involvement in CJA Committee	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Judge Members	62	66.0%	68	72.3%
No Judge Members	19	20.2%	19	20.2%
<i>Membership Not Addressed</i>	8	8.5%	5	5.3%
<i>Not Applicable/No Committee</i>	5	5.3%	2	2.1%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

The adopted recommendation also specifies that administration involves “the selection, appointment, retention, and removal of panel attorneys.” CJA plans often split these tasks into two different

<sup>1317</sup> The Cardone Report details issues of judicial participation on CJA committees, noting “[w]itnesses agreed that judicial input, rather than judicial control, is key to the success of CJA panel management,” at p. 75. The adopted recommendation also references “judicial input.” The role of judges in the selection of attorneys for the panel is discussed elsewhere in this analysis.

aspects of administration: who or what administers the CJA committee, and who or what administers the panel.<sup>1318</sup> Administration of the CJA committee was described in plans as staffing the committee, while administering the panel was an affirmative designation of who or what was ultimately responsible for managing the operations of the panel (making assignments, reviewing applications for membership, etc.).<sup>1319</sup>

Table 3 details the entity responsible for staffing the CJA committee, listed in CJA plans as an ex-officio member or formally assigned as secretary or record keeper for the committee. As the table shows, many plans are unclear on where the responsibility lies.

Table 3. CJA Committee Administrator (by frequency).

Administrator(s)	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Clerk/Clerk's Office/Court	29	30.9%	41	43.6%
Federal Defender/FD Staff	17	18.1%	20	21.3%
District Panel Rep/CJA Coordinating Attorney/ CJA Supervising Attorney	3	3.2%	2	2.1%
Clerk and Federal Defender	0	0.0%	1	1.1%
<i>No Mention</i>	40	42.6%	28	29.8%
<i>Not Applicable/No Committee</i>	5	5.3%	2	2.1%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Administration of the CJA panel speaks more to the day-to-day business of the CJA, including case assignment. Table 4 below lists the entities responsible for administration of each district's CJA panel.

1318. Though the plans frequently discuss the process by which attorneys could be removed from CJA panels, the criteria for doing so, apart from ethics violations leading to disbarment, were not discussed. District interviews included questions about the criteria for removing attorneys from the district CJA panel to identify other reasons for removing attorneys from panel lists. These results are reported elsewhere. See Technical Appendix 3: Project Interviews.

1319. In our analysis, administrative tasks were often broken up across several entities in CJA plans, and, occasionally, multiple groups were assigned the same task, such as maintaining the panel list. When plans assigned tasks to multiple entities, each was counted.

**Table 4.** CJA Panel Administrator (by frequency).

Administrator(s)	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Clerk/Clerk's Office/Court	27	28.7%	35	37.2%
Federal Defender/FD Staff	27	28.7%	31	33.0%
Panel Selection Committee/CJA Committee/ Board	10	10.6%	6	6.4%
Magistrate Judge(s)	1	1.1%	1	1.1%
Federal Defender and Court/Chief Judge	0	0.0%	2	2.1%
Clerk and CJA Supervising Attorney	0	0.0%	1	1.1%
CJA Coordinating Attorney/CJA Supervising Attorney/ CJA Panel Administrator/ Other	5	5.3%	7	7.4%
Varies by Division <sup>1320</sup>	1	1.1%	1	1.1%
<i>No Mention</i>	23	24.5%	10	10.6%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

By the end of FY 2021, more plans specified an entity as having responsibility for panel management, with the percentage of assignment to both the clerk/court and the FDO increasing during the study period, perhaps in response to changes in the model plan.<sup>1321</sup>

District CJA plans also varied as to who was designated the administrative responsibility of maintaining the panel list.

**Table 5.** CJA Panel List Administration (by frequency).

Administrator(s)	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Clerk/Clerk's Office/Court	47	50.0%	44	46.8%
Federal Defender/FD Staff	36	38.3%	40	42.6%
CJA Panel Administrator/CJA Coordinator/ CJA Supervising Atty.	3	3.2%	5	5.3%
Court and Federal Defender	1	1.1%	0	0.0%
Clerk and Federal Defender	1	1.1%	1	1.1%
Varies by Division	1	1.1%	1	1.1%
<i>No Mention</i>	5	5.3%	3	3.2%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Most district plans tasked either the clerk/court or the FDO, or both, with maintaining the panel list.

1320. The Southern District of Indiana's plan splits the administration of the panel by division, with the federal defender responsible in the Indianapolis, Terre Haute, and New Albany divisions and the court responsible in the Evansville division.

1321. The 2016 revision to the model plan included a section (VI.B) assigning administration of the panel to a specific entity.

**Recommendation 19:** All districts must develop, regularly review and update, and adhere to a CJA plan as per Judicial Conference policy. Reference should be made to the most recent model plan and best practices. The plan should include:

- a. Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
- b. A training requirement to be appointed to and then remain on the panel.
- c. A mentoring program to increase the pool of qualified candidates.

Every district meets the requirement of having a CJA plan. But Recommendation 19 says districts “must develop, regularly review and update, and adhere to a CJA plan as per JCUS policy” and “[r]eference should be made to the most recent model plan and best practices.” The model plan says review should occur, “every five years to ensure compliance with applicable statutory authorities, CJA Guidelines and other relevant Judicial Conference policies.”<sup>1322</sup>

- Seventy-six districts (81%) updated their plans since the start of FY 2017.
- Eighteen districts (19%) have not updated their plans since before the start of FY 2017.
  - Plans that had not been updated were between six and twenty-two years old.
- Eighty percent of current plans included a requirement that panel attorneys be appointed to a sufficient number of cases to remain proficient—similar to FY 2017 (77%).
- Sixty-one percent of plans included a training requirement (discussed more below)—an increase over 46% in FY 2017.
  - Plans rarely distinguished between training requirements for admission to and retention on the panel.
- Seventy-five percent of plans included a reference to a mentorship program—an increase over 52% in FY 2017.
  - Twenty-eight percent of the mentorship programs included a reference to diversity as a goal, an increase from 6% in FY 2017 plans.

## Panel Size and Anticipated Activity

Table 6 details the plan requirements for appointing panel attorneys to a sufficient number of cases to ensure proficiency, including the plans that defined “substantial” with a percentage of the caseload or a number of cases.

**Table 6.** Caseload Appointments to Panel Attorneys.

Target Case Allocation	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Required a “Substantial” Number of Cases	72	76.6%	75	79.8%
Specified a Percentage of Cases				
25%	59	62.8%	64	68.1%
Other Percentage:	5	5.3%	3	3.2%

<sup>1322</sup>. *Guide to Judiciary Policy*, § 210.10.10(e).

Of the 94 current plans, 75 (80%) require that CJA panel attorneys be appointed to a substantial number of cases or a number of cases sufficient to maintain proficiency. Of these, 67 (71%) specified a percentage of the docket or number of cases that would determine a sufficient or substantial caseload, with 25% by far the most common (68% of all plans).<sup>1323</sup> Reflecting that this principle is not new to the Cardone Report, 77% of plans in place at the start of FY 2017 included such a provision. Similarly, 63% of FY 2017 plans included a reference to 25% of the caseload.

Some CJA plans specified an annual target number of cases for attorneys to remain on the panel, some noting that declining appointments would be a factor considered in the attorney's reappointment. At the end of FY 2021, eleven CJA plans specified an annual target number of appointments for CJA panel attorneys;<sup>1324</sup> three required one to two cases, seven required three to four cases, and one required six cases. Ten of the FY 2017 plans required appointments for retention on the panel. FY 2017 plans were evenly split between requiring one to two appointments and three to four appointments.

In addition to provisions regarding the target apportionment of CJA cases, plans also detailed that the panel needs to be small enough to ensure that attorneys receive sufficient appointments to stay proficient while remaining large enough to meet the caseload needs of the district. Ninety-four percent of the current CJA plans included language requiring that the panel be both large enough to meet caseload demands and small enough to maintain attorney proficiency. Early plans were also likely to include such language (73%), but at a lower rate than the FY 2021 plans.

One additional provision for CJA panel membership is the length of term for panel members. Recommendation 19 references a training requirement for panel attorneys to be appointed to and then remain on the panel, suggest criteria for evaluating the panel attorney during their appointment to the court's CJA panel. Generally, when CJA plans included a term length, criteria for evaluating the attorney for reappointment mirrored the criteria for panel selection (discussed below). All plans included language for removing panel attorneys for cause, and 76% of current plans included a provision for reconsidering panel membership after a defined number of years.<sup>1325</sup> The reevaluation of the panel attorneys occurred between one and five years after appointment, with a majority of current district plans (82% of those with such a requirement, 63% of all plans) setting the term at three years. Plans at the start of FY 2017 were less likely to include a term of panel membership (54% versus 76%), but among those with a term, they, too, most often set the limit at three years.

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1323. The 25% standard is referenced in the model plan policy (IV-C) but appears as early as 1969. See, Dallin H. Oaks, *The Criminal Justice Act in the Federal District Courts*, Subcomm. on Constitutional Rights of the S. Comm. On the Judiciary, 90th Cong., 2d Sess. 11 (Comm. Print 1969) (hereinafter the "Oaks Report"), at p. 11. The 25% standard was intended to be a minimum percentage of appointments, to allow attorneys to maintain proficiency.

1324. Some plans required numbers of appointments per term, for multiyear terms. We have transformed such requirements into the number of appointments per year, to allow for comparison with districts that did not have a specified term of panel membership. For instance, a plan that required six appointments over a three-year term was transformed to require two appointments per year.

1325. One plan implied a set term for panel attorneys, including criteria for reappointment, but did not specify term length. Because we could not determine the length of the term, we have not included them in the percentage of cases with set terms.

**Table 7.** Length of Panel Term.

Years of Term	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percentage	Number	Percentage
1	0	0%	1	1.1%
2	5	5.3%	6	6.4%
3	43	45.7%	59	62.8%
4	2	2.1%	4	4.3%
5	1	1.1%	1	1.1%
Unclear	4	4.3%	1	1.1%
<i>No Term</i>	39	41.5%	22	23.4%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

**Recommendation 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.

- Sixty percent of plans include eDiscovery among the training requirements for panel attorneys—an increase over no plans in FY 2017.
  - None of the plans discuss eDiscovery training for judges.
  - FDO training topics (though a part of FDO responsibilities discussed below) are not detailed regarding substance.
  - No plans required eDiscovery training to remain on the panel, but plans didn’t often distinguish separate requirements for panel retention.

## Experience and Training

CJA plans detail various requirements for applying to and remaining on CJA panels, including the number of appointments an attorney must accept (discussed above), prior years of practice, specific skills or experience with federal litigation, participation in a minimum number of criminal trials (in state or federal court), or hours of CLE or other training (including a specific requirement regarding training in electronic discovery).

Eighty-four percent of the FY 2021 plans included language requiring members of the CJA panel to meet specific criteria, such as a commitment to indigent defense, and to have skills, including, but not limited to, experience with the Federal Rules of Criminal Procedure, the Bail Reform Act, and Sentencing Guidelines.<sup>1326</sup> Most older plans also included such requirements (74.5%). Though these general requirements were common, 23 current district plans (and 24 older plans) were more specific, requiring either a number of years of federal practice or involvement in a minimum number of cases or trials (often allowing for either state or federal trials) before an attorney could be admitted to the CJA panel.

<sup>1326</sup> Though some plans referred to a commitment to “indigent defense,” the purpose of the CJA is “furnishing representation for any person financially unable to obtain adequate representation” See 18 U.S.C. § 3006(a).

**Table 8.** Years of Criminal Litigation Practice Requirement for Panel Membership.

Year(s) of Practice Required	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
1	1	1.1%	1	1.1%
2	2	2.1%	4	4.3%
3	9	9.6%	8	8.5%
4	1	1.1%	3	3.2%
5	10	10.6%	6	6.4%
7	1	1.1%	1	1.1%
<i>No Requirement</i>	70	74.5%	71	75.5%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Just under one-fourth (24%) of the FY 2021 plans included a required number of years of criminal litigation practice (often allowing for either state or federal experience), ranging from one to seven years, with three to five years the most common. Eight plans required a number of cases or trials for admission to the panel. In these plans, the number of cases requirement was an alternative criterion to the years of practice requirement.<sup>1327</sup>

Two adopted recommendations reference training as a qualification for appointment to or retention on the panel. Recommendation 19 states that CJA plans “must include a training requirement to be appointed to and then remain on the panel,” and Recommendation 21 states that “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.”

While the CJA plans do not speak to training provided by the FJC or to DSO-sponsored training events,<sup>1328</sup> they do establish training requirements for members of the CJA panels, and many assign training responsibilities to their FDOs (discussed in a later section).

Training of panel attorneys was included in district CJA plans in two ways. First, some plans required training prior to an attorney’s appointment to the panel. This training could be on eVoucher, as an orientation, or a more general requirement of attending an FDO-sponsored or CLE program in the year prior to application to the panel. A second way was to specify training programs or hours required for retention on the panel. Table 9 shows the frequency of required hours of training per year. Plans requiring a specific number of programs did not specify how many hours of training each program should be. The lack of specificity in the requirement makes comparison across district plans impossible.<sup>1329</sup> We include program-only requirements in the count of plans with “no hour requirement.”

<sup>1327</sup> Because the number of cases or trials is a requirement for admission to the panel, and speaks to attorney experience, we include the information here. The districts are: the Northern District of California, the Southern District of California, the District of Connecticut, the District of New Mexico, the Western District of New York, the Middle District of Pennsylvania, the Western District of Pennsylvania, and the Western District of Tennessee. Several plans accept state court trial experience in lieu of federal court trial experience.

<sup>1328</sup> Information about the trainings offered for panel attorneys by the Federal Judicial Center, the Defender Services Office, and local defender office trainings is analyzed in a separately, using information collected directly from these institutions. See Appendix G: Attorney Training Resources and Challenges.

<sup>1329</sup> When we initially examined plans that included a training requirement prior to appointment to the panel, we found only four plans included such a requirement (The plans were adopted in 2013, 2015, and 2017). As a result, we report the number of hours or programs for either appointment or retention together. If appointment and retention training requirements differed, the value for panel retention is reported. Some plans required specific hours of training during the panel attorney’s term on the panel. We annualized the number of hours for purposes of this analysis.

**Table 9. Required Training Per Year.**

Hours of Training Required	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
2	1	1.1%	4	4.3%
3	6	6.4%	7	7.4%
4	4	4.3%	7	7.4%
5	4	4.3%	7	7.4%
6	13	13.8%	26	27.7%
8	4	4.3%	3	3.2%
10	0	0.0%	1	1.1%
12	2	2.1%	2	2.1%
<i>No Hour Requirement</i>	60	63.8%	37	39.4%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Some plans included a requirement for CLE or eDiscovery training without specifying the quantity required. Of the current CJA plans, 56 (60%) included an electronic discovery training requirement (no older plans included such a requirement), and 76 (81%) included a reference to required CLE training, with or without a specified number of hours (older plans included such references 52% of the time).

In terms of the adopted recommendations, 57 FY 2021 plans (61%) included a training requirement, at least for retention on the CJA panel, compared to 34 FY 2017 plans (40%). Training on eDiscovery, which was not required under any FY 2017 plan, is now required in 60% of plans. That said, the recommendation calls for training to be required for retention and application, and most of the plans did not include any preapplication training requirement.

## Mentorship Programs

The inclusion of a mentorship program is required by Recommendation 19, stating that the CJA plan “should include a mentoring program to increase the pool of qualified candidates.”

In FY 2021, 71 plans (76%) included a mentorship program, referred to variously as mentorship, training panel, or second chair programs.<sup>1330</sup> As shown in Table 10, the responsibility for administering the mentorship program was placed with the CJA committee, FDO, district court, a CJA supervising attorney, or some combination of those entities, depending on the district.

1330. The 2016 update to the model plan was transmitted to the courts via a *Guide to Judiciary Policy* update memo from the AO (Transmittal 07-010, October 3, 2016). The model plan that was current from 2010 to 2016 included a section providing that the CJA panel committee could establish a “CJA Training Panel” and specifically provided that “Training Panel members are not eligible to receive appointments independently, and will not be eligible to receive compensation for their services in assisting CJA Panel members.” The 2016 revision renamed the section “Mentoring,” removed the language about compensation, and provided in a defender services committee comment that “[m]entoring programs may include compensation for mentees (1) under the CJA at the prevailing hourly rate when appointed as second counsel in cases determined by the court to be extremely difficult; (2) under the CJA at a reduced associate rate with prior authorization by the court; or (3) using the court’s Bar and Bench funds at a rate determined by the court for non-representational services, such as consulting with appointed counsel or attending training sessions.”



**Table 10.** Administrator of the Panel Mentorship Program (by frequency).

Administrator(s)	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
District/Divisional CJA Panel Committee	42	44.7%	56	59.6%
Federal Defender	4	4.3%	8	8.5%
Federal Defender and Committee/Committee Chair	0	0.0%	4	4.3%
CJA Supervising Attorney	0	0.0%	1	1.1%
Court	2	2.1%	2	2.1%
Other	1	1.1%	0	0.0%
<i>Not Mentioned</i>	45	47.9%	23	24.5%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Increased mentoring in districts can help recruit a more diversified workforce, a goal identified in the adopted recommendations and the Judiciary’s Strategic Plan.<sup>1331</sup> Related to Recommendation 19’s call for a mentoring program, Recommendation 18 calls upon DSO to “compile and share best practices for . . . hiring staff, as well as the selection of panel members, to assist in creating a diversified workforce,” and Recommendation 14 calls for supporting FDO efforts to draw more diverse candidates. We coded CJA plans for references to diversity as a goal of panel mentorship programs. Twenty of the 71 plans (28%) that mentioned a mentorship program specifically stated that a goal of the program was to increase diversity among panel members. Three of the FY 2017 plans (6%) included such a reference.

## Compensation

**Recommendation 8:** The Judicial Conference should adopt the following standard for voucher review: 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.

- In FY 2021, 60% of plans permitted voucher reductions for mathematical errors—an increase from 26% of early plans.
- By FY 2021, 32% of plans limited reductions to the four reasons included in the recommendation—a standard that did not exist in FY 2017.
- 81% of FY 2021 district plans required attorney notice and an opportunity to be heard when vouchers were considered for reduction—an increase from 37% in FY 2017.

**Recommendation 9:** Every circuit should have available at least one case-budgeting attorney and reviewing judges should give due weight to their recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from the case-budgeting attorney’s recommendations.

- Ten of twelve circuits have access to a case-budgeting attorney—a number that has not changed since FY 2017.

1331. Strategic Plan for the Federal Judiciary, Sep. 2020, Strategy 4.1, p. 15.

- No plans formally included case-budgeting attorneys in voucher review processes.
- Two plans included case-budgeting attorneys among the group of resources judges may consult when contemplating voucher reductions, but neither specified the weight judges should give the CBA's recommendation.

## Voucher Review and Reductions

References to review of vouchers primarily focused on review for mathematical errors, technical accuracy, or compliance with what is compensable under the CJA. In addition, and in keeping with Recommendation 8, several plans referenced a separate review by the presiding judge or their designee, typically a “reasonableness” review, conducted either prior to voucher submission through eVoucher for payment or after proposed reductions to submitted vouchers were made.

The first step in voucher review is typically for mathematical errors, technical accuracy, or compensability (“technical review”), and most plans detailed where it occurred. This was true of both older plans and current ones. Table 11 lists where technical review occurred the most often.

**Table 11.** Location of Technical Reviewer.

Technical Reviewer(s)	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Clerk's Office/Court only	47	50.0%	54	57.4%
Federal Defender Organization only	21	22.3%	25	26.6%
Both Clerk's Office and Defender Organization	3	3.2%	2	2.1%
<i>No mention</i>	23	24.5%	13	13.8%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

No plan required technical review of vouchers by CBAs, and 13 plans (14%) did not specify an entity responsible for such review, a decline from the earlier plans.

Recommendation 8 limits CJA attorney voucher reductions to four specific reasons:

- mathematical errors
- instances in which the work billed was not compensable
- instances in which work was not undertaken or completed
- instances in which the hours billed were clearly in excess of what was reasonably required to complete the task

While mathematical errors have long been part of the process of reviewing vouchers (as part of technical accuracy, noted above), affirmative statements permitting reductions for mathematical errors were not always explicitly included in the CJA plans we reviewed (Table 12).

**Table 12.** Voucher Reduction.

Provisions for Voucher Reductions	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
To correct mathematical errors	24	25.5%	56	59.6%
Where the work was not compensable, not completed, or clearly in excess	0	0.0%	30	31.9%

Of the 94 FY 2021 plans reviewed, 56 (60%) explicitly allowed voucher reductions for mathematical reasons. Thirty plans (32%) permitted reductions for work that was not compensable, not completed, or clearly in excess and also allowed for reductions for all three remaining reasons, using the language of the adopted recommendation wholesale. These 30 plans are a subset of the 56 that specifically allow reduction for mathematical errors. The remaining plans did not specify criteria for voucher reductions. Overall, more plans reference reductions for mathematical or technical reasons now than at the start of the analysis period (from 26% in FY 2017 to 60% in FY 2021), and nearly one-third of plans adopted the language of Recommendation 8 (language that did not exist prior to the Cardone Report).

**Recommendation 16:** Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).

- Sixty-eight district plans (72%) included a process for reevaluating voucher reductions—an increase from 9% of plans in FY 2017—but not all plans fit the criteria of the recommendation.
  - Forty-one plans (44%) made the independent review of vouchers available to any attorney (either through automatic review of all voucher reductions (three plans) or a right for attorneys to appeal (38 plans)).
    - The remaining plans either permitted appeal only to the original reviewer, only permitted the judge to seek review, or did not specify who conducted review of voucher reductions.

We coded plans for references to providing panel attorneys notice and the opportunity to be heard regarding proposed reductions to their vouchers.

**Table 13.** Attorney Notice and Opportunity to be Heard.

Plan Provision(s)	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Attorneys to be provided with notice and an opportunity to be heard	35	37.2%	76	80.9%
Attorneys not to be provided with notice	5	5.3%	1	1.1%
<i>No mention</i>	54	57.4%	17	18.1%

Of the 94 current plans, 76 (81%) included some reference to providing attorneys with notice and an opportunity to be heard, one plan affirmatively did not include such an opportunity, and 17 plans (18%) made no mention.

## Independent Review Process

Recommendation 16 regarding an independent voucher review process goes beyond the opportunity for panel attorneys to be heard regarding proposed voucher reductions. The Cardone Report recommended that every district should implement an independent process available to panel attorneys to review reductions to vouchers and ensure that the process be consistent with the statute.

The adopted recommendation focuses on an attorney-initiated process independent from the presiding judge's decision (or the decision of the first reasonableness reviewer, if not the presiding judge) but does not otherwise specify what the process should entail. Court processes for voucher review vary widely (*see above*). Consistent with the recommendation and with the discussion surrounding voucher reductions in the Cardone Report,<sup>1332</sup> we focus only on two criteria to determine if a plan included independent voucher review: review conducted by someone other than the initial reviewer and available to any attorney. As we were coding, we also noted plans where review of any proposed reduction was automatic, not attorney initiated. Under an automatic process, any attorney who wanted review would obtain it, so we included automatic review of reductions as consistent with the adopted recommendations.

At the end of FY 21, 68 district plans (72%) included a provision for an entity other than the initial reviewer (typically the CJA committee or a subcommittee of the CJA committee)<sup>1333</sup> to review proposed reductions, but not all made the process available to any attorney seeking review, meaning not all 68 plans met both criteria from Recommendation 16. Of the 68 plans, 41 (44%) included a mechanism by which any attorney could appeal a reduction, including three districts with a provision for automatic review of any voucher reduction. This means that 44% of districts met both criteria at the end of FY 2021, an increase over eight districts (9%) in FY 2017. The remaining districts with a second-level reasonableness review had a process that could only be triggered by the presiding judge<sup>1334</sup> or were unclear as to who, if anyone, could trigger the second look at a voucher reduction. Two districts included a provision allowing the attorney to ask for review of a voucher reduction, but it was to be conducted by the same entity (usually the presiding judge) who made the reduction initially.

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1332. As adopted by the JCUS, Recommendation 16 included the language of “an independent review process” and “for panel attorneys who wish to challenge any reductions to vouchers,” supporting our understanding of a process available to all attorneys and outside the presiding judge (or other initial reviewer).

1333. The Eastern and Northern Districts of Oklahoma had very similar plans in which the CJA resource counsel reviewed any reductions judges proposed, making review automatic. The panel attorney, resource counsel, and presiding judge then worked together to resolve the issue. Because the reductions were always reviewed by someone other than the initial reviewer, we treated these plans as meeting the criteria. The 2014 plan in the District of Hawaii had an initial review by the voucher review committee, which made a recommendation to the presiding judge regarding the reasonableness of the voucher. In this district, all vouchers are reviewed by two different entities, meeting the criteria.

1334. Many courts included language such as, “The Court, when contemplating reduction of a CJA voucher for other than mathematical reasons, may refer the voucher to the CJA Committee for review and recommendation before final action on the claim is taken.” Because the court was not required to refer reductions for review, and because the affected attorney had no other recourse for review, we did not treat such a provision as consistent with Recommendation 16.

## Capital Litigation<sup>1335</sup>

Of the 94 FY 2021 plans, 76 (81%) included either a separate section on capital litigation or separate discussion of capital litigation in sections throughout the plan. In FY 2017 plans, 65 (69%) included a separate section on capital litigation.

**Recommendation 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 case-budgeting attorneys (CBAs) and/or resource counsel where appropriate.

- Nineteen percent of FY 2021 plans included a statement that there should be no caps on capital litigation—an increase over 5% of plans in FY 2017.
- Thirty percent of FY 2021 plans included a requirement that capital cases be budgeted with a case-budgeting attorney—an increase over 4% of plans in FY 2017.

Elimination of formal or informal non-statutory budgetary caps for capital litigation is difficult to capture. Only three plans (one in FY 2021 and two in FY 2017) included a reference to a separate rate for capital litigation; otherwise, no specific references to rates were found in plans. Eighteen FY 2021 plans (19%) included a provision prohibiting formal or informal caps on capital litigation, an increase over five plans (5%) in FY 2017. It is possible that non-statutory budget caps would not be discussed explicitly in district court CJA plans; the reference to “formal or informal non-statutory budgetary caps” in the recommendation suggests that district practices, not plans, created such limits.

Other adopted recommendations related to capital litigation focus on appointing well-qualified counsel to litigate these cases and call for more access to available, national expertise.<sup>1336</sup>

**Recommendation 24:** Local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.

- The number of districts covered by the jurisdiction of at least one CHU increased from 25 (27%) in FY 2017 to 36 (38%) in FY 2021.
- No plans included provisions prohibiting CHUs from engaging in cross-district or cross-circuit representations.
  - Eight of the current CHUs have jurisdiction beyond the district in which they sit, three of which were established since the start of FY 2017.
- Thirty-six percent of plans in districts with a CHU included a preference for appointing the CHU.

**Recommendation 25:** Circuit courts should encourage the establishment of Capital Habeas Units (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.

<sup>1335</sup> 18 U.S. Code § 3005 applies to those “indicted for treason or other capital crime” and requires, “In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts” ([Pub. L. 103-322, title VI, § 60026](#), Sept. 13, 1994, [108 Stat. 1982](#)). The statute applies to federal capital prosecutions. Capital habeas litigation is also included in this section. If we mean to distinguish between categories of capital litigation, we refer to either direct death or capital habeas litigation.

<sup>1336</sup> Though Recommendation 25 speaks explicitly to the use of CHUs and federal death penalty resource counsel, habeas assistance and training counsel (HAT) are available to assist counsel representing clients in 28 U.S.C. § 2254 proceedings. Also, though CHUs primarily represent clients in 28 U.S.C. § 2254 litigation, some CHUs also handle some litigation under 28 U.S.C. § 2255, and one CHU, in the Southern District of Indiana, exclusively works on § 2255 litigation.

- Four CHUs have been created since the start of FY 2017, including the CHU in the Southern District of Indiana, which takes § 2255 cases nationally.
  - With these CHUs, 10 districts in states with the death penalty gained access to a CHU after the start of FY 2017 (one jurisdiction saw its CHU close, and one CHU has national jurisdiction and so is not included in this total).
- Ten federal judicial districts in states with the death penalty currently do not fall under the jurisdiction of a CHU.
- Apart from mentioning capital panels (which may or may not include additional training requirements for membership), district plans did not include a provision to make training on capital litigation more widely available.
- Fifty-six percent of plans included a provision regarding courts utilizing expert services in capital litigation—an increase over 1% in FY 2017 plans.
  - Fifty-one percent of plans included a provision that the court *will, must, or shall* utilize expert services in capital litigation. No plans included this provision in FY 2017.
- Fifty-seven percent of plans included a provision regarding consultation between the federal defender and resource counsel—an increase over 3% in FY 2017 plans.
  - Thirty-nine percent of plans included a provision that federal defenders *should* notify or consult resource counsel. One percent of FY 2017 plans did so.
- Fifty-three percent of plans included a provision regarding consultation of appointed counsel and resource counsel. One percent of FY 2017 plans did so.
  - Forty-seven percent of plans included a provision that appointed counsel *should* consult with resource counsel—an increase over 1% of plans in FY 2017.

## Capital Habeas Units

Recommendations 24 and 25 emphasize increasing access to CHUs by creating new units where they do not exist and by lifting district or circuit restrictions on CHUs providing representation in districts outside of their jurisdiction. Table 14 shows the CHUs that existed as of the drafting of this report,<sup>1337</sup> including the year in which the CHU was created and if it had jurisdiction in other judicial districts in the state (or, with respect to one CHU, having jurisdiction in other states).<sup>1338</sup>

Some states with the death penalty are not listed in Table 14, below.

<sup>1337</sup> Information on the availability of CHUs provided by DSO staff.

<sup>1338</sup> The Fourth Circuit CHU, serving the entire circuit but housed in the Western District of North Carolina, was created with the jurisdiction listed in the table. On Feb. 22, 2021, the Virginia General Assembly passed legislation to abolish the death penalty in the state, and the Virginia governor signed it on March 24, 2021. The jurisdiction of the Fourth Circuit CHU changed with respect to Virginia when the sentences of all remaining death row prisoners were modified consistent with the new law. In 2022, the state legislature considered a bill to reinstate the death penalty, but the measure was not enacted. For purposes of this analysis, we consider Virginia to be a state without capital punishment.

**Table 14.** CHU Locations, Years of Establishment, and Jurisdictions.

Circuit	CHU Location	CHU Established	CHU Jurisdiction (alphabetical within circuit)
Third	DE	2010-2018	DE
Third	PAE	1995	PAE
Third	PAM	2003	PAM
Third	PAW	2003	PAW
Fourth	NCW	2020	NCE, NCM, NCW, SC, VAE, VAW
Fifth	TXN	2017	TXE, TXN, TXS, TXW
Fifth	TXW	2017	TXE, TXN, TXS, TXW
Sixth	OHN	2008	OHN
Sixth	OHS	2008	OHS
Sixth	TNE	1998	TNE
Sixth	TNM	1996	TNM, TNW
Seventh	INS	2019	§ 2255 clients (nationally)
Eighth	ARE	2003	ARE, ARW
Eighth	MOW	2016	MOE, MOW
Ninth	AZ	1996	AZ
Ninth	CAC	1995	CAC
Ninth	CAE	1996	CAE
Ninth	ID	1996	ID
Ninth	NV	1996	NV
Tenth	OKW	1996	OKE, OKN, OKW
Eleventh	ALM	2003	ALM, ALN, ALS
Eleventh	FLM	2019	FLM
Eleventh	FLN	2014	FLN
Eleventh	GAN	1996	GAN

Note: The CHU in Delaware closed at the end of FY 2018.

Many CHUs serve a jurisdiction greater than a single district, meaning districts can have access to a CHU without having one locally. We considered whether the district plans included a preference for appointing CHUs (either within the court or across jurisdictions) in capital habeas litigation. Such a preference would suggest that the CJA plans are consistent with the adopted recommendations regarding increasing access to CHUs. Of the 34 districts included within the jurisdiction of a CHU, 13 (36%)<sup>1339</sup> had plans that included such a preference for appointing CHUs in capital habeas cases in the district. This is an increase over the six plans with such a preference at the beginning of our study period.

<sup>1339</sup> The Fourth Circuit CHU did not open until October 2020, and the period for our analysis of district court plans ended in FY 2021, meaning districts within the circuit had one year to update their plans to reflect a preference for appointing the newly established CHU. No current plans included this preference.

As described in Recommendation 24, courts could also increase access to CHU resources by removing prohibitions on cross-jurisdictional representation for district CHUs. Other than the multijurisdictional CHUs listed in the table above, appointment of an out-of-jurisdiction CHU would require a separate process,<sup>1340</sup> and any restrictions on this process are not included in district court CJA plans.

**Recommendation 27:** In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so.

- Forty-six percent of plans included a provision regarding courts weighing the recommendation of resource counsel in capital appointments—an increase from 2% of plans in FY 2017.
  - Twenty-five percent of plans included a requirement that the court *will, must, or shall* weigh the recommendation of resource counsel—an increase from 1% of plans in FY 2017.
- Seventy-seven percent of plans included a provision regarding court consultation with federal defenders in capital appointments—an increase from 50% in FY 2017.
  - Fifty-seven percent of plans included a requirement that courts *will, must, or shall* consult with the federal defender when appointing counsel in capital cases—an increase from 36% of FY 2017 plans.

## Resource Counsel

A second source of expertise available in capital litigation specifically mentioned in Recommendations 25<sup>1341</sup> and 27 is resource counsel.

In examining the CJA plans for references to soliciting and considering the recommendations of available resources such as resource counsel or federal defenders (discussed below) in the appointment of counsel, we recorded differences in the standard of deference. Recommendations 25 and 27 use the standard of “should,” but not all plans did the same. Some plans used the permissive “may,” while others chose higher standards of “should,” or even “will,” “must,” or “shall” for considering recommendations by a specific group. Not only did the words differ across districts, they also differed within some districts depending on the expert source discussed and the nature of the capital litigation (often with federal capital prosecution representation using a “must” standard and capital habeas using “may”). The model plan also differs on the standard for consultation, depending on the section.<sup>1342</sup>

Given the detail in the model plan for consulting with capital litigation experts and the Recommendation 19 call for making court plans consistent with the model plan and best practices, we examined court plans for all types of consultations included in the model plan.

Table 15 below shows the frequency of reference for the federal defender to notify or consult with resource counsel, as well as the standard under which federal defenders are required to notify or consult with resource counsel.

1340. Appointment of an FPDO from outside the district requires approval from the Defender Services Office after notification of the circuit chief judges for the appointed and appointing districts. See Theodore J. Lidz, Memorandum to All Federal Public/Community Defenders, “Out-of-District Representations,” Nov. 10, 2008. On file with FJC.

1341. Adopted Recommendation 25 was directed specifically at circuit courts, but we nonetheless examine how this recommendation may be influencing action at the district level. Districts ask circuits to create CHUs, and district courts make the majority of appointments in capital litigation, meaning district court counsel would benefit from the expertise and training included in the recommendation.

1342. “Should” is the wording in the general section of the model plan, XIV-B5, but “will” is used in all of the individual sections. See also model plan, XIV-B6.



**Table 15.** Federal Defender to Notify/Consult with Resource Counsel (by level of deference).

Requirement Standard	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
May consult	0	0.0%	2	2.1%
Should consult	1	1.1%	37	39.4%
Will/Must/Shall consult	2	2.1%	15	16.0%
No reference	91	96.8%	40	42.6%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

The majority of the FY 2021 plans (57%) included such a provision, and among those that did, districts tended to use the middle standard “should” to require federal defenders to consult with resource counsel (37 of the 54 plans (69%) with such a reference). The 54 plans with some reference to the notice/consultation requirement is an increase over three plans from FY 2017.

Recommendation 27 says that the court should consider the recommendations of resource counsel in capital cases, and Recommendation 25 makes clear that attorneys should also consult with resource counsel. Once again, as shown by Table 16, the level of courts’ deference to resource counsel when doing so differed.

**Table 16.** Courts to Weigh the Recommendation of Resource Counsel in Capital Appointments (by level of deference).

Requirement Standard	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
May consult	1	1.1%	7	7.4%
Should consult	0	0.0%	13	13.8%
Will/Must/Shall consult	1	1.1%	23	24.5%
No reference	92	97.9%	51	54.3%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

An affirmative statement that the court consider and give due weight to the recommendation of resource counsel occurred in 46% of FY 2021 plans, compared to 2% of FY 2017 plans. Most of the 43 plans including such a statement used the most restrictive “will/must/shall consult.” The adopted recommendation itself uses “should consult.”

Current CJA plans also included references to a requirement that courts utilize the expert services available through the AO and resource counsel projects in capital litigation, where appropriate. Table 17 shows the differences across FY 2017 and FY 2021 CJA plans in the requirement of consulting the expertise of the AO and resource counsel during capital litigation.

**Table 17.** Courts to Utilize Expert Services in Capital Litigation (by level of deference).

Requirement Standard	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
May consult	1	1.1%	3	3.2%
Should consult	0	0.0%	2	2.1%
Will/Must/Shall consult	0	0.0%	48	51.1%
<i>No reference</i>	93	98.9%	41	43.6%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

As the table shows, references to the use of available capital resources were found in over half of the FY 2021 plans (56%), higher than the 46% of plans that referenced resource counsel discussed above. One plan (1%) in FY 2017 had a provision for using expert services. Interestingly, 91% of the plans with a reference to available resources used the highest standard of “will/must/shall consult” with available resources.

Lastly, some plans included provisions for any attorney appointed in a capital case to regularly consult with the resource counsel projects, consistent with Recommendation 25. Table 18 shows the variation in district plans regarding such a reference, along with the deference standard used.

**Table 18.** Attorney Consultation with Resource Counsel (by level of deference).

Requirement Standard	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
May consult	0	0.0%	2	2.1%
Should consult	1	1.1%	44	46.8%
Will/Must/Shall consult	0	0.0%	4	4.3%
<i>No reference</i>	93	98.9%	44	46.8%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Of the current CJA plans, 50 (53%) included a provision requiring appointed counsel in capital cases to consult with resource counsel, and the majority (88%) of those plans used the standard of “should” consult. Once again, the percentage of plans with such a reference is an increase over the 1% of plans in place at the beginning of FY 2017.

In addition to courts considering the recommendation of resource counsel, some CJA plans included a provision for courts to consider the recommendation of the federal defender when appointing counsel in capital cases, consistent with adopted Recommendation 27. Once again, the standard under which courts were to consult with federal defenders varied. See Table 19.

**Table 19.** Courts to Consult with the Federal Defender in Capital Appointments (by level of deference).

Requirement Standard	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
May consult	9	9.6%	4	4.3%
Should consult	4	4.3%	14	14.9%
Will/Must/Shall consult	34	36.2%	54	57.4%
<i>No reference</i>	47	50.0%	22	23.4%
<b>Total</b>	<b>94</b>	<b>100.0%</b>	<b>94</b>	<b>100.0%</b>

Not only are plans far more likely to include provisions for consulting with the federal defender than resource counsel when appointing counsel in capital cases (77% included such a provision), but most of those plans (75%) used the most stringent standard of “will/must/shall consult.” The prevalence is likely because such consultation has been required by statute for federal capital prosecutions since 1994, nearly 30 years prior to this study period. Unlike the requirements discussed above, this provision was common in older plans (50%), yet still less frequent than FY 2021 plans (77%).

Though many of the plans listed CBAs and resource counsel as available resources for courts in capital litigation, and many noted the value of budgeting high-cost cases, only 28 plans (30%) included a requirement that capital cases be budgeted with the assistance of a CBA or resource counsel, consistent with Recommendation 26. This is an increase over the four plans including such a requirement from the beginning of FY 2017.

## Training

One final aspect of the recommendations related to capital litigation focused on training. Recommendation 25 states “other resources as well as training opportunities” should be “more widely available to attorneys who take [capital] cases,” charging the circuits with establishing such opportunities. The availability of training programs for capital litigation is not something district CJA plans discussed directly, nor was such training a requirement to be appointed to capital cases included in any plan we coded.

## Defender Office Responsibilities

The CJA plans do not address changes to the way in which FDOs are resourced, but plans do provide information about the nonrepresentational responsibilities with which the offices are tasked. These responsibilities are work FDOs are expected to complete, regardless of available resources; they take resources away from case-related work; and they may be criteria used in the evaluation of federal defender job performance.

We examined the current district CJA plans to determine how often FDOs are required to perform tasks for which they do not receive workload credit. It should be noted that since not all districts have federal defenders, the total number of districts served by an FDO in this section is 91.

**Recommendation 14:** Modify the work-measurement formulas, or otherwise provide funding to reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and 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.

- Of the districts with FDOs and CJA committees, 97% included participation by the federal defender on the CJA committee—compared to 90% of plans in FY 2017.
- Seventy-eight percent of plans require FDOs to provide trainings—compared to 40% of plans in FY 2017.
- Seventy-five percent of plans require FDOs to assess the training needs of the panel—compared to 45% of plans in FY 2017.
- Sixty-two percent of plans require FDOs to provide other educational programs and resources—compared to 6% of plans in FY 2017.
- Sixty-two percent of plans require FDOs to assist defendants with the completion of financial affidavits—compared to 32% of plans in FY 2017.
- Sixty percent of plans require FDOs to work with U.S. attorneys and courts to ensure timely appointment of counsel—compared to 17% of plans in FY 2017.
- Fifty-nine percent of plans require FDOs to assess the training needs of their staff—compared to 5% of plans in FY 2017.
- Three percent of plans require FDOs to provide staff development to increase diversity—compared to 1% of plans in FY 2017.

Throughout this assessment of district CJA plans, we have highlighted several nonrepresentational responsibilities, including those where federal defenders must coordinate and consult with other entities, work which takes time. Other nonrepresentational responsibilities are administration of the CJA committee (assigned to FDOs in 22% of plans),<sup>1343</sup> administration of the panel (35%), maintaining panel lists (44%), and administering mentorship programs (13%). Of the districts with FDOs and CJA committees, 77 (90%) included participation by the federal defender on the CJA committee in early FY 2017, and 87 current plans (97%) included this requirement.

In addition to the work discussed above, district plans included other responsibilities for federal defenders, including assessing the needs, such as training, of FDO staff and CJA panel attorneys. Some plans require that FDOs hold trainings for CJA panel attorneys that may be considered in decisions about panel retention. Tables 20 and 21 detail the changes in these FDO responsibilities over time.

**Table 20.** Training and Education responsibilities of Federal Defender Organizations Required by Their District CJA Plan.

FDO Training Requirements	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Assess the needs of their staff	5	5.3%	55	58.5%
Assess the needs of the CJA panel	42	44.7%	70	74.5%
Provide trainings	38	40.4%	73	77.7%
Provide other educational programs and services	6	6.4%	58	61.7%
Provide staff development program to increase diversity	1	1.1%	3	3.2%

1343. The percentages in this paragraph include plans giving FDOs sole or shared responsibility for the tasks described. See *infra*, Panel Administration section.

Looking from the beginning of FY 2017 to FY 2021, we see an increase in the nonrepresentational responsibilities of FDOs detailed in CJA plans. In FY 2021, three-quarters of all plans included requirements for the FDO to assess the needs of panel attorneys and provide training, and roughly 60% required assessment of staff needs and providing educational programs and services generally. Efforts related to increasing the diversity of FDO staff were rarely mentioned.

In addition to training and recruitment efforts, many plans also gave responsibility for assisting defendants, regardless of who ultimately represents them, to the FDO.

**Table 21.** Other FDO Responsibilities Required by Their District CJA Plan.

Other FDO Requirements	Plans at the Start of FY 2017		Plans at the End of FY 2021	
	Number	Percent	Number	Percent
Assist defendants with the completion of financial affidavits to show eligibility for appointed counsel under the CJA.	30	31.9%	58	61.7%
Work with the U.S. attorney and the court to ensure timely appointment of counsel	16	17.0%	56	59.6%

Between FY 2017 and FY 2021, district CJA plans were more likely to assign to the FDO the obligations to assist defendants with financial affidavits and to work with the U.S. attorney to ensure timely appointment of counsel. Between 60% and 62% of all plans included such responsibilities for FDOs.

## Conclusions of Plan Analysis

In looking at how closely current district CJA plans align with the Cardone Report recommendations adopted by the Judicial Conference, we find mixed results. Some adopted recommendations were referenced more in district plans in FY 2021 than at the start of our study period in FY 2017. Recommendations related to training, either requirements to be on the panel or assessment of training needs by FDOs, increased over time. Likewise, plans are more likely to limit voucher reductions to the four reasons specified in the recommendations now than in 2017.

## District Criminal Justice Act Plans Coding Methodology

A key element of the Cardone study research plan is the review of districts' Criminal Justice Act (CJA) plans. These plans, required by 18 U.S.C. § 3006A(a), are expected to be affected by a number of the adopted recommendations in the areas of governance, collaboration, and voucher review. Although having something written in a plan does not necessarily mean that is how business is conducted in practice, the plans are the starting point in understanding how districts approach implementing CJA requirements and assessing whether these approaches changed as a result of the recommendations.

Coding of the CJA plans was divided among the members of the research team. For some districts, more than one plan was coded because the district had updated its plan since FY 2017. In total, 188 plans were analyzed.

### Selection of Plans

Given the timing of the release of the Cardone Report in October 2017, the research team captured key information from the plan in each district that was in effect at the beginning of FY 2017 (i.e., effective on October 1, 2016) and the plan in effect at the end of FY 2021 (i.e., effective on September 30, 2021). These plans were compared to assess changes in how they reflect the adopted recommendations. The comparison time period comports with the Judicial Conference policy that plans are to be updated at least every five years and provides districts with ample time to have considered and implemented modifications.

There were two phases of data collection. The research team first coded the latest available plans as of February 2020, both to provide an interim progress update for the DSC and to serve as a guide for the research team members who conducted interviews with key stakeholders in a sample of 40 districts between September 2020 and February 2021. The analysis was updated in early 2022 to reflect changes to district plans through the end of FY 2021.<sup>1344</sup>

### Data Elements

The plan data elements that were coded stemmed from the adopted recommendations aimed at district practices (*see* Attachment 1). They fall into four general categories:

- administration (assignment of administrative responsibilities, panel size and anticipated activities; panel appointment and retention requirements, mentorship program)
- compensation (technical review, limitations to voucher cuts, voucher reduction review process, compensation caps)
- federal defender responsibilities (training; staff development; role in assisting with financial affidavits, timely appointment, and panel administration)
- capital case representation (CHU, consultation during appointment process, utilization of resources).

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<sup>1344</sup>. Team members reviewed the CJA plans posted on each district's website on November 3, 2021. This review found that 61 districts were still operating under the latest plan already in our database and that 33 districts had a newer plan to be added to the database to establish the post-plan pool.

## Intercoder Reliability

Intercoder reliability checks were run for each phase of data collection. In April–May 2020, the research team double-coded 66 plans from those 42 districts that subsequently participated in the study interviews. Between January and February 2022, the team double-coded 15 of the 33 plans updated after February 2020.

The intercoder reliability assessment excluded pure text fields, leaving 67 data elements for the 81 plans (see Attachment 2), for a total of 5,427 discrete coding comparisons. After cleaning the data, the coding matched for 4,731 of the elements for an overall intercoder reliability of 87 percent. There was, however, not a single plan for which the interrater reliability was 100 percent. The range across districts in “matched” data elements was 69 to 97 percent, with all but three of 52 districts matching on at least 80 percent of the coding elements, and 17 achieving 90 percent or more (see Attachment 3).<sup>1345</sup>

We examined a few other factors to identify patterns in reliability. There was little variability based on which coder was involved, with reliability rates within 10 percentage points for the eight coders.<sup>1346</sup> There was also little variation in coding reliability based on the plan timeframe, with agreement rates of 88 and 86 percent, respectively, for plans in effect at the start of FY 2017 and updated plans that were in effect at the end of FY 2021. This seemed surprising at first because coders could point to the 2019 model plan for the location of particular pieces of information and wording used in the later plans, but this was more than compensated for by the agreement stemming from earlier plans that simply did not address many of the areas of interest.

There was quite a bit of variation in intercoder agreement across elements. The range was 52 percent (for who, if anyone, staffed a district’s or division’s CJA committee) to 99 percent for five practices that were rare in plans: Dollar amount case caps on capital and non-capital cases, whether the plan explicitly stated that there were to be no compensation caps in capital cases, and whether a judge considering a voucher reduction may, should, or must refer such to a *divisional* CJA committee or to the CJA supervising attorney.<sup>1347</sup>

More generally, there was, understandably, less agreement on those few items that were text based (entered from a text drop-down, but with an “Other” option) rather than numeric and for those areas that were, frankly, unclear from the beginning: independent voucher review and judicial consultation with other stakeholders in capital cases.

Differences in coding were resolved by the project director, who did not participate in the double-coding exercise. Using both a listing, by district, of each element on which the two coders differed and a text plan comparison for each district showing both the coding and the comments of both coders, the project director resolved the disputes and created a final coding for the plan data. One section of the original plan coding was revised after presentation of the interim findings to the DSC. The DSC requested refinement of the coding of independent voucher review to account for plans to provide detail on where voucher review was available to any attorney, where the reviewer was different from the original review, and where the reviewer could override the decision of the original reviewer. The more detailed coding was conducted by the project director and reviewed by another member of the team, and the process was replicated with the 2022 analysis update.

1345. The second phase of double-coding included five districts that were also doubled-coded in the first phase.

1346. All the Phase II coders had participated in Phase I, but two Phase I coders were no longer available for Phase II.

1347. As discussed in the analysis, vouchers could be reviewed by CJA district committees.

# Attachment 1

## Cardone Recommendations with Implications for CJA Plans and Associated Questions

### Administration

#### *Administrative Responsibility*

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*Recommendation 15. 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.*

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Plan establishes the following to manage the panel attorney membership process: (MP-VIII.A.)<sup>1348</sup>

1. District CJA Panel Committee
2. Divisional CJA Panel Committees
3. CJA supervisory or administrative attorney  
Other: \_\_\_\_\_
4. Plan does not establish administrative structures.

If one or more committees are established:

5. Judges serve on the panel committee(s)? (MP-VIII.A.)
6. Committee administration assigned to staff of: (MP-VIII.A.)  
Federal Defender Office  
Court  
Clerk's Office  
Other: \_\_\_\_\_
7. Panel administration assigned to: (MP-VI.B.)  
Court  
Clerk's Office  
Federal Defender
8. Panel list maintained by: (MP-X.A.)  
Court  
Clerk's Office  
Federal Defender

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<sup>1348</sup>. [Note on the original coding document]: These references are to the Judicial Conference's Model CJA Plan dated May 21, 2019, which incorporated the Conference-adopted version of the Cardone recommendations.



**Panel Size and Activity**


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*Recommendation 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 must include a provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work. \*The plan must include a training requirement to be appointed to and then remain on the panel. \*The plan must include a mentoring program to increase the pool of qualified candidates.*

*Recommendation 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.*

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9. Plan provides for panel appointments in a "substantial" percentage of appointments. (MP-VI.C.)
10. \_\_\_\_\_ Percentage of appointments (if specified)
11. Panel size is described in general "large enough" / "small enough" language mentioning proficiency. (MP-IX.B.)
12. Plan provides a target number of cases for each panel attorney. (MP-IX. B)
13. \_\_\_\_\_ per year

To be appointed to the panel does the plan specify:

14. General skill and experience requirements to become a member of the CJA panel? (MP-IX C.3)
15. Minimum years of practice?
16. \_\_\_\_\_ Years
17. Specific types of experience (e.g., # criminal trials, # federal defendants represented)?
18. Specific types of pre-appointment training?
19. If members are subject to terms, length of term \_\_\_\_\_ Years

**To be retained on the panel does the plan require:**

20. Electronic Discovery training/competence
21. CLE; *If specified:*
22. Minimum Hours \_\_\_\_\_
23. Minimum # of Programs \_\_\_\_\_
24. A mentoring program is to be developed by: (MP:VIII.B)  
District CJA Panel Committee  
Divisional CJA Panel Committees  
CJA supervisory or administrative attorney  
Other: \_\_\_\_\_
25. If a mentoring program is to be developed, is diversity cited as a goal of the program?

## Compensation

### *Voucher Review and Reduction*

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*Recommendation 9. Every circuit should have available at least one case-budgeting attorney and reviewing judges should give due weight to their recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from the case-budgeting attorney's recommendations. Note: Original recommendation was for judges to defer to these recommendations rather than "give due weight" and reason requirement.*

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Voucher reviewed for technical accuracy before submitting to presiding judge by: (MP-XII.B.)

26. Case-budgeting attorney

27. Clerk's office

28. Federal defender officer

Other \_\_\_\_\_

29. No Technical Review

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*Recommendation 8. The Judicial Conference should adopt the following standard for voucher review: Voucher cuts should be limited to mathematical errors, instances in which work billed 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.*

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Voucher Cuts should be limited to: (MP-XII.A.2.)

30. Mathematical errors

31. Instances in which work billed was not compensable (NOTE: Not in recommendation language, but in Model Plan.)

32. Instances in which work was not undertaken or completed

33. Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task

34. Other specific \_\_\_\_\_

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*Recommendation 16: Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).<sup>1349</sup>*

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35. Except for mathematical corrections, no claim is to be reduced without affording counsel notice and the opportunity to be heard. (MP-XII.B.5)
36. There is an independent review process to address attorney challenges to voucher reduction. (MP-XII.C.)<sup>1350</sup>

A judge contemplating a non-mathematical voucher reduction (may/should/will) submit the voucher for review to: (MP-VIII-B)

37. District CJA Advisory Committee
38. Divisional CJA Advisory Committee
39. CJA Supervisory Attorney
40. Case-Budgeting Attorney
41. Other \_\_\_\_\_

## Compensation Caps

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*Recommendation 7. The annual budget request should reflect the highest statutorily available rate for CJA panel attorneys, unless adverse fiscal conditions require the Defender Services budget request to reflect less than the highest statutorily available rate. Note: The original recommendation said “must” instead of “should” and did not have the “unless” exception.*

*Recommendation 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.*

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42. Does the plan reference statutory and/or JCSU caps?

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<sup>1349</sup>. [Note on the original coding document]: Original recommendation contemplated that districts would designate a CJA advisory committee to determine how to process appeals, and that any proposed reasonableness [sic].

<sup>1350</sup>. Though the initial coding of independent voucher review processes used the coding rule above, we conducted a subsequent coding that was more refined to include the two criteria discussed in the text. These criteria included a second reviewer of the reasonableness reduction, different from the first, and a review process available to any attorney who wanted review of the reduction to their voucher.

Plan sets compensation caps as follows: (MP-XII)

	Non-Capital Cases	Capital Cases <sup>1351</sup>
Hourly Rates for Attorney Fees	43.	46.
Attorney Fees per Case	44.	47.
Expert Services	45.	48.

## Capital Case Representation

49. There is a separate section in the Plan to address Capital Cases. (MP-VI.E.)

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*Recommendation 24. Local or Circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU. Original recommendation was to “Remove any” restrictions without the “good cause” exception.*

*Recommendation 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.*

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If district has a CHU: (MP-VII.A. or XIV.F.)

50. CHU is statewide

51. May CHU may serve other districts \_\_\_\_\_

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*Recommendation 27. In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so. Original recommendation was for judges to defer to these recommendations rather than “give due weight” and reason requirement.*

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## Consultation Regarding Appointment of Counsel (MP-XIV.B.)

52. FPD (may/should/will) notify/consult with resource counsel

53. Court (may/should/will) give due weight to recommendations of federal defenders.

54. Court (may/should/will) give due weight to recommendations of .resource counsel.

55. CHU or Defenders office is given preference in capital appointments.

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1351. [Note on the original coding document]: There is no recommendation to eliminate compensation caps in non-capital cases, but that principle can be inferred from these two recommendations.

**Use of Resources (MP-XIV.B.)**

56. There should be no formal or informal non-statutory budget caps on any capital case
57. All capital cases are to be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate.
58. Court (may/should/will) utilize of Resource Counsel Project services where appropriate
59. Appointed counsel should consult regularly with the appropriate Resource Counsel projects.

**Defender Office Non-Representational Responsibilities**


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*Recommendation 14. Modify the work-measurement formulas, or otherwise provide funding to (a) Reflect the staff needed for defender offices to provide more training for defenders and panel attorneys; and (b) 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.*<sup>1352</sup>

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Plan notes that the federal defender organization is to engage in the following training activities (MP-VII.D.)

60. Assess training needs of staff
61. Assist with assessment of training needs of panel attorneys
62. Provide training opportunities
63. Disseminate other educational resources.
64. Organization to develop an in-office staff development program to promote diversity by, for example, hiring and mentoring young lawyers and/or recruiting out of law school. (*Not in MP. Drop unless it shows up during our plan review.*)
65. Defender serves on the District / Divisional CJA Advisory Committee (MP-VIII.A.)
66. When practical, defender organization to discuss financial eligibility with defendants indicating they can't pay for an attorney and assist in the completion of a financial affidavit form. (MP-IV.B.)
67. Defender organization to work in cooperation with the court & the US Attorney's office to make arrangements with investigative & police agencies to ensure timely appointment of counsel. (MP-V.B.)

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1352. [Note on the original coding document]: This recommendation recognizes that non-representational responsibilities currently are not considered when determining the appropriate staffing level of Federal Defender Organizations (which are staffed based solely on the number and difficulty of the organizations representations.) These data elements expand the scope to capture additional non-representational tasks specified in the Model Plan and not captured in the sections, above.

## Attachment 2

### Intercoder Element Documentation

#### Administrative Responsibilities

**NoAdminAddressed** A box that is checked only when the plan does not establish any administrative structures.

-1 = Administrative structures not addressed

0 = Administrative structures addressed as indicated in the next items

**DistrictCJA** Numeric option box. Plan establishes a CJA Panel Committee for the district.

**DivisionalCJA** Numeric option box. Plan establishes CJA Panel Committees for all or some of the divisions in the district.

**CJASupATT** Numeric option box. Plan names a person or position to serve as the CJA supervising attorney for the district.

1=Yes

0=No/Missing

**JudgePanel** Numeric option box. Whether or not judges serve on the CJA panel committees. If judges serve on just one type of committee, i.e., on the divisional committees but not the district committee, or if only district judges or magistrate judges (but not both) participate, select “Yes” and explain in the CJAAdminNotes field, below.

1=Yes

0=No

9=No Mention/Missing

-8 = Not applicable (No District or Divisional CJA Committee)

**CommAdmin** Text from dropdown. Whether and to whom the plan assigns responsibility for administering the *committee*.

Federal Defender’s Office

Court

Clerk’s Office

Other: \_\_\_\_\_

Not Mentioned (Missing converted to Not Mentioned)

-8 = Not applicable (No District or Divisional CJA Committee)

**Admin** Text from dropdown. Whether and to whom the plan assigns responsibility for administering the *CJA panel* as provided in the plan.

**PanelList** Text from dropdown. Whether and to whom the plan assigns responsibility for maintaining the list of CJA panel attorneys.

Federal Defender’s Office

Court

Clerk’s Office

Other: \_\_\_\_\_

Not Mentioned (Missing converted to Not Mentioned)

## Panel Size and Anticipated Activities

**Substantial** Numeric option box. Whether or not the plan notes that a substantial percentage of CJA eligible cases are to be assigned to panel attorneys.

1=Yes

-99=No/No Mention/Missing

**ApportionPer** If specified, the anticipated percentage of CJA-eligible cases to be assigned to panel attorneys.

0 = “Substantial” language, but no percentage given

-8=Not Applicable (no “substantial” language in plan)

**SmallEnough** Numeric option box. Whether or not the plan notes that the panel should be large enough to handle the caseload but small enough to ensure that the attorneys on the panel receive adequate appointments to maintain proficiency. If the goal of maintaining attorney proficiency is not mentioned, check “No Mention”

**TargetCases** Numeric option box. Whether or not the plan specifies a range or specific number of cases that panel attorneys are expected to handle each year.

1=Yes

-99=No/No Mention/Missing

**Targetnumber** Originally a text field to permit ranges; converted to numeric and includes plans that required that members accept at least \_\_\_ per \_\_\_ or the lower of a range of cases per \_\_\_, all converted to years. (If, e.g., it was 12 cases per term, and the term was for three years, the target was set to 4 per year.)

-8 = Not Applicable (No target number specific)

## Panel Appointment and Retention Requirements

**ApptSkill** Numeric option box. Whether or not the plan sets out specific skills or experience that attorneys are to possess in order to be appointed to the panel. Check “No” if the appointment requirements do not include specific references to years or types of experience (such as strong litigation skills, proficiency with federal criminal procedure, or experience representing indigent defendants charged with serious crimes) or a requirement that the applicant participate in specific types of training. (Very general references, e.g., “Experience with criminal litigation,” do not count.) Check “Yes” if there are specific skills, experience or training requirements even if there is also a provision for accepting attorneys who have equivalent other experience.

**PracticeYrsReq** Numeric option box. Whether or not appointment requires a minimum number of years in practice.

1=Yes

-99=No/No Mention/Missing

**PracticeYears** Numeric. If PracticeYrsReq is “Yes,” the minimum number of years of practice required. -8 = No specific number of years of practice required for panel appointment

**SPECIFIC:** Whether the required experience includes a specific number of cases or trials. Coded from text in the Panel Appointment section of the database

**PREAPP:** Whether specific hours or types of training are required before appointment to the panel or to the first case. Coded as “Yes” when OtherTrainAPP was checked as “Yes” and the text indicated that the required training was, in fact, before appointment rather than CLE. This is most commonly to attend an orientation or eVoucher training, but also in the few cases where potential panel members are to have engaged in particular types of training in the year(s) preceding their application for panel membership. It excludes agreeing to participate in ongoing training.

**REQED** (edisctrainAPP or EDReq = 1) = Electronic Discovery mentioned as a requirement for appointment or retention

**REQCLE** (CLEAPP or CLE = 1) Whether CLE is required for appointment or retention

1=Yes

-99=No/No Mention

**PROGRAMS** (CLEAPPPGMS or CLERETPGMS): Minimum number of programs per year. Requirements such as “Must attend at least one session of Federal Defender sponsored training per year” was counted as 1 program. In the two cases where a range of programs, the minimum was used. Requirements framed as per term or “every \_\_ years” were converted to their annual equivalent

**HOURS** (CLEAPPHRS or CLERETHOURS): Minimum number of CLE hours per year. If a range of hours, the minimum was used. In the two cases where there was a difference between the minimums for panel application and panel retention, the latter was used. Requirements framed as per term or “every \_\_ years” were converted to their annual equivalent

-8 = Not applicable, i.e., no CLE requirement for panel appointment or retention

-99=CLE is required for either appointment or retention, but not quantified

**LengthTerm** Numeric. The length of the term of panel membership.

-8 = No term (REAPPREQ = -1)

0=Term length could not be determined

## Mentor Program for Panel Attorneys

**MentorType** Text from dropdown. Whether the plan establishes a mentoring program or training panel for panel attorneys and, if so, the entity charged with establishing the program.

District CJA Panel Committee

Divisional CJA Panel Committee

CJA Supervisory Attorney

Federal Defender

Other \_\_\_\_\_

Not Mentioned

**MentorDiv** Numeric option box. If a mentoring program is to be established, whether or not the plan specifically notes the promotion of diversity as a goal of the program.

1=Yes

0=No

-8=Not applicable (mentor program not addressed)



## Technical Voucher Review

**TechRev** Check Box. Check only if the plan does not address technical voucher review before submission to the presiding judge.

-1=Plan does not address technical voucher review

0=Plan provides for technical voucher review as indicated in the next items

**techrevCBA** Numeric option box. Plan provides for a case-budgeting attorney to review vouchers for technical accuracy before submitting to the presiding judge. If the voucher goes first to the judge who then may or may not refer, check “No.”

**Techrevclerk** Numeric option box. Plan provides for the clerk’s office or a CJA clerk to review vouchers for technical accuracy before submitting to the presiding judge. If the voucher goes first to the judge who then may or may not refer, check “No.”

**techreviewFDO** Numeric option box. Plan provides for the federal defender’s office to review vouchers for technical accuracy before submitting to the presiding judge. If the voucher goes first to the judge who then may or may not refer, check “No.”

1=Yes

-99=No or Missing

## Voucher Cuts

Plan specifies that voucher cuts should be limited to the following:

**Errors** Mathematical errors

**NotEligible** Instances in which work billed was not compensable

**NotCompletd** Instances in which work was not undertaken or completed

**Excess** Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task

**OtherCutSpec** Other specific circumstances under which vouchers may normally be cut.

1=Yes

-99=No/No Mention/Missing

## Voucher Review

**Notice** Numeric option box. Plan provides that attorneys must be provided notice of any proposed voucher cut that is not based on a mathematical error. If notification is only permitted rather than required, check “No.”

1=Yes

0=No

9 = No Mention/Missing

**RefertoDC** Refer voucher to the District CJA Committee when considering reduction

**RefertoDVDC** Refer to a Divisional CJA Committee when considering reduction

**RefSupAtt** Refer to CJA Supervising Attorney when considering reduction

**RefertoCBA** Refer to a Case-Budgeting Attorney when considering reduction

- 1=May
- 2=Should
- 3=Will/Must/Shall
- 9=Not mentioned/Missing

**OtherRefer** Refer to another entity for voucher review

**IndReview** Numeric option box. Plan sets out a process for reviewing a proposed voucher cut that is independent of the presiding judge. To qualify as “independent,” the review must be conducted by a person or entity other than the presiding judge, attorneys must be able to invoke the process without the approval of the presiding judge, and there must be circumstances under which the decision of the reviewing authority may override the decision of the presiding judge.

- 0=Neither
- 1=Yes, Before submission
- 2=Yes, After submission
- 3=Yes, both before & after submission
- 9=No Mention/Missing

## Compensation Caps

**JCUSMax** Numeric option box: Check “Yes” if the plan incorporates the statutory and/or Judicial Conference caps by reference with language in the compensation section such as “In accordance with the provisions of . . .”, “Rates shall not exceed . . .”

- 1=Yes
- 0=No/Missing

**NCHourly** Currency. The dollar cap on hourly attorney fees in non-capital representations. Entered only if a specific amount is noted in the Plan. Otherwise, missing.

**NCCase** Currency. The dollar cap on payments to an attorney per case in non-capital representations. Entered only if a specific amount is noted in the Plan. Otherwise, missing.

**NCExpert** Currency. The dollar cap on payments for expert services per case in non-capital representations. Entered only if a specific amount is noted in the Plan. Otherwise, missing.

**CHourly** Currency. The dollar cap on hourly attorney fees in capital representations. Entered only if a specific amount is noted in the Plan. Otherwise, missing.

**CCase** Currency. The dollar cap on payments to an attorney per case in capital representations. Entered only if a specific amount is noted in the Plan. Otherwise, missing.

**CExpert** Currency. The dollar cap on payments for expert services per case in capital representations. Entered only if a specific amount is noted in the Plan. Otherwise, missing.

## Federal Defender Organization Responsibilities

**FPDassesstaffneeds** FDO is to assess training needs of office staff.

**FPSassessCJAneeds** FDO is to assist with assessment of training needs of panel attorneys.

**FPDTrain** FDO is to provide training opportunities.

**OtherEd** FDO is to disseminate other educational resources.

**StaffDevelop** FDO is to develop an in-office staff development program to promote diversity by, for example, hiring and mentoring young lawyers and/or recruiting out of law school. Check “Yes” only if diversity is cited as a goal of the program or mentioned specifically in the name of the program.

**FinAff** When practical, FDO is to discuss financial eligibility with defendants who indicate that they can’t pay for an attorney and assist in the completion of a financial affidavit form.

**TimelyApp** FDO is to work in cooperation with the court & the U.S. Attorney’s office to make arrangements with investigative and police agencies to ensure timely appointment of counsel.

1=Yes

-8= Not Applicable (No Federal Defender Organization)

-99=No/No Mention/Missing

**OnCJAComm** Defender or designee is to serve on the District CJA Advisory Committee.

1=Yes

0=No

9=No Mention/Missing

-8 = Not applicable (No District CJA Committee)

## Capital Cases

**SepSec** Numeric option box. Check “Yes” or “No” to indicate if the plan has special procedures for the appointment of counsel to and/or processing of capital cases. These may be set forth in an entirely separate section of the plan or scattered across various topic areas.

1=Yes

0=No/Missing

**CHUstate** Numeric from option box. Whether a housed CHU has statewide responsibilities.

**OthCHUDist** Numeric from option box. Whether a housed CHU is available to other districts.

1=Yes

-99=No/Not Mentioned/Missing

-8 = Not applicable (i.e., not a housed CHU)

**FPDResCon** FPD to notify/consult with Resource Counsel.

**CourtWeighFD** Court to give due weight to recommendations of federal defenders.

**CourtWeighRC** Court to give due weight to recommendations of Resource Counsel.

1=May

2=Should

3=Will/Must/Shall

9=Not mentioned / Missing

**CHUPref** Numeric option box. Whether the plan expresses a preference for appointment of the federal defender office or capital habeas unit (CHU) in capital cases.

**NoCaps** Plan states that there should be no formal or informal non-statutory budget caps on any capital case.

**Budget** All capital cases are to be budgeted with the assistance of case-budgeting attorneys and/or Resource Counsel where appropriate.

1=Yes

9=No/Not mentioned/Missing

**CourtResCon** Court is to utilize the expert services available through the AO and Resource Counsel Projects where appropriate.

**AttResCon** Appointed counsel to consult regularly with the appropriate Resource Counsel projects.

1=May

2=Should

3=Will/Must/Shall

9=Not mentioned/Missing

# Attachment 3

## Interrater Reliability

**Highlight** indicates a text field via selection from a dropdown with an “Other” selection.

A. Reliability By District				B. Reliability By Data Element			
District	% Agree	District	% Agree	Element	% Agree	Element	% Agree
CAC	69%	MOE	88%	commAdmin	52%	PROGRAMS	89%
ND	78%	VT	88%	Admin	54%	PracticeYrsReq	91%
CAS	79%	NYN	88%	CourtWeighFD	56%	Specific	91%
AZ	81%	GAN	89%	Errors	63%	techrevclerk	91%
ILN	82%	IN	89%	SepSec	64%	Budget	93%
MA	82%	ARW	89%	IndReview	65%	CHUPref	93%
OR	82%	OHN	89%	JCUSMax	67%	DistrictCJA	93%
PAE	82%	NV	89%	ApptSkill	72%	DivisionalCJA	93%
MD	83%	PAW	89%	CourtWeighRC	75%	OtherEd	93%
CO	83%	GAS	90%	HOURS	75%	OtherCutSpec	93%
NYW	83%	RI	90%	MentorType	80%	CJASupATT	94%
PAM	84%	TXW	90%	PanelList	80%	FinAff	94%
IAN	85%	WY	90%	TimelyApp	80%	REQED	94%
TXN	85%	DE	91%	OnCJAComm	81%	TechRev	94%
DC	85%	LAE	91%	FPSassessCJneeds	84%	FPDassessstaffneeds	95%
INS	85%	MSN	92%	FPDResCon	85%	SmallEnough	95%
PR	85%	TXS	92%	FPDTrain	85%	CHourly	96%
OKE	86%	ALS	93%	JudgePanel	85%	CourtResCon	96%
VAE	86%	FLS	93%	LengthTerm	85%	NCExpert	96%
VAW	86%	NYS	93%	MentorDiv	85%	NotCompletd	96%
KYW	87%	NCM	93%	Notice	85%	StaffDevelop	96%
ME	87%	NM	94%	OthCHUDist	85%	techrevCBA	96%
NCE	87%	WIE	94%	RefertoDC	85%	techreviewFDO	96%
NH	87%	OHS	95%	REQCLE	85%	CExpert	98%
WIW	87%	KYE	96%	Substantial	85%	Excess	98%
IAS	88%	FLN	97%	ApportionPer	86%	NCHourly	98%
<b>C. Reliability by Coder</b>				CHUState	86%	NoAdminAddressed	98%
Coder	% Agree	Coder	% Agree	OtherRefer	88%	NotEligible	98%
1	87%	5	86%	TargetCases	88%	RefertoCBA	98%
2	91%	6	83%	Targetnumber	88%	CCase	99%
3	89%	7	84%	AttResCon	89%	NCCase	99%
4	86%	8	86%	PracticeYears	89%	NoCaps	99%
<b>D. Reliability by Plan Time Frame</b>				Preapp	89%	RefertoDVDC	99%
<b>Effective on</b>			<b>% Agree</b>			RefSupAtt	99%
10/1/2016			88%				
9/30/2021			86%				

# Appendix D

## Circuit Court CJA Plan Analysis

### Introduction

By statute, both district courts and the courts of appeals have responsibility for administration of the CJA. Courts detail the policies of CJA administration in a CJA plan.<sup>1353</sup> The courts of appeals not only approve district court plans, but they are also required by statute to supplement the plans “with provisions for representation on appeal.”<sup>1354</sup> Additionally, they create their own plans and policies for administration of the CJA,<sup>1355</sup> including the selection of panel attorneys appointed in appellate litigation.

The adopted recommendations rarely mention courts of appeals specifically, but many of the recommendations involve areas of the defense function in which courts of appeals, or the chief judge of the court of appeals, play a role, and their implementation would involve changes in policy or practice in these courts. Thus, to assess implementation we must examine CJA plans for the courts of appeal and how they changed after the adoption of the Cardone Report recommendations.

Implementing the adopted recommendations of the Cardone Report requires changes to CJA administration in both the district courts and courts of appeals, including specific provisions of court plans. In December 2021, members of the research team examined all CJA plans adopted by the twelve regional U.S. Courts of Appeals. Similar to the district plan analysis, the researchers read and coded

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1353. Criminal Justice Act of 1964 (CJA), Pub. L. 88-455, § 1, 78 Stat. 552 (Aug. 20, 1964), codified at 18 U.S.C. § 3006A.

1354. 18 U.S.C. § 3006A(a)(3). “Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.”

1355. Full citations of the sources is as follows: U.S. Court of Appeals for the District of Columbia Circuit Plan to Implement the Criminal Justice Act of 1964, Effective July 1, 1991, as amended April 8, 1996; October 23, 1996; March 19, 2005; June 26, 2007; September 4, 2020; Local Rule 46.5, Appointment of Counsel in Criminal Cases, United States Court of Appeals for the First Circuit Rulebook, May 20, 2021; United States Court of Appeals for the First Circuit CJA Reference Manual, Jan. 7, 2021; (Second Circuit) Amended Plan to Implement the Criminal Justice act of 1964, Effective Jan. 29, 2002, as Amended Sept. 28, 2016; Criminal Justice Act Plan for the Court of Appeals for the Third Circuit, Apr. 1988; Plan of the United States Court of Appeals for the Fourth Circuit in Implementation of the Criminal Justice Act, amended plan effective June 1, 2018; Judicial Council of the Fifth Circuit Plan for Representation on Appeal Under the Criminal Justice Act, Revised Apr. 2009; United States Court of Appeals for the Sixth Circuit Criminal Justice Act Plan, adopted Feb. 11, 1971 amended May 7, 2008; The Plan of the United States Court of Appeals for the Seventh Circuit to Supplement the Plans of the Several United States District Courts Within the Seventh Circuit, effective Jan. 1, 1991, as amended Jan. 1, 1996; [Eighth Circuit] Plan to Implement the Criminal Justice Act of 1964, adopted Feb. 8, 1971, effective Feb. 11, 1971; [Ninth] Circuit Rule 4-1. Counsel in Criminal Appeals, revised Mar. 1, 2021; Judicial Council of the Ninth Circuit Criminal Justice Act Policies and Procedures, effective Oct. 20, 2016, appendices revised Jan. 20, 2021; Addendum I Criminal Justice Act Plan United States Court of Appeals for the Tenth Circuit, as amended, eff. July 1, 2019; [United States Court of Appeals for the Tenth Circuit] Criminal Justice Act (CJA) Claims for Hourly Compensation and Expenses Reimbursement Advice to CJA Counsel Regarding Death Penalty and Capital Habeas Matters 18 U.S.C. § 3599, 18 U.S.C. § 3005, revised July 29, 2015; United States Court of Appeals for the Tenth Circuit Criminal Justice Act (CJA) Claims for Hourly Compensation and Expenses Reimbursement Advice to CJA Counsel Regarding Non-Capital Cases, dated Feb. 25, 2019; Instructions for Submitting Tenth Circuit CJA Vouchers, revised July 17, 2015; and Addendum Four Eleventh Circuit Plan Under the Criminal Justice Act, revised Mar. 2020. Throughout this report, we refer to these by “[Insert name] Circuit plan” or “[Insert name] Circuit manual” and a page number for reference. If we refer to prior plans, we note the date of the prior plan, but otherwise we are discussing the current circuit plan, regardless of how old it may be. If we refer to Tenth Circuit supporting materials, we cite it with an abbreviated name.

any plan in effect since the start of FY 2017 through the end of FY 2021. The coding scheme for circuit plans was much simpler than that constructed for the district court plans, but the coding process was similar.<sup>1356</sup> A member of the research team compared the policies detailed in circuit CJA plans to the adopted recommendations to consider whether current policies implement the changes sought by the recommendation. The coder identified information about the following:

- CJA panel administration, including any CJA committee, panel selection or removal process, or term of panel membership
- compensation, including voucher submission and review
- capital litigation
- responsibilities of the FDO

Recommendation 19 requires districts, not circuits, to review and update their plans routinely.<sup>1357</sup> Nevertheless, the age of circuit plans may affect CJA administration in the courts of appeals with respect to the other adopted recommendations discussed below. Table 1 below shows the variation in the age of the current circuit CJA plans.

**Table 1.** Circuit CJA Plan Dates of Adoption.

Circuit	Plan Adoption Year (End of FY 2021)	Plan Adoption Year (Prior CJA Plan)
D.C.	2020	2007
First	2021	2018
Second	2016	2002
Third	1988	Not available
Fourth	2018	Not available
Fifth	2009	Not available
Sixth	2008	1971
Seventh	1996	1991
Eighth	1971	Not available
Ninth	2021	2015
Tenth	2019	Not available
Eleventh	2020	2009

Note: Plans described as “Not Available” could not be found or did not exist.

Fifty years separates the oldest circuit CJA plan from the most recent in place at the end of FY 2021. The substantial difference in age means the details of the CJA plans likely do not reflect current practices for administration of the CJA and may affect the implementation of the adopted recommendations.<sup>1358</sup>

<sup>1356.</sup> A list of coded elements from circuit CJA plans is available at the end of this appendix.

<sup>1357.</sup> Recommendation 19 says, “All districts must develop, regularly review and update, and adhere to a CJA plan as per Judicial Conference policy. Reference should be made to the most recent model plan and best practices. The plan must include a provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work. The plan should include a training requirement to be appointed to and then remain on the panel. The plan must include a mentoring program to increase the pool of qualified candidates.” See JCUS-SEP 2018.

<sup>1358.</sup> See Appendix C: District Court CJA Plan Analysis.

The age of the plans also highlights the importance of interviewing stakeholders in the circuits, about e.g., upcoming revisions to court plans or differences between administration of the CJA in the plan and the court's practices. These interviews can shed light on whether plans match practice and if circuits are considering revisions in light of the adopted recommendations. Information from these interviews is discussed elsewhere in this analysis.<sup>1359</sup>

As Table 1 shows, how often circuits revise their plans varies a great deal too. Though we do not have prior plans for all circuits, among those with information about the year of adoption for each revision, we see some differences. The D.C. Circuit plan, for example, lists all the prior amendments to it, with the prior plan adopted in 2007.<sup>1360</sup> The First Circuit's prior plan was adopted in 2018, but the text of the local rule with the plan was no different after revision in 2021.<sup>1361</sup> Some plans, such as the Second, Sixth, and Seventh Circuit plans, noted that the current plan replaced the prior plan from a specific year, but didn't detail the changes made.<sup>1362</sup> The Ninth Circuit, on the other hand, annotates sentences modified with each date of revision to the section of the plan, allowing comparisons across versions. These changes are discussed below in Analysis of Plan Revisions.

Plans also differ in the specificity with which they detail the administration of the CJA. All plans were short, between two and twelve pages and averaging about seven pages total. Two circuits created a manual in addition to their plan,<sup>1363</sup> and one circuit provided additional information for panel attorneys elsewhere online.<sup>1364</sup> The additional information often included substantial detail about specific case types or the administration of the CJA generally, running from 19 to 48 pages. The information from these additional sources is included below.

With this backdrop of plan age and length, we turn now to comparing circuit CJA plans in four areas: panel administration, compensation, capital litigation, and federal defender responsibilities. Each section is described below.

## Panel Administration

- Most circuit CJA plans presume that counsel appointed in the district court will continue, meaning district court CJA panel processes affect the quality of appellate representation.
  - Circuit plans varied in whether the preference was to appoint initial counsel from the FDO or from the panel (district or circuit), should appointment of new counsel be necessary, affecting the ability of panel attorneys to receive a “sufficient number of cases per year so that these attorneys remain proficient.”<sup>1365</sup>
- Few circuit plans included formal qualifications for circuit panel membership beyond application and selection. Training, for example, is rarely included (*see below*).

1359. See Chapter 4: Defender Services Human Resources, Chapter 3: Panel Attorney Compensation, Chapter 5: Standards of Practice and Training, and Chapter 6: Capital Representation.

1360. The D.C. Circuit plan lists prior versions in 2007, 2005, 1998, Oct. 1996, Apr. 1996, and 1991.

1361. Local Rule 46.5 and the First Circuit CJA Manual were both revised in 2021, but the local rule is the same as the prior version from 2018, suggesting it was reviewed but not changed in 2021. Before 2018, the prior version of the plan was 2002, which did differ from the 2018/2020 version of the plan (discussed below).

1362. Second Circuit plan, p. 1; Sixth Circuit plan, p. 1; and Seventh Circuit plan, p. 7.

1363. First Circuit and Ninth Circuit manuals.

1364. Tenth Circuit plan.

1365. Recommendation 19, *supra* note 1357.



- Of the ten circuits with a separate appellate panel,
  - seven selected panel attorneys through an application process,
  - one tasked the clerk of court with creating a list of panel attorneys without describing a process for doing so, and
  - two did not describe how the panel was to be constituted.
- Five circuit plans discussed a role for a circuit CJA committee to assist with the selection of panel attorneys in the courts of appeals.
  - The remaining circuit plans either did not reference a committee participating in the panel selection process, or there was no separate appellate panel.
- Membership on the circuit CJA committee varied, with some plans listing specific members of the committee and others listing general categories (e.g., one defender from each district in the circuit).
- Ten plans tasked the clerk of court with maintaining the list of panel attorneys for the circuit, though the clerk could work in conjunction with the federal defender, the court, or the chief judge or the judge's designee.
- Five of the ten plans with a separate appellate panel also included detail on reasons for attorney removal from the panel, a process for doing so, or both.

The administration of the panel involves both the appointment of counsel for those who cannot afford it and the selection of attorneys for those appointments. These processes differ across courts. Two adopted recommendations discuss the administration of the CJA panel.

**Recommendation 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.<sup>1366</sup>

**Recommendation 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.<sup>1367</sup>

Given their statutory responsibilities with CJA administration, one interpretation of Recommendation 15 is that the courts of appeals, like the districts, ought to adopt a committee or designate someone to manage selection, appointment, retention, and removal of panel attorneys. Most (ten) circuit plans included provisions for appellate panels. If Recommendations 15 and 21 were implemented in circuit CJA plans, judges would be involved in panel administration and attorneys would have an eDiscovery training requirement to be appointed to and remain on the panel. Circuit plans were examined to determine if their processes were consistent with these recommendations.

## Appointment of Counsel

Generally, circuit CJA plans detailed a process where the appointed counsel in the district court continued to represent the client on appeal, meaning much of panel attorney appointment is governed by district court CJA plans. Exceptions occur that require courts of appeals to appoint counsel, such as

<sup>1366</sup>. See JCUS-SEP 2018.

<sup>1367</sup>. See JCUS-SEP 2018.

when counsel asks for relief or the client asks for alternate counsel. The plans generally recognize there are legitimate reasons either to change counsel, or to maintain continuity of counsel, from district court proceedings.<sup>1368</sup> Plans noted that requests for relief or to appoint alternate counsel for appeal would be entertained, but many stated that the person seeking representation is not permitted to choose their own counsel.<sup>1369</sup> Ultimately, selection of counsel rests with the court of appeals.

Circuit plans differed in their process for appointing counsel. Two circuits (the Fourth and D.C. Circuits) defaulted appointments to the federal defender, and in the Fourth Circuit there was a preference to first appoint the defender from the district where the appeal arose, then consider any other defender in the circuit. If all the defenders were unable to accept the appointment, the court would turn elsewhere (typically to the appellate panel) to appoint counsel.<sup>1370</sup>

Other circuits took a different approach, listing a rotation of appointments among appellate panel attorneys, FDO attorneys, legal aid organizations, etc., but the lists were not always in the same order. The Tenth Circuit listed the Colorado/Wyoming FDO first (regardless of where the appeal originated), then other district FDOs, and then the panel.<sup>1371</sup> The Fifth Circuit and the Seventh Circuit listed the panel first, then any FDO or CDO.<sup>1372</sup> For capital litigation, the Sixth Circuit expressed a preference for consulting state public defenders over federal defenders, even going so far as to list a preference of appointing state attorneys over attorneys from federal CHUs (appointment of CHUs is discussed more below).<sup>1373</sup> Four plans noted a guideline of 25% of appointments assigned to the panel at the circuit level, similar to the district court preference.<sup>1374</sup> Either the circuit clerk's office or the FDO was responsible for tracking appointments, to ensure compliance with the 25% goal or to allow reporting to the Administrative Office.

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1368. See, e.g., Tenth Circuit plan, p. 2. "While the Court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that trial counsel may not have the requisite skills, or the desire, to represent an individual on appeal."

1369. See, e.g., the Fourth Circuit plan, p. 2. "[N]o person entitled to court-appointed counsel shall be permitted to select counsel to represent him."

1370. D.C. Circuit plan, p. 4: "Upon the determination of a need for counsel, the Clerk shall notify the Federal Public Defender of that need and the nature of the case. The Office of the Federal Public Defender shall either provide the representation or select as counsel the next attorney on the CJA Panel list who has handled or assisted in a case of equal or greater complexity and who is available to accept the appointment." Fourth Circuit plan, p. 10: "Appointments shall be initially offered to the Federal Public Defender for the district out of which the appeal arises. If the Defender for that district cannot accept a case, appointments may be made to the Federal Public Defender for another district within the Circuit or to a member of the CJA Appellate Panel."

1371. Tenth Circuit plan, p. 1. "The Court of Appeals may appoint the Office of the Federal Public Defender for the Districts of Colorado and Wyoming, another Federal Public Defender office within the Circuit, an attorney from the Court's Criminal Justice Act Panel, or counsel from the trial court."

1372. Fifth Circuit plan, p. 2: "The court of appeals will select counsel for appointment under this Plan from: panels of attorneys designated or approved by the district courts of the Fifth Circuit; a Federal Public Defender Organization; a Community Defender Organization approved by a district court plan and authorized to provide representation under the Act; or any other organized program the court of appeals has approved that provides attorneys to represent financially eligible persons on appeal." Seventh Circuit plan, p. 3: "Counsel furnishing representation under the Plan shall be selected from a panel of attorneys designated or approved by the Court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the Plan."

1373. The Sixth Circuit plan states, "Should one or both attorneys who represented a capital defendant in the district court not continue as appellate counsel, the Court may consult with the state public defender's office in the state where the case originated or a Federal Public Defender or Community Defender Capital Habeas Unit located in the district in which the case was litigated in order to locate death penalty qualified counsel to appoint on appeal. After this consultation, the Court may: (1) appoint and compensate under the Act, an attorney or attorneys from a state public defender's office located in the state where the case originated; (2) appoint an attorney or attorneys from a Federal Public Defender or Community Defender Capital Habeas Unit located in the district in which the case was litigated; or (3) appoint counsel from the CJA Panel, giving consideration to the extent of counsel's experience litigating capital appellate issues in the Circuit" (pp. 1-2).

1374. Plans in the D.C. Circuit, the Fifth Circuit, the Seventh Circuit, and the Eleventh Circuit included this provision. See D.C. Circuit plan, p. 4; Fifth Circuit plan, p. 2; Seventh Circuit plan, p. 3; and Eleventh Circuit plan, p. 2.

One final aspect of case assignment that warrants attention is the inclusion in some of the circuit plans that attorneys not on the appellate panel could receive assignments at the discretion of the court. This plan feature was not common among district CJA plans. Generally, non-panel members could be added to the list upon appointment. Some circuits included a reference to appointing “any other organized program the court of appeals has approved that provides attorneys to represent financially eligible persons on appeal,”<sup>1375</sup> but other plans were even more expansive. The Eighth Circuit, for example, noted that

the placing of a name upon the panel or its removal there from will not be controlled by whether the attorney is or is not desirous of being appointed as counsel under the Act. The obligation of members of the legal profession, when called upon to do so by the courts, to represent those charged with a criminal offense who are unable to obtain counsel, is traditional, and this responsibility on the part of the bar has not been lessened as to the federal courts by the passage of the Criminal Justice Act of 1964.

This statement about case appointments touches on another broad theme of the circuit CJA plans regarding panel administration: the ongoing presumption that attorneys have an obligation to represent people who cannot afford counsel. Several of the plans included a general reference to service to the profession, a duty to represent people who cannot afford representation, or professional obligation when discussing appointment under the CJA or, more specifically, the difference between compensation under the CJA and the prevailing rates for such services (discussed below).

## Panel Attorney Selection and Qualifications

Ten circuit plans established an appellate panel; the Fifth and Eleventh Circuits did not. Instead, the appellate panels in these circuits included all attorneys on the district court panels for all the districts in the circuit.<sup>1376</sup> In most circuits, the panel is selected by the court of appeals itself (or a committee of the court, as in the Second Circuit).<sup>1377</sup> The Seventh and Eighth Circuits differed in that the selector is the circuit clerk, but he or she works in consultation with the court.<sup>1378</sup> The D.C. Circuit allowed the federal defender to add attorneys to the panel list after they met eligibility requirements, with eligibility being determined by the CJA committee (discussed below).<sup>1379</sup>

Some plans detailed the qualifications of attorneys to be included on appellate CJA panels, typically beginning with completing an application. Of the ten circuits with a separate appellate panel, seven selected panel attorneys through an application process, two did not include a process detailing how

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1375. Fifth Circuit plan, p. 2.

1376. Fifth Circuit plan, p. 2: “The court of appeals will select counsel for appointment under this Plan from: panels of attorneys designated or approved by the district courts of the Fifth Circuit; a Federal Public Defender Organization; a Community Defender Organization approved by a district court plan and authorized to provide representation under the Act; or any other organized program the court of appeals has approved that provides attorneys to represent financially eligible persons on appeal.” Eleventh Circuit plan, p. 1: “(1) Pursuant to subsection (b) of the Act, counsel furnishing representation under this plan shall be selected from the panels of attorneys designated or approved by the district courts of the Eleventh Circuit, which are hereby approved by this court, or from a bar association, legal aid agency, or federal public defender organization or community defender organization approved by a district court plan and authorized to furnish representation under the Act.”

1377. Second Circuit plan, pp. 3–4.

1378. Seventh Circuit plan, p. 2; Eighth Circuit plan, p. A13–A14.

1379. D.C. Circuit plan, p. 1.

attorneys join the panel, and one tasked the circuit clerk with creating a list of panel attorneys without describing a process for doing so.<sup>1380</sup>

In addition to an application process, circuit CJA plans detailed other qualifications for panel attorneys, such as being a member in good standing of the bar of the court; being familiar with federal criminal law, appellate law, the Rules of Evidence, the Sentencing Guidelines, or habeas corpus law; and a willingness to accept appointments. The D.C. Circuit plan set a minimum time period of bar membership (one year) to be eligible for the panel but provided attorneys an alternative criterion of attending an appellate litigation training course in lieu of the year of experience requirement.<sup>1381</sup> Several plans noted a desire for panel lists to include attorneys from each of the federal districts within the circuit, to create geographic diversity among circuit panel attorneys.<sup>1382</sup>

Though qualifications were specified, the terms of responsibilities of panel membership, such as trainings, were not routinely provided in circuit CJA plans. Three plans set the term of panel membership at three years (or no more than three years), after which attorneys needed to reapply for the panel.<sup>1383</sup> One plan affirmatively said there was no term of panel membership,<sup>1384</sup> and several plans noted that panel attorney lists were reevaluated every year to ensure they were current and met the needs of the circuit. The term of membership was especially important in courts that required panel attorneys to take at least one appointment per year (*see below* regarding removal from the panel). Finally, some plans listed maintaining an eVoucher account as an obligation of panel members.<sup>1385</sup>

Five circuit plans discussed having a committee to assist with the selection of panel attorneys in the circuit. The committees went by a variety of names, including, CJA Panel Committee,<sup>1386</sup> CJA Appellate Panel Committee,<sup>1387</sup> CJA Attorney Advisory Group,<sup>1388</sup> or CJA Standing Committee.<sup>1389</sup> The remaining circuit plans did not reference a committee participating in the panel selection process, or there was no separate panel. For purposes of the rest of this analysis, we will refer to these as CJA committees regardless of their official name under the circuit plan.

CJA committee membership varied widely, with some listing specific members of the committee to those listing general categories.

- The D.C. Circuit’s CJA committee includes two active circuit judges, the D.C. federal defender, and two experienced criminal law attorneys, only one of whom can be from the panel.<sup>1390</sup>

1380. D.C., Second, Third, Fourth, Sixth, Eighth, and Tenth Circuits all discussed attorneys submitting applications to serve on the panel. The First and Ninth Circuits did not detail a panel selection process, and the Seventh left panel selection to the discretion of the clerk.

1381. D.C. Circuit plan, p. 1. “No attorney with less than one year’s active membership in the District of Columbia or a state bar shall be included on the Panel. Completion of an appellate litigation training course may substitute for demonstrated experience.”

1382. *See, e.g.*, Tenth Circuit plan, p. 3. “To the extent possible, the Panel will include qualified attorneys from every judicial district within the Tenth Circuit.”

1383. Second Circuit plan, p. 4; Fourth Circuit plan, p. 9; and Tenth Circuit plan, p. 3.

1384. Sixth Circuit plan, p. 2. “There are no fixed terms for panel membership.”

1385. *See, e.g.*, Tenth Circuit plan, pp. 4–5. “The Panel attorney shall be solely responsible for promptly updating his or her eVoucher User Profile regarding any change of firm association, physical business address, taxpayer identification number, email address, telephone number, and IRS Form W-9.”

1386. D.C. Circuit plan.

1387. Fourth Circuit plan.

1388. Second Circuit plan.

1389. Sixth and Tenth Circuits plans.

1390. D.C. Circuit plan, p. 2.

- The Fourth Circuit CJA committee includes one circuit judge, a federal defender from within the circuit, at least one attorney from each district in the circuit, the circuit executive, the clerk, the senior staff attorney and the circuit case-budgeting attorney (CBA).<sup>1391</sup>
- The Second Circuit CJA committee is advised by a group including the attorney-in-charge of the appeals bureau in the New York Southern/New York Eastern CDO, and twelve other attorneys representing all districts in the circuit but who cannot be panel attorneys.<sup>1392</sup>
- The Sixth Circuit CJA committee consists of one criminal defense lawyer from each district and one member of the circuit judicial council.<sup>1393</sup> The lawyers could be from the panel or a district FDO.
- The Tenth Circuit has perhaps the most complex list of CJA committee members. The plan states:

The Federal Public Defender for the Districts of Colorado and Wyoming shall be a permanent member of the Standing Committee. The remaining membership shall consist of two lawyers from Oklahoma, and one lawyer from the remaining states in the Circuit. At least one of these positions must be filled with one of the other Federal Public Defenders from the Circuit. Two of the other positions must be filled with attorneys who are not current members of the Panel.<sup>1394</sup>

Members of the circuit CJA committees are chosen by the chief judge or the judge's designee (three plans)<sup>1395</sup> or the court of appeals more generally (two plans).<sup>1396</sup> Terms on the committee were generally set at three years, and plans often specified that committee members could serve no more than two consecutive terms.<sup>1397</sup>

Across the five circuits whose plans provided for a CJA committee, the duties of the CJA committees varied considerably as well. Committees were tasked with reviewing applications of attorneys seeking to be on the panel,<sup>1398</sup> reviewing eligibility for applicants (where such requirements existed),<sup>1399</sup> ensuring the list of panel attorneys was current (D.C. only),<sup>1400</sup> making recommendations for adding or removing attorneys from the panel,<sup>1401</sup> meeting once per year to review applications and the operation and

1391. Fourth Circuit plan, p. 10.

1392. Second Circuit plan, pp. 2–3.

1393. Sixth Circuit plan, p. 4.

1394. Tenth Circuit plan, p. 5.

1395. D.C. Circuit plan, p. 2; Sixth Circuit plan, p. 4; and Tenth Circuit plan, p. 5.

1396. Second Circuit plan, pp. 2–3, and Fourth Circuit plan, p. 10.

1397. *See, e.g.*, Fourth Circuit plan, p.10. “Attorneys appointed to the Committee shall serve staggered three year terms and may serve two consecutive terms. The Federal Defender representative shall serve a three-year term and may serve two consecutive terms.”

1398. *See, e.g.*, Second Circuit plan, pp. 2–3. “A CJA Attorney Advisory Group will be appointed by the Court to assist the Court and the CJA Committee in reviewing applications for membership on the CJA Panel . . . .”

1399. *See, e.g.*, Fourth Circuit plan, p. 10. “The Committee shall review the qualifications of applicants for the panel and recommend, for approval by the Court, those applicants best qualified to fill the panel.”

1400. D.C. Circuit plan, p. 1. “Attorneys who wish to be included on the CJA Panel may submit an application to the Office of the Federal Public Defender, stating their eligibility as defined in subsection (B) above. The Court or the Office of the Federal Public Defender may add any attorney when satisfied of his or her eligibility.”

1401. *See, e.g.*, Tenth Circuit plan, p. 1. “The Court shall approve private attorneys for membership on the Panel after receiving recommendations from the Court’s Standing Committee on the Criminal Justice Act.”

administration of the panel,<sup>1402</sup> recommending any changes necessary to administration of the CJA,<sup>1403</sup> and investigating any complaints against panel attorneys (typically at the request of the court).<sup>1404</sup>

Because of the fluidity of panel membership, most circuit plans described the process of physically adding or removing attorneys from the panel list (or updating contact information for panel attorneys). Ten of twelve circuit plans tasked the clerk of court with maintaining the list of panel attorneys,<sup>1405</sup> though the clerk could work in conjunction with the federal defender,<sup>1406</sup> the court,<sup>1407</sup> or the chief judge or their designee.<sup>1408</sup> When the clerk maintained the list with the court or chief judge, it was typically described as the clerk maintaining the list of panel attorneys “under the direction and supervision” of the judicial authority.<sup>1409</sup> One plan (the Tenth Circuit’s) listed the clerk of court and/or court’s panel administrator as responsible for maintaining the panel list.<sup>1410</sup>

Three of the circuit plans (Second, Sixth, and Tenth Circuit plans) all assumed a willingness by (or explicitly made a requirement for) counsel to be appointed to at least one case per year. Refusal of three cases (typically in a three-year term) was grounds for removal from the panel,<sup>1411</sup> or an assumption of resignation from the panel (Sixth Circuit).<sup>1412</sup>

## Panel Attorney Removal

In addition to declining appointments, removal from the panel could occur for any number of reasons. Five of the ten plans with a process for adding attorneys to a circuit panel list also included detail on reasons for removal from the panel or a process for doing so.

- The D.C. Circuit allows an attorney to petition for removal, for a panel of judges to recommend to the CJA committee the removal of an attorney, or for the CJA committee to recommend removal on its own motion.<sup>1413</sup>

1402. *See, e.g.*, Fourth Circuit plan, p. 10. “The CJA Appellate Panel Committee shall meet at least once a year in person or by teleconference to consider applications for the CJA Appellate Panel.”

1403. *See, e.g.*, Fourth Circuit plan, p. 10. “At its annual meeting the Committee shall also review the operation and administration of the panel over the preceding year and the legal education and training opportunities provided to panel members and make any recommendations for improvement to the Court.”

1404. *See, e.g.*, Second Circuit plan, p. 5. “All complaints concerning the conduct of a CJA Panel member shall be forwarded to the Clerk of Court. If the CJA Committee determines that a complaint alleges facts that, if true, would warrant consideration of removal of the CJA Panel member, or that other facts exist potentially warranting removal of a Panel member, the Committee may direct the Attorney Advisory Group to review the complaint, or brief, make such inquiry as it deems appropriate, and issue a report of its findings and recommendations to the Court.”

1405. These plans were for the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits.

1406. The D.C. Circuit plan says the federal defender manages the list (p. 6), but the court notifies the clerk of attorneys seeking to be removed from the panel (p. 2). D.C. Circuit plan, p.1: “The Court or the Office of the Federal Public Defender may add any attorney when satisfied of his or her eligibility.”

1407. *Id.*

1408. Second Circuit plan.

1409. *See, e.g.*, Second Circuit plan, p. 3. “The Clerk of Court, under the direction and supervision of the Chief Judge or the Chief Judge’s designee, shall maintain the list of the CJA Panel members . . . .”

1410. Tenth Circuit plan, p. 4.

1411. *See, e.g.*, Second Circuit plan, p. 4. “The Court may remove a CJA Panel member for refusing three times to accept an appointment during the membership term.”

1412. Sixth Circuit plan, p. 3 “[T]he refusal to accept appointments on a consistent basis will lead the Court to assume that the attorney has resigned from the panel.”

1413. D.C. Circuit plan, p. 2.

- The Fourth Circuit plan provided for the removal of panel attorneys at the discretion of the court but listed reasons for which it could propose removal. Included among these reasons were member failure “to fulfill satisfactorily the obligations of panel membership, including the duty to afford competent counsel, or [engagement] in other conduct that renders inappropriate his or her continued service on the panel.”<sup>1414</sup>
- The Second Circuit included a similar statement but also added that attorneys could be automatically suspended if they received a state or federal bar suspension, or if they were arrested for, charged with, or convicted of a crime.<sup>1415</sup>
- The Sixth Circuit tied removal of the panel attorneys to performance assessments given by presiding judges for each appointment, with attorneys “rating at a less-than-professional level” or those with “repeated marginal ratings” being referred to the standing committee for a “recommendation as to whether the attorney should continue as a CJA panel member.”<sup>1416</sup>
- The Tenth Circuit, in addition to including the above-referenced language about the court’s discretion for removing attorneys, included a description of the process for removal. The policy states the recommendation needs to be in writing, and if the court removes the attorney, counsel will be given written notice and an opportunity to respond.<sup>1417</sup>

In both the Tenth and Sixth Circuits, attorneys who were removed from the panel could reapply after a set time, but the application had to include an explanation of the removal and why reappointment should be granted.

## Compensation

- Some plans predated the use of eVoucher for submission and review of claims for compensation and so could not reference it; other circuits with recent plans did not require submission through eVoucher for all types of reimbursement claims and authorizations.
- Ten of the twelve plans included a deadline to submit vouchers for payment after the conclusion of the representation.
- Personnel tasked with reviewing vouchers included the clerk of court, court staff, a judge from the panel hearing the appeal, or the CJA administrative attorney.
  - Two plans included a statement regarding a presumption in favor of the reasonableness of the claimed amount, and one stated a presumption against fees in excess of statutory limits.
  - Ten of twelve plans included a process for reviewing claims in excess of the statutory limits.
  - Nine of twelve plans included discussion of the use of interim vouchers, with most plans stating a preference against the use of interim voucher payments.
  - Two plans included an independent review process to appeal proposed reductions to vouchers.
- Two plans discussed case budgeting.

1414. Fourth Circuit plan, p. 9.

1415. Second Circuit plan, p. 4–5.

1416. Sixth Circuit plan, p. 3.

1417. See, e.g., Tenth Circuit plan, p. 4. “The Standing Committee shall make all removal recommendations to the Court in writing. If the Court decides to accept the recommendation, counsel will be given notice of the proposed basis for removal and will be provided an opportunity to respond in writing. The Court of Appeals will make all final decisions regarding removal. An attorney who is removed will receive a written explanation of removal from the Court.”

Compensation of CJA attorneys has been an ongoing topic of discussion since a system of federal public defense was first recommended by the Allen Committee.<sup>1418</sup> Three of the adopted recommendations discuss changes in the system of compensation for attorneys to improve the defense function.

**Recommendation 8:** The Cardone Committee has identified a number of problems related to voucher cutting. The Judicial Conference should:

- a. Adopt the following standard for voucher review—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.
- b. Provide, in consultation with the Defender Services Committee, comprehensive guidance concerning what constitutes a compensable service under the CJA.<sup>1419</sup>

**Recommendation 9:** Every circuit should have available at least one case-budgeting attorney and reviewing judges should give due weight to their recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from the case-budgeting attorney's recommendations.<sup>1420</sup>

**Recommendation 16:** Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).<sup>1421</sup>

As with Recommendation 19 (discussed above), Recommendation 16 does not say it applies to the circuit courts, but the circuit must approve vouchers when district court presiding judges certify that excess payment is necessary to provide fair compensation. The circuits also review vouchers for appellate appointments. Fundamentally, both require an understanding of the criteria for review and reduction at the circuit level. The role of the circuit's case-budgeting attorney (CBA) in reviewing requests for compensation and expert services, and the processes for appealing reductions made by the circuit, are important for understanding implementation of the recommendations. Some circuit plans included discussion of voucher review processes.

Circuit CJA plans typically included the process for panel attorneys to receive compensation, though plans varied on specificity. Plans provided information about the forms to submit vouchers,<sup>1422</sup> documentation required to support claims for compensation,<sup>1423</sup> rates of compensation,<sup>1424</sup> statutory

1418. The Allen Committee, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, submitted to the Attorney General on February 25, 1963.

1419. Approved as modified. See JCUS-SEP 2018.

1420. Approved as modified. See JCUS-MAR 2019.

1421. Approved as modified. See JCUS-MAR 2019.

1422. In addition to information about submitting vouchers using CJA Forms 20, 21, 30, and 31, plans provided more detailed information as well. See, e.g., Second Circuit plan noting that CJA Form 24 (for transcripts) should be filed with the district court to furnish a transcript (p. 6).

1423. See, e.g., Tenth Circuit, capital letter, p. 6, "Section IV, Claims for Hourly Compensation - General Rules" and non-capital letter, p. 7, "Section VII, Claims for Hourly Compensation - General Rules," detailing documentation required for each expense type.

1424. See, e.g., Ninth Circuit Manual, Appendix-1 listing hourly rates for attorneys in capital eligible, capital habeas, and non-capital litigation.



maximums,<sup>1425</sup> expenses that could be claimed,<sup>1426</sup> and those that could not.<sup>1427</sup> Given the age of some of the plans, information about compensation was not always accurate.<sup>1428</sup>

In discussing compensation of counsel appointed under the CJA, some circuit plans made a general reference to a disparity between compensation and the value of the work. For example, the Sixth Circuit plan stated, “Although the Act provides for limited compensation, the Court recognizes that the compensation afforded often does not reflect the true value of the services rendered.”<sup>1429</sup> Other circuit plans were more explicit in tying lower rates of compensation to service obligations. The Seventh Circuit plan stated, “The payment of compensation to counsel under the Act, in most cases, probably will be something less than compensatory. Service of counsel by appointment under the Act will continue to require a substantial measure of dedication and public service.”<sup>1430</sup> Finally, some plans more plainly stated that compensation was not sufficient, such as the Second Circuit plan referring to the “nominal” compensation of CJA counsel and stating an expectation that “services will be performed with devotion and vigor” nonetheless.<sup>1431</sup>

Provisions regarding the services for which attorneys could be compensated and procedures for seeking compensation varied substantially. Discussion of the process for submitting vouchers ranged from the very vague to the very specific, often (but not always) depending on the age of the circuit’s plan. This was especially true when discussing the use of eVoucher. Circuits with very old plans referenced neither vouchers nor eVoucher, and more recent plans varied in what could be submitted through eVoucher.<sup>1432</sup> Among the plans that discussed use of eVoucher, all noted accepting submission of standard CJA forms (20, 21, 30, and 31) along with supporting documentation for claimed amounts. Even among older plans that did not discuss eVoucher, use of the forms and supporting documentation was detailed.<sup>1433</sup>

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1425. See, e.g., Tenth Circuit Advice to CJA Counsel Letter, 2/25/2019, p. 4, referencing the statutory maximums (with a link to chapter 2 of the *Guide*) when detailing submission of requests for excess compensation.

1426. See, e.g., Eleventh Circuit plan, referencing allowable claims for “travel expenses and other expenses reasonably incurred and necessary for adequate representation on appeal” (p. 5).

1427. *Id.*, noting, “Expenses of general office overhead, personal items, filing fees and expenses for printing of briefs are not reimbursable.”

1428. For example, the Eighth Circuit plan provided the following information about compensation: “The hourly rates of compensation fixed by the Act are designated and intended to be maximum rates only and shall be treated as such. In no event may the hourly rates of compensation for services rendered in this Court exceed \$30 per hour for time expended in court and \$20 per hour for time reasonably expended out of court” (p. A-16). Though the information is current in that the Act sets compensation and those rates were current when the plan was created in 1971, those are not the current rates of compensation.

1429. Sixth Circuit plan, p. 5.

1430. Seventh Circuit plan, p. 1.

1431. Second Circuit plan, p. 1.

1432. Details of what is and is not reviewed, authorized, and paid through eVoucher are important for evaluating other recommendations from the Cardone Report because they provide information on the quality of the data housed within the eVoucher program. Data quality affects our ability to use eVoucher to evaluate other recommendations from the Cardone Report, including Recommendation 8 on limiting voucher reductions to the four reasons and Recommendation 9 regarding requests for expert and other services. Our look at CJA plans shows the First Circuit plan doesn’t allow for submission of transcript requests (CJA Form 24) in eVoucher (attorneys must use CM/ECF), meaning vouchers for those services will be missing in the data from the First Circuit. See, First Circuit Manual, p. 5. The Ninth Circuit uses eVoucher for all voucher submissions, including the requests and approvals of CJA Form 26 requesting attorney excess fees where there is an expectation that the case will exceed the statutory maximum and the pre-authorization for expert services expected to exceed case maximums (a form known as AUTH), meaning eVoucher provides more detailed information for the Ninth Circuit than for others. See, Ninth Circuit manual, p. 26.

1433. See, e.g., Sixth Circuit plan from 2008, referencing submission of CJA 20 vouchers (p. 5).

Despite differences in plan details for how to submit vouchers, the majority of plans (ten of the twelve) included a deadline for when to submit vouchers for payment after the conclusion of the representation. Three plans listed a 30-day deadline,<sup>1434</sup> five plans listed a 45-day deadline,<sup>1435</sup> and two plans gave a 60-day deadline.<sup>1436</sup> Though most stated a “good cause” exception for delayed voucher submissions, two plans (Ninth and Eleventh Circuit plans) explicitly noted that delayed submission could result in voucher reductions, a criterion for reduction different from the four reasons stated in Recommendation 8 and different from the *Guide to Judiciary Policy, Vol. 7A, Ch. 2, § 230.13*.

## Review of Vouchers

Ten of the circuit CJA plans discussed proposed reductions to vouchers (either for appellate appointments or circuit review of district court excess compensation vouchers detailed below). The plans differed in describing how such reductions occurred, what type of reviewer made the reduction, under what circumstances reductions were permitted, and how attorneys were notified, addressing the Cardone Report Recommendations 8, 9, and 16 detailed above.

- In the D.C. Circuit, general voucher review consisted of the clerk reviewing vouchers for mathematical or technical accuracy and then forwarding the voucher to the “appropriate judge” (any active member of the court who was designated by the appellate panel hearing the case) to fix compensation.<sup>1437</sup>
- The First Circuit manual noted that the chief circuit judge delegated all non-excess voucher review to administrative staff in the court.<sup>1438</sup>
- The Fifth Circuit plan only detailed voucher review with respect to capital cases, noting that the senior active member of the panel (or designee) reviewed compensation in capital cases (except in instances of excess vouchers, where the reviewing judge made a recommendation to the chief circuit judge who made the final decision).<sup>1439</sup>
- The Sixth Circuit plan listed a series of criteria the court would consider when reviewing vouchers (complexity, length of record, whether the counsel was also trial counsel, use of associates, quality of brief, and reasonableness) and stated a policy not to reduce claims that were reasonable and necessary.<sup>1440</sup>
- The Seventh and Eighth Circuit plans noted that a judge of the panel hearing the appeal would determine compensation but provided no other detail.<sup>1441</sup>
- The Ninth Circuit detailed a process whereby the CJA administrative attorney reviewed vouchers in the first instance and notified counsel of any proposed reductions.<sup>1442</sup>
- The Tenth Circuit also stated a policy against voucher reductions generally and provided for notice to be given to attorneys about proposed reductions so they would have an opportunity to

1434. Fifth Circuit plan, p. 8; Eighth Circuit plan, p. A17; and Seventh Circuit plan, p. 6.

1435. D.C. Circuit plan p. 8; First Circuit manual, p. 5; Ninth Circuit manual, p. 30; Second Circuit plan, p. 9; and Tenth Circuit non-capital letter, p. 3.

1436. Fourth Circuit plan, p. 5, and Eleventh Circuit plan, p. 6.

1437. D.C. Circuit plan, p. 8.

1438. First Circuit manual, p. 2.

1439. Fifth Circuit plan, pp. 5–6.

1440. Sixth Circuit plan, p. 6.

1441. Seventh Circuit plan, p. 6, and Eighth Circuit plan, p. A17.

1442. Ninth Circuit plan, p. 18.

be heard regarding why the voucher should not be reduced (notice would not be given for mathematical or technical reductions).<sup>1443</sup>

- The Eleventh Circuit stated that in reviewing vouchers, the court would also consider payments made in “cases involving comparable issues, comparable records, comparable days at trial, work by other lawyers in the same case, and other matters where comparisons may be fairly drawn.”<sup>1444</sup>
- The Second, Third, and Fourth Circuits did not describe criteria for voucher review (or the review process generally) in the CJA plan.

Despite the detail about the process for reducing vouchers in other circuits, only two plans (the D.C. and Ninth Circuit plans) included an independent process for reviewing voucher reductions. Though Recommendation 16 references only “districts or divisions,” the statutory responsibility of circuits in voucher review, especially excess compensation vouchers that are scrutinized closely, makes this omission worthy of notice. In the D.C. Circuit, counsel notified of a proposed voucher reduction could ask the CJA committee to prepare an opinion as to whether the reduction met with CJA guidelines. The court considers the CJA committee’s position in its final decision.<sup>1445</sup> In the Ninth Circuit, if the CJA administrative attorney thought a reduction was necessary, they notified the attorney, who could request reconsideration. If the CJA administrative attorney did not grant reconsideration, the request for review was referred to the chief circuit judge or the judge’s designee.<sup>1446</sup>

Approval of excess compensation vouchers by the chief judge or designee is specifically stated in the CJA,<sup>1447</sup> so it is not surprising that the process was discussed in ten of the twelve circuit plans.<sup>1448</sup> Plans typically noted that in “extended or complex cases,” payment in excess of the statutory case maximum may be required “to provide fair compensation,”<sup>1449</sup> consistent with the statute. Some plans even defined extended or complex cases.<sup>1450</sup> Several plans required additional documentation to support the claim, such as a “detailed memorandum supporting and justifying counsel’s claim that the representation given was in a complex or extended case, and that the excess payment is necessary to provide fair compensation.”<sup>1451</sup> All ten plans discussing excess compensation claims required approval by the chief circuit judge or designee, but some, including the Ninth Circuit’s, involved a prior stage of review by the CJA administrative attorney, who would make a recommendation to the chief judge’s designee.<sup>1452</sup>

Related to the discussion of excess compensation vouchers are the details of circuit CJA plans regarding interim voucher payments and case budgeting. Interim vouchers were discussed in nine of

1443. Tenth Circuit plan, p. 7.

1444. Eleventh Circuit plan, p. 5.

1445. D.C. Circuit plan, p. 9.

1446. Ninth Circuit plan, p. 18.

1447. See the Criminal Justice Act of 1964 (CJA), Pub. L. 88-455, § 1, 78 Stat. 552 (Aug. 20, 1964), codified at 18 U.S.C. § 3006A and Pub. L. 110-406, §§ 11–12, Oct. 13, 2008, 122 Stat. 4294, the Judicial Administration and Technical Amendments Act of 2008, which revised the CJA to allow the chief judge of the circuit to delegate review of all excess compensation vouchers to a senior circuit judge.

1448. The Seventh Circuit only discussed excess compensation with respect to traveling for oral argument, where costs exceeded the maximum allowed. The Third Circuit plan and the Sixth Circuit plan did not discuss voucher review of excess compensation claims.

1449. D.C. Circuit plan, p. 9.

1450. See, e.g., Fourth Circuit plan, p. 6. “If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is ‘complex.’ If more time is reasonably required for total processing than would normally be required in the average case, the case is ‘extended.’”

1451. Fourth Circuit plan, p. 6.

1452. Ninth Circuit plan p. 18.

twelve circuit plans, often with a note about their use in extended or complex cases.<sup>1453</sup> Plans applied different standards for authorizing interim payments, from those that said the court will “in rare cases”<sup>1454</sup> permit their use or where the appeal is “extraordinary”<sup>1455</sup> to those that said interim payments were permitted without these caveats.<sup>1456</sup> Most plans suggested a presumption against the use of interim vouchers except in rare circumstances or in specific case types, such as capital cases (which by their nature are extended or complex).<sup>1457</sup> Generally, attorneys had to seek permission for the authorization of interim vouchers, and the chief judge or designee approved such requests.<sup>1458</sup>

Case budgeting was discussed only in two plans, with the Ninth and Tenth Circuit plans including substantial detail about the process of case budgeting, e.g., when it is required, and whom to contact for assistance.<sup>1459</sup> One plan (the Fourth Circuit’s) included the CBA on the circuit CJA committee but did not otherwise discuss case budgeting.<sup>1460</sup> Otherwise, the role of CBAs, including their recommendations on requests for compensation or use of expert services, were not included in circuit court plans. Whether consideration of their recommendation by judges occurs in practice, as described in Recommendation 9, is a matter considered elsewhere.<sup>1461</sup>

## Capital Litigation

- One circuit plan referenced a recent revision to the local rules that comports with Recommendation 24, removing a restriction on the appointment of Capital Habeas Units (CHUs) in capital habeas cases.
- One plan included a limit on compensation in capital litigation, contrary to Recommendation 26 calling for the elimination of any formal or informal non-statutory budgetary caps on capital cases.
- One plan discussed the appointment of counsel in capital cases (beyond the statutory requirements for appointing learned counsel), including consultation with the FDO in appointing counsel.
- No plans discussed the need for training in capital litigation specifically.

One adopted recommendation discussed compensation in capital litigation, and three adopted recommendations discussed the appointment of counsel in capital litigation, including the creation and jurisdiction of CHUs.

**Recommendation 24:** Local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.<sup>1462</sup>

1453. The Third Circuit plan didn’t use the term “interim” but did refer to voucher payments at the end of “segments” of litigation instead of the end of litigation itself. Plans in the Sixth, Seventh, and Eighth Circuits did not discuss interim vouchers.

1454. Fourth Circuit plan, p. 7.

1455. Tenth Circuit non-capital letter, p.4.

1456. Second Circuit plan, p. 10.

1457. Fifth Circuit plan, p. 5.

1458. *See, e.g.*, Second Circuit plan, p. 10. “A judge of this Court may authorize interim payment where the judge determines it is appropriate upon the filing of a motion by a CJA attorney. The Chief Judge or the designee of the Chief Judge may arrange for interim payments.”

1459. Ninth Circuit plan, pp. 7–10; Tenth Circuit non-capital letter, pp. 4–5; and Tenth Circuit capital letter, p. 3.

1460. Fourth Circuit plan, p. 10.

1461. *See* Chapter 3: Compensation and Staffing for Panel Attorneys.

1462. *See* JCUS-MAR 2019.

**Recommendation 25:** Circuit courts should encourage the establishment of Capital Habeas Units (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.<sup>1463</sup>

**Recommendation 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 case-budgeting attorneys (CBAs) and/or resource counsel where appropriate.<sup>1464</sup>

**Recommendation 27:** In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so.<sup>1465</sup>

## Formal and Informal Budgetary Caps

Plans often separately addressed compensation in capital litigation. Most plans included a reference to the higher hourly rate for capital litigation,<sup>1466</sup> and some discussed the rates and fees for expert services.<sup>1467</sup> Recommendation 26 called for the removal of formal or informal caps on capital litigation, including attorney fees. By statute, there is no cap on attorney fees in capital litigation, unlike non-capital litigation. The absence of any reference to capital litigation maximums was the most common feature of the plans reviewed, though one plan contradicted the adopted recommendation.

- The First and Fourth Circuits explicitly said case maximums do not apply in capital cases.<sup>1468</sup>
- The Ninth Circuit manual was consistent with the adopted recommendation by listing case maximums for other cases but not including a maximum for capital litigation.<sup>1469</sup>
- The Second Circuit noted that “different limits” for attorney compensation applied to death penalty petitions but didn’t specify what those limits were.<sup>1470</sup>
- The Eleventh Circuit referenced “special rates” of compensation for capital cases under a section regarding maximum compensation but provided no detail other than the clerk having information about such rates.<sup>1471</sup>
- The Tenth Circuit had a detailed letter for attorneys in capital cases but didn’t explicitly say there was no maximum for capital cases.<sup>1472</sup>
- The Fifth Circuit at the end of FY 2021 was inconsistent with the adopted recommendation, stating the “maximum total compensation allowed for death penalty proceedings, including interim

1463. See JCUS-SEP 2018.

1464. See JCUS-MAR 2019.

1465. See JCUS-MAR 2019.

1466. See, e.g., D.C. Circuit plan, p. 7. “The presumptive rate of compensation in a capital case in which the death sentence was imposed shall be the same as the current CJA capital rate. Cases in which the client was eligible for a death sentence, but it was not imposed, shall be treated as non-capital cases for the purpose of determining the rate of compensation for counsel on appeal. Counsel in such cases may file a motion for a higher rate should this be necessary to ensure fair compensation.”

1467. First Circuit manual, p. 16.

1468. First Circuit manual, p.15, and Fourth Circuit plan, p. 6.

1469. We can infer this is not an error, because a table listing statutory maximums for expert services did include capital litigation as having a maximum amount. Ninth Circuit manual, p. 38.

1470. Second Circuit plan, p. 9.

1471. Eleventh Circuit plan, p. 6.

1472. See, generally, Tenth Circuit capital letter.

payments but excluding approved expenses” was “\$50,000 for representing one appellant in a capital murder direct appeal, or \$15,000 for representing one petitioner or movant in a death penalty habeas case at the appellate level. A request for compensation exceeding the above amounts, either in total amount claimed, hourly rate, or both, is presumptively excessive.”<sup>1473</sup> Requests for excess compensation in capital litigation were reviewed by the chief judge or the judge’s designee after a recommendation was made by the judge receiving the initial request.<sup>1474</sup>

Though the Fifth Circuit plan was recently revised to eliminate the presumptive case maximum, the presumption against reasonable work remains, with the plan including substantial detail regarding compensation in death penalty proceedings and the additional scrutiny with which such requests are reviewed.<sup>1475</sup>

## Appointing Counsel in Capital Litigation

As we consider the provisions of circuit plans with respect to appointing counsel in capital cases, including the appointment of CHUs, we must reconsider the age of some circuit plans. Neither the Eighth Circuit plan nor the Third Circuit plan could discuss appointing CHUs per se, as CHUs did not exist when the plans were adopted, though both circuits now include districts with CHUs.<sup>1476</sup>

Circuit plans said very little about the appointment of counsel in capital cases, apart from a general discussion of appointing counsel discussed above. The information included generally referenced statutory obligations for the appointment of two attorneys, one of whom must be learned in the law of capital litigation, but failed to clearly distinguish between district and appellate courts in appointing counsel.<sup>1477</sup> The Ninth Circuit Manual was one of the few documents to discuss consulting with the federal defender in capital appointments, but again it was not specified in the recommendation if appellate courts were required to do so when new counsel were appointed for appeal.<sup>1478</sup> The Fourth Circuit plan also included a reference to the appointment of learned counsel, stating the court could appoint an additional attorney in “extremely difficult” cases, as well as capital litigation, and that each attorney was eligible to be paid the maximum compensation under the CJA.<sup>1479</sup>

Only two plans referenced the appointment of CHUs, though one did so indirectly. The Sixth Circuit plan included a reference to the appointment of a CHU conflicting with the adopted recommendations

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1473. Fifth Circuit plan, pp. 5–6. This provision was not included in the plan adopted in FY 2022, but other limitations on compensation in capital litigation remain. See Plan for the Representation on Appeal Under the Criminal Justice Act, Judicial Council of the Fifth Circuit, Oct. 7, 2021.

1474. Fifth Circuit plan, p. 6.

1475. Plan for the Representation on Appeal Under the Criminal Justice Act, Judicial Council of the Fifth Circuit, Oct. 7, 2021, Sec. 7.B.2.

1476. See Appendix C: District Court CJA Plan Analysis and Chapter 6: Capital Representation.

1477. See, e.g., Ninth Circuit manual, p. 11. “At the outset of any proceeding in which a financially eligible defendant is or may be charged with a crime punishable by death, a court must appoint two counsel, at least one of whom is learned in the law applicable to capital cases. 18 U.S.C. § 3005. Courts must consider the recommendation of the federal defender organization before appointing counsel.”

1478. *Id.*

1479. See, e.g., Fourth Circuit plan, p. 3. “In capital cases, and in other cases of extreme difficulty where the interests of justice so require, the Court may appoint an additional attorney to represent a defendant. Each attorney so appointed shall be eligible to receive the maximum compensation allowed under the Criminal Justice Act. Any defendant indicted for a federal capital offense is entitled, upon request, to have two attorneys appointed, at least one of whom shall be learned in the law applicable to capital cases. 18 U.S.C. § 3005.”

by stating a preference for appointing state defender offices over federal offices.<sup>1480</sup> The Fourth Circuit referenced a local rule about the appointment of counsel in capital cases. In 2018, Local Rule 113 was repealed, allowing CHUs to be appointed to represent clients in capital habeas litigation,<sup>1481</sup> consistent with the adopted recommendation encouraging the establishment of CHUs and removing prohibitions on the appointment of CHUs. Though the repeal did not explicitly specify permission for cross-jurisdictional representations, removing the prohibition allowed for cross-jurisdictional appointment until a CHU could be established in the circuit, which occurred in 2021.

## FDO Responsibilities

- No plan detailed the process by which circuit judicial councils select or reappoint federal public defenders.
- Two plans discussed training for panel attorneys, typically offered by the FDO.
- One plan assigned the district court's federal public defender responsibility for maintaining the panel attorney list for the court of appeals.
- No plans included a reference to considering staffing formula-based requests for the number of assistant federal public defenders, though circuit judicial councils calculated the number of attorneys from the total staff determined by the work-measurement formula.

The adopted recommendations speak to staffing FDOs, including modifying the work-measurement formula to account for additional responsibilities of FDOs.

**Recommendation 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.<sup>1482</sup>

**Recommendations 12 and 13:** Circuit court judges should give due weight to Defender Services Office recommendations and Judicial Conference-approved Judicial Resources Committee staffing formulas when approving the number of assistant federal defenders in a district.<sup>1483</sup>

**Recommendation 14:** Modify the work-measurement formulas, or otherwise provide funding to reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and 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.<sup>1484</sup>

1480. Sixth Circuit plan, pp 1–2, discussed above.

1481. United States Court of Appeals for the Fourth Circuit Judicial Council, Order No. 367, Feb. 27, 2018, repealing United States Court of Appeals for the Fourth Circuit Judicial Council, Order No. 113, Oct. 3, 1996, amended Oct. 1, 2008.

1482. No action taken by the JCUS. See JCUS-SEP 2018 and JCUS-MAR 2019.

1483. Approved as modified. See JCUS-MAR 2019.

1484. Approved as modified. See JCUS-SEP 2018.

Unlike district CJA plans, circuit plans said very little about the responsibilities of federal defenders,<sup>1485</sup> and none of the plans we examined discussed the process of appointing federal defenders, though we know from other analyses that each circuit has its own approach.<sup>1486</sup> Further, in our interviews many defenders noted the absence of criteria for appointment or transparency of process (or both).<sup>1487</sup> The lack of detail in circuit plans is consistent with the absence of information provided to defenders in some districts about reappointment.<sup>1488</sup>

Recommendations 12 and 13 direct circuit court judges to give due weight to the Defender Services Office recommendations and Judicial Conference-approved Judicial Resources Committee staffing formulas when approving the number of assistant federal defenders in a district. We examined circuit plans for any references to FDO staffing. None of the plans included information about the process of approving staffing requests or deference by circuit court judges to the recommendations of the DSO and JRC when approving the number of assistant federal defenders.

Circuit plans also lack specificity about training needs of panel attorneys, something district court plans detailed, including the responsibility of FDOs for providing it.<sup>1489</sup> Several of the adopted recommendations reference a need for attorney training, including in eDiscovery, capital litigation, and use of experts, though none are specific to panel attorneys.<sup>1490</sup>

The D.C. and Fourth Circuit plans are exceptions in their requirements for attorney training and in describing a role for the FDO. The D.C. Circuit plan states, “Attorneys on the CJA Panel are encouraged to avail themselves of opportunities for training and continuing legal education in federal criminal appellate law, practice, and procedure, including programs sponsored by the Office of the Federal Public Defender or the Defender Services Office.”<sup>1491</sup> The Fourth Circuit plan says, “At its annual meeting the Committee shall also review the operation and administration of the panel over the preceding year and the legal education and training opportunities provided to panel members and make any recommendations for improvement to the Court.”<sup>1492</sup>

The D.C. Circuit plan was the only plan to list formal duties for the federal defender with respect to circuit CJA administration, duties that could be included in modification of work measurement. In a section titled “Duties of the Federal Public Defender,” the plan details responsibilities discussed above, such as maintaining the panel list, maintaining a record of appointments, and ensuring timely appointment of counsel. Though some other plans included references to the federal defender for serving on CJA committees, making appointments, or serving as the default appointment when CJA counsel are needed (*see above*), the D.C. Circuit plan was unique in assigning formal circuit responsibilities to

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1485. One example of this point is the detail provided regarding financial eligibility and completing the affidavit required for CJA appointment. As reported in Appendix C: District Court CJA Plan Analysis, district court plans required FDOs to assist with this process 62% of the time in FY 2021 plans. Circuits accept financial eligibility determinations made by the district court as evidence of need for appellate appointment. *See, e.g.*, D.C. Circuit plan, p. 3: “If the District Court determines that the party is financially unable to obtain counsel, this Court will accept the District Court’s determination and appoint counsel without further inquiry.” When counsel does not continue from the district court, circuit plans noted acceptance of the same CJA Form 23 to determine financial eligibility but did not specifically assign the FDO responsibility for helping defendants complete it.

1486. *See* Chapter 4: Federal Defender Staffing.

1487. *Id.*

1488. *Id.*

1489. *See* Appendix C: District Court CJA Plan Analysis.

1490. Adopted Recommendation 19 suggests a training component for panel attorneys to be appointed to and remain on the panel; adopted Recommendation 20 suggests training for panel attorneys regarding experts, investigators, and other service providers; adopted Recommendation 21 suggests training for panel attorneys regarding eDiscovery; and Recommendation 25 suggests increased training availability for attorneys who want to be appointed in capital cases.

1491. D.C. Circuit plan, p. 2.

1492. Fourth Circuit plan, p. 10.



someone working in a district rather than the circuit. This arrangement is likely the result of having only one district in the circuit, but issues of overlap aside, the detail includes additional work for the federal defender not captured in work-measurement formulas.

## Analysis of Plan Revisions

Finally, we compare prior and current versions of the plans (where available) in the areas of CJA implementation discussed above. This analysis helps identify changes circuits made over time and how those changes are reflected in their plans.<sup>1493</sup> As noted above, such a comparison can only be made in four of the circuits. Three offer a clear before-and-after comparison, and one references a substantial change in the local rules.<sup>1494</sup> These changes are discussed below.

- Major differences between the 2007 and the 2020 versions of the D.C. Circuit plan relate to inclusion of the section on panel attorney training (discussed above), allowing the federal defender to add attorneys to the panel list if they meet eligibility requirements and creating a process to appeal proposed reductions to vouchers.
- Though the 2020 First Circuit plan didn't differ from the 2018 plan, both versions added a reference to the *Guide to Judiciary Policy* at the beginning of the plan, as compared to the 2002 plan (included in Local Rule 46.5).
- As noted above, the Ninth Circuit annotates its plan with changes. The 2021 version of the plan changed the language regarding who reviews vouchers and added a process for appealing voucher reductions.
- The Fourth Circuit plan referenced a local rule that was repealed in 2018. The prior rule prohibited the appointment of the federal defender for capital habeas cases. The change allowed for CHUs to be appointed in such cases going forward.

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1493. When we interviewed circuit court personnel, we asked about the reasons for the changes and whether additional, undocumented changes were made. See Chapter 5: Standards of Practice and Training.

1494. The Fifth Circuit revised its circuit plan in FY 2022, just outside the scope of this five-year analysis of circuit plans. The Second Circuit also revised its plan in FY 2022 and is not included in this analysis.

## Coded Elements of Circuit CJA Plans

Feature	Definition
Plan Year	Year of circuit plan adoption
Last Plan	Year of prior circuit plan (if known, sometimes listed in plan as original date with other dates listed as amendments)
Pages	Number of pages of the plan
Panel Selection Process	How the circuit CJA panel is selected
CJA Committee Y/N	Is there is a circuit CJA committee or committees?
CJA Committee Name	Name of committee or committees choosing the members of the panel
CJA Committee Appointed by Whom?	Who appoints the members of the CJA committee?
CJA Committee Responsibilities	Responsibilities of the CJA committee
List Administrator	Who maintains the list of panel attorneys for the circuit?
Committee Membership	What is the membership of the CJA committee?
Committee Membership Term	What is the term of membership for the CJA committee?
Panel Selected by Whom	Who formally selects members of the CJA panel?
Who Collects Applications	Where do attorneys submit applications to serve on the panel?
Who Advises Panel Selector	Who advises the entity selecting the panel attorneys?
Panel Term	What is the term of panel membership, and can it be renewed/can members reapply?
Who Can Remove Panel	What entity or entities can remove attorneys from the panel?
Panel Removal Process	How are attorneys removed from the panel, and what are the grounds for removal?
Qualifications?	What are the qualifications (beyond selection) to serve on the panel?
Assigned Number of Cases	What is the required number of appointments panel attorneys are expected to accept?
Case Appointment Process	Who makes the appointment in the case and how (rotation, default assignment, etc.)? <i>This does not include the language that district court-appointed counsel is presumed to stay unless relieved by the court of appeals.</i>
CBA/Case Budgeting	Does the plan mention a CBA or use of case budgeting?
Deadline for Voucher Submission	How many days after termination of the representation are attorneys expected to submit vouchers?
Voucher Review (General)	What is the voucher review process for the circuit?
Interim Vouchers	Are interim vouchers permitted and, if so, under what circumstances?
Excess Process	What is the process for reviewing and approving excess compensation vouchers?
Voucher Appeal Process Y/N	Is there a process for appealing proposed voucher reductions?
Appeal Detail	What is the process for appealing proposed voucher reductions (if there is one)?
Capital Cap	Does the plan mention caps for capital representations (or does it say there are no caps)?
Manual	Is there a separate CJA manual that details information about administration of the CJA in the circuit?
Manual Date	What is the date of the circuit CJA manual?
Manual Pages	How many pages is the circuit CJA manual?
Notes	Notes on oddities, details to discuss with circuit judges and staff, major changes (if there is a prior plan), etc.

# Appendix E

## eVoucher Review Data Analysis

This appendix provides additional detail about the CJA voucher review process and includes an explanation of the methods and results of two analyses of data from eVoucher, the online system the judiciary uses to review and approve payments to CJA panel attorneys. The first analysis addresses the incidence of payment reductions; the second concerns the reasons provided for payment reductions by voucher reviewers. Attachments include more information about the descriptive and multiple regression analyses.

### Voucher Review Process

The following description of the current voucher review process comes from the CJA Resources website maintained by the AO on behalf of DSO:<sup>1495</sup>

1. The voucher process starts with the appointment of a CJA Panel Attorney after a U.S. magistrate judge or the court determines an individual is financially eligible for representation.
2. This attorney performs legal services on behalf of the client and may request authorization to obtain transcripts and investigative, expert, or other necessary services.
3. Upon completion of the representation, the appointed panel attorney and the other service providers submit vouchers for review and payment. A provider of services other than counsel completes a voucher, which is signed by appointed counsel certifying that the services were rendered for the case and is submitted to the court or other entity designated by the court for initial review, such as a federal defender organization (FDO). If the presiding judge determines that periodic or interim payments are necessary and appropriate for a specific case, vouchers may be filed prior to the completion of service.
4. Vouchers submitted by CJA panel attorneys and other service providers are reviewed to determine that the claims are for services and expenses that are authorized by the CJA, that the vouchers are submitted in accordance with applicable Judicial Conference Guidelines, and that the amounts claimed should be approved as necessary and reasonable to provide adequate representation.
5. Preliminary Reviews. Various court or FDO personnel perform administrative, mathematical, and technical voucher reviews, ensuring that the claim is complete and accurate, interacting with attorneys where documents or explanations are missing, and identifying non-compensable services or non-reimbursable expenses. After these reviews are completed, the claim is provided, with the Reviewers' observations and recommendations, to the presiding judge.
6. Presiding Judge's Review and Approval or Certification. The judge who presided over the case (or authorized delegate) reviews the "reasonableness" of the claim and approves payment within the levels of the person's delegation or statutory approval authority.
7. Notification of Proposed Reduction of CJA Attorney Voucher. To ensure basic procedural fairness, if the court determines that the appointed panel attorney's claim should be reduced, the court should provide the attorney with prior notice of the proposed reduction with a brief statement of the reason(s) for it and an opportunity to address the matter (unless the proposed reduction is based on mathematical or technical errors). The court may conduct a hearing (although one is not required) to consider

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1495. <https://cjaresources.fd.org/cjaort/processes/011.html>; <https://cjaresources.fd.org/cjaort/processes.html/#?page=2>.

- the attorney's response or may communicate informally with counsel about questions or concerns (in person, telephonically, or electronically). [*Guide*, Vol. 7, § 230.36].
8. CJA vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances. [*Guide*, Vol. 7, § 230.33]
  9. Approved vouchers are provided to court personnel for further processing.
  10. For vouchers claiming amounts in excess of statutory maximums, after the presiding judge certifies that the “excess” amounts are authorized and appropriate, the voucher is forwarded to the circuit chief judge (or circuit judge delegate) for review and approval. The presiding judicial official should furnish a memorandum containing the recommendation and a detailed statement of reasons. [*Guide*, Vol. 7, § 230.30(b)(2)]
  11. Once vouchers are approved, the payment information is electronically submitted to the AO for processing and payment disbursement.

Additional notes:

- Current policy is that non-capital criminal cases in which there is an expectation that total attorney hours will exceed 300 for an individual defendant or the total expenditures for the representation (attorney and service provider work) is expected to exceed 300 times the panel attorney non-capital hourly rate should be budgeted.<sup>1496</sup> Some courts leave identification of potential cases for budgeting to the presiding judge, while others have standing orders or local rules to encourage budgeting. In most districts, when cases are budgeted, attorneys work with a circuit employee, the case-budgeting attorney (CBA),<sup>1497</sup> to create an estimate of the work and costs expected for the case. Presiding judges then review and approve case budgets. In districts within circuits that do not have CBAs, judges or court staff work with attorneys to create case budgets, and some judges may contact another circuit’s CBA for assistance. Case budgeting is not captured in eVoucher.
- Expert services in excess of \$900 are to be preapproved by the presiding judge or the judge’s designee in both non-capital and capital cases.<sup>1498</sup>
- Expert services in excess of \$2,800 in non-capital cases are to be preapproved by both the presiding judge and the circuit chief judge (or designee).<sup>1499</sup>
- The statutory case compensation maximums apply to entire representations, not single vouchers. For attorney services, there are four levels of maximum amounts (currently ranging from \$2,600 to \$12,300) that apply to specified types of representations, and these change over time.<sup>1500</sup> There are no statutory case compensation maximums for attorney compensation in capital representations.
- The eVoucher system automatically sets applicable hourly rates based on the date entered by an attorney for when work was completed. Vouchers should be submitted no later than forty-five

1496. *Guide to Judiciary Policy*, § 230.26.10, [https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230\\_26](https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_26).

1497. Margaret S. Williams, Circuit CJA Case-Budgeting Attorney Pilot Project Evaluation (2007–2009) Final Report, 2010. See <https://www.fjc.gov/content/circuit-cja-case-budgeting-attorney-pilot-project-evaluation-2007-2009-final-report-0>.

1498. This limit has periodically changed, including during the time period under study. See [https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310\\_20\\_10](https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310_20_10) for applicable maximums by service date.

1499. *Id.*

1500. See *Guide to Judiciary Policy*, § 230.23.30, <https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses>, for further details.

days after the conclusion of the representation,<sup>1501</sup> so that errors in hourly rates can largely be avoided.

Individual court procedures or practices may differ. For more information, see the CJA Guidelines (the *Guide to Judiciary Policy*, Vol. 7A),<sup>1502</sup> the CJA handbook for new judges,<sup>1503</sup> or the National CJA Voucher Reference Tool.<sup>1504</sup>

## eVoucher Data Analysis: Regression Analysis of Payment Reductions, FY 2017–FY 2022

The following analysis uses data from eVoucher to examine payment of CJA panel attorneys. This analysis captures payment reductions made after vouchers have been submitted.<sup>1505</sup> It does not include changes requested before final voucher submission or wholesale rejections requiring resubmission. The analysis also does not address whether a payment reduction was appropriate in the circumstances of the individual representation.

### Data and Methodology

The information in this analysis is based primarily on the eVoucher “Vouchers” and “Appointments” data files provided by the AO’s Judiciary Data and Analysis Office at the request of the Defender Services Office. These files detail the voucher claims submitted and CJA payments made over the entire course of a CJA appointment. This approach takes into account any release of payments that may have been withheld on an earlier voucher or work-arounds that may have been necessary in the early days of eVoucher as the new system evolved to accommodate the various practices across jurisdictions.

Included in this analysis are those 391,516 appointments that had a final voucher payment on or after October 1, 2016, the start of fiscal year 2017. The sum of claims on all vouchers associated with the appointment (including any that may have been submitted before fiscal year 2017) were compared to the sum of payments on those vouchers. The unit of analysis is therefore the appointment. We do not analyze individual voucher reductions because relevant statutory limits on hours and claim amounts are specified for the totality of an appointment. We do not analyze “cases” because multiple attorneys can be appointed in the same case. Our primary quantity of interest is whether claims on all vouchers for a given appointment were paid in full or if the payment for the given appointment was reduced from the claimed amount.<sup>1506</sup> Of the 391,516 appointments in our analysis, 332,219 were paid in full (85%); payment was reduced from the claimed amount in 59,297 (15%).

1501. See *Guide to Judiciary Policy*, § 230.13, [https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230\\_13](https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_13).

1502. [https://www.uscourts.gov/sites/default/files/vol\\_07a.pdf](https://www.uscourts.gov/sites/default/files/vol_07a.pdf).

1503. [Blair Perilman and Cari Dangerfield Waters, Presiding Over District Court Cases with Appointed Criminal Justice Act \(CJA\) Counsel: A Handbook for Judges. June 2019.](#)

1504. <https://cjaresources.fd.org/cjaort/>.

1505. See Cardone Report, p. 104 for a discussion of attorney “self-cutting” before voucher submission. For an update on this practice, see Appendix F: Survey of Panel Attorney Experiences with Voucher Review and Chapter 3: Panel Attorney Compensation.

1506. We define claims for an appointment as “paid in full” if the exact amount or an amount within \$1 of the claimed amount was reimbursed. We also include overpayments in the total for claims “paid in full.” We define payment as “reduced” when there is an underpayment of more than \$1. See Table 8 in the Attachments for more details.

We examine a number of factors identified in the Cardone Report and the interviews and survey conducted for this report as important influences on payment reductions, using regression analysis to estimate the effects of these factors on the odds that payment in an appointment will be reduced. Regression analysis is helpful in simultaneously accounting for the influences of these multiple factors, as well as for the variation by court and over time in reduction rates discussed in Chapter 3: Panel Attorney Compensation. We provide results for several different specifications of regression models, including by court and by reviewer, as well as for capital appointments only.<sup>1507</sup>

The specific factors we examine are:

1. Claim types and amounts: whether reimbursement was requested for specific types of expenses, like expert services or travel.
2. Factors related to the complexity of a case: number of attorney hours (in-court and out-of-court), number of vouchers submitted, appointment duration, and whether there were multiple appointments for a single representation.
3. Features of the review process: whether vouchers are reviewed by someone other than the presiding judge; whether there is appellate review of excess compensation claims.
4. Statutory limits: on dollar amounts for particular types of vouchers.
5. Year: fiscal year of final payment.
6. Court: appointing court (court of appeals or district court).
7. Features of the district's CJA plan: provisions of a district's CJA plan that concern voucher review and payment in effect at the time of final payment in an appointment, such as whether the plan requires a technical review before submission to the presiding judge, whether the plan stipulates acceptable reasons for payment reductions as outlined in the recommendations of the Cardone Report, and whether the plan requires notice to be given to attorneys in advance of a payment reduction, among others.

The data for items 1–6 come from eVoucher. Item 7, the features of the appointing court's CJA plan, are only available for district courts. These variables come from the analysis of CJA plans discussed in Appendix C: District Court CJA Plan Analysis.

We use logistic regression to estimate the odds that payment in an appointment was reduced based on the factors outlined above. Logistic regression is a type of regression analysis used to model the probability that an event occurs.<sup>1508</sup> Importantly, regression analysis allows us to estimate the effect of each factor on the outcome of interest, whether payment in an appointment is reduced, while controlling for the influences of the other factors.

While our models include a number of factors, it is possible that additional factors that differ by appointing court or reviewer are not included, either because we cannot measure them or we are not aware of their possible influence. To account for this, we first incorporate fixed effects for each appointing court. These fixed effects control for variation specific to each court that is not captured by the other variables and that does not vary over time. We then present reviewer fixed-effects models, which control for practices or preferences specific to individual judge or staff reviewers that impact how often they

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1507. We analyze capital appointments separately because there is a specific budgeting process and there are no statutory limits for capital appointments. The Cardone Report also noted the existence of non-statutory ("presumptive") caps in capital appointments. See Cardone Report, p. 197.

1508. See J. Scott Long, *Regression Models for Categorical and Limited Dependent Variables*, 34–83 (1997).

reduce payment in CJA appointments.<sup>1509</sup> We include in the attachments to this appendix an alternative model specification that does not use any fixed effects (“pooled” models).

Certain results differ between the fixed-effect and pooled models. Although we provide the results of the pooled model for context, fixed-effect models are preferred for grouped data. The objective of using statistical controls in a regression analysis is to ensure that the effect of a variable of interest on the outcome can be estimated with “all else equal,” or that like can be compared to like. Failing to account for the group (the court or the reviewer) in which data were generated risks drawing incorrect inferences because groups may be different in important ways.<sup>1510</sup> Fixed-effect models reduce bias that may result from comparing across groups rather than within courts or reviewers of the same court.

The drawback of using fixed effects, then, is that they substantially reduce the variation being analyzed. For variables in which there is no variation in a particular court (or reviewer), those courts will not contribute to the estimate of the effect of that variable. Despite these limitations, because the CJA is administered locally, and because the Cardone Report observed notable variation in policies and practices by courts and judges, we present the fixed-effect models as the main results in this analysis.

## Results: Logistic Regression with Court Fixed Effects

The results in this section concern the 388,742 non-capital appointments with a final payment between FY 2017 and 2022 (99% of all appointments). Figure 1 presents the results of our logistic regression analysis in graph form, and Table 1 shows the results in tabular form. Descriptive statistics for the independent variables in the full data set, including capital appointments, are also in the attachments.

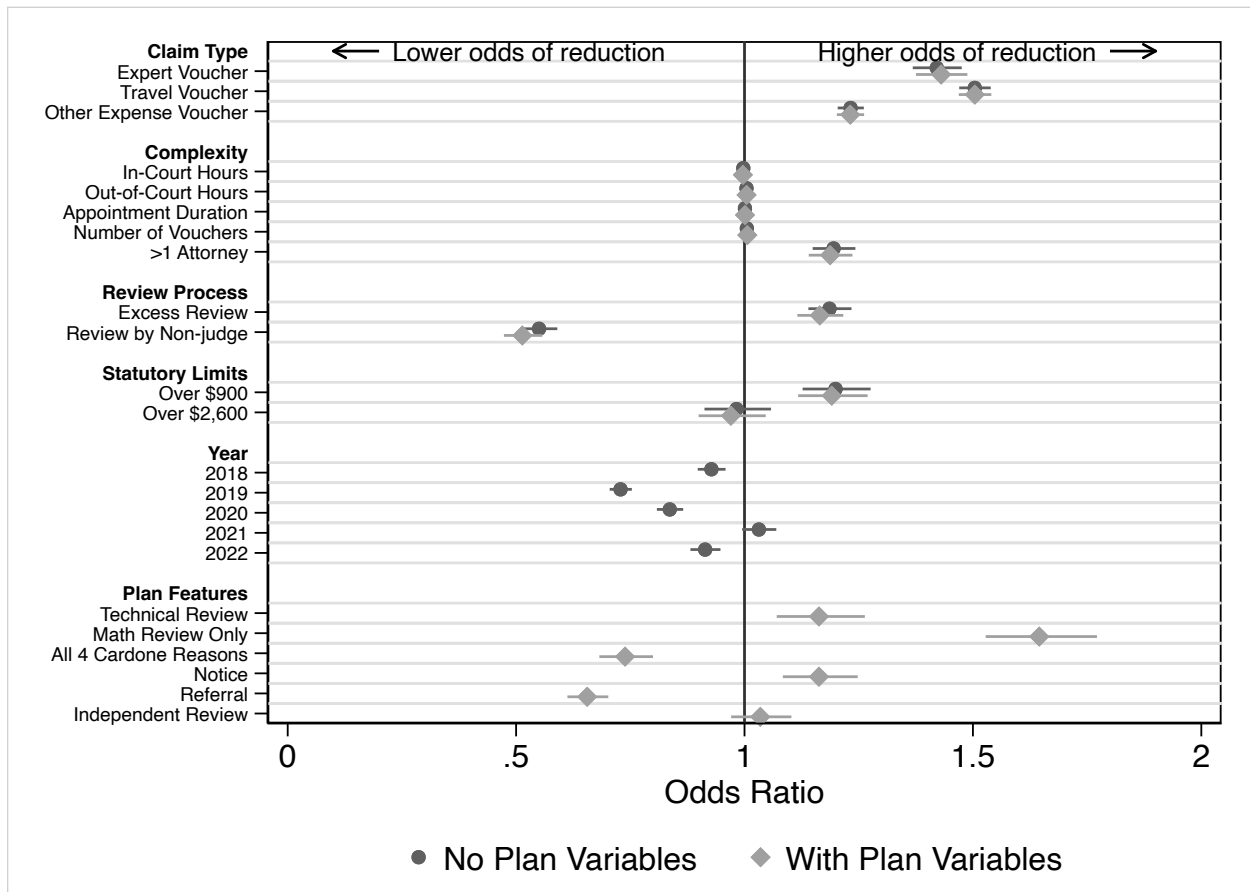
We present two models: Model 1 (“No Plan Features”) does not incorporate features of a court’s CJA plan; Model 2 (“With Plan Features”) does include these features. Appeals courts are not included in Model 2 because their CJA plans do not include specific provisions aimed at voucher review.

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1509. Cardone Report, p. 95. This variation may be the result of a lack of familiarity with public defense work, the number of years since judges were practicing lawyers, or the judicial philosophy the judges bring to the bench.

1510. See Andrew Gelman and Jennifer Hill, *Data Analysis Using Regression and Multilevel/Hierarchical Models* 1-8 (2007).

Figure 1. Logistic Regression Results (Court Fixed Effects).



Note: Results of the logistic regression model estimating the odds that payment for an appointment is reduced including court fixed effects. Odds ratios are transformations of the beta coefficients from logistic regression analyses, which aid in interpreting the results. An odds ratio of 1, denoted by the vertical line, indicates “even odds;” in other words, a variable has no effect on the odds that payment will be reduced. Odds ratios below 1 indicate decreased odds of reduction, while odds ratios above 1 indicate increased odds of reduction. Points represent the odds ratio estimates; bars are 95% confidence intervals. Fixed effects are omitted in the interest of space; see Table 14 for specific court fixed effects.



**Table 1.** Logistic Regression (Court Fixed Effects).

	(1)			(2)		
	No Plan Features			With Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
<b>Claim Type</b>						
Expert Voucher	0.363	0.019	0.000	0.373	0.020	0.000
Travel Voucher	0.409	0.012	0.000	0.408	0.012	0.000
Other Expense Voucher	0.210	0.012	0.000	0.209	0.012	0.000
<b>Complexity</b>						
In-Court Hours	-0.003	0.001	0.000	-0.004	0.001	0.000
Out-of-Court Hours	0.004	0.000	0.000	0.005	0.000	0.000
Appointment Duration	0.001	0.000	0.000	0.001	0.000	0.000
Number of Vouchers	0.005	0.003	0.115	0.006	0.003	0.038
>1 Attorney	0.178	0.020	0.000	0.171	0.021	0.000
<b>Review Process</b>						
Excess Review	0.172	0.020	0.000	0.153	0.022	0.000
Review by Non-judge	-0.734	0.043	0.000	-0.876	0.045	0.000
<b>Statutory Limits</b>						
Over \$900	0.178	0.032	0.000	0.171	0.033	0.000
Over \$2,600	-0.019	0.038	0.623	-0.029	0.039	0.458
<b>Year</b>						
2018	-0.073	0.017	0.000			
2019	-0.311	0.017	0.000			
2020	-0.170	0.018	0.000			
2021	0.038	0.019	0.039			
2022	-0.085	0.018	0.000			
<b>Plan Features</b>						
Technical Review				0.120	0.042	0.004
Math Review Only				0.534	0.038	0.000
All 4 Cardone Reasons				-0.295	0.041	0.000
Notice				0.138	0.036	0.000
Referral				-0.409	0.035	0.000
Independent Review				0.032	0.033	0.320
Constant	-5.130	0.069	0.000	-5.384	0.079	0.000
N	388,742			366,757		

Note: See attachments for individual court fixed effects.

## Claim Types

The Cardone Report suggests that courts and judges vary in how they approach payment for specific kinds of expenses, such as expert services and travel. In some districts, panel attorneys reportedly spent much less on expert and professional services than the FDO (in part because panel attorneys need to seek court approval to use experts), and the report found evidence of wide disparities in expert service use between districts.<sup>1511</sup> Furthermore, the Cardone Report discusses the reluctance of some judges and courts to reimburse attorneys for travel costs.<sup>1512</sup>

We measure factors associated with claim types<sup>1513</sup> as follows:

- Expert services: whether any of the vouchers associated with the appointment were for expert services. Twenty percent of non-capital appointments included expert service vouchers.
- Travel: whether any of the vouchers associated with the appointment were for travel. Forty-seven percent of non-capital appointments included travel vouchers.
- Other expenses: whether any of the vouchers associated with the appointment were for “other” expenses. Twenty nine percent of non-capital appointments included vouchers for other expenses.

The results for these three factors are statistically significant and substantively relatively large in both models. The odds of reduction are 43% to 44% higher for appointments with at least one voucher for expert services (compared to appointments without any expert service vouchers). For appointments with at least one travel voucher, the odds of reduction are 50% higher, and for appointments with at least one voucher for “other” expenses, the odds of reduction are 23% higher.<sup>1514</sup>

## Complexity

The Cardone Report discusses that judges may not be aware of how much work is involved in mounting an effective defense, including the number of out-of-court hours required.<sup>1515</sup> In-court hours, by contrast, can be easily verified by the presiding judge or other reviewer (though these may still be reduced for various reasons).<sup>1516</sup> Other factors that indicate the complexity of an appointment include the length of the appointment and the number of vouchers submitted during the appointment.

We define factors that relate to the complexity of an appointment as follows:

- In-court hours: the sum of in-court hours claimed on all vouchers associated with the appointment
- Out-of-court hours: the sum of out-of-court hours claimed on all vouchers associated with the appointment
- Appointment duration: the number of days between the date the court made the appointment and the date the last payment record was created
- Number of vouchers: the number of vouchers associated with the appointment
- More than one attorney: whether any other attorneys were ever appointed in the same representation. More than one attorney had been appointed in 7% of non-capital appointments.

1511. Cardone Report, p. 151.

1512. *Id.*, p. 99.

1513. We present results for claim types here. Using claim amounts yields substantively similar results.

1514. The rates at which attorneys submit vouchers for expert services and travel vary by appointing court; see Figures 16 and 17 in the attachments.

1515. Cardone Report, p. 93.

1516. *Id.*, p. 103.

In both Models 1 and 2, more out-of-court hours increased the odds of reduction by a small, but statistically significant, amount, while more in-court hours decreased the odds of reduction by a small, statistically significant amount. These results align with statements made by attorneys in the Cardone Report and in the survey of panel attorneys for this study indicating that attorneys were hesitant to submit the full number of out-of-court hours they had worked, but they were comfortable submitting for all in-court hours because those were directly observable by the presiding judge.<sup>1517</sup>

Appointments that last longer are also more likely to be reduced. For each additional month an appointment lasted, the odds of reduction increased by approximately 3%. Similarly, the greater the number of vouchers submitted in an appointment, the greater the odds of reduction, although this effect was significant only in Model 2. For each additional voucher submitted, the odds of reduction increased by 3% (Model 2).

When there was more than one appointment associated with a representation, the odds of reduction increased by 18% to 19%. This finding aligns with statements from attorneys indicating that some reviewers seem to compare work done by different attorneys on the same representation, and that some reviewers seem to think that less work should be required by a single attorney when multiple attorneys have been assigned to a representation.<sup>1518</sup>

### **Review Process**

We examine two factors related to the review process: whether any voucher associated with the appointment was approved by someone other than a judge at the first level review (“review by non-judge”)<sup>1519</sup> and whether any voucher associated with the appointment was ever reviewed by the court of appeals (“excess review”).

We find a substantively large effect for “review by non-judge”: when an appointment is reviewed by someone other than a district or magistrate judge at the first level, the odds of reduction decrease by 42% to 48%. This result comports with the findings of the Cardone Report, which noted that FDO supervisors and CJA supervising attorneys used a presumption of reasonableness standard that judges often did not.<sup>1520</sup> Notably, these “non-judges” are often former criminal defense attorneys who are familiar with the work needed to mount an effective defense.

About 15% of non-capital appointments were reviewed by someone besides the judge. All appointments were reviewed by non-judges in four courts of appeals and one district court in each year from 2017 to 2021.

Excess compensation review by the court of appeals increases the odds of payment reduction. When a court of appeals reviewed payments in an appointment, the odds of reduction increased by 17% to 19%.

### **Statutory Limits**

The CJA and JCUS policies establish key thresholds that trigger certain features of the compensation process, such as required appellate review of vouchers, pre-approval of expert services, and expected budgeting of a “complex” case.

1517. See Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

1518. Cardone Report, p. 125.

1519. Because we found discrepancies in the coding of this variable in the eVoucher data, we manually coded the identities of all payment reviewers and reconstructed this variable from our coding.

1520. Cardone Report, p. 96.

We include variables for two statutory thresholds:

- “Over \$900” (threshold for investigative, expert, or other services without prior authorization): whether claims for services on expert vouchers totaled more than \$900 over the course of the appointment. Expert services in excess of \$900 must be pre-approved by the presiding judge in both non-capital and capital appointments. Only 6% of the non-capital appointments were above this cap.<sup>1521</sup>
- “Over \$2,600” (threshold for investigative, expert, or other services with prior authorization): whether claims for services on expert vouchers in non-capital cases totaled more than \$2,600 over the course of the appointment. Expert services in excess of \$2,600 in non-capital cases are to be pre-approved by both the presiding judge and chief judge of the circuit (or designee). This level of activity was rare (3% of the non-capital appointments).<sup>1522</sup>

When appointments exceeded the \$900 limit for expert services, the odds of reduction increase by about 19%, which is statistically significant. The effect for “Over \$2,600” was not statistically significant, which is not surprising given the small number of observations in the data set that exceed this cap.

### Year

We include a fixed effect for the fiscal year of the last voucher payment date associated with the appointment to capture any effects of time on the odds of payment reduction in Model 1. We do not incorporate year fixed effects in Model 2 because the plan features directly measure plan changes, which the year fixed effects approximate. Additionally, plan features will not vary within years for a given court.

The odds of reduction varied over time. The baseline year in our model is FY 2017. In comparison to FY 2017, the odds of reduction were lower (i.e., a negative effect) in every subsequent year except FY 2021. The odds of reduction from FY 2020 to FY 2022 varied between 16% lower to 4% higher than in FY 2017. The largest negative effect was in FY 2019, when the odds of reduction were 27% lower than in FY 2017. Thus, there is no evidence of a consistent trend over time.

### Plan Features

We include variables for five features of districts’ CJA plans that address voucher payment. Four of the five variables are coded as 0/1 indicator variables; another is coded as a three-level categorical variable, as described below.

- “Technical review”: whether the plan provides for technical accuracy review by court or FDO staff before submission to the presiding judge.
- “Reduction reasons”: whether the plan specifies the limited reasons outlined in Recommendation 8 that voucher payments can be reduced. This is a categorical variable with three levels. The baseline category (1) is that the plan does not specify any limitations to the reasons voucher

1521. See *Guide to Judiciary Policy*, § 310.20.30. This limit was increased from \$800 to \$900 in February 2019. Because we cannot reliably obtain data on when services were performed (and therefore which limit was in effect), we use \$900, which was in effect for the majority of the study period, as the limit throughout the study period. *Guide* § 660.10.40 notes that this provision applies in capital cases.

1522. See *Guide to Judiciary Policy*, § 310.20.10. This limit changed twice during the time period under study (from \$2,500 at the beginning of FY 2017 to \$2,700 in January 2021 and in effect until the end of FY 2022). Because we cannot reliably obtain data on when services were performed (and therefore which limit was in effect), we use \$2,600, the mid-point of \$2,500-\$2,700 as the limit throughout the study period. *Guide to Judiciary Policy*, § 660.20.10 notes that this provision does not apply in capital cases.

payments can be reduced. The category “Math Review Only” (2) indicates that the plan specifies only that voucher reductions should be limited to mathematical errors. The category “All 4 Cardone Reasons” (3) indicates that the plan specifies all four reasons outlined in Recommendation 8: voucher reductions should be limited to mathematical errors, instances in which work billed was not compensable, instances in which work 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. Logistic regression results present the effects of “Math Review Only” and “All 4 Cardone Reasons” in comparison to the baseline category of no limits specified.

- “Notice”: whether the plan provides that attorneys must be given notice of any proposed voucher reduction that is not based on a mathematical error.
- “Referral”: whether the plan provides for referral of vouchers to the district or divisional CJA committee or a CBA when considering reduction.
- “Independent review”: whether the plan sets out a process for reviewing a proposed voucher reduction that is independent of the original reviewer, either before or after submission. “Independent” review is conducted by a person or entity other than the original reviewer, and the review must be available to any attorney seeking to appeal their reduction, either automatically or upon attorney request.<sup>1523</sup> Recommendation 16 of the Cardone Report directs courts to “implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge.”<sup>1524</sup>

We find statistically significant effects for four of these plan features:

1. Including a technical review provision increases the odds of reduction by 13%.
2. Only providing for mathematical review increases the odds of reduction by 71%, compared to not specifying any reasons voucher payments can be reduced. Specifying the four reasons from Recommendation 8 (“All 4 Cardone Reasons”), as 32% of district plans did as of 2021, decreases the odds of reduction by 26%.
3. Including a provision requiring attorneys to be given notice of proposed voucher reductions not based on mathematical errors somewhat counterintuitively increases the odds of payment reduction by 15%.
4. Providing for the referral of vouchers under consideration for reduction to the district or divisional CJA committee or CBA, though, decreases the odds of reduction by 34%.

We do not find a statistically significant effect for independent review, a feature of 43% of the plans included as of 2021.

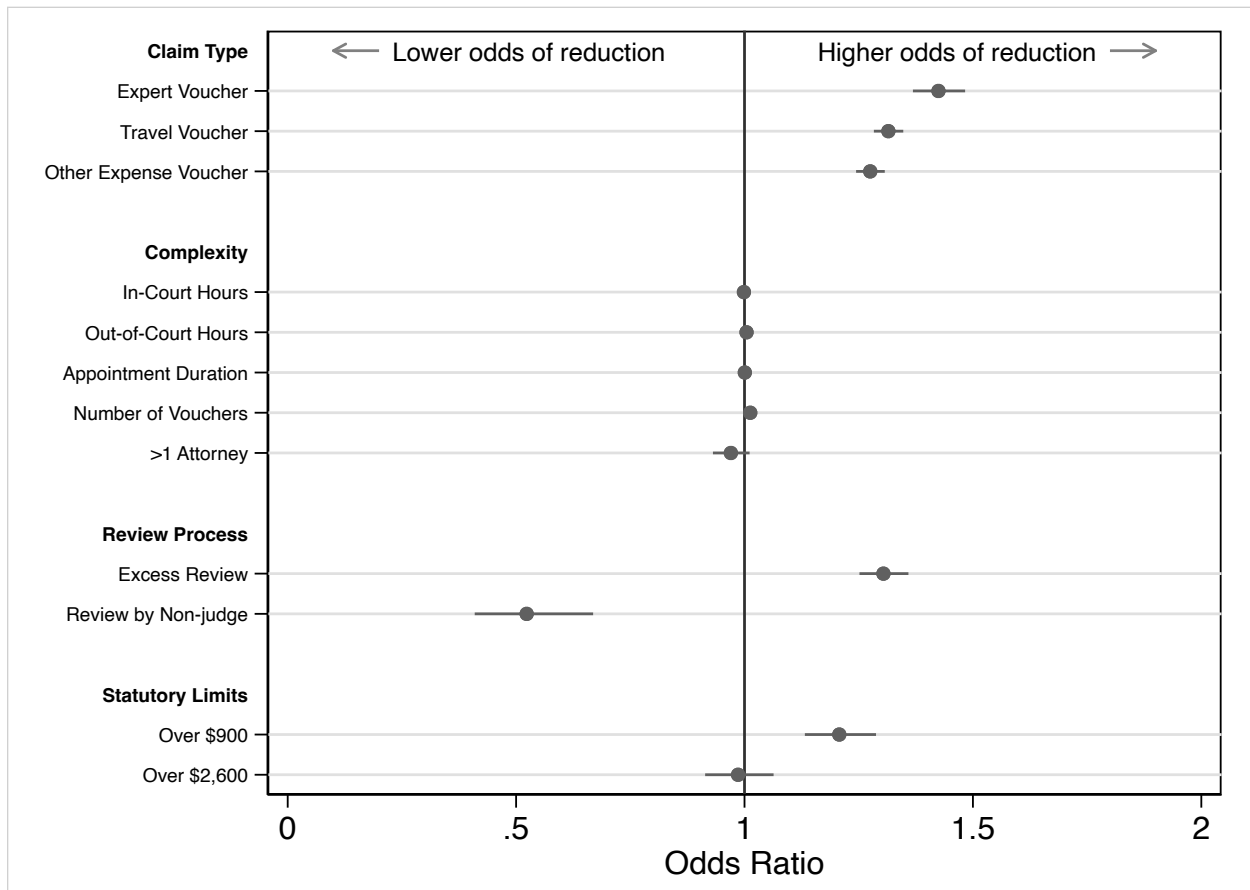
## Payment Reduction by Reviewer

Although including both appointing court and reviewer fixed effects in the same regression model is not possible for both statistical and computational reasons, estimating a regression model with fixed effects by reviewer instead of appointing court produces similar estimates for the factors discussed above.

<sup>1523</sup>. Though some plans also included a provision that the second reviewer could override the decision of the original reviewer, those processes were less common and thus not included in this analysis.

<sup>1524</sup>. JCUS-MAR 19, p. 19.

Figure 2. Logistic Regression Results (Reviewer Fixed Effects).



Note: Results of the logistic regression model estimating the odds that payment for an appointment is reduced including reviewer fixed effects. An odds ratio of 1, denoted by the vertical line, indicates “even odds;” in other words, a variable has no effect on the odds that payment will be reduced. Odds ratios below 1 indicate decreased odds of reduction, while odds ratios above 1 indicate increased odds of reduction. Points represent the odds ratio estimates; bars are 95% confidence intervals. Fixed effects are omitted in the interest of space.

**Table 2.** Logistic Regression (Reviewer Fixed Effects).

	Beta	Std. Err.	p-value
<b>Claim Type</b>			
Expert Voucher	0.354	0.020	0.000
Travel Voucher	0.274	0.012	0.000
Other Expense Voucher	0.243	0.013	0.000
<b>Complexity</b>			
In-Court Hours	-0.001	0.001	0.030
Out-of-Court Hours	0.004	0.000	0.000
Appointment Duration	0.001	0.000	0.000
Number of Vouchers	0.012	0.003	0.000
>1 Attorney	-0.030	0.021	0.150
<b>Review Process</b>			
Excess Review	0.266	0.021	0.000
Review by Non-judge	-0.648	0.125	0.000
<b>Statutory Limits</b>			
Over \$900	0.189	0.033	0.000
Over \$2,600	-0.014	0.039	0.713
Constant	-2.561	0.256	0.000
N	377,882		

## Capital Appointments

For courts with very few capital appointments, the percentage of capital appointments reduced may not be very informative, as there are not enough observations from which to draw any inferences. For example, of the five courts that reduced payment in 100% of capital appointments, all had three or fewer. The Cardone Report raised this issue, observing that federal judges may be even less familiar with what is necessary to mount an effective defense in a capital case than in a non-capital case because of their rarity.<sup>1525</sup> See Figure 19 for a plot of the total number of capital appointments versus the proportion of capital appointments reduced by court.

Although we can estimate regression models like those for non-capital appointments, because of the relatively smaller number of appointments involving capital charges, it is more difficult to precisely estimate the effects of our independent variables of interest. In addition to the statistical difficulties with modeling the odds of reduction in appointments involving capital charges, it is also possible that the idiosyncratic nature of these appointments means that the factors identified as influencing reductions in non-capital appointments may not have the same effects in capital appointments.

1525. Cardone Report, p. 195.

**Table 3.** Logistic Regressions: Appointments in Capital Representations.

	(1)			(2)			(3)		
	No Plan Features, Pooled			No Plan Features, Year FE			With Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
<b>Claim Type</b>									
Expert Voucher	-0.085	0.228	0.711	-0.097	0.229	0.673	-0.139	0.300	0.643
Travel Voucher	0.513	0.113	0.000	0.507	0.113	0.000	0.784	0.138	0.000
Other Expense Voucher	-0.073	0.104	0.483	-0.071	0.104	0.496	-0.136	0.118	0.249
<b>Complexity</b>									
In-Court Hours	0.001	0.001	0.073	0.001	0.001	0.070	0.001	0.001	0.084
Out-of-Court Hours	0.000	0.000	0.001	0.000	0.000	0.003	0.000	0.000	0.018
Appointment Duration	-0.000	0.000	0.778	-0.000	0.000	0.795	0.000	0.000	0.285
Number of Vouchers	0.024	0.004	0.000	0.025	0.004	0.000	0.027	0.004	0.000
>1 Attorney	-0.402	0.092	0.000	-0.405	0.092	0.000	-0.412	0.106	0.000
<b>Review Process</b>									
Excess Review	0.673	0.100	0.000	0.676	0.100	0.000	0.464	0.114	0.000
Review by Non-judge	0.392	0.172	0.023	0.378	0.173	0.029	0.666	0.229	0.004
<b>Statutory Limits</b>									
Over \$900	-0.226	0.234	0.333	-0.222	0.235	0.345	0.117	0.303	0.699
<b>Year</b>									
2018				0.031	0.177	0.859			
2019				0.307	0.167	0.065			
2020				0.254	0.164	0.123			
2021				0.226	0.170	0.184			
2022				0.053	0.159	0.736			
<b>Plan Features</b>									
Technical Review							-0.103	0.126	0.416
Math Review Only							0.145	0.139	0.299
All 4 Cardone Reasons							-0.625	0.218	0.004
Notice							-0.012	0.121	0.920
Referral							-0.178	0.143	0.214
Independent Review							-0.313	0.194	0.107
Constant	-1.568	0.113	0.000	-1.710	0.157	0.000	-1.624	0.158	0.000
N	2,774			2,774			2,353		



## eVoucher Data Analysis: Reasons for Payment Reductions, Jan. 2020 to Sept. 2022

According to Cardone Recommendation 8, “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.” To further the adoption of this standard, in January 2020, functionality was added to eVoucher to allow reviewers to select the reason they chose to reduce any line items in a voucher from a list of the four reasons specified in Recommendation 8 (see the check boxes numbered 1 through 4 in Figure 3). Reviewers were also asked to provide an open-ended explanation (by typing in the field “Provide explanation here” in Figure 3). In February 2020, stating a reason for reduction (checking at least one of the four boxes) became mandatory.<sup>1526</sup> The following section examines these reasons provided for reductions since January 2020, as well as the open-ended explanations written by reviewers.<sup>1527</sup>

Figure 3. eVoucher Module Release Requiring Reasons.

The screenshot shows the 'Services' tab in the eVoucher system. The form is for a voucher line item with the following details:

- Date:** 09/21/2017
- Service Type:** a. Interviews and Conferences
- Doc.# (ECF):** [Empty]
- Pages:** [Empty]
- Hours:** 0.4 at \$132.00 per hour.

Below the form, there are four reasons for reduction, each with a checked checkbox and a text area for explanation:

1. Mathematical error
2. Work billed was not compensable
3. Work was not undertaken or completed
4. Hours billed are clearly in excess of what was reasonably required to complete the task

At the bottom right, there are 'Adjust' and 'Remove' buttons.

Note: the analysis to follow uses shorter labels to represent the four reasons for reduction outlined in Recommendation 8 and programmed into eVoucher. “Math error” for “mathematical error” (1), “not compensable” for “work billed was not compensable” (2), “not completed” for “work was not undertaken or completed” (3), and “excessive,” for “hours billed are clearly in excess of what was reasonably required to complete the task” (4).

In contrast to previous sections of this appendix, the unit of analysis in this section is not the entire appointment, it is the voucher line item. Only line items in which a reviewer reduced payment from the claimed amount are included in this dataset, as a reviewer will not select a reason for reduction or write an explanation when paying a line item in full. One appointment may result in multiple vouchers, and

1526. See DIR20-021, Memorandum, James C. Duff, Director, Administrative Office of the United States Courts and Hon. Raymond J. Lohier, Jr., Chair, Judicial Conference Committee on Defender Services, re: Informational Video on CJA Voucher review standard (INFORMATION), Feb. 10, 2020, available at: <https://jnet.ao.dcn/sites/default/files/pdf/DIR20-021.pdf>.

1527. One caveat is that this dataset does not capture communications between reviewers and the attorneys submitting claims outside of eVoucher. More explanation that might be helpful to attorneys could be occurring through other channels. Furthermore, the dataset does not capture any requests to reduce from attorneys resubmitting vouchers.

each voucher can have multiple line items reduced. The average (mean) number of reduced line items per voucher is 4 (median = 2; maximum = 193).

The analysis dataset consists of 87,744 line items that were reduced in 21,675 unique vouchers. A reviewer can select more than one reduction reason for each line item, though in practice reviewers usually select only one.

All 21,675 vouchers in this analysis are attorney compensation vouchers. Ninety-seven percent of the 87,744 reduced line items are for CJA-20 vouchers (non-capital attorney compensation), while 3% are for CJA-30 vouchers (capital attorney compensation). Ninety-five percent are reductions at the first level of review, and 5% are reductions at the second level of review.

## Reduction Reasons (Multiple Choice)

Across all reductions to line items (non-capital and capital) at any stage, the most frequently selected reason for reduction is that the “hours billed are clearly in excess of what was reasonably required to complete the task” (44%). Thirty nine percent of reductions are due to the work not being compensable, 13% of reductions are for math errors, and 4% are because the work was not completed. As Table 4 shows, the most common reason reviewers selected for reducing payment in non-capital vouchers was “excessive,” while the most common reason selected in capital vouchers was “not compensable.”

**Table 4.** Reduction Reason by Voucher Type.

	CJA-20 (Non-capital)	CJA-30 (Capital)
Math error	10,887 (13%)	496 (17%)
Not compensable	32,434 (38%)	<b>1,503 (51%)</b>
Not completed	3,347 (4%)	138 (5%)
Excessive	<b>38,110 (45%)</b>	829 (28%)
	84,778	2,966

Note: Percentages displayed are for the column (percentage of non-capital line items reduced for each of the four reasons specified at left or percentage of capital line items reduced by reason at right).

Table 5 shows the reduction reasons selected for different types of line items (across both non-capital and capital vouchers). “Excessive” was the most common reason selected in eight of the eighteen line item types. “Math error” was most frequently selected in vouchers for in-court hearings, motions, travel, and trials. The line item types most frequently deemed “not compensable” were counsel consultations, evidence, expert consultations, interviews, other investigative, and witness interviews.

**Table 5.** Reduction Type by Line Item Type.

Line item type	Excessive	Math Error	Not Compensable	Not Completed	Total
Appeals court	<b>86</b>	14	33	12	145
Arraignment plea	<b>840</b>	415	83	257	1,595
Bail detention	<b>347</b>	154	49	107	657
Counsel consultation	35	12	<b>95</b>	3	145
Evidence	25	14	<b>63</b>	2	104
Expert consultation	20	13	<b>68</b>	9	110
In-court hearing	59	<b>115</b>	20	21	215
Interview	3,244	1,033	<b>7,713</b>	635	12,625
Investigative-Other	2,727	476	<b>10,285</b>	227	13,715
Motion	104	<b>165</b>	123	11	403
Other	<b>1,198</b>	558	738	364	2,858
Record	<b>20,226</b>	727	8,311	695	29,959
Research/Writing	<b>6,297</b>	317	4,929	370	11,913
Revocation	<b>223</b>	49	9	86	367
Sentencing	<b>421</b>	278	49	86	834
Travel	3,059	<b>6,871</b>	1,335	592	11,857
Trial	28	<b>172</b>	26	8	234
Witness interview	0	0	<b>8</b>	0	8

Note: Bolded numbers indicate the most common reduction reason for each line item type.

The *Guide to Judiciary Policy*, Vol. 7 § 230 gives general information about certain expenses and tasks that are and are not reimbursable. Most of the guidance concerns expenses, like office overhead, copying, or travel expenses. As discussed in the Cardone Report, the specifics of what is viewed as compensable or reasonable may differ from court to court and reviewer to reviewer. The report highlighted client meetings, meetings with family, arranging bond, obtaining sentencing letters, travel time, and discovery review as types of tasks or expenses that certain courts and reviewers did not view as compensable or often deemed excessive.<sup>1528</sup>

Table 5 reinforces some of what the Cardone Report suggested. Claims for reviewing the record are most frequently reduced because they are excessive, as is work related to bail detention and sentencing. Counsel consultations are most frequently reduced because they are not compensable. Travel line items are most frequently reduced because of math errors, though Figure 4 below (giving more detail on the terms used in the open-ended explanations for reductions for math errors) shows that references to travel limits and policy are often cited in math error reductions, suggesting that some reviewers use the math error category to enforce policy on travel compensability. Frequent reductions to interviews and investigative work due to non-compensability are a noteworthy finding from Table 5, adding detail to the testimony before the Cardone Committee reporting reductions to out-of-court hours.

<sup>1528</sup>. Cardone Report, p. 98–101.

## Open-Ended Explanations for Reductions

Of the 87,744 reduced line items in this analysis, 87,577 (99.8%) included an explanation of one word or more written by the reviewer making the reduction to the line item. One hundred sixty-seven explanations are functionally blank (the reviewer entered a period, dash, or asterisk in lieu of words or letters).

Many of the explanations are short. The average number of words in an explanation is 6.3 (mean; median=3; maximum=186). Eighty-two percent of explanations consist of ten words or fewer. About one-quarter (24%) of explanations are a single word. As Table 6 shows, the most frequently used single-word explanations are “clerical,” “excessive,” “reasonableness,” “administrative,” the letter “c,” and “duplicate.”<sup>1529</sup>

**Table 6.** Frequency of Single-Word Explanations.

	Number	% of Overall Total
clerical	8,223	9.4
excessive	6,231	7.1
reasonableness	1,984	2.3
administrative	1,429	1.6
c	1,423	1.6
other	855	1.0
duplicate	541	0.6

In the video announcing the new requirement to select a reason for payment reductions in eVoucher,<sup>1530</sup> the importance of providing specific explanations for reductions was emphasized, as this would allow for better communication between reviewers and attorneys, would serve a training purpose, and would provide quality data for the judiciary. Given these goals, it is notable that many of these explanations are brief and that in the open-ended field reviewers often seem to restate the multiple choice option they already selected. For example, if a reviewer selects the reduction reason that the “hours billed are clearly in excess of what was reasonably required to complete the task” and then simply writes the word “excessive,” which was the explanation in 7% of all line-item reductions, or the word “reasonableness,” which was the explanation in 2% of all reductions, no additional information has been provided to the attorney. Notably, “comprehensive reasonableness” or “comprehensive reasonableness reduction” was the entire entry in approximately 13% of all 87,744 open-ended explanations.

To get a sense of the content of the open-ended explanations, we consider the phrases which appear most frequently in these explanations. We divide each explanation into sequential two- and three-word phrases, then tally the most common phrases. Because symbols, numbers, punctuation marks, and very common words (like “a,” “the,” or “and,” among others) are not informative, we remove them before creating the phrases.<sup>1531</sup>

1529. Spelling variations have been combined. The total for “reasonableness” also includes variations of “unreasonable.”

1530. Memorandum, James C. Duff, Director, Administrative Office of the United States Courts and Hon. Raymond J. Lohier, Jr., Chair, Judicial Conference Committee on Defender Services, re: Informational Video on CJA Voucher review standard (INFORMATION), Feb. 10, 2020, <https://jnet.ao.dcn/sites/default/files/pdf/DIR20-021.pdf>.

1531. Dividing text into phrases is a common technique in natural language processing, as is pre-processing text through standard steps like removing common phrases (“stop words”). See Daniel Jurafsky & James H. Martin, *Speech and Language Processing*, 3d ed. (2023).

For example, if a reviewer enters the explanation “duplicate entry” for a reduction, that is the only two-word phrase in the explanation. An explanation of three words, like “exceeds travel limits,” is divided into the two-word phrases “exceeds travel” and “travel limits,” in addition to including the entire three-word phrase. If reviewers enter longer explanations, more phrases will be created from that explanation. For instance, the explanation “filing a pleading is considered administrative and is not compensable under the CJA guidelines” contains phrases like “considered administrative,” “pleading considered administrative,” “not compensable,” and “CJA guidelines,” among others. Longer explanations will therefore contribute more phrases to those analyzed. Because we examine phrases of at least two words, single-word explanations are omitted (24% of the line-item reduction explanations), though Table 6 above displays the most common single-word explanations.

The figures to follow illustrate patterns in these phrases that reviewers used in the eVoucher open-ended explanation fields for payment reductions.

Phrases used by reviewers when selecting “math error” as the reason for payment reduction most often invoked travel limits and policies, as well as corrections to in-court hours based on clerk minutes and elimination of duplicate entries (Figure 4). Reasons for “not compensable” payment reductions cited judiciary policy and the types of work or expenses not deemed compensable by policy, including administrative/secretarial/clerical work, personal services, and office overhead (Figure 5). For payment reductions made because work was “not completed,” reviewers most frequently said an entry was a duplicate. Other common phrases referenced communications with or documentation provided by the attorney requesting payment, overlap with other payments, or references to travel policy (Figure 6). For line items deemed “excessive,” reviewers commonly used terms related to reasonableness, policies and memorandums related to policy, and assessments of time billed (Figure 7).

Figure 4. Frequency of Phrases Used in Explanations of Reductions for Math Errors (Top Fifty Two- to Three-Word Phrases).

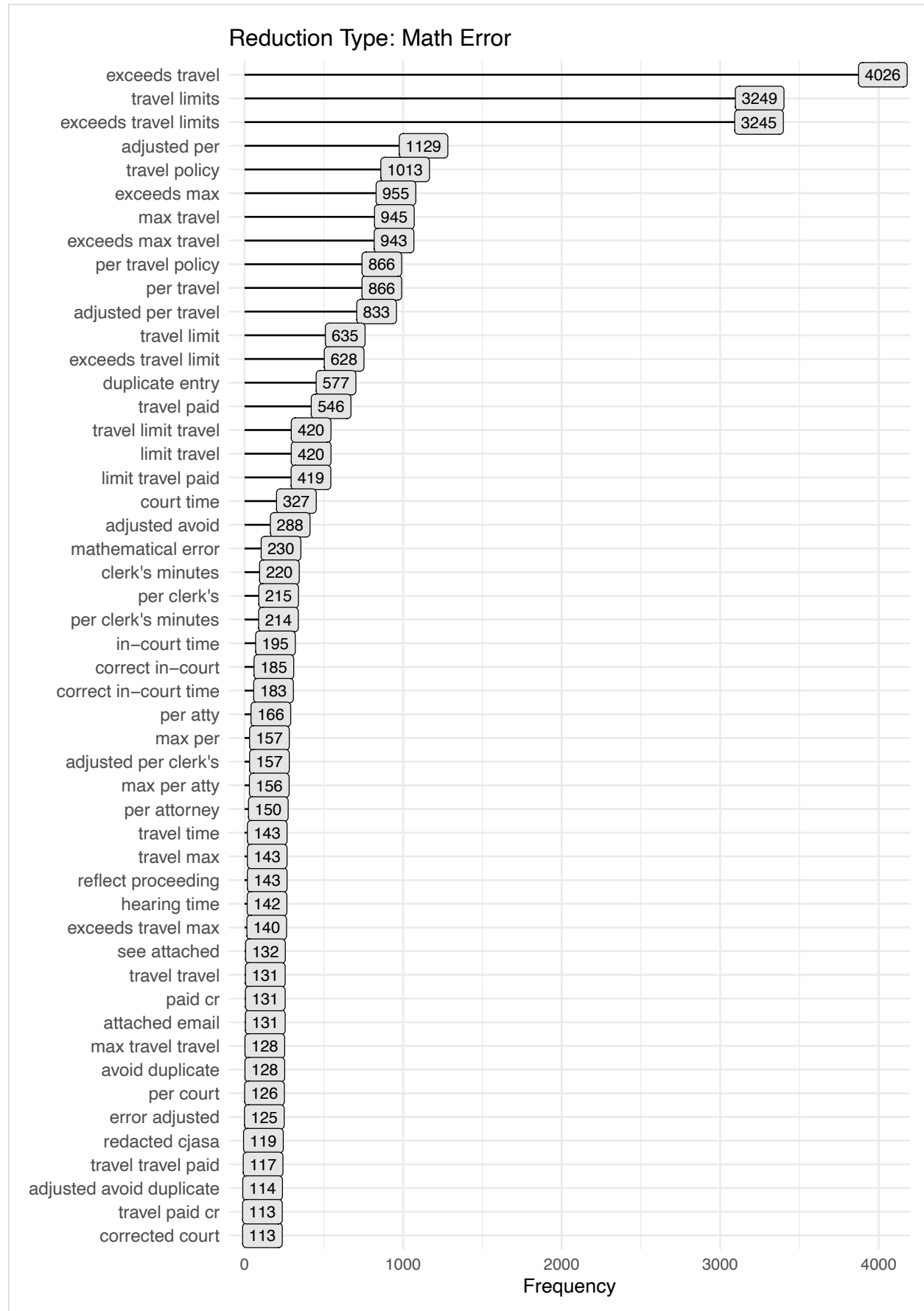


Figure 5. Frequency of Phrases Used in Explanations of Reductions to Expenses Deemed Not Compensable (Top Fifty Two to Three-Word Phrases).

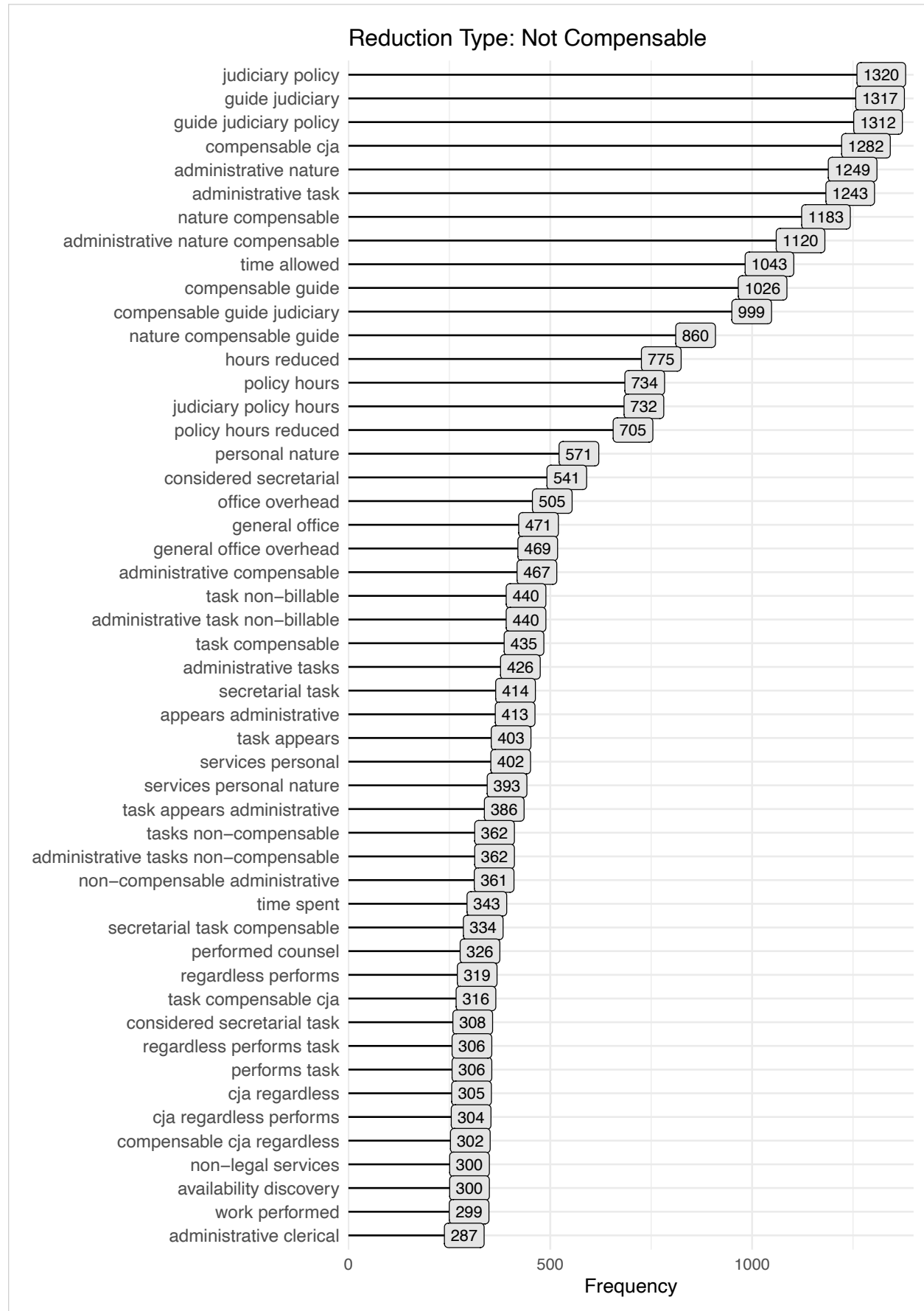


Figure 6. Frequency of Phrases Used in Explanations of Reductions Due to Non-Completion (Top Fifty Two- to Three-Word Phrases).

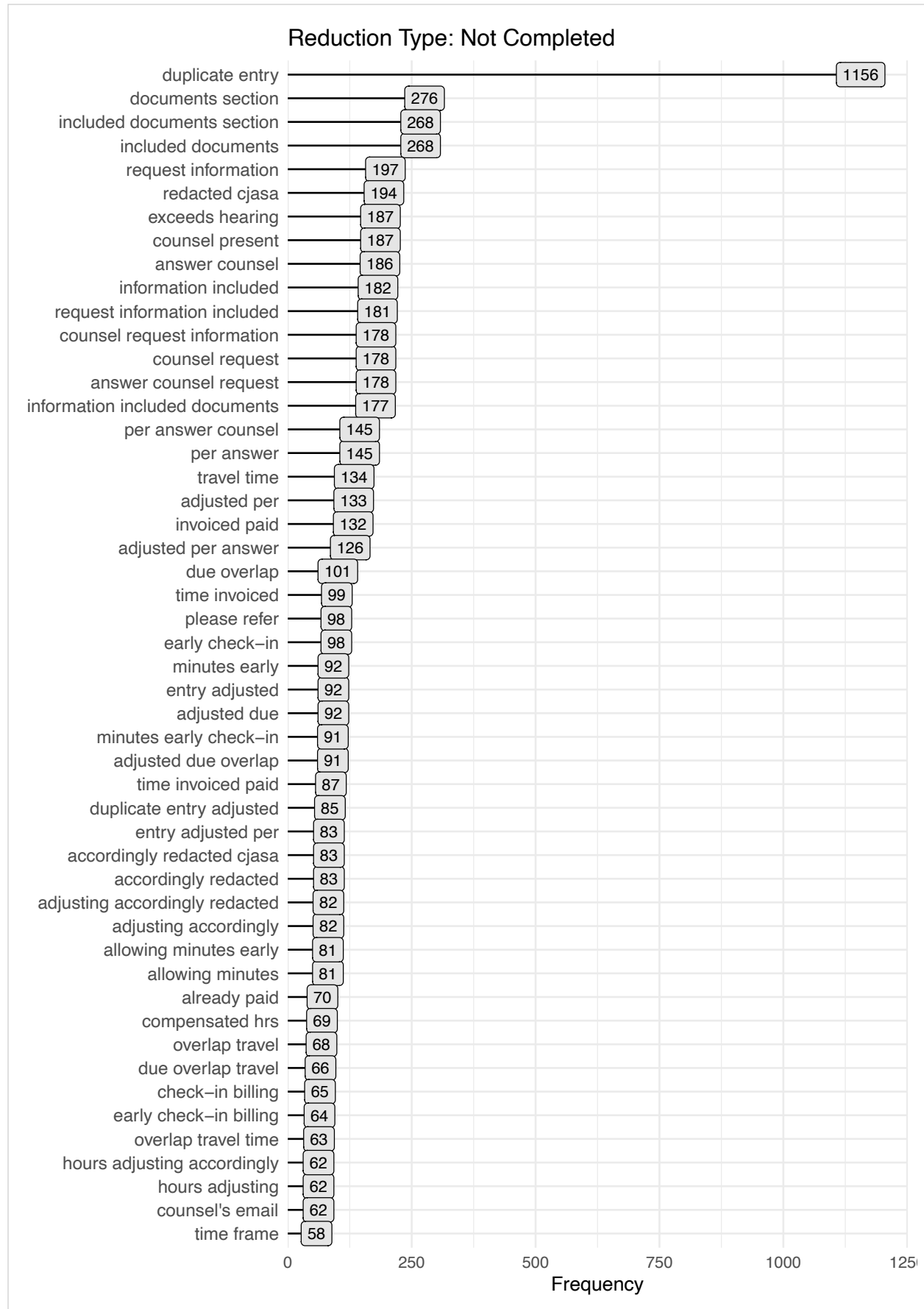
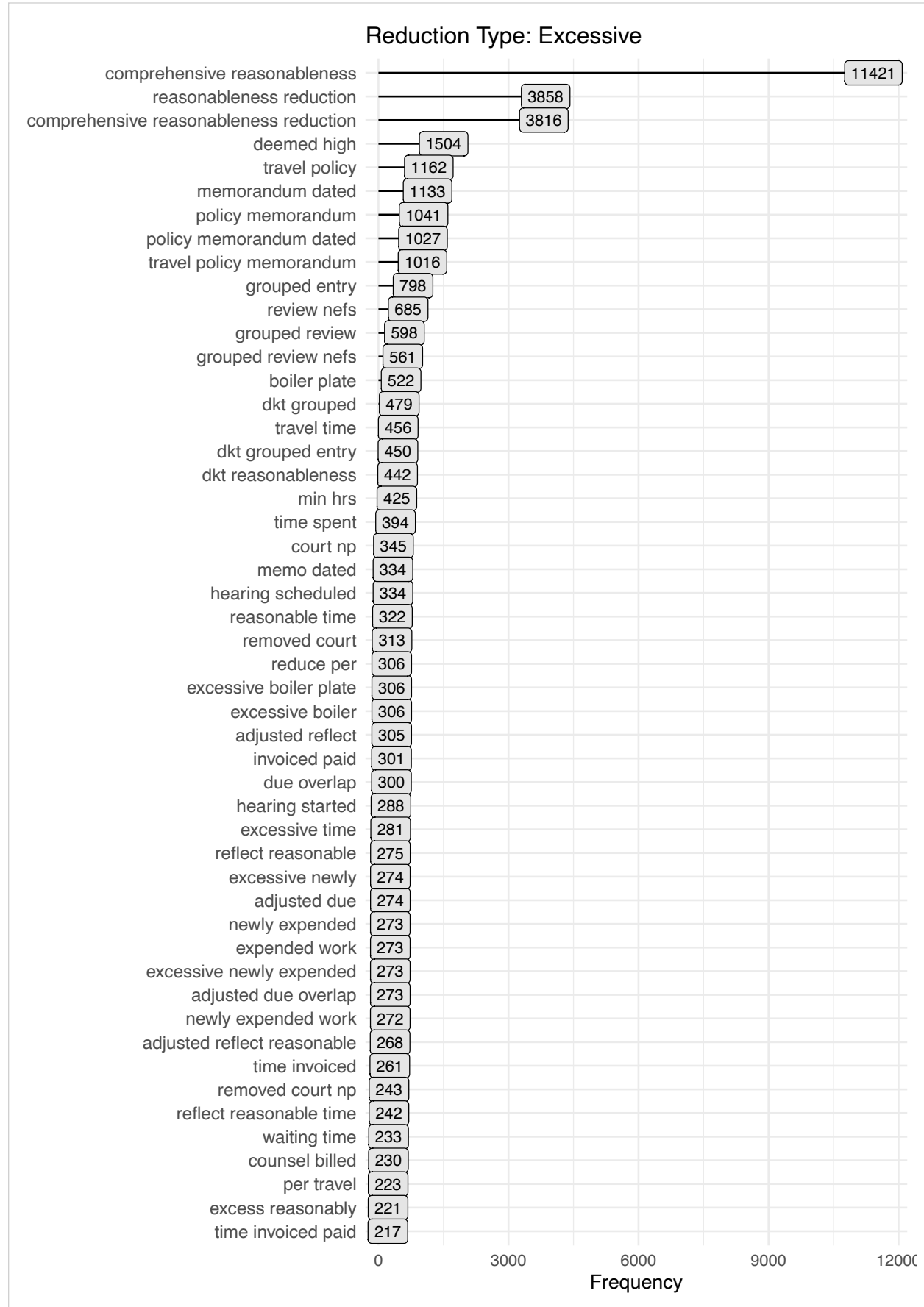




Figure 7. Frequency of Phrases Used in Explanations of Reductions to Expenses Deemed in Excess of What was Reasonably Required to Complete the Task (Top Fifty Two to Three-Word Phrases).



Figures 8 and 9 display the most frequently used phrases for capital versus non-capital vouchers. Reviewers largely use similar phrases to explain reductions to capital (Figure 8) and non-capital (Figure 9) vouchers, including phrases referencing judiciary policy, whether work is compensable, and specific tasks or expenses that are not compensable, like administrative/secretarial work and office overhead. For non-capital vouchers, reviewers more frequently invoke “comprehensive reasonableness” and travel policies. Reference to interim payments occurs more frequently in capital appointments than in non-capital appointments.

Figure 8. Frequency of Phrases Used in Explanations of Reductions to Capital Voucher Line Items (Top Fifty Two- to Three-Word Phrases).

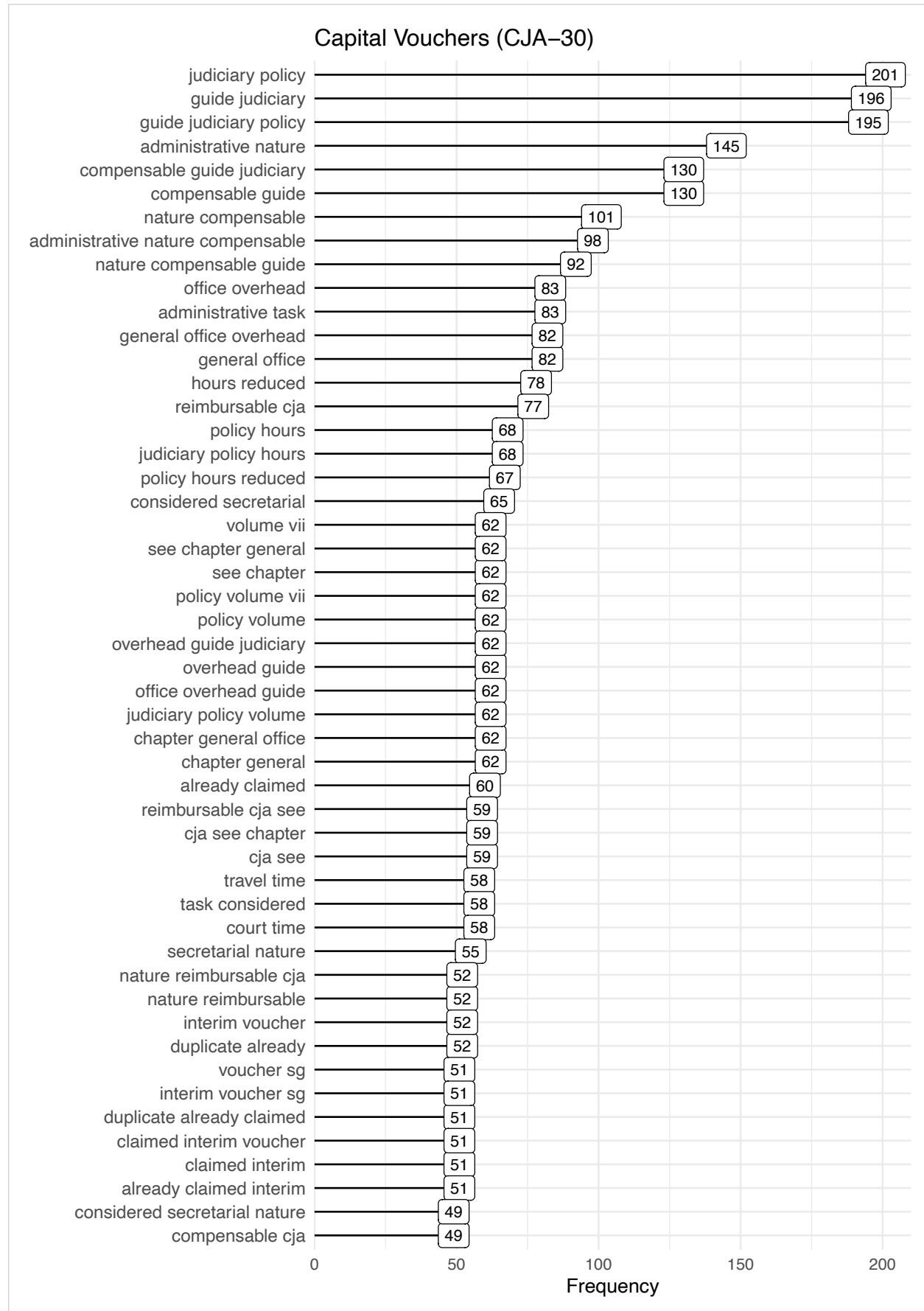
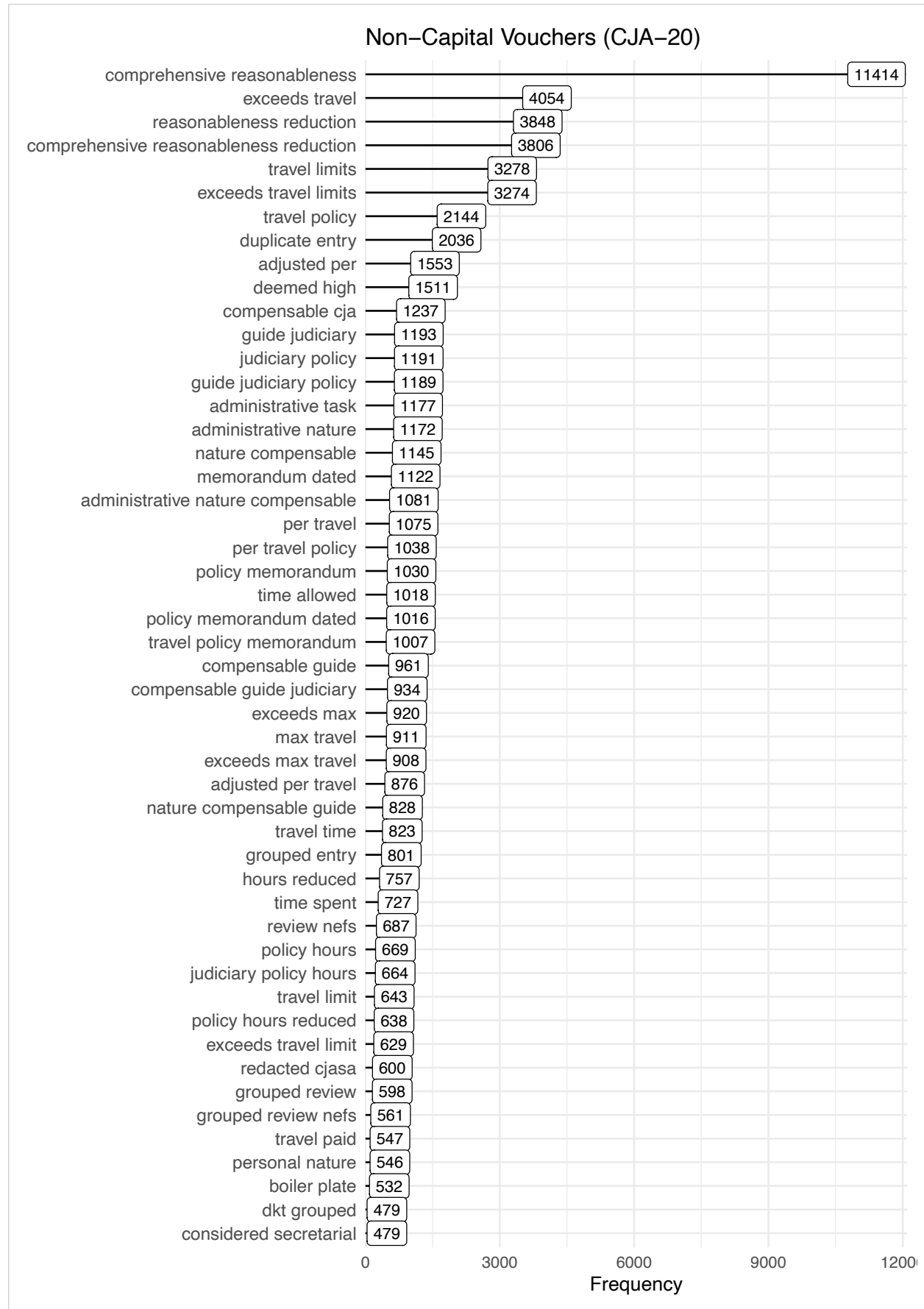


Figure 9. Frequency of Phrases Used in Explanations of Reductions to Non-capital Voucher Line Items (Top Fifty Two- to Three-Phrases).



## Attachments

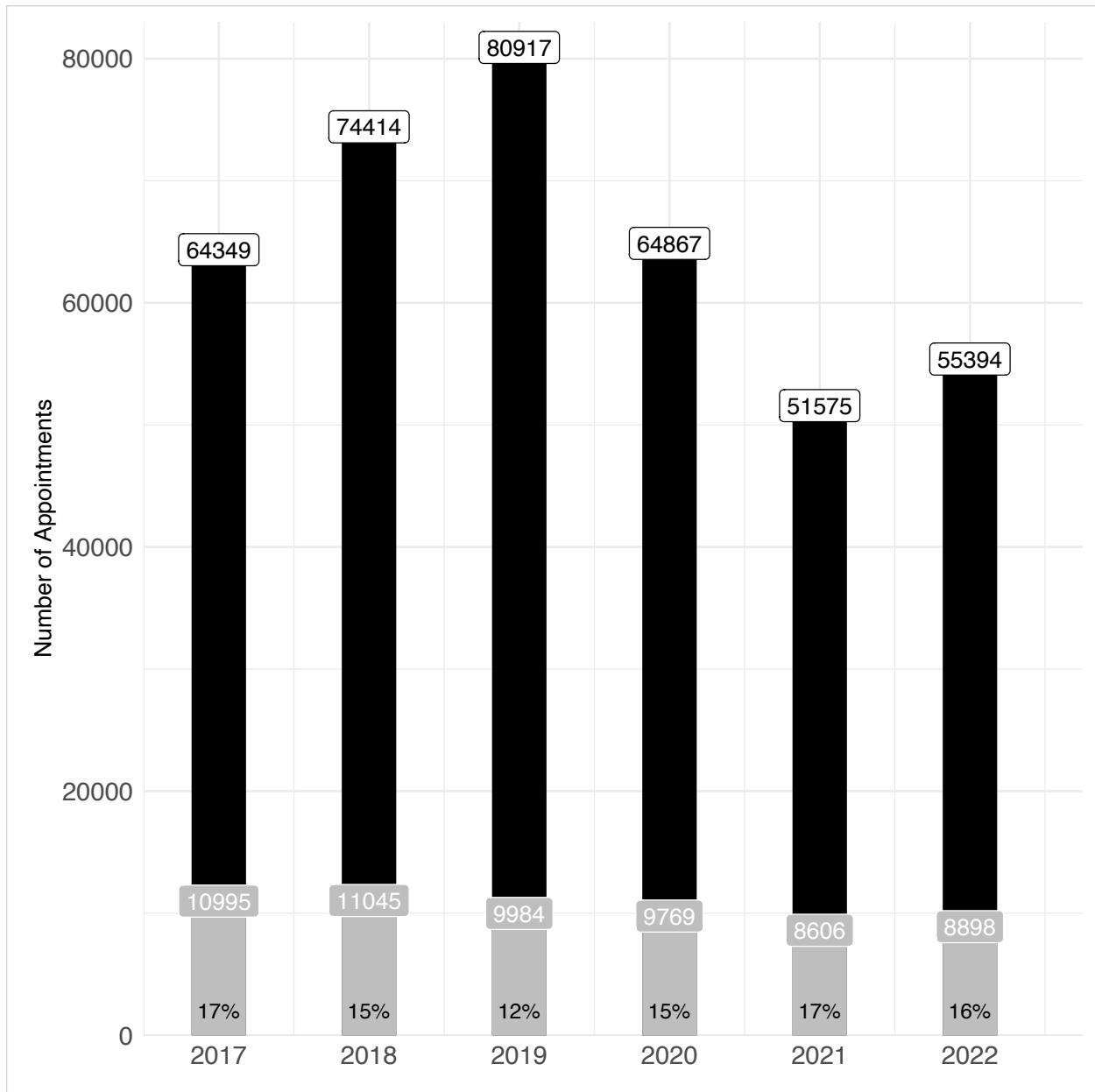
The attachments to follow provide additional context for and detail about the analysis of data from eVoucher as outlined below:

- *Attachment 1: Additional Descriptives: Appointments, Reductions, and Payments:* more information on numbers of appointments, reductions, and payments, including over time, by type of court, and by reviewer
- *Attachment 2: Descriptive Statistics for Independent Variables:* descriptive statistics for all courts, border courts, non-border courts, and a visualization of distributions of the variables coded from courts' CJA plans
- *Attachment 3: Descriptive Patterns in Independent Variables:* visualizations of patterns in independent variables (claim type, claim amount, and capital)
- *Attachment 4: Additional Regression Results:* full results of the fixed-effects models, including individual court fixed effects, and results for the pooled models

# Attachment 1

## Additional Descriptives: Appointments, Reductions, and Payments

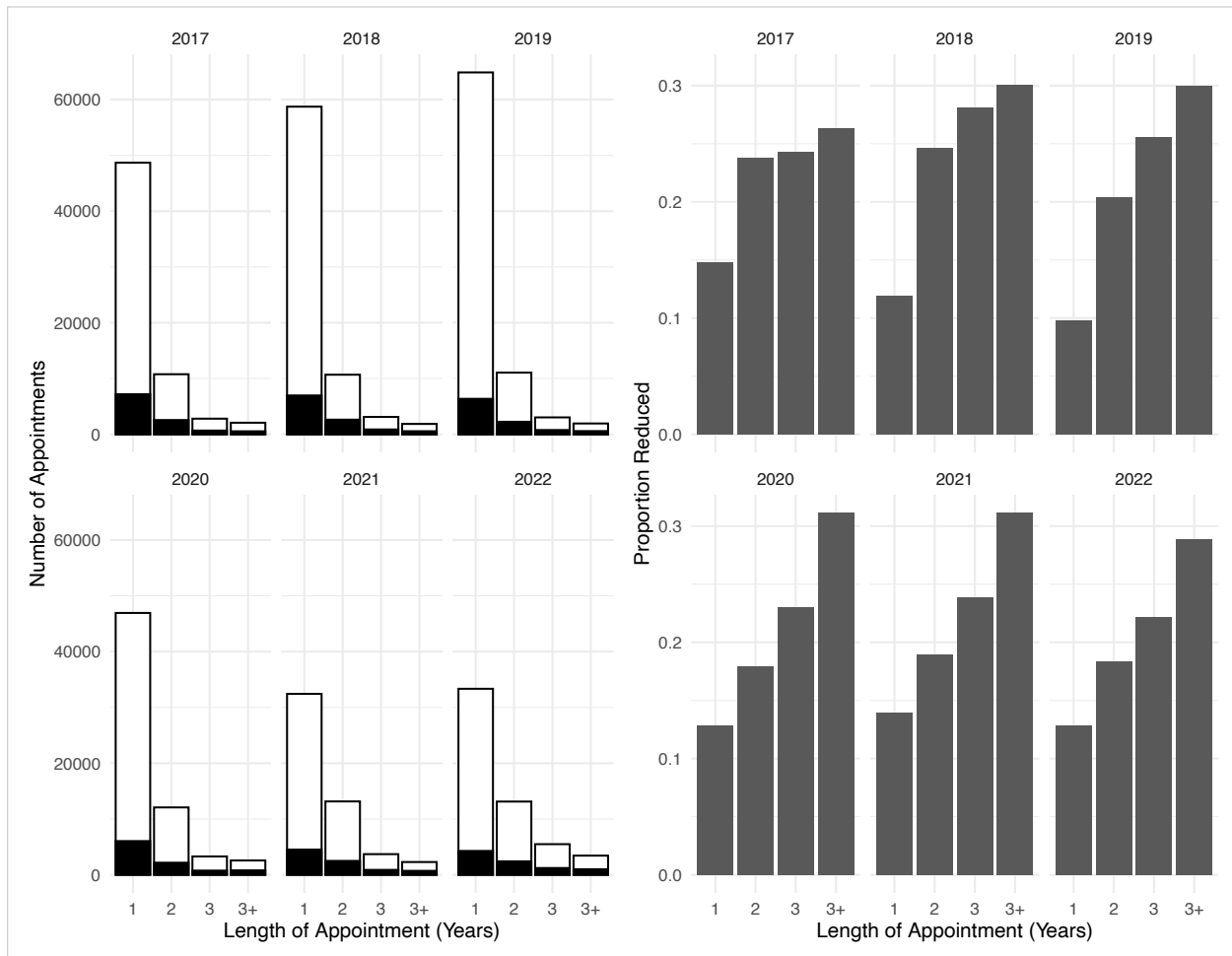
Figure 10. Number of Appointments by Fiscal Year of Last Payment.



Note: The gray portion of each bar shows reductions (number and percentage of total appointments). The black portion is the number of appointments not reduced. The top label displays the total number of appointments.

Figure 10 shows that the total number of appointments varies by fiscal year. There is no trend easily apparent from this short time series, though the COVID-19 pandemic may have contributed to fewer appointments from 2020 to 2022.<sup>1532</sup> The proportion of appointments with payment reductions varies between 12% and 17% of appointments per year.

Figure 11. Reductions by Length of Appointment.

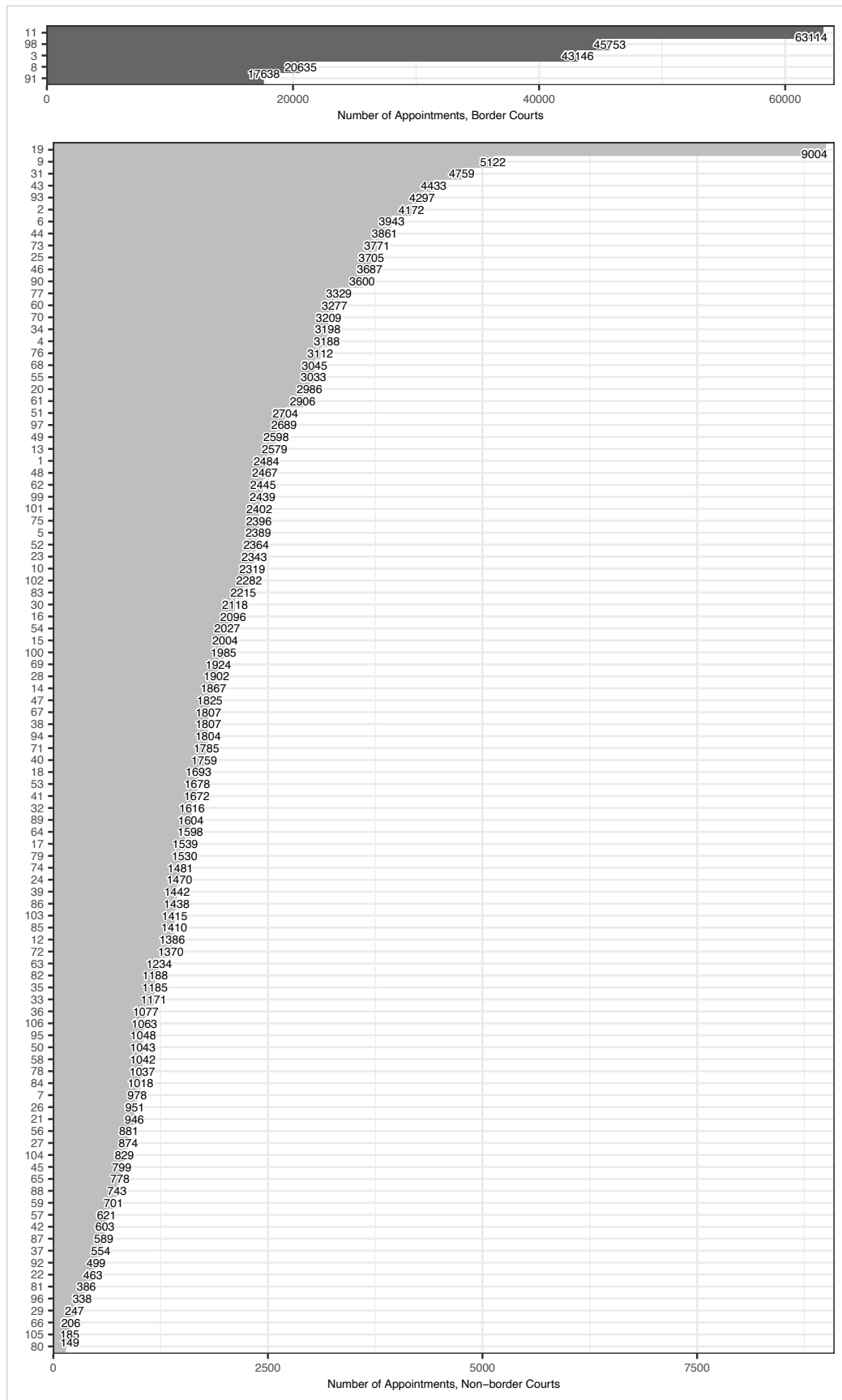


Note: The length of appointment is categorized as “1” for 0–12 months (1 year old or less), “2” for 13–24 months (between 1 and 2 years), “3” for 25–36 months (between two and three years), or “3+” for 37 months or more (more than three years). The heights of the bars in the left panel illustrate the total number of appointments in each “length” category, by year. The black portion of each bar indicates the number of appointments in which payment was reduced. For example, the leftmost bar in the top-left plot shows that in 2017 there were 48,681 appointments with final payments that were one year old or less; 7,199 of which saw payment reductions (15%). The right panel of the figure shows the proportion of appointments with payment reductions by length category and year. For example, in FY 2017, 15% of appointments that were one year old or less (1) saw payment reductions. For appointments between one and two years old (2) and between two and three years old (3), about 24% of appointments saw reductions. For appointments more than three years old (3+), 26% saw reductions.

Figure 11 suggests one reason that voucher reductions are not widespread: in the aggregate (combining all courts), most appointments last one year or less, and appointments lasting one year or less are reduced at lower rates. The length of an appointment is one measure of its complexity.

1532. Roy Germano, Timothy Lau, and Kristin Garri, Federal Judicial Center, COVID-19 and the U.S. District Courts: An Empirical Investigation (2022), [https://www.fjc.gov/sites/default/files/materials/11/22-1109\\_2-COVID19\\_and\\_the\\_US\\_District\\_Courts.pdf](https://www.fjc.gov/sites/default/files/materials/11/22-1109_2-COVID19_and_the_US_District_Courts.pdf), discussing the changes in civil case and criminal defendant filings brought by the pandemic.

Figure 12. Number of Appointments by Court, Border (top) and Non-border (bottom).



Note: The scale for the number of appointments per court differs in the top and bottom panels to maximize readability. Southwest border district courts are extracted and displayed separately because the number of cases in those courts is drastically higher than the number of cases in other courts.



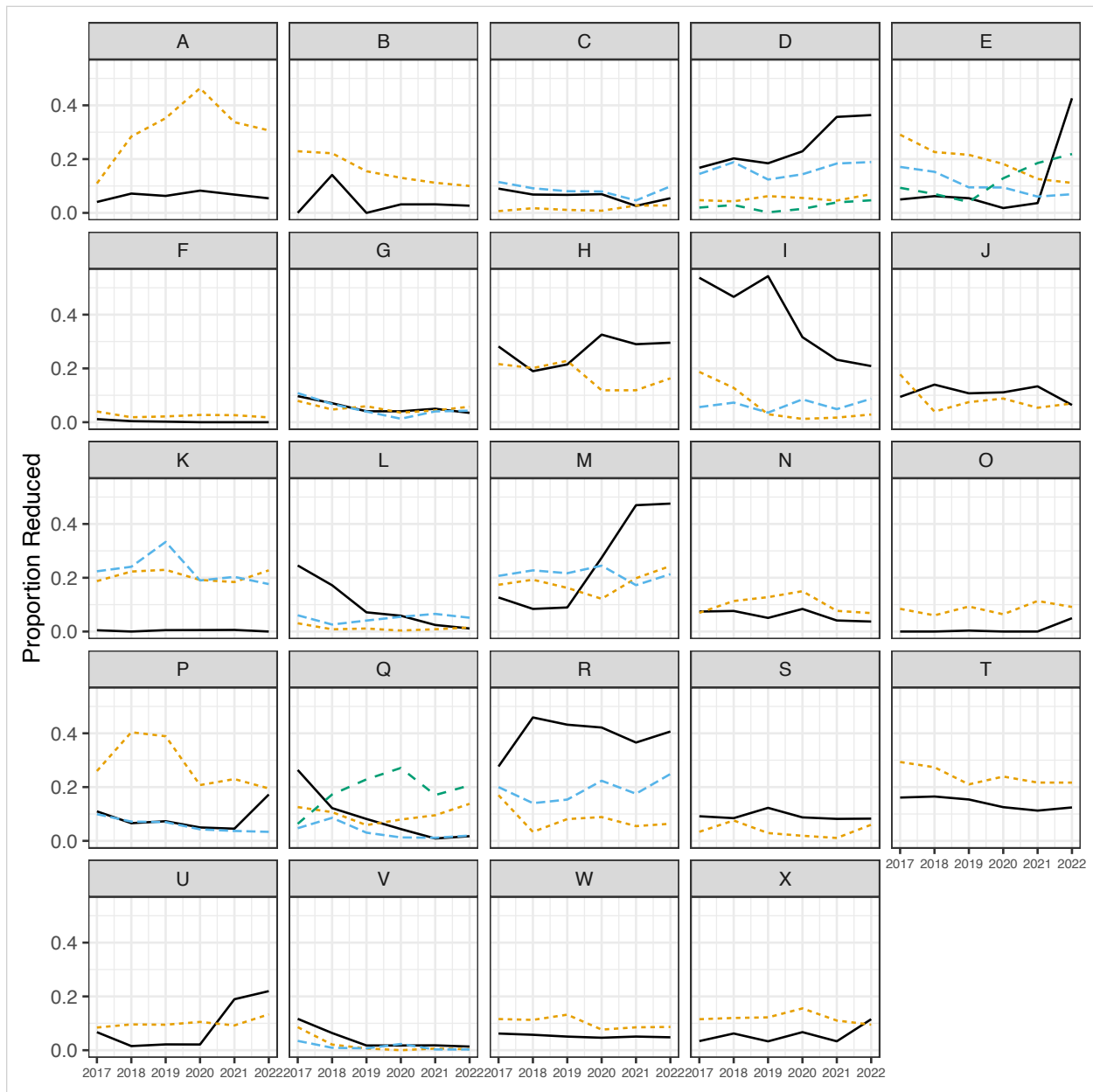
**Table 7.** Descriptive Statistics, Border and Non-Border Courts.

	Obs.	Mean	SD	Median	Min.	Max.
<b>Border courts</b>						
Payment reduced	190,286	0.16	0.37	0	0	1
Payment differential	190,286	-\$30.65	\$391.65	\$0	-\$96,399	\$20,231
Claim amount	190,286	\$1,862.17	\$7,614.81	\$759.68	\$0	\$1,120,439
<b>Non-border courts</b>						
Payment reduced	201,230	0.14	0.35	0	0	1
Payment differential	201,230	-\$113.19	\$1,529.05	\$0	-\$211,062	\$176,695
Claim amount	201,230	\$9,360.31	\$25,498.59	\$5,039.25	\$0	\$3,724,742

Note: Descriptive statistics for whether there was a payment reduction (“payment reduced”) and the difference in the amount claimed versus paid (“payment differential”) for southwest border district courts and all other courts. Note that courts of appeals are included as “non-border courts.”

The five southwest district courts alone are the appointing authorities for 49% of appointments in the eVoucher payment data set (FY 2017 to FY 2022). The remaining 51% of appointments are accounted for by the 101 other appointing authorities. Notably, the average (mean) “payment differential” for border courts is much lower than for non-border courts. The average difference between the amount claimed by a lawyer in an appointment and the amount paid by the court is about \$31 in the five southwest border courts and \$113 in all other courts. Southwest border district courts handle smaller payment claims, on average, than other appointing authorities. The mean claim in non-border courts is more than five times higher than in border districts (\$9,360 versus \$1,862). The median claim in non-border courts is more than six times higher than in southwest border districts (\$5,039 versus \$760).

Figure 13. Proportion of Appointments by District Courts in the Same State.



Note: Each panel shows the proportion of appointments with payment reductions in each fiscal year from 2017 to 2022 for each district in states with multiple districts. Each line represents a different district within the state (Central, Eastern, Middle, Northern, Southern, or Western, where applicable).

In states with multiple districts, reduction rates can vary considerably by district. For instance, as Figure 13 illustrates, reduction rates are consistently higher in some districts of States I and R than in the other districts of those states. However, reduction rates are similar across districts in other states, like States F and G.

**Table 8.** Number/Percentage of Appointments by Amount Reimbursed.

	Frequency	Percentage
Reduced by \$100,000+	4	0.001
Reduced by \$10,000–\$100,000	433	0.11
Reduced by \$1,000–\$10,000	4,733	1.2
Reduced by \$100–\$1,000	22,474	5.7
Reduced by \$100 or less	31,653	8.1
<b>Paid in full</b>	<b>329,013</b>	<b>84</b>
Overpaid by less than \$100	2,434	0.62
Overpaid by \$100–\$1,000	481	0.12
Overpaid by \$1,000–\$10,000	248	0.063
Overpaid by \$10,000–\$100,000	41	0.010
Overpaid by \$100,000+	2	0.00051
Total	391,516	

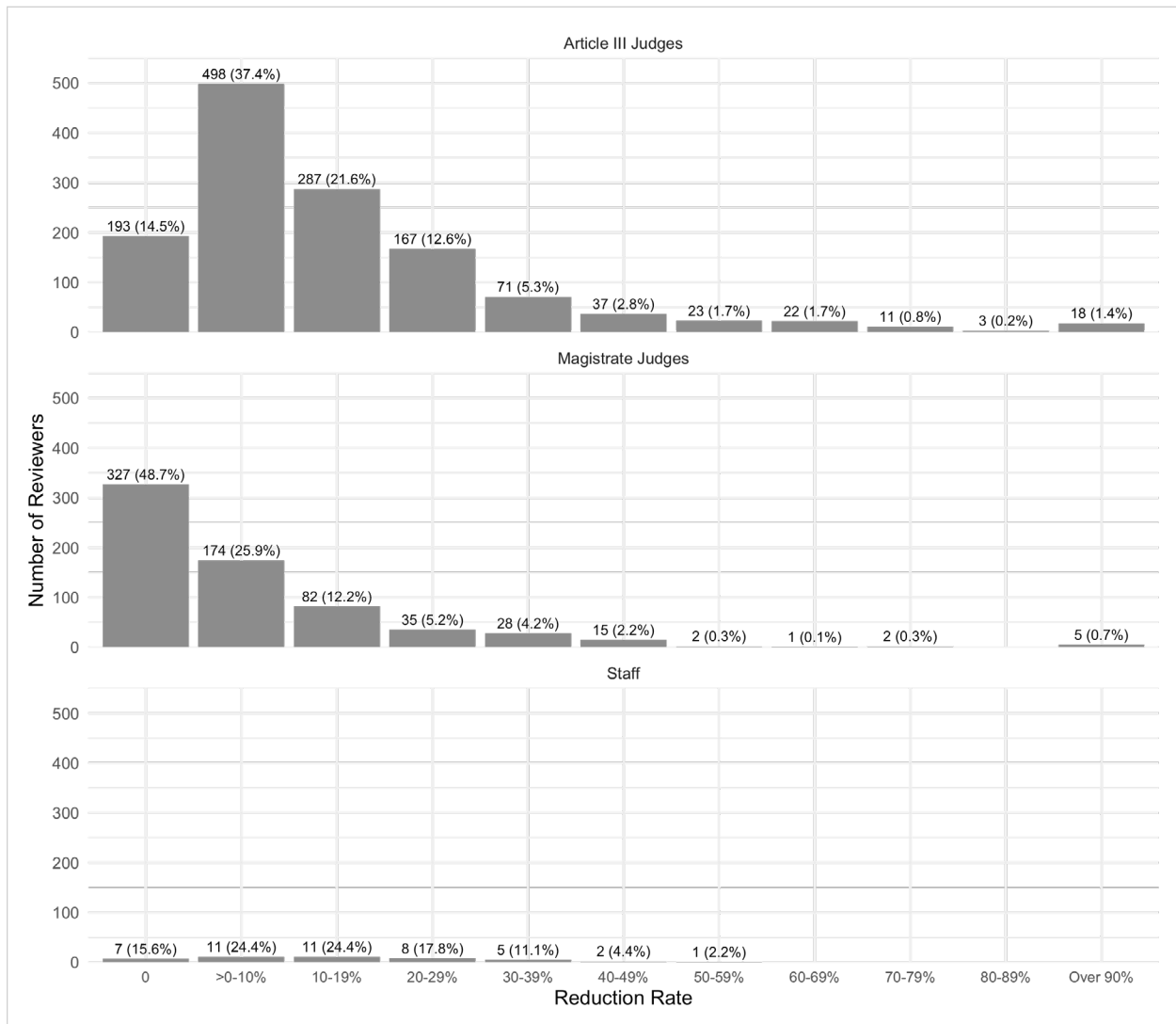
Note: Appointments “paid in full” were reimbursed the exact amount, or within \$1 of the claimed amount. Percentages are rounded to two significant figures.

**Table 9.** Type of Reviewer for Appointments with Final Payments from FY 2017 to FY 2022, Non-capital and Capital Appointments.

	Non-Capital			Capital		
	# of Appointments Reviewed	% of Appointments Reviewed	# of Courts Using Reviewer Type	# of Appointments Reviewed	% of Appointments Reviewed	# of Courts Using Reviewer Type
Article III Judge	244,707	62.9%	101	2365	85.3%	84
Magistrate Judge	84,640	21.8%	90	69	2.5%	14
Staff	59,395	15.3%	19	340	12.3%	13
Total	388,742			2,774		

Note: Courts may use multiple types of reviewers.

Figure 14. Number of Reviewers by Reduction Rate Category and Type of Reviewer.



Note: The height of each bar represents the number of reviewers in a given category of reduction rate. The label on top of each bar includes the number of reviewers in the category as well as the percentage of reviewers of that type (in parentheses).

Table 10. Number/Percentage of Courts by Total Number of Capital Appointments Paid.

Number of Capital Appointments	Number of Courts	Percentage of Courts
0	14	13.2%
1-5	27	25.5%
6-10	16	15.1%
11-50	33	31.1%
51-100	10	9.4%
101-400	5	4.7%
400+	1	0.9%

## Attachment 2

### Descriptive Statistics for Independent Variables

Table 11. All Courts.

Variable	Units	Obs.	Mean	Std. Dev.	Median	Min.	Max
Expert service voucher	0/1	391,516	0.20	0.40	0	0	1
Travel voucher	0/1	391,516	0.47	0.50	0	0	1
Other expense voucher	0/1	391,516	0.29	0.45	0	0	1
In-court hours	hours	391,516	2.55	11.07	1	0	1,306
Out-of-court hours	hours	391,516	32.14	77.89	11	0	7,393
Appointment duration	days	391,516	309.80	377.32	203	1	12,681
Number of vouchers	count	391,516	1.67	2.76	1	1	297
>1 Attorney	0/1	391,516	0.07	0.26	0	0	1
Review by non-judge	0/1	391,516	0.13	0.34	0	0	1
Excess review	0/1	391,516	0.12	0.32	0	0	1
Over \$900	0/1	391,516	0.07	0.25	0	0	1
Over \$2,600	0/1	388,742	0.03	0.18	0	0	1
Fiscal year (last payment)	year	391,516	2019.33	1.64	2019	2017	2022
Technical review	0/1	369,110	0.88	0.32	1	0	1
Reduction reasons	1/2/3	369,110	1.67	0.62	2	1	3
Notice	0/1	369,110	0.64	0.48	1	0	1
Referral	0/1	369,110	0.28	0.45	0	0	1
Independent review	0/1	369,110	0.27	0.44	0	0	1
Capital	0/1	391,516	0.01	0.08	0	0	1

Note: The mean of “0/1” variables gives the proportion of observations in the “1” category (the proportion of observations that have the indicated feature). For example, the mean of 0.07 for “Over \$900” indicates that 7% of appointments exceeded \$900 for expert services.

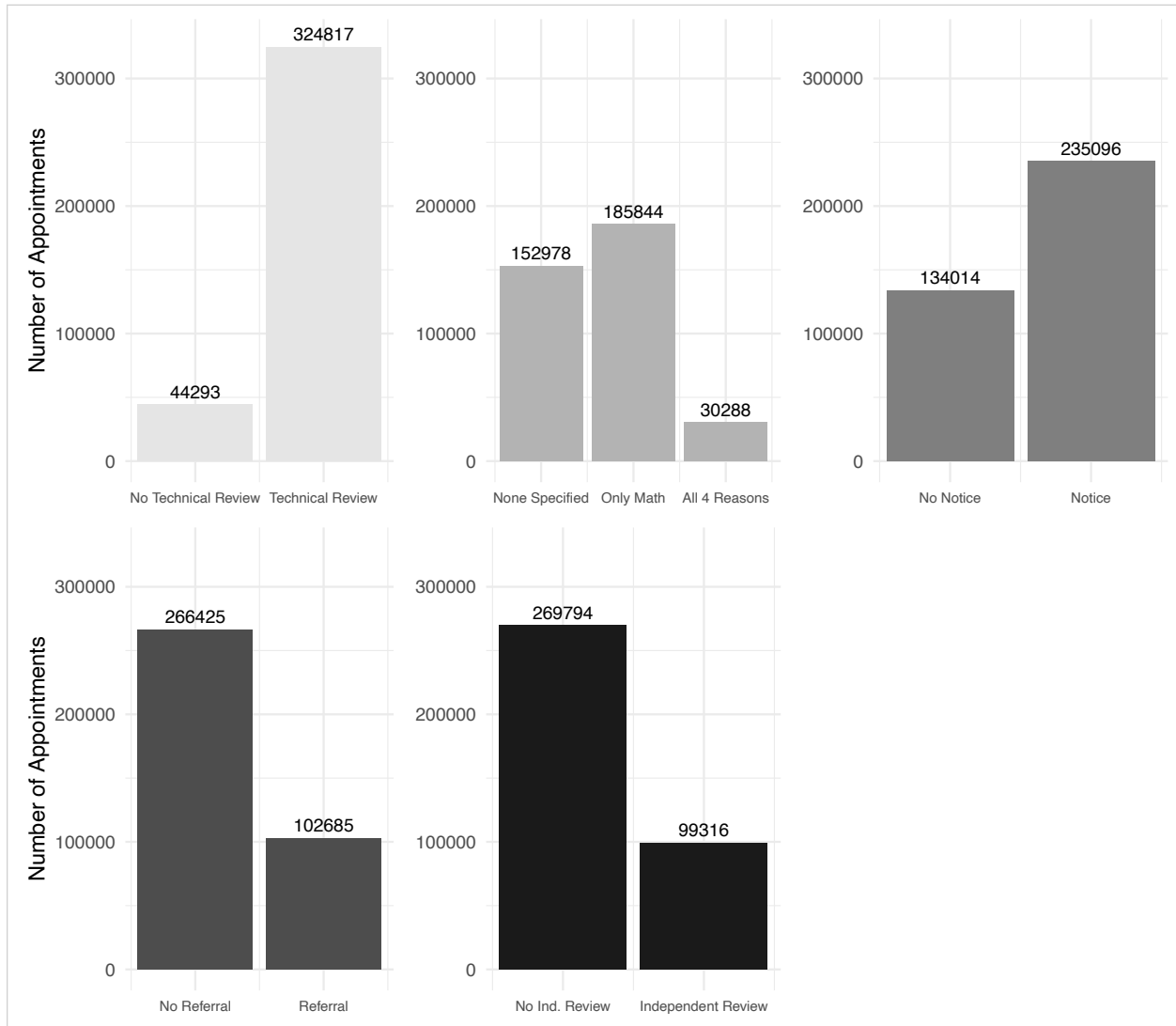
**Table 12.** Border Courts.

Variable	Units	Obs.	Mean	Std. Dev.	Median	Min.	Max.
Expert service voucher	0/1	190,286	0.19	0.39	0	0	1
Travel voucher	0/1	190,286	0.41	0.49	0	0	1
Other expense voucher	0/1	190,286	0.18	0.39	0	0	1
In-court hours	hours	190,286	1.31	4.80	1	0	539
Out-of-court hours	hours	190,286	10.18	31.76	4	0	3,710
Appointment duration	days	190,286	166.55	210.61	104	2	7,043
Number of vouchers	count	190,286	1.32	1.19	1	1	125
>1 Attorney	0/1	190,286	0.05	0.22	0	0	1
Review by non-judge	0/1	190,286	0.20	0.40	0	0	1
Excess review	0/1	190,286	0.02	0.13	0	0	1
Over \$900	0/1	190,286	0.02	0.15	0	0	1
Over \$2,600	0/1	190,120	0.01	0.09	0	0	1
Fiscal year (last payment)	year	190,286	2019.09	1.52	2019	2017	2022
Technical review	0/1	190,286	1.00	0.00	1	1	1
Reduction reasons	1-3	190,286	1.73	0.44	2	1	2
Notice	0/1	190,286	0.67	0.47	1	0	1
Referral	0/1	190,286	0.27	0.44	0	0	1
Independent review	0/1	190,286	0.27	0.44	0	0	1
Capital	0/1	190,286	0.00	0.03	0	0	1

**Table 13.** Non-border Courts.

Variable	Units	Obs.	Mean	Std. Dev.	Median	Min.	Max.
Expert service voucher	0/1	201,230	0.21	0.41	0	0	1
Travel voucher	0/1	201,230	0.53	0.50	1	0	1
Other expense voucher	0/1	201,230	0.39	0.49	0	0	1
In-court hours	hours	201,230	3.73	14.62	2	0	1,306
Out-of-court hours	hours	201,230	52.91	99.81	31	0	7,393
Appointment duration	days	201,230	445.25	444.18	331	1	12,681
Number of vouchers	count	201,230	2.01	3.64	1	1	297
>1 Attorney	0/1	201,230	0.10	0.30	0	0	1
Review by non-judge	0/1	201,230	0.07	0.25	0	0	1
Excess review	0/1	201,230	0.21	0.41	0	0	1
Over \$900	0/1	201,230	0.11	0.31	0	0	1
Over \$2,600	0/1	198,622	0.06	0.23	0	0	1
Fiscal year (last payment)	year	201,230	2019.57	1.72	2020	2017	2022
Technical review	0/1	178,824	0.75	0.43	1	0	1
Reduction reasons	1-3	178,824	1.60	0.76	1	1	3
Notice	0/1	178,824	0.60	0.49	1	0	1
Referral	0/1	178,824	0.29	0.45	0	0	1
Independent review	0/1	178,824	0.27	0.45	0	0	1
Capital	0/1	201,230	0.01	0.11	0	0	1

Figure 15. Number of Appointments by Category of Each Plan Variable.

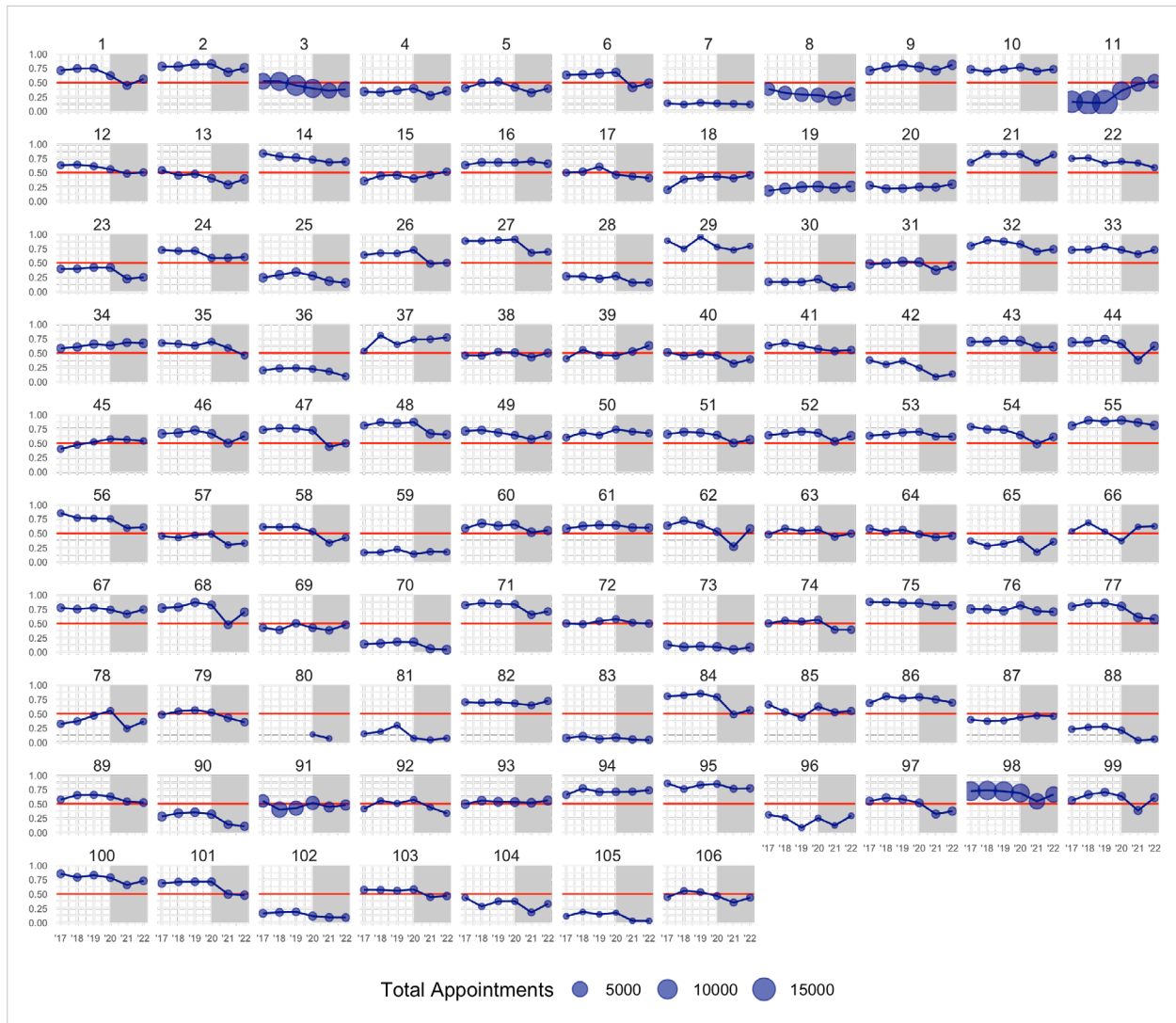




# Attachment 3

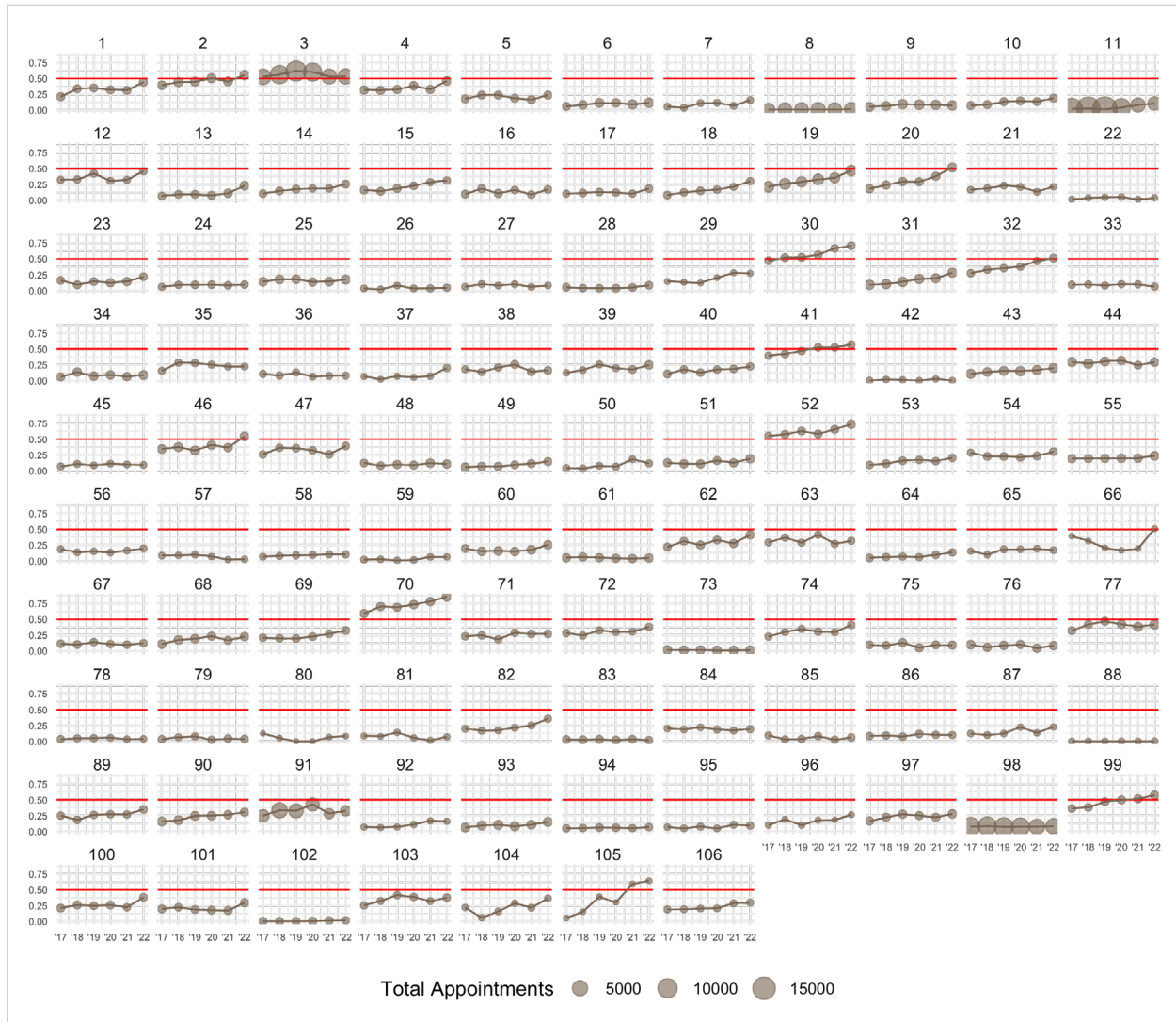
## Descriptive Patterns in Independent Variables

Figure 16. Proportion of Appointments Including Vouchers for Travel Expenses by Court.



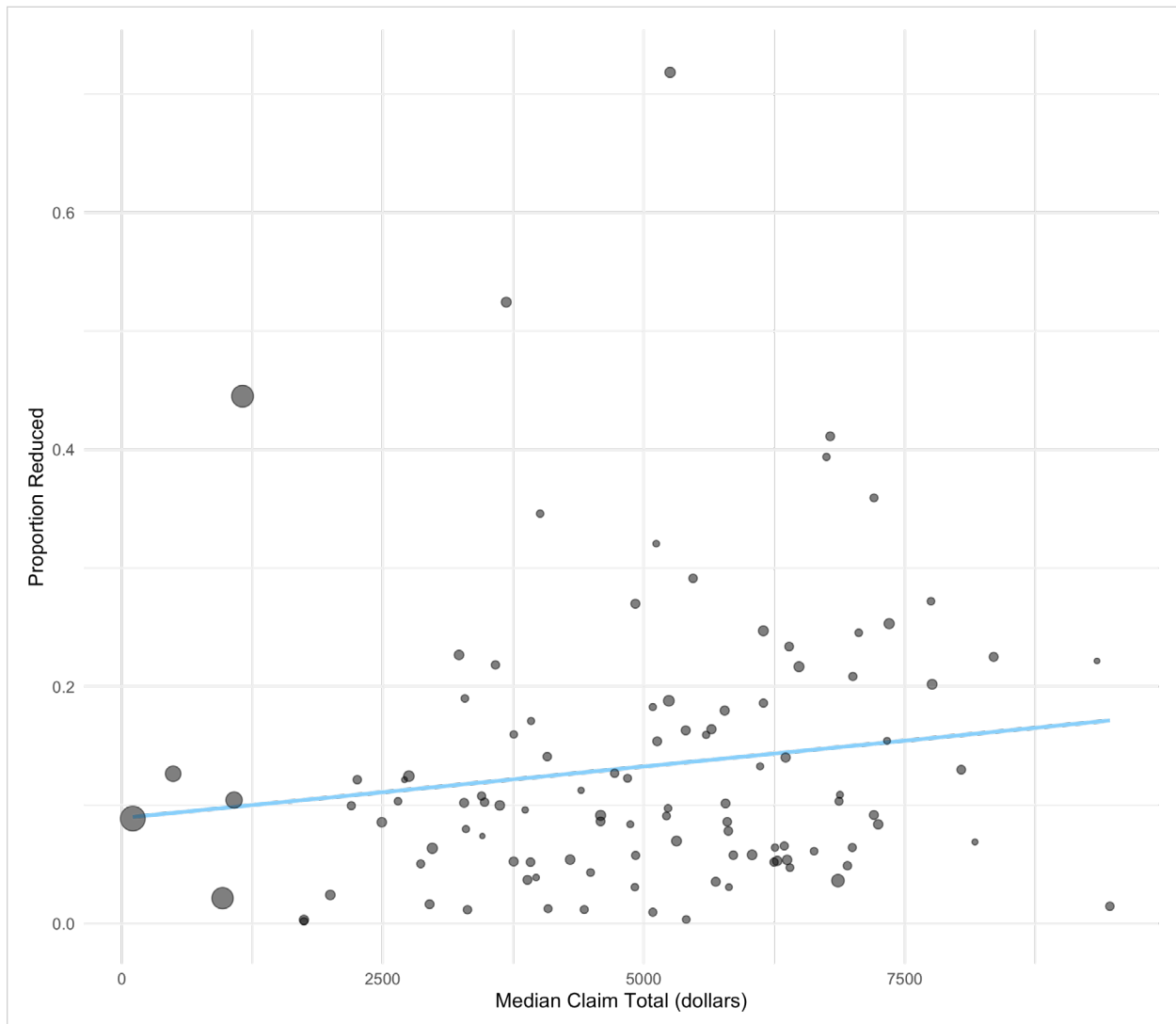
Note: The red reference line denotes 50%. The size of the points indicates the total number of appointments for that court and year. The gray area highlights 2020 to 2022, the years in which the COVID-19 pandemic may have affected travel.

Figure 17. Proportion of Appointments Including Vouchers for Expert Services by Court.



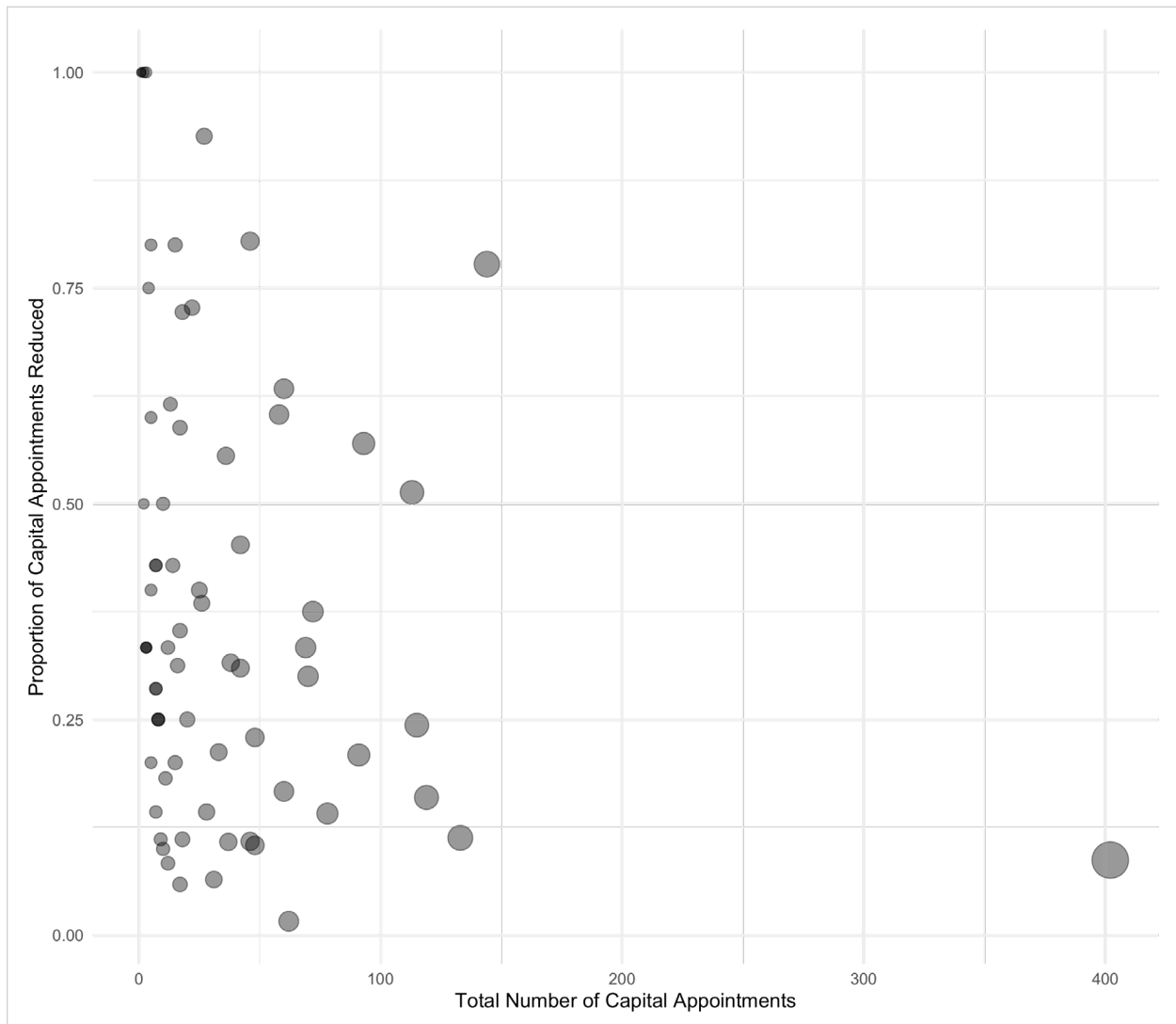
Note: The red reference line denotes 50 percent. The size of the points indicates the total number of appointments for that court and year.

Figure 18. Median Appointment Claim Amount (in Dollars) Versus Proportion of Appointments Reduced by Court.



Note: The size of each red point indicates the total number of appointments for a court, with larger points denoting more appointments. The blue line is a line of best fit showing the weak, positive relationship between a court's median claim amount and the proportion of appointments that the court reduces (correlation coefficient = 0.14).

Figure 19. Number of Capital Appointments Versus Proportion Reduced by Court.



Note: Label size is scaled by total number of capital appointments. There is not a strong relationship between the total number of capital appointments and the proportion of capital appointments reduced (correlation coefficient = -0.20), especially when the court represented by the point on the bottom right of the figure is excluded (correlation coefficient = -0.15).

## Attachment 4

### Additional Regression Results

**Table 14.** Full Results of Logistic Regression (Court Fixed Effects). The baseline court is a large metropolitan court. Non-capital appointments only.

	(1)			(2)		
	No Plan Features			Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
<b>Claim Type</b>						
Expert Voucher	0.363	0.019	0.000	0.373	0.020	0.000
Travel Voucher	0.409	0.012	0.000	0.408	0.012	0.000
Other Expense Voucher	0.210	0.012	0.000	0.209	0.012	0.000
<b>Complexity</b>						
In-Court Hours	-0.003	0.001	0.000	-0.004	0.001	0.000
Out-of-Court Hours	0.004	0.000	0.000	0.005	0.000	0.000
Appointment Duration	0.001	0.000	0.000	0.001	0.000	0.000
Number of Vouchers	0.005	0.003	0.115	0.006	0.003	0.038
>1 Attorney	0.178	0.020	0.000	0.171	0.021	0.000
<b>Review Process</b>						
Excess Review	0.172	0.020	0.000	0.153	0.022	0.000
Review by Non-judge	-0.734	0.043	0.000	-0.876	0.045	0.000
<b>Statutory Limits</b>						
Over \$900	0.178	0.032	0.000	0.171	0.033	0.000
Over \$2,600	-0.019	0.038	0.623	-0.029	0.039	0.458
<b>Year</b>						
2018	-0.073	0.017	0.000			
2019	-0.311	0.017	0.000			
2020	-0.170	0.018	0.000			
2021	0.038	0.019	0.039			
2022	-0.085	0.018	0.000			
<b>Appointing Court</b>						
Court 1	1.709	0.092	0.000	1.777	0.098	0.000
Court 2	3.045	0.090	0.000	3.244	0.107	0.000
Court 3	1.088	0.080	0.000	0.926	0.089	0.000
Court 4	0.403	0.112	0.000	-0.256	0.120	0.033
Court 5	0.592	0.139	0.000	0.091	0.144	0.528
Court 6	1.961	0.088	0.000	2.180	0.098	0.000
Court 7	0.367	0.218	0.093	0.529	0.224	0.018

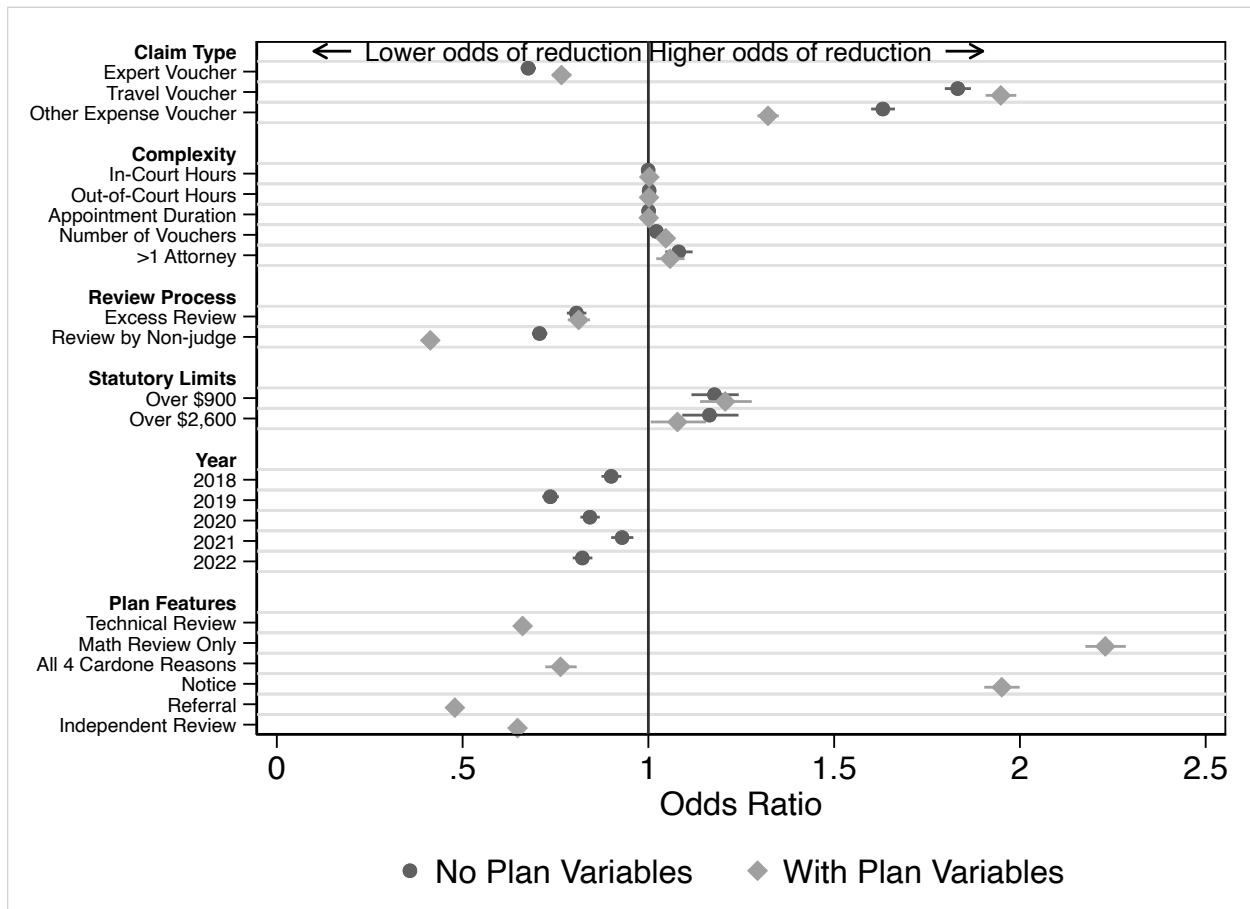
	(1)			(2)		
	No Plan Features			Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
Court 8	2.565	0.072	0.000	2.742	0.083	0.000
Court 9	2.745	0.077	0.000	2.783	0.088	0.000
Court 10	1.939	0.098	0.000	1.583	0.102	0.000
Court 11	2.605	0.070	0.000	2.204	0.087	0.000
Court 12	3.078	0.092	0.000	2.787	0.101	0.000
Court 13	1.144	0.113	0.000	0.932	0.123	0.000
Court 14	2.933	0.086	0.000	2.635	0.101	0.000
Court 15	1.117	0.110	0.000	0.957	0.123	0.000
Court 16	2.882	0.086	0.000	2.567	0.095	0.000
Court 17	2.087	0.111	0.000	1.817	0.122	0.000
Court 18	2.188	0.096	0.000	2.119	0.107	0.000
Court 20	0.753	0.102	0.000	0.755	0.112	0.000
Court 21	2.579	0.115	0.000	2.475	0.120	0.000
Court 22	1.051	0.252	0.000	1.057	0.254	0.000
Court 23	1.794	0.101	0.000	1.774	0.104	0.000
Court 24	-0.754	0.289	0.009	-1.068	0.294	0.000
Court 25	1.238	0.096	0.000	0.664	0.110	0.000
Court 26	3.620	0.098	0.000	3.944	0.105	0.000
Court 27	1.460	0.157	0.000	1.599	0.162	0.000
Court 28	2.421	0.096	0.000			
Court 29	0.804	0.281	0.004	0.773	0.285	0.007
Court 30	1.610	0.097	0.000			
Court 31	2.739	0.089	0.000	2.837	0.096	0.000
Court 32	2.321	0.094	0.000	1.942	0.103	0.000
Court 33	-1.610	0.506	0.001	-1.626	0.508	0.001
Court 34	3.226	0.080	0.000	3.350	0.090	0.000
Court 35	0.446	0.172	0.010	0.268	0.176	0.129
Court 36	2.702	0.099	0.000			
Court 37	0.481	0.267	0.071	-0.057	0.272	0.833
Court 38	-0.670	0.247	0.007	-0.498	0.249	0.046
Court 39	-0.355	0.262	0.174	-0.170	0.265	0.521
Court 40	2.935	0.090	0.000	2.697	0.097	0.000
Court 41	1.916	0.103	0.000	2.322	0.110	0.000
Court 42	3.205	0.141	0.000			
Court 43	4.870	0.076	0.000	4.957	0.086	0.000
Court 44	2.708	0.079	0.000	2.288	0.093	0.000

	(1)			(2)		
	No Plan Features			Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
Court 45	2.797	0.116	0.000	2.803	0.123	0.000
Court 46	2.958	0.078	0.000	2.780	0.090	0.000
Court 47	0.577	0.132	0.000	0.667	0.138	0.000
Court 48	3.162	0.083	0.000	3.019	0.089	0.000
Court 49	2.442	0.086	0.000	2.406	0.088	0.000
Court 50	2.948	0.103	0.000	2.593	0.115	0.000
Court 51	2.257	0.090	0.000	2.562	0.096	0.000
Court 52	2.026	0.087	0.000	1.325	0.097	0.000
Court 53	0.883	0.135	0.000	1.038	0.139	0.000
Court 54	0.558	0.130	0.000	0.565	0.137	0.000
Court 55	0.977	0.107	0.000	1.203	0.114	0.000
Court 56	3.321	0.102	0.000	3.203	0.107	0.000
Court 57	1.787	0.165	0.000	1.951	0.170	0.000
Court 58	2.821	0.107	0.000	2.979	0.112	0.000
Court 59	2.174	0.135	0.000			
Court 60	0.540	0.133	0.000	0.494	0.138	0.000
Court 61	-1.399	0.341	0.000	-1.734	0.345	0.000
Court 62	1.701	0.098	0.000	2.113	0.105	0.000
Court 63	1.486	0.125	0.000	0.792	0.132	0.000
Court 64	2.025	0.107	0.000	2.252	0.118	0.000
Court 65	1.900	0.152	0.000	1.744	0.156	0.000
Court 66	1.630	0.245	0.000	1.707	0.249	0.000
Court 67	1.910	0.106	0.000	1.935	0.112	0.000
Court 68	0.679	0.109	0.000	0.754	0.116	0.000
Court 69	1.086	0.121	0.000	0.920	0.126	0.000
Court 70	1.688	0.092	0.000			
Court 71	-1.140	0.233	0.000	-1.091	0.237	0.000
Court 72	2.070	0.108	0.000	2.283	0.117	0.000
Court 73	5.314	0.087	0.000			
Court 74	0.885	0.133	0.000	0.644	0.143	0.000
Court 75	0.225	0.176	0.200	0.336	0.178	0.059
Court 76	1.758	0.095	0.000	1.966	0.099	0.000
Court 77	0.867	0.102	0.000	0.655	0.112	0.000
Court 78	2.340	0.124	0.000	1.654	0.131	0.000
Court 79	1.258	0.130	0.000	1.416	0.134	0.000
Court 80	1.166	0.344	0.001	1.234	0.348	0.000

	(1)			(2)		
	No Plan Features			Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
Court 81	2.196	0.189	0.000	2.297	0.195	0.000
Court 82	0.756	0.167	0.000	0.642	0.172	0.000
Court 83	3.909	0.082	0.000			
Court 84	1.701	0.128	0.000	1.510	0.140	0.000
Court 85	1.453	0.141	0.000	1.633	0.146	0.000
Court 86	-0.124	0.247	0.615	0.109	0.252	0.664
Court 87	1.979	0.152	0.000	1.922	0.157	0.000
Court 88	2.620	0.125	0.000			
Court 89	1.231	0.123	0.000	0.537	0.130	0.000
Court 90	2.245	0.081	0.000			
Court 91	2.766	0.072	0.000	2.103	0.083	0.000
Court 92	3.455	0.122	0.000	3.264	0.126	0.000
Court 93	1.563	0.093	0.000	1.825	0.104	0.000
Court 94	2.412	0.100	0.000	2.588	0.105	0.000
Court 95	1.306	0.148	0.000	0.977	0.156	0.000
Court 96	2.039	0.200	0.000	2.017	0.204	0.000
Court 97	2.100	0.088	0.000	2.188	0.091	0.000
Court 98	4.381	0.069	0.000	3.711	0.081	0.000
Court 99	0.104	0.138	0.450	0.197	0.144	0.169
Court 100	1.135	0.111	0.000	0.699	0.121	0.000
Court 101	1.021	0.104	0.000	0.637	0.111	0.000
Court 102	2.582	0.090	0.000			
Court 103	1.957	0.113	0.000	2.004	0.117	0.000
Court 104	2.458	0.124	0.000	2.554	0.136	0.000
Court 105	1.984	0.217	0.000			
Court 106	-2.197	0.718	0.002	-2.177	0.721	0.003
<b>Plan Features</b>						
Technical Review				0.120	0.042	0.004
Math Review Only				0.534	0.038	0.000
All 4 Cardone Reasons				-0.295	0.041	0.000
Notice				0.138	0.036	0.000
Referral				-0.409	0.035	0.000
Independent Review				0.032	0.033	0.320
Constant	-5.130	0.069	0.000	-5.384	0.079	0.000
N	388,742			366,757		



Figure 20. Logistic Regression Results, Pooled Models.



Note: Robustness check of the results of the logistic regression models estimating the odds that payment for an appointment is reduced, without fixed effects by appointing court. An odds ratio of 1, denoted by the vertical line, indicates “even odds;” in other words, a variable has no effect on the odds that payment will be reduced. Odds ratios below 1 indicate decreased odds of reduction, while odds ratios above 1 indicate increased odds of reduction. Points represent the odds ratio estimates (dark gray for Model 1 (“No Plan Features”) and light gray for Model 2 (“With Plan Features”). Bars are 95% confidence intervals. All results are statistically significant except for “In-court Hours” in Model 1. In these pooled models (without fixed effects by court), the effect of the presence of an expert voucher is negative instead of positive (as it is in the main results). Other effects that differ from the main results are in-court hours in Model 2 (positive effect instead of negative), excess review (negative effect instead of positive), “Over \$2,600” (effect is statistically significant), 2021 (negative instead of positive), technical review (negative instead of positive), and independent review (effect is statistically significant).

**Table 15.** Logistic Regressions: Non-capital Appointments, Pooled Models.

	(1)			(2)		
	No Plan Features			Plan Features		
	Beta	Std. Err.	p-value	Beta	Std. Err.	p-value
<b>Claim Type</b>						
Expert Voucher	-0.340	0.016	0.000	-0.211	0.017	0.000
Travel Voucher	0.615	0.010	0.000	0.664	0.011	0.000
Other Expense Voucher	0.473	0.010	0.000	0.276	0.011	0.000
<b>Complexity</b>						
In-Court Hours	-0.000	0.000	0.706	0.003	0.001	0.000
Out-of-Court Hours	0.002	0.000	0.000	0.002	0.000	0.000
Appointment Duration	0.001	0.000	0.000	0.001	0.000	0.000
Number of Vouchers	0.023	0.002	0.000	0.045	0.003	0.000
>1 Attorney	0.084	0.017	0.000	0.056	0.018	0.002
<b>Review Process</b>						
Excess Review	-0.236	0.017	0.000	-0.217	0.019	0.000
Review by Non-judge	-0.502	0.018	0.000	-1.029	0.025	0.000
<b>Statutory Limits</b>						
Over \$900	0.143	0.028	0.000	0.163	0.029	0.000
Over \$2,600	0.159	0.033	0.000	0.072	0.035	0.041
<b>Year</b>						
2018	-0.097	0.015	0.000			
2019	-0.292	0.015	0.000			
2020	-0.155	0.016	0.000			
2021	-0.060	0.016	0.000			
2022	-0.182	0.016	0.000			
<b>Plan Features</b>						
Technical Review				-0.399	0.016	0.000
Math Review Only				0.796	0.012	0.000
All 4 Cardone Reasons				-0.338	0.029	0.000
Notice				0.668	0.012	0.000
Referral				-0.746	0.015	0.000
Independent Review				-0.415	0.017	0.000
Constant	-2.300	0.013	0.000	-2.807	0.018	0.000
N	388,742			366,757		

# Appendix F

## Survey of Panel Attorney Experiences with Voucher Review

### Compensation of CJA Panel Attorneys

The 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (“Cardone Report”) identified voucher review and compensation as a challenge for panel attorneys accepting appointments under the CJA. The report described problems with panel attorney compensation in detail, including reviewers ill-equipped to review requests for compensation,<sup>1533</sup> attorneys reducing their own vouchers to speed payment<sup>1534</sup> or avoid reductions,<sup>1535</sup> and reduction practices differing substantially across courts.<sup>1536</sup>

To address these problems, the Cardone Report made two recommendations specific to voucher review (Recommendations 8 and 16) and one regarding the use and approval of expert services in cases with appointed counsel (Recommendation 20). Below is the full text of these recommendations as adopted by the JCUS.

#### Recommendation 8 (approved as modified)<sup>1537</sup>

The Cardone Committee has identified a number of problems related to voucher cutting. The Judicial Conference should:

- a. Adopt the following standard for voucher review—  
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.
- b. Provide, in consultations with DSC, comprehensive guidance concerning what constitutes a compensable service under the CJA.

#### Recommendation 16 (approved as modified)<sup>1538</sup>

Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process. All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).

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1533. Cardone Report, pp. 92–95.

1534. *Id.*, p. 107, figure reporting that 39% of attorneys reduced their own vouchers to avoid review by the circuit, and p. 105, “the Committee found that a considerable number of attorneys self-cut their vouchers to remain below the case maximums that would trigger circuit review.”

1535. *Id.*, p. 107, figure reporting 19% of attorneys reduced vouchers because they thought the district court would anyway, and 7% thought the appellate court would reduce the voucher.

1536. *Id.*, pp. 95–102.

1537. JCUS-SEP 18.

1538. JCUS-MAR 19.

## Recommendation 20 (approved)<sup>1539</sup>

The Federal Judicial Center (FJC) and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

In this appendix we describe attorney experiences with the implementation and impact of these recommendations on voucher review, as measured through a survey of panel attorneys.

## Survey Structure and Response

To explore differences in CJA voucher procedures across judicial districts, we surveyed panel attorneys who submitted at least one voucher for final payment since the start of FY 2017.<sup>1540</sup> The survey was open from September 28 to November 8, 2021. The goal of the survey was to ask attorneys about their experiences with and perceptions of the voucher review process, both before and after vouchers are submitted for payment in eVoucher. The survey asked questions about a specified appointment for each attorney, as well as some general questions about the voucher submission process.

The online questionnaire typically took twenty to thirty minutes to complete, and respondents answered between sixteen and forty-seven questions.<sup>1541</sup> Answers to the following four “screening” questions determined which survey sections the attorneys would be directed through:

1. Whether the attorney submitted voucher(s) for less than the full cost of the litigation (i.e., whether they “self-cut”<sup>1542</sup>)
2. Whether anyone notified the attorney of a *proposed* reduction to the voucher after submission
3. Whether a reduction was made after voucher submission
4. Whether the attorney requested the use of expert services in the representation

Of the over 11,000 attorneys contacted, we received responses from 39%, varying by court from 20% to 60%.<sup>1543</sup> Reported below are the results of the survey from the 4,262 attorneys who at minimum completed the four primary screening questions.

Attorneys who reported a proposed or actual reduction to their vouchers were asked to provide additional details about that experience, while attorneys who indicated that their vouchers were not proposed for reduction or ultimately reduced were asked about the general process of voucher review in the appointing court.<sup>1544</sup>

All attorneys were given the opportunity to provide information on various aspects of implementation of the adopted recommendations from the Cardone Report, including standards of review, processes for appealing vouchers, and the need for training on the use of expert services.

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1539. JCUS-SEP 18.

1540. Details about the sampling process can be found in Technical Appendix 4: Survey of Panel Attorney Experiences with Voucher Review (hereinafter Technical Appendix 4: Survey).

1541. See Attachment 1 in Technical Appendix 4: Survey for the complete survey instrument.

1542. Cardone Report, p.104.

1543. The 39% response rate accounts for removing attorneys from the pool who never received the survey invitation because they were deceased, the email bounced back, or an out-of-office reply indicated they were unavailable during the survey period (such as those on maternity/paternity leave). The number of attorneys who never received the invitation was 746, approximately 7% of sampled attorneys.

1544. Thus, in this report, the number of responses for each survey item varies because attorneys were shown different combinations of questions. Additionally, attorneys could skip individual questions throughout.

When asked if the appointment under consideration represented their experiences generally, 75% of attorneys said that it was. The representativeness of the experience gives us confidence in the results reported below, as do the findings on attorney legal experience discussed in further detail in the Technical Appendix 4: Survey of Panel Attorney Experiences with Voucher Review.

## Survey Results

Below we describe the results of our survey of panel attorneys.

### Reductions Before Submission

To gather information on the practice of attorneys reducing the requested amounts on vouchers before submission, referred to in the Cardone Report as “self-cutting,”<sup>1545</sup> we asked attorneys whether the vouchers they submitted in the representation reflected the full cost of all time and expenses the defense team spent during the appointment. Table 1 shows the results.

**Table 1.** Thinking about this representation, did you bill for all the time and expenses you or other members of your defense team spent on this CJA appointment?

	Number	Percentage
Yes	1,971	46%
No	1,886	44%
I don't recall	405	10%
<b>Total</b>	<b>4,262</b>	<b>100%</b>

Just under half the attorneys who recalled their actions during the selected representation reported reducing their vouchers before submitting them for review. These attorneys were asked a series of questions designed to capture which costs were most often reduced, who was involved in the decision, and why the attorneys ultimately chose to make the reduction.

<sup>1545</sup> Cardone Report, p. 104.

**Table 2.** For which categories did you bill less than you or other members of your defense team spent on this representation? (by frequency).

Category	Number	Percentage of Respondents
Attorney out-of-court hours	1,427	76%
Other expenses	436	23%
Travel expenses	401	21%
Expert fees	30	2%
Expert hourly rates	19	1%
Categorized other		
Team member hours	87	5%
Communication	59	3%
Research	27	1%
In-court hours	9	<1%
Total costs	3	<1%
Uncategorized other	8	<1%
Unanswered	271	14%
<b>Total Respondents</b> <sup>1546</sup>	<b>1,886</b>	

Note: Communication and research could be included in attorney out-of-court hours.

When asked which expense categories they reduced, just over three-quarters (76%) of attorneys identified out-of-court hours. Other common reductions were to “other” expenses not listed in the question (23%) and travel expenses (21%). Attorneys rarely reduced rates or fees for expert services, although only 21% of attorneys reported requesting such services (*See: Expert Services Providers* below).

The vast majority (1,617, or 86%) of attorneys who submitted vouchers for less than their total cost of representation said that they did so on their own, while 8% indicated that one or more entities asked or encouraged them to do so. The remaining 7% did not respond.

1546. In this and all following tables, “Total Respondents” is listed when attorneys were allowed to choose multiple, or no, responses.

**Table 3.** Who asked or encouraged you to reduce the voucher request(s)?

	Number	Percentage of Respondents	Percentage of Encouraged
I did so on my own	1,617	86%	
I was asked/encouraged to do so by:	146	8%	
Clerk	40	2%	27%
CJA administrator	35	2%	24%
Presiding judge	29	2%	20%
CJA supervising attorney	21	1%	14%
Chambers	7	<1%	5%
FDO	5	<1%	3%
Non-presiding judge	4	<1%	3%
Uncategorized other	3	<1%	2%
No entity reported	17	1%	12%
Unanswered	123	7%	
<b>Total Respondents</b>	<b>1,886</b>		<b>146</b>

Attorneys who reported submitting less than the full cost at the request of someone else most frequently cited the clerk or CJA administrator as the person who asked or encouraged them to submit reduced vouchers.

The attorneys who reduced vouchers on their own were asked if their decision to do so was based on their prior experience in the court, and 40% said that it was. Attorney experience on the panel and years of practice were negatively correlated with submission of vouchers for less than the full cost of litigation. That is, attorneys with more years on the panel and more experience practicing law were less likely to report submitting vouchers for less than the full cost of the litigation. The number of appointments, however, had no significant relationship to an attorney's decision to submit a voucher for less than the full cost.<sup>1547</sup>

All attorneys who reported that they submitted vouchers for less than the full cost of litigation were asked why they did so. Table 4 shows the results.

1547. Number of years on the panel and submitting less than the full costs of litigation had a correlation of -0.0768, significant at the  $p < 0.001$  level or higher. Years practicing law and submitting less than full costs had a correlation of -0.0630, significant at the  $p < 0.001$  level or higher. Number of appointments and submitting less than the full costs had a correlation of 0.0272, but the significant level was  $p < 0.10$ , beyond conventional levels of significance.

**Table 4.** Why did you submit one or more vouchers for less than the full cost of the litigation? (by frequency).

Reason	Number	Percentage of Respondents
The effort required to support the request for full cost was too burdensome.	769	41%
To stay below the statutory maximum for attorney compensation.	544	29%
The voucher was likely to be reduced after submission.	283	15%
I did not want to oppose the request to reduce the voucher.	55	3%
I did not think opposing the request to review the voucher would change the result.	43	2%
To stay below the statutory maximum for expert services.	22	1%
Categorized Other		
View as public service	181	10%
Attorney practice	136	7%
Work not documented	121	6%
Inefficient work	83	4%
Rules	81	4%
Stay in the court's good graces	35	2%
Speed payment	21	1%
Uncategorized other	131	7%
Unanswered <sup>1548</sup>	88	5%
<b>Total Respondents</b>	<b>1,886</b>	

Most often, attorneys reported submitting for less than the full cost of litigation because the effort required to support the request was too burdensome (41%), they wanted to stay below the statutory maximum for attorney compensation (29%), or they felt the voucher was likely to be reduced after submission (15%). Of the 146 attorneys reporting they were encouraged to submit for less than the full cost, 55 (38%) reported they did not want to oppose the request to reduce the voucher.<sup>1549</sup>

In addition to the categories presented to them, attorneys also specified additional reasons for submitting less than the full cost of the litigation. Most often (10%), these attorneys reported they viewed CJA work as public service and thus didn't feel it was appropriate to bill for the full cost of the litigation. Seven percent of attorneys reported it was their practice not to bill for the full costs of the litigation regardless of the type of appointment (CJA or retained), while 6% reported they didn't keep sufficient records to support the request. Four percent of attorneys reported they felt their work had been inefficient, and thus didn't think the full reimbursement was appropriate. Another 4% reported submitting less than the full cost to comply with a "court rule" or "local practices." Small percentages of attorneys reported submitting for less than the full cost specifically to speed payment (1%) or to "stay in the court's good graces," so they would continue to be appointed in CJA cases (2%).

1548. In this and all following tables, "Unanswered" refers to responses that were either blank or contained text that did not respond to the question.

1549. The analysis confirmed that the fifty-five people reporting they did not want to oppose a request to submit for less than the full cost also reported they were encouraged to submit for less than the full cost.



The 544 attorneys who reported submitting less than the full cost to stay below the statutory maximum for attorney compensation (and presumably then avoid review by the circuit court) were asked why this was important. A similar question was asked of the twenty-two attorneys reporting they wanted to stay below the statutory limit for expert compensation. For both questions, attorneys could select any of the explanations from the provided list that applied to their situation or could specify another reason. Table 5 shows the frequency of each reason, differentiated for attorney and expert statutory limits.

**Table 5.** Staying below the statutory maximum for attorney compensation/expert services was important because ... (by attorney frequency).

Reason	Attorney		Expert	
	Number	Percentage of Respondents	Number	Percentage of Respondents
It avoided delays in payment caused by additional review at the circuit.	389	72%	15	68%
The additional work to request compensation above the cap was not worth my effort.	274	50%	9	41%
The effort required to support the request for full cost was too burdensome.	140	26%	5	23%
It reduced the work required of the district court to support the request for compensation above the cap.	125	23%	8	36%
The circuit was likely to cut the voucher.	79	15%	4	18%
Categorized other:				
Viewed the work as public service/sense of fairness	30	6%		
Because of formal or informal rules	12	2%		
To stay in the court's good graces	9	2%		
Uncategorized other	7	1%	2	9%
<b>Total Respondents</b>	<b>544</b>		<b>22</b>	

Attorneys varied in their explanations for why it was important to stay below the statutory maximum for attorney compensation. The most common reason they selected from the list provided was “avoiding delayed payment caused by circuit review” (72%), followed by the additional work not being worth the effort (50%), the effort being too burdensome (26%), saving the court the work of supporting the request (23%), and feeling the circuit would cut the voucher anyway (15%). Consistent with the reasons given for reducing vouchers before submission in general (reported above), attorneys also reported viewing the work as public service (6%), staying in the court's good graces (2%), and being motivated by local rules or practices (2%). Similar results were found with respect to expert service compensation limits, though a greater percentage of attorneys reported they wanted to save the court the work necessary to support requests for expert service excess compensation than was true for attorney compensation.

For the seventy-nine attorneys who submitted for less than the full cost of litigation because they thought the circuit would reduce the voucher, we asked if this expectation was based on prior experience with circuit review of attorney compensation. Sixty-one attorneys (77%) reported that the expectation was based on their prior experience.

The 283 attorneys who submitted for less than the full costs of litigation because they thought the voucher would be cut (reported in Table 4) were asked to identify who they thought would reduce the voucher. Because many courts have several voucher reviewers and levels of review, attorneys were permitted to select more than one person. Table 6 below shows the results.

**Table 6.** Who did you think was likely to reduce the voucher(s)? (by frequency).

Response Selected	Number	Percentage of Respondents
Presiding judge	94	33%
Clerk's office staff	52	18%
CJA panel administrator	28	10%
Circuit chief judge	20	7%
CJA supervising attorney	16	6%
Chamber's staff	16	6%
Non-presiding district judge	12	4%
Case-budgeting attorney	11	4%
Circuit judge (other than circuit chief judge)	10	4%
Non-presiding magistrate judge	6	2%
FDO staff	5	2%
CJA committee	1	<1%
Other	1	<1%
I don't know/I don't recall	63	22%
Unanswered	49	17%
<b>Total Respondents</b>	<b>283</b>	

While a plurality (33%) of attorneys who thought the voucher would be reduced expected the presiding judge to do it, the clerk's office staff, CJA panel administrators, and circuit chief judges were also perceived as likely to do so (7% to 18% of attorneys). There may be some overlap across categories as, for example, a CJA panel administrator may work in the clerk's office.

Regardless of who the attorney expected to reduce the voucher, we asked if the expectation of voucher reductions by the chosen reviewers was based on past personal experiences. Seventy-two percent of attorneys reported that their expectation was based on past experiences with the voucher submission and review process.

## Proposed and Actual Reductions After Submission

Attorneys were asked if reductions to their vouchers were proposed, and made, after submission for payment. Tables 7 and 8 report the results.

**Table 7.** During this representation, for any vouchers submitted, did anyone notify you of a *proposed* reduction to any voucher amount for any reason during the review process?

	Number	Percentage of Total
Yes	557	13%
No	2,930	69%
I don't recall	775	18%
<b>Total</b>	<b>4,262</b>	<b>100%</b>

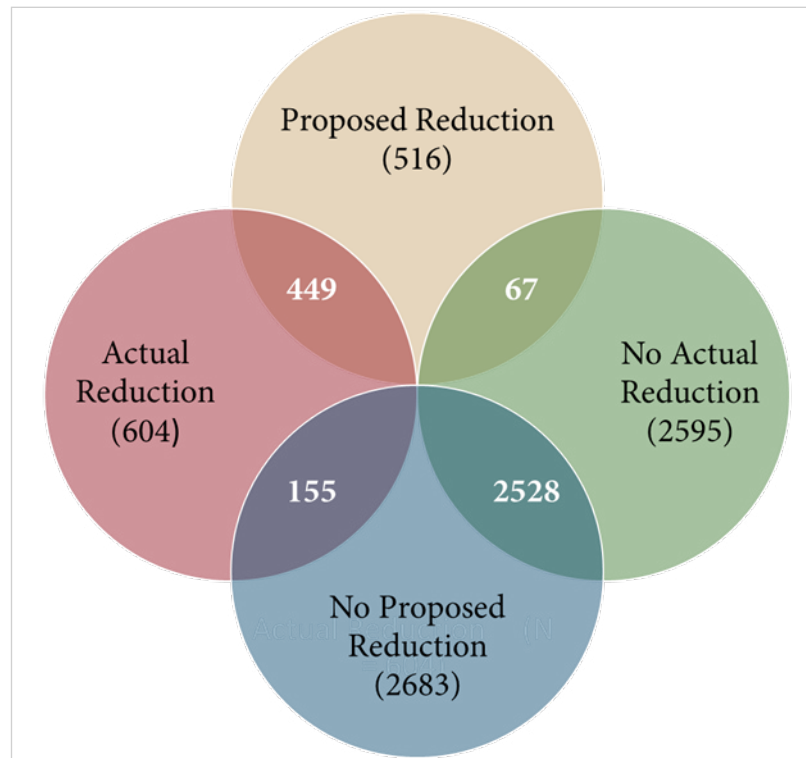
**Table 8.** During this representation, for any vouchers submitted, did anyone ultimately *reduce* any voucher amount for any reason during the review process?

	Number	Percentage of Total
Yes	654	15%
No	2,710	64%
I don't recall	898	21%
<b>Total</b>	<b>4,262</b>	<b>100%</b>

As shown above, roughly two-thirds (69%) of attorneys responding said they were not notified of a proposed voucher reduction, and 64% said their voucher(s) for the selected representation were not ultimately reduced. Thirteen percent of attorneys reported being notified of a potential reduction to their voucher(s), while 15% saw their vouchers ultimately reduced after submission. Of course, some attorneys experienced both. Figure 1 shows the number of attorneys reporting proposed and actual reductions in response to these questions.<sup>1550</sup>

<sup>1550</sup> Figure 1 only includes attorneys who were able to recall if their vouchers were proposed for reduction and if they were actually reduced and responded to both questions. See Table 3 in the Technical Appendix 4: Survey for additional detail.

Figure 1. Proposed and Actual Reductions.



Of the 516 attorneys who reported a proposed reduction and who could recall if an actual reduction was made, 449 (87%) saw an actual reduction made to their vouchers. This suggests that some attorneys may be successful in appealing proposed reductions, as 13% of proposed reductions did not occur. On the other hand, of the 604 attorneys who reported a voucher reduction and were able to recall whether it had been initially proposed, 155 (26%) reported they were not notified of the reduction before payment.

Attorneys brought to these appointments varying levels of experience, and it is possible that less experienced attorneys, either in years of practice or years on the panel, are more likely to have their vouchers reduced for a variety of reasons. When we looked at the experience of attorneys—both at the court and individual level, either years on the panel or years practicing law—and whether their vouchers were reduced, we found no relationship between years of experience and voucher reduction.<sup>1551</sup> However, when we analyzed how many appointments with final (paid) vouchers attorneys had during the study period and whether they reported a reduction in the specific representation we sampled, we found a positive and significant relationship. More appointments were associated with more frequent reductions.<sup>1552</sup>

As noted above and discussed in the Cardone Report, some panel attorneys believe that submitting vouchers for less than full cost could prevent additional reductions by the court. To examine this theory, we compared the aggregate outcomes of vouchers that were and were not submitted for less than the full costs.

1551. At the individual level, the correlation between years on the panel and reduction was 0.0164. Between years practicing law and reductions, the correlation was -0.0018. Neither correlation reaches standard levels of statistical significance.

1552. The correlation between number of appointments and reductions was 0.1027 with  $p < 0.001$  or higher.

**Table 9.** Vouchers Submitted for Less than Full Costs, by Reductions After Submission.

Proposed Reduction		Actual Reduction					
		Yes		No		Total	
		Number	Percentage of Respondents	Number	Percentage of Respondents	Number	Percentage of Respondents
	Yes	253	71%	35	3%	288	20%
	No	105	29%	1,072	97%	1,177	80%
	<b>Total</b>	<b>358</b>	<b>24%</b>	<b>1,107</b>	<b>76%</b>	<b>1,465</b>	<b>100%</b>

**Table 10.** Vouchers Submitted for the Full Costs, by Reductions After Submission.

Proposed Reduction		Actual Reduction					
		Yes		No		Total	
		Number	Percentage of Respondents	Number	Percentage of Respondents	Number	Percentage of Respondents
	Yes	178	80%	30	2%	208	13%
	No	45	20%	1,289	98%	1,334	87%
	<b>Total</b>	<b>223</b>	<b>14%</b>	<b>1,319</b>	<b>86%</b>	<b>1,542</b>	<b>100%</b>

As shown in Tables 9 and 10, reducing vouchers before submission is not associated with a lower rate of voucher reductions after submission. In fact, vouchers that attorneys reduced pre-submission were reduced again by the court more often than vouchers that were submitted for the full cost of the representation (there were reported reductions in 24% of appointments when attorneys submitted less than the full costs, compared to 14% when the full costs were submitted).

We then asked attorneys to report the stage of review—the initial mathematical or technical review (often conducted by court staff), the second-level reasonableness review (often conducted by the presiding judge), or the circuit-level excess compensation review—at which reductions were proposed or made. Substantive responses are shown in Table 11.

**Table 11.** At what stage of review were the voucher(s) proposed for reduction/reduced?

Stage of Review	Vouchers with Proposed Reductions		Vouchers with Actual Reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Mathematical/technical	14	21%	104	16%
Reasonableness	6	9%	98	15%
Excess compensation	4	6%	65	10%
Uncategorized other	5	7%	2	<1%
I don't know/don't recall	14	21%	164	25%
Unanswered	21	31%	213	33%
<b>Total Respondents</b>	<b>67</b>		<b>654</b>	

Though many attorneys did not recall or did not know the stage of review at which reductions were proposed or made, those who could answer reported most frequently that the reduction was proposed or made at the mathematical/technical review stage. For vouchers that were ultimately reduced, attorneys reported more frequent reductions at the reasonableness and excess compensation stages than they did for proposed voucher reductions.

When asked which categories of expenses on their submitted vouchers were proposed or actually reduced, attorneys cited their out-of-court hours most often for both (30% proposed, 41% actual). Data for most other response categories are reported in Table 12.

**Table 12.** What amount(s) were proposed for reduction/reduced during the voucher review process? (by frequency).

Response Selected	Proposed Reduction with No Actual Reduction		Actual Reduction Whether Proposed or Not	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Attorney out-of-court hours	20	30%	268	41%
Total compensation amount	10	15%	86	13%
Other expenses	5	7%	37	6%
Travel expenses	3	4%	62	9%
Expert hourly rates	1	1%	13	2%
Expert fees	1	1%	12	2%
Categorized other				
In court hours	3	4%	19	3%
Communication			4	1%
Team member hours	2	3%	24	4%
Research			5	1%
Uncategorized other	1	1%	2	<1%
It was not clear	1	1%	37	6%
<b>Total Respondents</b>	<b>67</b>		<b>654</b>	

Note: Of the 654 attorneys reporting actual reductions to their vouchers, only 49% could provide specific information about amounts reduced, as did 52% of the sixty-seven attorneys who reported proposed reductions.

We also asked attorneys about the type of reviewer who proposed or made reductions to their vouchers. Table 13 reports the results.

**Table 13.** Who proposed reducing the voucher(s)/reduced the voucher(s)? (by frequency).

Reviewer	Vouchers with Proposed Reductions		Vouchers with Actual Reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Clerk's office staff	14	21%	94	14%
Presiding judge	4	6%	89	14%
CJA panel administrator	5	7%	36	6%
CJA supervising attorney	3	4%	32	5%
Circuit judge (other than circuit chief judge)			12	2%
FDO staff	1	1%	11	2%
Chamber's staff	1	1%	11	2%
Circuit chief judge			10	2%
Case-budgeting attorney	1	1%	9	1%
Non-presiding district judge			7	1%
Non-presiding magistrate judge			6	1%
I don't know/I don't recall	4	6%	125	19%
Unanswered	26	39%	194	30%
<b>Total Respondents</b>	<b>67</b>		<b>654</b>	

As discussed above, there is some overlap among the reviewers listed in Table 13. Broadly speaking, it appears that members of the clerk's office and other judicial staff make the majority of the proposed reductions, while judges (of all types), are more likely to actually reduce the voucher amount without having proposed a reduction.

Recommendation 8 specifically requires those making reductions to limit them to four enumerated reasons.<sup>1553</sup> Since early 2020, eVoucher has required reviewers to state a reason for the reduction, and some attorneys responding to our survey said they were provided a reason for proposed or actual reductions prior to the release of that module as well. We asked attorneys to select the reasons they were given for proposed and actual voucher reductions; the results are shown in Table 14.

1553. Voucher reductions should be limited to: (a) Mathematical errors; (b) Instances in which work billed was not compensable; (c) Instances in which work billed was not undertaken or completed; and (d) Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task. See *Guide to Judiciary Policy*, Vol. 7A, Chapter 2: § 230.33.10 Standard for Voucher Review.

**Table 14.** What was the stated reason for the proposed reduction(s)/ actual reduction(s)?

Stated Reason	Vouchers with Proposed Reductions		Vouchers with Actual Reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Work was not compensable	6	9%	119	18%
Hours billed were clearly in excess of what was reasonably required to complete the task	11	16%	101	15%
Mathematical/technical error	11	16%	75	11%
Work was not undertaken or completed			2	<1%
No reason given	7	10%	66	10%
I don't know/I don't recall	3	4%	48	7%
Categorized other				
Exceeded a limit	4	6%	23	4%
Needed more documentation			9	1%
Uncategorized other				
Unanswered	23	34%	248	38%
<b>Total Respondents</b>	<b>67</b>		<b>654</b>	

Reductions resulting from mathematical/technical errors and work being considered in excess of what was reasonably required were reported relatively more frequently than other reasons for both proposed and actual reductions. Across the other categories, some reasons were given with more relative frequency for one or the other, including compensability, which was reported more frequently when vouchers were actually reduced, and exceeding a limit, which was reported more frequently when reviewers proposed a reduction.

Attorneys reported that no reason was given for approximately 10% of proposed and actual reductions, which is not surprising, as reasons were not required by Judicial Conference policy until 2018 and were not routinely reported in eVoucher until February 2020. When we looked by year of final payment, we found that proposed reductions without a reason always occurred before the 2020 eVoucher update. On the other hand, with respect to actual reductions, one-third of attorneys who reported that no reason was given were discussing an appointment with final payment during or after 2020.

Attorneys with proposed reductions as well as those whose vouchers were ultimately reduced reported the method by which they were notified of the reduction, presented in Table 15.



**Table 15.** How were you notified of the reduction(s)?

Notification Method	Vouchers with Proposed Reductions		Vouchers with Actual Reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Email	18	27%	211	32%
eVoucher notice	11	16%	132	20%
Phone call	13	19%	62	9%
In person	1	1%	9	1%
Letter	1	1%	7	1%
Other	3	4%		
Unanswered	24	36%	183	28%
<b>Total Respondents</b>	<b>67</b>		<b>654</b>	

Both groups reported electronic communications collectively (email and eVoucher notices) more often than other forms of notification. Notice was by phone in around 9% of reductions that were ultimately made, but a phone call was more than twice as likely to have been used for notification of proposed reductions. Around 1% of respondents reported that notice was provided via letter or in person, regardless of reduction type.

## Appealing Voucher Reductions

Recommendation 16 calls for courts to create an independent review process to allow attorneys to challenge reductions to their vouchers. The recommendation does not specify whether attorneys should be able to appeal reductions before or after receiving payment. We asked attorneys about their decision to appeal proposed and actual reductions generally, without specifying where in the process the appeal occurred or which entity ultimately resolved the challenge. Notably, the results indicate that attorneys broadly interpreted appeals to include requests for reconsideration by the original reviewer, which would not be considered an independent review as envisioned by Recommendation 16.

A broad interpretation of what it means to appeal voucher reductions may have influenced attorney responses on the availability of these processes. As shown in Table 16 below, a very small percentage of attorneys (3% of those with a proposed reduction, 5% with an actual reduction) reported that they did not appeal because an appeals process was not available to them, despite less than half of all district plans describing an independent review process as of the end of FY 2021.

Voucher reduction appeals are rare; of the 721 attorneys who reported a proposed or actual voucher reduction, only forty-six (6%) appealed. Eleven attorneys appealed a proposed reduction, and thirty-five appealed an actual reduction.<sup>1554</sup> Overall, 72% did not appeal, and the remaining 21% were unable to recall whether they appealed or not.

Ninety-four percent of attorneys who could recall the decision chose not to appeal reductions, proposed or actual, to their vouchers, and their reasons for this choice are illuminating.

1554. For all responses to questions regarding appeals of voucher reductions, see Tables 4–6 in Technical Appendix 4: Survey.

**Table 16.** Why did you not appeal? (by frequency).

Reason	Proposed Reduction		Actual Reduction	
	Number	Percentage of Respondents	Number	Percentage of Respondents
The effort required to support the appeal was too burdensome.	9	26%	145	30%
I did not believe the appeals process would be successful.	5	15%	135	28%
I believed the appeals process would negatively affect future appointments or interactions with judges or court staff.	5	15%	111	23%
Appeals process takes too much time.	5	15%	93	19%
No appeals process was available.	1	3%	24	5%
Categorized other				
Thought the reduction reasonable.	3	9%	48	10%
Issue was resolved without reduction.	3	9%	13	3%
Was not notified of reduction.			4	1%
Uncategorized other	2	6%	41	8%
Unanswered	10	29%	67	14%
<b>Total Respondents</b>	<b>34</b>		<b>487</b>	

Both groups of attorneys most often reported that they chose not to appeal reductions because of the burden required to do so.

Additionally, the next-most-frequent reasons reported by both groups of attorneys for not appealing (15%–28%) were that they thought they were not likely to succeed and because they were concerned that doing so would negatively affect future CJA appointments or interactions with the courts. Attorneys noting these concerns tended to be clustered in a small number of jurisdictions; half the attorneys who selected these options practiced in eight courts.

## General Experiences

The majority of respondents (3,500) reported no reductions of any type (or reported not recalling reductions) to their vouchers for the selected representations. These attorneys were asked to provide details on their experience with voucher review in the court that appointed them.

In looking at the answers to this series of questions, it is important to highlight the differences in definitions for each response type. Attorneys were given the following definitions for their choices:

- “I don’t know”: information you were never privy to.
- “It was unclear”: when steps in voucher review were not transparent.
- “I don’t recall”: answers that you once knew but have since forgotten.

Attorneys were asked which stages of review their vouchers were processed through; Mathematical/Technical, Reasonableness, or Excess Compensation. Table 17 summarizes their responses.

**Table 17.** Were the voucher(s) you submitted in this representation reviewed for ...

Response	Mathematical/ Technical Errors		Reasonableness		Excess Compensation	
	Number	Percentage	Number	Percentage	Number	Percentage
Yes	1,082	31%	747	21%	386	11%
No	236	7%	284	8%	1,642	47%
I don't know	1,334	38%	1,840	53%	721	21%
I don't recall	684	20%	423	12%	584	17%
It was unclear	52	1%	89	3%	20	1%
Unanswered	112	3%	117	3%	147	4%
<b>Total Respondents</b>	<b>3,500</b>	<b>100%</b>	<b>3,500</b>	<b>100%</b>	<b>3,500</b>	<b>100%</b>

The inability to report whether vouchers were reviewed at each stage is not because the process itself is unclear (only 1% to 3% of attorneys reported that the steps of each type of review were not transparent) but because attorneys were not made aware of which stages their vouchers went through. Between 21% (in the excess compensation stage) and 53% (in the reasonableness stage) of attorneys said they didn't know if their vouchers were reviewed at each stage. The inability to recall if vouchers were reviewed at each stage was somewhat lower. Combining these responses means definitive answers were provided less than half the time for two of the three stages of voucher review. Attorneys were better able to report mathematical/technical review than reasonableness, but they were most certain of review for excess compensation—a process determined by statute.

This data provides information about panel attorney understanding of voucher review generally. Where criteria were clear, such as a monetary threshold over which circuit review is required by statute, attorneys were less likely to say they didn't know if the review occurred (21%) than they were to say this about reasonableness review (53%).

Table 18 shows who the attorneys identified as the reviewer at each stage of the process.

**Table 18.** Who reviewed the voucher(s) for ... (by frequency of mathematical/technical group).

Reviewer	Mathematical/Technical		Reasonableness		Excess Compensation	
	Number	Percentage of Respondents	Number	Percentage of Respondents	Number	Percentage of Respondents
Clerk's office staff	385	36%	121	16%		
CJA panel administrator	189	17%	103	14%		
CJA supervising attorney	114	11%	103	14%		
FDO staff	99	9%	63	8%		
Presiding judge	64	6%	226	30%		
Chamber's staff	36	3%	45	6%		
Case-budgeting attorney	17	2%	23	3%	48	12%
Circuit chief judge	11	1%	58	8%	61	16%
Circuit judge (other than circuit chief judge)	7	1%	28	4%	59	15%
I don't know	175	16%	143	19%	183	47%
I don't recall	64	6%	41	5%	46	12%
Unanswered	54	5%	24	3%		
<b>Total Respondents</b>	<b>1,082</b>		<b>747</b>		<b>386</b>	

Consistent with the results in earlier sections that discussed reduced vouchers, court staff were most often involved in mathematical/technical review, and presiding judges often conducted reasonableness review. Attorneys were unlikely to report knowing who reviewed vouchers for excess compensation. Thus, despite reporting with greater certainty whether vouchers were reviewed for excess compensation, attorneys were unclear as to who, exactly, was responsible for review at the circuit.

## Expert Service Providers

In addition to asking attorneys about their experiences with voucher review for attorney costs and compensation, the survey also collected information regarding voucher submissions for expert services. Attorneys were initially asked if they had requested the use of expert services in the representation in question and if that request was approved by the court.

**Table 19.** Did you request the use of expert services in this representation, even if such requests were denied?

	Number	Percentage
Yes	878	21%
No	2,795	66%
I don't recall	589	14%
<b>Total</b>	<b>4,262</b>	<b>100%</b>

As shown in Table 19, a minority of attorneys (14%) could not recall if they requested experts, and the majority reported they did not make such a request (66%). This infrequency is consistent with the findings of the Cardone Report, in which 43% of panel attorneys requested the use of service providers

in less than 5% of their appointments over a five-year period, and 87% requested experts in fewer than half.<sup>1555</sup> Despite Cardone Report recommendations<sup>1556</sup> to use experts for mitigation, litigation support, and other aspects of CJA litigation, attorneys continued to request such resources in less than a quarter of appointments.

The 878 attorneys (21%) who requested expert services were asked about the type of expert(s) requested and if such requests were approved by the court. A total of 1,008 experts were requested in 878 appointments, and 937 (93%) of these requests were approved by the court.

**Table 20.** Sometimes expert services are requested, but not approved by the court. Thinking about the representation in case number [inserted case number], what type(s) of experts did you request, and what type(s) were approved by the court? (by frequency of request).

Expert service provider	Requested		Approved	
	Number	Percentage of Total	Number	Percentage of Requested
Investigator	299	30%	277	93%
Interpreter/translator	169	17%	165	98%
Psychologist/psychiatrist	147	15%	132	90%
Paralegal services	119	12%	113	95%
Mitigation specialist	77	8%	70	91%
Forensics	45	4%	41	91%
eDiscovery	28	3%	27	96%
Computer	27	3%	25	93%
Medical	25	2%	22	88%
Legal/jury consultant	17	2%	16	94%
Accountant	14	1%	13	93%
Administrative support	14	1%	11	79%
Categorized other				
Another attorney	16	2%	15	94%
Telecommunications	6	1%	6	100%
Uncategorized other	5	<1%	4	80%
<b>Total</b>	<b>1,008</b>	<b>100%</b>	<b>937</b>	<b>93%</b>

We asked the remaining 2,795 attorneys why they did not request expert services during the course of the representation. By far the most frequent reason, reported by 2,266 attorneys, or 81% of those asked, was that such services were not necessary given the facts of the case. No other reason was provided by more than 3% of attorneys.<sup>1557</sup>

1555. See the discussion of expert services in The Cardone Report generally, pp. 149–156, and the figure on p. 152 specifically for the 87% estimate.

1556. See Cardone Report, p. 149. “Service providers—whether investigators, paralegals, or discovery coordinators—are critical to effective representation.” Noting the role of judicial approval in panel attorney requests for expert services, the Cardone Report made three recommendations to address the issue. Recommendations 9, 20, and 29 all call for resources to assist judges reviewing requests for expert services. Additionally, Recommendation 17 calls for DSO to regularly disseminate best practices. See JCUS-SEP 18 and JCUS-MAR 19.

1557. For all responses, see Table 7 in Technical Appendix 4: Survey.

## Panel Attorney Perspectives

Attorneys were provided the option to comment more generally on their experiences litigating cases under the CJA, including a separate opportunity to comment on voucher review specifically. Comments about both are discussed below.

### General Comments

Over half of all responding attorneys (2,487, 58%) provided comments that were then coded by a member of the research team as being generally positive, negative, or neutral.<sup>1558</sup> More than half (54%) were positive, noting, for example, that reductions were rare, attorneys experienced few problems with getting paid, reviewers were fair, or the system worked as expected. Twenty-four percent of attorneys provided a comment that was neutral, ranging from saying simply that the case was or was not representative, to saying it was or was not complicated, or generally describing details of the case (such as the case was a misdemeanor, with no additional detail provided). The 552 negative comments (22%) largely provided details about problems attorneys reported encountering, from the burdens of submitting time in eVoucher to unwarranted and routine reductions in some courts or by some reviewers.

Comparing the tone of attorney comments by whether they felt the appointment in question represented their overall experience adds further detail, as shown in Table 21.<sup>1559</sup>

**Table 21: Comment Tone by Representativeness of Appointment.**

	Was the appointment representative of overall experience?							
	Yes		No		Unanswered		Total	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Positive comment	1,174	67%	160	23%	3	10%	1,337	54%
Neutral comment	270	15%	303	43%	25	81%	598	24%
Negative comment	315	18%	234	34%	3	10%	552	22%
<b>Total</b>	<b>1,759</b>	<b>71%</b>	<b>697</b>	<b>28%</b>	<b>31</b>	<b>1%</b>	<b>2,487</b>	<b>100%</b>

Note: Thirty-one respondents provided a comment but did not answer the question about the representativeness of the appointment to their overall experience. They are reported in the Unanswered column above.

Attorneys reporting that the appointment was representative of their experience tended to make comments that were positive, while those who said the appointment was not representative were more likely to make a negative comment. This would suggest that most attorneys in most cases have relatively positive experiences litigating under the CJA and that negative experiences are the exception rather than the rule.

<sup>1558</sup>. Technical Appendix 4: Survey describes the comment coding process in detail.

<sup>1559</sup>. Note that not all attorneys who provided comments also answered as to the representativeness of the experience.

Attorneys were also asked about how their experience with the voucher review process has changed since the start of FY 2017.<sup>1560</sup>

**Table 22. How Has the Voucher Review Process Changed?**

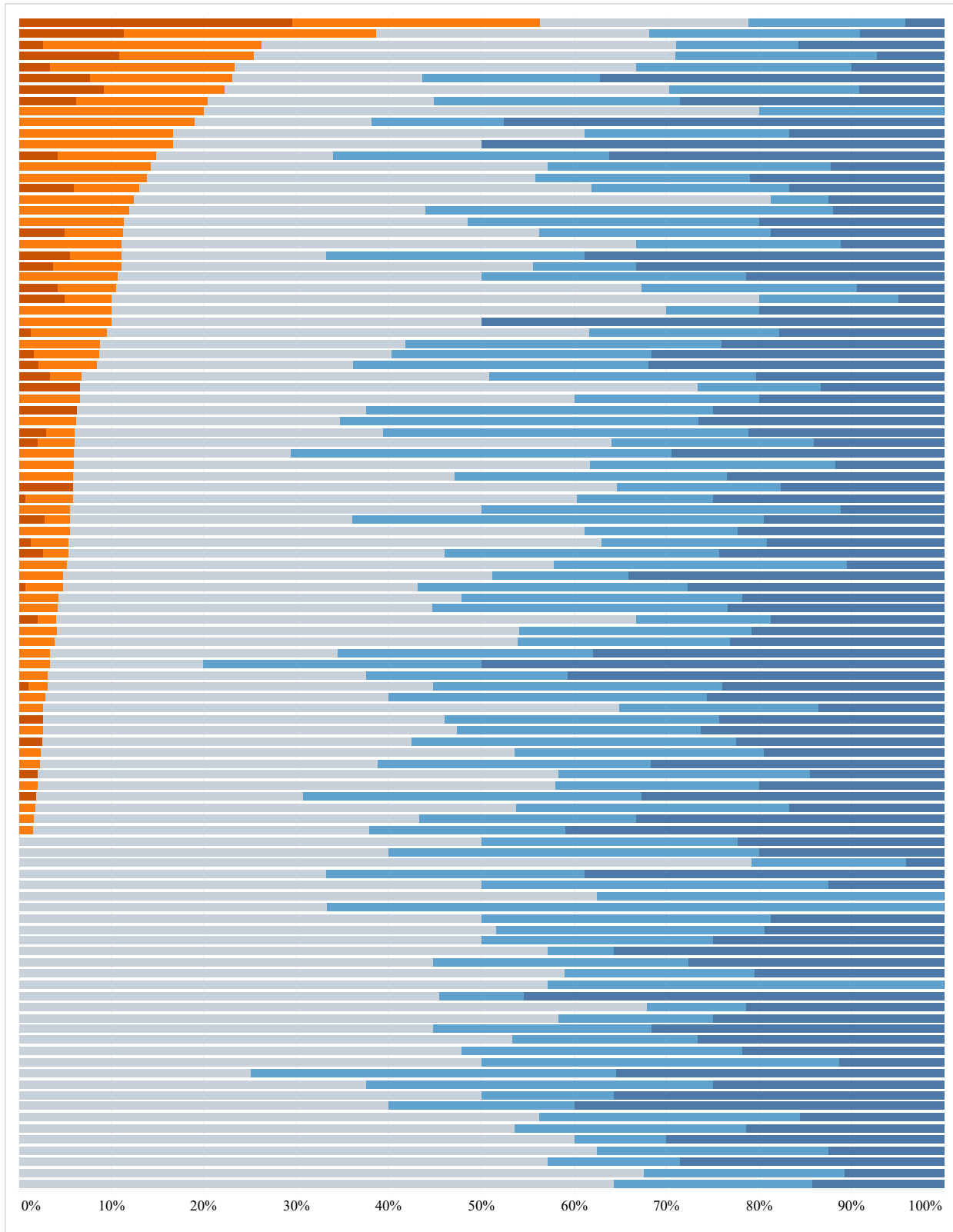
Response	Number	Percentage
Improved greatly	884	21%
Improved slightly	994	23%
Not changed	1711	40%
Worsened slightly	222	5%
Worsened greatly	88	2%
Unanswered	363	9%
<b>Total Respondents</b>	<b>4,262</b>	<b>100%</b>

The plurality (44%) of attorneys reported that the voucher review process had improved, either slightly or greatly, over time, while only 7% reported that the process was getting worse.<sup>1561</sup> But these overall percentages obscure clusters, both positive and negative, in some individual courts. Figure 2 shows attorneys' reported views on how the voucher review process had changed by appointing court, sorted by most negative to most positive average response. At the extremes, there were twenty-two courts where 60% or more of attorneys saw improvement, and nine courts where over 20% of attorneys reported changes for the worse.

1560. Though many of the recommendations were not adopted until after FY 2017, DSO made, and the Judicial Conference adopted, a major revision to the CJA model plan in 2016, portions of which overlapped with the adopted recommendations and addressed some issues of voucher review. For example, Section XII.B.6 added a section permitting referral to the CJA committee for review when the court was contemplating a voucher reduction.

1561. We considered the possibility that attorneys with longer tenure on the panel may have a different perspective, but the data showed no significant differences between new and long-tenured attorneys.

Figure 2. Perceptions of Voucher Process Changes in Appointing Court (by most negative).  
Key: Greatly Worsened Slightly Worsened Not Changed Slightly Improved Greatly Improved





In addition to variation in perception by appointing court noted above, length of professional experience was also significantly correlated with attorneys' perspectives on whether the voucher process had improved during our period of study. Panel attorneys who had served on the panel or practiced law longer saw the voucher review process as slightly or greatly improved at a higher rate than did those with less time on the job—perhaps the result of their longer event horizon.<sup>1562</sup>

## Comments about Voucher Review

All attorneys were provided an opportunity to share any further thoughts about the voucher review process. Of the 4,262 attorneys included in this analysis, 1,557 (37%) provided a response. Many attorneys discussed a variety of issues, which were coded into multiple categories. In total, the responses were broken down into 3,289 individual comments and coded by the research team.<sup>1563</sup> The small number (10%) of comments that only included text such as “nothing more to add” and “no” were coded as unanswered, and the remaining 90% were analyzed for tone and categorized as positive, neutral, or negative, as shown in Table 23.

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1562. Panel years and perception of the voucher review process (where higher scores mean seeing the process as getting slightly or greatly worse since FY 2017) had a correlation of -0.1007, significant at the  $p < 0.001$  level or higher. Years practicing law had a correlation of -0.0894 with perception of voucher review, significant at the  $p < 0.001$  level or higher. Number of appointments was unrelated to perceptions.

1563. Details on the coding process can be found in Technical Appendix 4: Survey.

**Table 23.** Comments about Voucher Review, Coded by Tone (by frequency).

Tone of Comment	Number	Percentage of Total	Percentage of Tone Group
Positive	930	28%	100%
Experience or improved process	512	16%	55%
Specific person or court	167	5%	18%
eVoucher	112	3%	12%
Faster payments	102	3%	11%
Neutral	209	6%	100%
Better in some ways, worse in others	105	3%	50%
Process unchanged	48	1%	23%
Suggestion	23	1%	11%
Negative	1824	55%	100%
Approval or payment times	428	13%	23%
Too much detail required	197	6%	11%
Opaque process	164	5%	9%
eVoucher	132	4%	7%
Specific reduction details	132	4%	7%
Reviewer too picky	132	4%	7%
Uneven or subjective review	132	4%	7%
Unfair review	99	3%	5%
One reviewer is the problem	66	2%	4%
Training needed for CJAs	66	2%	4%
Opaque expense categories	33	1%	2%
Statutory maximum too low	33	1%	2%
Need more reviewers	33	1%	2%
Remove judges from process	33	1%	2%
Training needed for reviewers	33	1%	2%
Unanswered	326	10%	100%
<b>Total Comments</b>	<b>3289</b>	<b>100%</b>	

The majority of positive comments reported a generally positive experience or improved voucher review process (55%), while 18% praised a specific person or court, 12% were positive about eVoucher, and 11% noted faster payments now than in prior years. Half the comments coded as neutral described processes that had gotten better in some ways and worse in others, 23% noted that processes remained unchanged without offering additional details that would allow coding of a positive or negative tone, and 11% offered a suggestion, similarly without additional commentary, such as using interim payments (also discussed below in Suggestions for Improving Voucher Review).

Lastly, the most common comments coded as negative were general statements about voucher review (31%), including that approval or payment took too long (13%); that too much detail was required

(6%); that the process was too opaque (5%), too picky (4%), uneven or subjective (4%), or unfair (3%); that a single reviewer was the source of problems (2%); or that more training was needed (either for reviewers, who attorneys often felt should have a background in criminal law (1%), or for the attorneys themselves (2%)). Other negative comments were more specific and included complaints about eVoucher (4%, discussed below in Suggestions for Improving Voucher Review); details about a specific reduction (4%); and requests for clearer expense categories (1%), raising the statutory maximum (1%), additional reviewers (1%), or removing judges from the process altogether (1%).

## Suggestions for Improving Voucher Review

The survey also asked attorneys to suggest ways to improve any part of the voucher submission and review process. This question provided the opportunity for panel attorneys to give feedback on the processes by which they were paid, even if they did not see voucher review as problematic. Some attorneys said they didn't have specific suggestions, noting that they felt the system worked well<sup>1564</sup> or that they had never experienced a problem.<sup>1565</sup> However, even attorneys who gave positive evaluations offered suggestions for improvement.

Suggestions varied, from ways to avoid delays in payment—including hiring more voucher review staff and allowing interim payments—to changing rates, limits, deadlines, and compensability rules to adapt to changing litigation practices. Generally, suggestions centered on how to make submissions easier, how to make payments faster, or how to make the process fairer. Though few attorneys specifically mentioned the adopted recommendations, their suggestions for improvement addressed similar issues, i.e., voucher review and reduction (including appeal of reductions), rates of compensation, and the process of requesting service providers.

Suggestions for making voucher submission easier covered both modifications to the eVoucher system and rule changes. Regarding the payment system itself, several attorneys suggested allowing direct upload from routinely used timekeeping software<sup>1566</sup> or allowing attorneys to upload spreadsheets.<sup>1567</sup> Many described the duplicative work of entering their hours into eVoucher as a burden, as they could not bill for time spent for them to complete and submit vouchers<sup>1568</sup> or for their staff to do

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1564. See, e.g., Respondent 2014, "I have no problems with the process. I believe it functions well."

1565. See, e.g., Respondent 3921, "I have had no negative experiences with the voucher process and, thus, have no reason to seek changes."

1566. See, e.g., Respondent 3412, "Provide some mechanism to permit commercial timekeeping programs to synchronize with eVoucher."

1567. See, e.g., Respondent 273, "The Number 2 suggestion is to add an import CSV file feature. I use a timer program that makes it relatively seamless and frictionless to track my time for all my cases, including my CJA cases. But then I have to manually enter the items into eVoucher. Most every time-tracking and database application I've seen supports export to CSV file. I imagine such a feature would be extremely useful to the panel." As it turned out, this feature was added shortly after the survey closed.

1568. See, e.g., Respondent 1291, "There is considerable time spent by lawyers/law firms reentering each entry from an expert's/investigator's invoice. This wasted time cannot also be billed in eVoucher."

so.<sup>1569</sup> Other suggestions included providing the ability to sort entries by date,<sup>1570</sup> changing the review feature to list dates in order,<sup>1571</sup> and adding an autosave feature.<sup>1572</sup> Additionally, a number of attorneys suggested increasing the court-set timelines for voucher submission in comments such as, “Stop rejecting vouchers because it is after 45 days from sentencing. Issues with surrender or release come up after that.”<sup>1573</sup>

The most common suggestion provided by panel attorneys was to reduce the time necessary for voucher review and payment, including for excess compensation requests. As one attorney said,

Not sure how you could implement it, but it would be great if we could have a clear-cut date on how long it would take for a voucher to be paid. I understand that would not be possible for a voucher beyond the statutory maximum, but for one under it, if we could know that when we submit a voucher, assuming all is well, it would be paid within 30/45 days, it would greatly help with budgeting we need to do, particularly for those of us with small law firms. The Court is usually pretty good about getting them back, but a set time frame would really help.<sup>1574</sup>

Of course, not all attorney comments discussing delays in payment were as positive. The attorney quoted below was somewhat more frustrated with payment delays.

Vouchers take months to review and approve, which is horrendous and unprofessional. State court vouchers are approved and paid within 15 days, by comparison. Judges and CJA administrators simply do not give CJA vouchers the time, priority, and respect which they deserve.<sup>1575</sup>

Most of the suggestions were direct pleas to speed up payment, such as, “Anything that can speed up the time between submission of the voucher and remittance of payment would be appreciated,”<sup>1576</sup> or specific suggestions on how to make the process more efficient, including requiring court deadlines

1569. See, e.g., Respondent 3904, “Service providers should be allowed, permitted, required to enter their own time, and then attorney reviews and approves. Either that or pay the attorney’s staff for the data entry. I do not believe it’s fair to shift work to the attorney and then not pay them for required work,” and Respondent 3775, “My staff works several hours a month on this process at a significant cost to my overhead.”

1570. See, e.g., Respondent 3707, “I wish there was a mechanism that would arrange the entries by date rather than by category. For instance, I might have an entry for 10/13/2021 for a call, 0.1 hr. Then I later say on 10/15/2021 that I had another document or entry to make for the 13th. The system does not relocate the entry back to the 13th, but it follows the 15th. And now the system is being stored by category, not by date necessarily, all visits and conferences together, for example, and, all reviewing of records together in another place. So sometimes you don’t see the last entry you made because it is not where you expect it to be.”

1571. See, e.g., Respondent 786, “Additionally, a system that would allow simultaneous review and correction (for typos etc.) would be useful. For instance the ‘CJA Form’ where the data is chronologically listed—an opportunity to correct mistakes here instead of having to find which page the erroneous entry was made. Oftentimes my initial entry of data is not all in chronological order. Thus, finding where the original entry was made to make the correction can be time consuming.”

1572. See, e.g., Respondent 4088, “Overall the system should record and save the data at entry. Having the old-school ‘remember to press save’ button is outdated.”

1573. Respondent 3956. See also Respondent 1568, “Extend the 45-day filing period to 60 days.” In 2020, the *Guide to Judiciary Policy* was revised to discourage reduction of vouchers due to untimely submission unless the delay inhibits the review process. See *Guide to Judiciary Policy* § 230.13.

1574. Respondent 290.

1575. Respondent 310.

1576. Respondent 2890.

for payment (a suggestion ranging from thirty<sup>1577</sup> to sixty days<sup>1578</sup>), hiring more staff,<sup>1579</sup> allowing for interim payments,<sup>1580</sup> or allowing experts to submit their own vouchers instead of requiring attorneys to duplicate the work.<sup>1581</sup> Even where attorneys noted faster payment in recent years, they described persistent problems at the circuit level: “I am so appreciative of the improvements over the past 4–5 years. That said, if there is one issue, it would be the length of time it takes for a voucher exceeding the cap to be returned from circuit and processed for payment.”<sup>1582</sup>

Other suggestions for faster payment included moving to direct deposit,<sup>1583</sup> raising statutory case maximums, raising amounts eligible for approval by CJA administrative staff,<sup>1584</sup> and giving authority to magistrate judges to approve excess compensation vouchers.<sup>1585</sup>

Related to the issue of delayed payments were complaints that reviewers “nitpicked” vouchers or that attorneys were getting “nicked and dimed,” causing both delayed payment and frustration with a process that attorneys perceived as unfair. Attorneys reported reductions they viewed as arbitrary, as per the following quote.

[Voucher review staff] will reject vouchers, which is money relied upon for work completed, for arbitrary and sometimes the wrong reason. This has a huge impact on the finances of court-appointed attorneys.<sup>1586</sup>

The perception of arbitrary reductions led attorneys to make suggestions for increasing transparency,<sup>1587</sup> training (for judges,<sup>1588</sup> court staff,<sup>1589</sup> and panel attorneys<sup>1590</sup>), and creating standards for re-

1577. Respondent 290.

1578. *See, e.g.*, Respondent 3304, “Have Judge’s review within 60 days.”

1579. *See, e.g.*, Respondent 3764, “We need more staff in the review process.”

1580. *See, e.g.*, Respondent 4140 “The process desperately needs to be streamlined. It takes too long to get paid. Interim billing needs to be made available in every case; it is absurd to ask attorneys to work for years on a case without any compensation.”

1581. *See, e.g.*, Respondent 3155, “Have experts do their own vouchers or just accept the expert’s invoice instead of requiring attorneys to essentially re-type the invoice into the voucher program.”

1582. Respondent 3973.

1583. *See, e.g.*, Respondent 1943, “Also, I believe all CJA panelists would benefit from a direct deposit option for payment. I have had at least two CJA checks never get to me in the mail, and the replacement process extends the payment turnaround time a lot.”

1584. *See, e.g.*, Respondent 3450, “First, increase the amount which can be approved by the clerk’s office. They currently have signing approval for under [a specified amount], which can get us our checks faster when approved by the clerks.”

1585. *See, e.g.*, Respondent 3958, “I would say give the magistrates more authority to approve vouchers seeking excess compensation. I doubt it saves any taxpayer money to require excess compensation vouchers to go to the circuit court, while increasing appellate court judges’ already-significant workloads. The magistrates would have a better idea of how a case proceeded because they handled much of it, as well, while appellate court judges have no idea how a case proceeded other than what is written in the voucher.”

1586. Respondent 3392.

1587. *See, e.g.*, Respondent 2772, “Transparency is important. The reductions I have received over the years seem arbitrary or solely based on the cap without consideration for the difficulty of the case,” and Respondent 4065, “More transparency in this process would be much appreciated. Upon what grounds would a reduction happen? Is a reduction ultimately decided by the district court judge who presided over the matter?”

1588. *See, e.g.*, Respondent 4096, “To avoid the arbitrary voucher cutting, I think judges should receive proper training on voucher review. If the work is legitimately performed, an individual judge should not cut a voucher based upon how he or she feels about a particular case, an attorney, or their perception on the necessity of a task.”

1589. *See, e.g.*, Respondent 2716, “I also think better training and more support for finance office review.”

1590. Several respondents suggested increased training of panel attorneys, both on substantive areas of law and voucher processes. *See, e.g.*, Respondent 2293, “More training is needed for CJA lawyers in the proper use of experts and the request and submission process. In my opinion lawyers fail to ask for such assistance such as paralegal help (large document cases) investigators, and mitigation specialists because the process and fear of rejection (by the court) seems overwhelming to them,” and Respondent 3550, “Having basic training information directly on the eVoucher site would be helpful.”

view.<sup>1591</sup> Additionally, one attorney suggested eliminating the court practice of comparing across counsel in related cases:

Cuts to compensation are (in my experience) not tied to scrutiny of the actual work done by the lawyer who is getting cut. They are made based on the sense that the lawyer—who could be the most prolific producer in the case—is charging more than [an]other. That approach makes little sense, is arbitrary and fundamentally disrespectful.<sup>1592</sup>

Other attorneys discussed issues with specific billing categories and how clearer definitions would prevent reductions:

Voucher reviews should be based on reasonableness and not picked over for specific words and explanation of legal strategy. Subcategories for out-court work are arbitrary and don't reflect actual practice. Attorney is required to spend time trying to fit work into category title instead of just getting work done. All time attorney spends related to client work should be billable, not just words that fit into the auditor definition of the subcategory. Travel to court should include all forms of travel, not just driving. Allowing billing for copy machine but not for printing is just ridiculous."<sup>1593</sup>

More than one attorney mentioned clarifying rules for compensability as well as calls for greater transparency in how compensability decisions affect voucher reductions<sup>1594</sup> and where vouchers were in the review process.<sup>1595</sup> For example, one attorney suggested, "Make it clearer what the rules are. Do not impose arbitrary rules, i.e., rules like 'you may have an expert but not from out of state,' or 'you can have an out of state expert, but they have to fly to [the state] from [a contiguous state], not drive.'"<sup>1596</sup>

More specifically, some attorneys suggested changing rules, especially with respect to statutory case maximums. Several attorneys suggested increasing statutory maximums, both to reflect current practice standards and litigation costs and to eliminate the frequency of required circuit court review. For example, one attorney said, "The maximum amount of money apportioned to trials and pleas is totally unrealistic if the attorney is to do an effective job. Raising the maximum fee permitted could eliminate the excessive claim voucher."<sup>1597</sup>

Additionally, attorneys expressed concern that the current caps mean attorneys do not submit the full costs of their work:

It would be nice to see the totals being requested on appellate vouchers, the reductions, the categories, etc. without names. None of the attorneys I have talked to request anywhere close to the amount of time they are spending because the maximums are so low. Some have shared their excess compensation requests, and so I have seen the briefs and the case facts and I can't believe the judges or reviewers think these amounts are anywhere close to the amount of time needed.<sup>1598</sup>

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1591. See, e.g., Respondent 2820, "There is much ad hoc decision making and inconsistency among the judges and among districts. The standards for payment should, for the most part, be consistent across the country."

1592. Respondent 4117.

1593. Respondent 2840.

1594. See, e.g., Respondent 2725, "More transparency about why some things may have been paid and others excluded."

1595. See, e.g., Respondent 3106, "In reviewing appeals to reductions, the CJA panel should know who is actually reviewing the vouchers. Is it the CJA local representative or other local magistrates and district court judges? There's no transparency, and therefore any appeal of the payment remains obscure and discourages counsel from any appeal process."

1596. Respondent 456.

1597. Respondent 2784.

1598. Respondent 3534.

Attorneys also expressed concerns about statutory maximums with respect to both attorney compensation and expert services. As one attorney noted, “This isn’t really a voucher issue, but it’s hard to find experts for the \$2,700 cap.”<sup>1599</sup> Another said,

It is very difficult to obtain experts to work CJA cases due to delay in payment of services; some simply decline to do it. In regards to investigators, there are judges that deny their use and indicate the attorney should do the work. Cases that I have requested an investigator recently the judge has denied the service or, if not, put a cap on the amount that can be billed, which at times is a ridiculous amount.<sup>1600</sup>

It was clear, however, that not all attorneys felt clarifying rules and processes or raising limits would be sufficient to improve the process. For example, one attorney asked, “Why are judges reviewing vouchers? Doesn’t that present an inescapable conflict in all cases?”<sup>1601</sup>

Not all attorneys said that the role of judges in voucher review was problematic, however:

I think the system works. At the end of the day, the judge has the final word and will get what they want. A reasonable judge will yield a reasonable result and an arbitrary judge will produce an arbitrary result. A system is only as good as those that run it.<sup>1602</sup>

To overcome these issues, some attorneys suggested creating an appeals process, consistent with Recommendation 16. “There needs to be an appeal process. It should be run by practicing attorneys and not people from FPD offices, prosecutors, or others who have never recorded their time.”<sup>1603</sup> One attorney suggested a process through which attorneys could correct factual errors (or assumptions) about the appointment that resulted in reductions:

The reviewing Judge cut the fees significantly (65%) based on the presumption that I had been trial counsel and I should not have needed so much billable time to have reviewed the transcript. I was *not* trial counsel but was appointed only for sentencing after the client fired his retained attorney. The transcript covered [redacted] weeks of trial. I only bring this up because the reviewing judge was mistaken, and there was no process by which to review the decision. I wrote to [them] but I never heard back. Therefore, I would certainly suggest some process by which a submitting attorney would be able to correct factual errors such as the one I described. Perhaps a simple submission of a petition for review based on a mistake of fact in determining a fee reduction.<sup>1604</sup>

Others suggested changing the review process to remove judges altogether: “I advocate for removing judges from the voucher approval process altogether, and that they be replaced instead by qualified CJA administrators (presumably with defense backgrounds).”<sup>1605</sup>

But not every respondent agreed that removing judges from the process would eliminate the problems discussed. In one court, where a majority of attorneys reported that voucher review had changed for the worse since FY 2017, an attorney summed up problems caused by changes in voucher review staff, not judges:

The system needs to be returned to how it was done by the previous reviewer. It is difficult to believe that the dozens of lawyers all of a sudden began submitting vouchers incorrectly after years of no issues. The current person takes twice as long and seems to question many entries which I do not think is correct. For instance, I was questioned for having two entries of reviewed PSR that were weeks apart as being a duplicate entry.<sup>1606</sup>

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1599. Respondent 3100.

1600. Respondent 1721.

1601. Respondent 1598.

1602. Respondent 3488.

1603. Respondent 3046.

1604. Respondent 3742.

1605. Respondent 3996.

1606. Respondent 2839.

## Conclusion

This survey sought to gather information about the experiences of attorneys with voucher review since the publication of the Cardone Report in 2017. We invited 11,193 attorneys to complete a survey anchored to a specific representation.<sup>1607</sup> In total, 4,262 attorneys provided information about their experiences with the selected representation, with 75% saying that the selected appointment represented their experience overall. The attorneys participating in this survey were neither new to the panel nor to the practice of law, with an average of fifteen years of panel service and an average of twenty-eight years of practice.

The survey asked attorneys what they understood the voucher review process in their court to be; if their vouchers were reduced, at what stage and by whom; and if they appealed the reduction. Attorneys were also asked if they submitted less than the full cost of the litigation and, if so, why, as well as whether they had requested expert services and if those requests were approved. Lastly, attorneys had a chance to provide their general perspective on voucher review, ways to improve it, and their assessment of whether the process had improved since the publication of the Cardone Report and the adoption of some of its recommendations.

The data from the survey suggests that attorney experiences currently do not appear to differ from what was reported by the Cardone Committee. For example, the Cardone Report included a CJA panel survey in which “the majority of panel attorneys surveyed (72%) believe that voucher cutting happens in just one out of four cases or less,”<sup>1608</sup> which may be an undercount given the frequency with which attorneys submit less than the full costs.<sup>1609</sup> The Cardone Report also found that voucher review practices varied by court,<sup>1610</sup> while regular “self-cutting” was reported by 40% of the respondents to the Cardone Committee’s survey.<sup>1611</sup> This survey of panel attorney experiences found in the aggregate that 15% of attorneys reported voucher reductions in the randomly selected appointment, that reductions were made more frequently in some places and by some types of reviewers than others, and that 44% of attorneys reported they submitted vouchers for less than the full costs of the litigation.

Reductions were often because the voucher was thought to be unreasonable by the reviewer, though there could be other reasons for reductions that attorneys did not always know. Regardless of whether they knew the reason, less than 6% of the attorneys in our survey appealed proposed or actual voucher reductions. The low number of appeals makes determining the success of such efforts unclear. Often attorneys did not appeal because of the effort required to do so, a low expectation of success, or concerns that they would suffer professional consequences for doing so.

Reductions after submission are only part of the picture. Forty-four percent of attorneys reported submitting vouchers for less than the full cost of the litigation, a decision that most of them made on their own but that was often based on prior experience with reductions or the expectation that someone (such as the clerk’s office or presiding judge) would reduce the amount after submission. We found attorneys who submitted less than the full cost of litigation were more likely to see their voucher reduced despite their attempt to avoid reduction. It’s important to emphasize here that these attorneys reported

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1607. For detailed information on the sampling process, see Technical Appendix 4: Survey.

1608. Cardone Report, p. 103.

1609. *Id.*, p. 104.

1610. *Id.*, p. 95. “Judicial review produces wildly inconsistent outcomes.”

1611. Cardone Report, p. 106.



that they submitted vouchers for less than the full cost of litigation, despite the statute supporting payment for such costs.<sup>1612</sup>

Attorneys also reported reducing their vouchers because the effort to support a full request was too burdensome or would push them above the threshold for review by the circuit, which could create further delays in payment. Attorneys often reduced their out-of-court hours, though travel and other expenses were also reduced.

Attorneys rarely submitted less than the full costs of expert services and fees, but only 21% requested such services. Of these requests, 30% were for investigative services, and 17% were for interpreters or translators. Regardless of the type of service requested, over 90% were approved. The low numbers of requests, despite the high success rates, were explained by the overwhelming percentage of attorneys reporting that experts were not requested because they were not necessary based on the facts of the case (81% of those who did not request expert services).

Among the 85% of attorneys who did not report voucher reductions by the court, we found varied levels of familiarity with the specifics of voucher review. Though attorneys knew if their voucher met the statutory limit for excess compensation review, they were unlikely to know who conducted such review. Attorneys were more likely to know if their vouchers were reviewed for mathematical/technical reasons than reasonableness, but they were less familiar with who conducted such review.

When asked about their experience with voucher review overall, attorneys were generally positive—44% reported the voucher review process had slightly or greatly improved since FY 2017, though 40% saw the process as unchanged. When asked how to improve the process, attorneys provided suggestions for improving the speed of payment, including setting deadlines or hiring more staff, and ways to reduce the burden on attorneys for voucher submission and payment, including creating an interface with standard timekeeping software and allowing for direct deposit. Several respondents discussed their concerns with what they considered the arbitrary nature of voucher review, both within a district and across reviewers of all types, again echoing the concerns voiced to and by the Cardone Committee.

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1612. 18 U.S.C. 3006(d)(1). “Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated . . . for time expended in court or before a United States magistrate judge and for time expended out of court . . . . Attorneys may be reimbursed for expenses reasonably incurred . . . .”

# Appendix G

## Attorney Training Resources and Challenges

The Cardone Report highlighted the importance of training for improving the quality of representation provided under the Criminal Justice Act (CJA). The emphasis on more access to training was not new to the Cardone Report, as a prior evaluation of the CJA reached a similar conclusion in 1993.<sup>1613</sup> In fact, the recommendation from the prior report was met with an increase in training, including the creation of the Training Division within the Defender Services Office (DSO).

Training is offered by the DSO Training Division, the Federal Judicial Center Education Division (FJC Education) and local federal defender organizations (FDOs),<sup>1614</sup> as well as through professional organizations and state and local bar associations. The DSO Training Division is the primary source of training for attorneys, both federal defender and panel attorneys, but, through an interagency agreement, FJC Education collaborates with the DSO Training Division on a limited number of training programs for federal defenders. The Cardone Report recommended expanding training for attorneys to improve the quality of representation provided under the CJA. Described below is the training offered to implement these recommendations, delineated by the source of training.

On access to training for panel attorneys and FDO staff, the Cardone Report highlighted that, although the training exists and is of high quality, panel attorneys, especially those who are solo practitioners or in rural districts, may find it difficult to access the training.<sup>1615</sup> Whether it is the cost of traveling to the training or the need to shut down a practice for several days to attend training, “local” training can be burdensome for panel attorneys, no matter how beneficial they may see it.<sup>1616</sup> These barriers exist even when training is conducted by local FDOs and DSO has been providing resources to sponsor and assist with program management. To address the need for additional attorney training, the Cardone Report made several recommendations.

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1613. See, e.g., Recommendation A-2, Report of the Committee to Review the Criminal Justice Act, Jan. 29, 1993, p.56. Hereinafter “the Prado Report.”

1614. The terms federal defender and FDO are used here generically to refer to federal defenders in federal public defender organizations (FPDOs) as well as executive directors of community defender organizations (CDOs), unless otherwise specified.

1615. The difficulty in accessing training, including the financial impact on panel attorneys, is tied to the issues of compensation generally. It wasn't until FY 2021 that the hourly non-capital rate for panel attorneys met the statutory maximum, and compensation for panel attorneys continues to be cited as an issue in some areas where cost of living is high. See Appendix C: District Court CJA Plan Analysis and Chapter 3: Panel Attorney Compensation for a discussion of ongoing issues with compensation.

1616. See Cardone Report, p. 162. “As useful as national and regional programs are, they cannot fully meet the panel’s need for more training .... A defender told the Committee, that especially in these rural districts, travel to attend regional training programs takes longer and is more expensive .... A panel attorney who practices in a rural district agreed that even regional training was difficult to attend.”

## Recommendations Regarding Training

### Recommendation 14 (approved as modified)<sup>1617</sup>

Modify the work-measurement formulas, or otherwise provide funding, to reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and 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.

Originally, this recommendation spoke only to modification of the work-measurement formula to hire more staff responsible for training defender staff and panel attorneys, as well as recruitment of more diverse staff to defender offices. The addition of “or otherwise provide funding” allows for implementing these recommendations through mechanisms other than work measurement, whose formula is reevaluated approximately every five years, and which historically has not included staffing resources for anything beyond representational tasks.<sup>1618</sup> Revision of the formula is currently underway, so we cannot determine at this time if revision addressed the need for resources to offer more training. Even if work measurement isn’t modified to implement Recommendation 14, implementation could occur through money earmarked in defender offices for this purpose, if additional DSO funds are available.<sup>1619</sup> Increases in FDO training staff as well as increases in the number of trainings offered must be considered when evaluating this recommendation.<sup>1620</sup>

Other recommendations highlight needs within the defense function that could be improved through educational materials often provided in a training setting, such as the distribution of best practices or pocket guides.<sup>1621</sup> This appendix focuses on recommendations specific to training by analyzing data available on training budgets, training programs held, and attendance. Recommendations 19–21 as well as 25 detail training needs within the defense function, all of which recommend specific program offerings and all of which would require additional resources to implement.

<sup>1617</sup> JCUS-SEP 18.

<sup>1618</sup> The work-measurement formula includes three constants that do not vary by the numbers of representations. These constants are for the federal defender, administrative officer, and the computer systems administrator. Based on caseload, some districts are eligible to receive an additional FTE, which districts can use to hire an assistant computer systems administrator. Work measurement does not, however, include FTE to support training and other FDO responsibilities that do not generate weighted case openings. The most recent work-measurement formula was postponed due to COVID. The formula revision is currently underway. See DSC Dec. 2022 Agenda Item 1D.

<sup>1619</sup> There are few sources from which funds could “otherwise be provided” for training under adopted recommendation. Additional funds for training can come from a program increase as part of the appropriation request; supplemental funding from funds otherwise not allotted; any FDO funds that might otherwise lapse, e.g., from vacant positions; or surplus expert or travel funds. Though unspent money from budget line items other than training could be reallocated for training purposes, in practice this does not occur. Email from DSO Staff, Dec. 16, 2020, on file with FJC. Even if funding is provided for additional training, staff support is needed to stage training events. The changes in local training budgets, including the two ways local training budgets increased between FY 2017 and today, are discussed in the Training Funding section.

<sup>1620</sup> Though mentorship and diversity are important aspects of the recommendation to evaluate as well, they are outside the scope of this discussion of training. Discussion of mentorship and diversity is included in other analyses. See Appendix C: District Court CJA Plan Analysis and Chapter 5: Standards of Practice and Training.

<sup>1621</sup> Recommendations 17, 18, and 23 speak to distributing best practices on defense, best practices on hiring in defender offices, and the *Criminal eDiscovery Pocket Guide* for judges, all of which could be construed as training materials. All three recommendations were adopted by the Judicial Conference in September 2018. The *Criminal eDiscovery Pocket Guide* was published in 2015, is widely available to judges, and is in the process of being revised. The revision was scheduled in 2021 but was delayed by the pandemic. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act. Distribution of other best practices may not come from the DSO Training Division per se but may be available elsewhere through DSO. For example, the Performance Measurement Working Group (PMWG) and Defender Services Advisory Group (DSAG) created checklists to help panel attorneys hire and work with investigators. The materials are distributed at training events and are also available online through FD.org. See DSC Dec. 2020 Agenda Item 2G, p. 5.

## Recommendation 19 (approved)<sup>1622</sup>

All districts must develop, regularly review and update, and adhere to a CJA plan as per Judicial Conference policy. Reference should be made to the most recent model plan and best practices. The plan should include:

- a. Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
- b. A training requirement to be appointed to and then remain on the panel.
- c. A mentoring program to increase the pool of qualified candidates.

## Recommendation 20 (approved)<sup>1623</sup>

The Federal Judicial Center (FJC) and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

## Recommendation 21 (approved)<sup>1624</sup>

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.

## Recommendation 25 (approved)<sup>1625</sup>

Circuit courts should encourage the establishment of Capital Habeas Units (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.

The training recommendations assign different judiciary entities with the responsibility of increasing training for FDO staff and panel attorneys. Recommendation 19 tasks districts with creating or updating CJA plans to include a training requirement for panel attorneys to be appointed and to remain on the panel, though it does not obligate the districts themselves to provide the training. As detailed elsewhere, CJA plans containing this training requirement frequently tasked FDOs with providing the necessary training for panel attorneys, practically linking Recommendation 19 with 14 discussed above.<sup>1626</sup>

Recommendation 21, which requires mandatory training of panel attorneys on eDiscovery issues, is also linked to other recommendations. It is unclear, however, if this mandatory training should be conducted by the FJC (the training entity listed earlier in the recommendation but not typically responsible for training panel attorneys in practice<sup>1627</sup>) or some other organization. Given that the mandatory eDiscovery training is tied to panel appointment and retention, one could argue the requirement fits with other panel attorney training, typically the responsibility of the DSO Training Division and

1622. JCUS-SEP 18.

1623. *Id.* DSO staff noted that the DSO Training Division partners with the FJC Education Division to train judges and does not train them independently. The DSO Legal and Policy Division participated in magistrate judge training run by the FJC Education Division as well. Interview 59.1.

1624. JCUS-SEP 18.

1625. *Id.*

1626. See Appendix C: District Court CJA Plan Analysis.

1627. See Appendix H: Training and Education for Federal Judges on the Criminal Justice Act.

FDOs. While courts do not enforce mandatory training requirements in most districts,<sup>1628</sup> understanding access to training, especially where it is required, is necessary to evaluate implementation of the recommendation. Our findings from analysis of CJA plans shows that, although 60% of district plans now include eDiscovery among the training requirements for panel appointment, no plan specifically listed it as a requirement to remain on the panel.<sup>1629</sup>

Recommendations 20 and 21 task FJC Education with training panel attorneys on the need for experts, investigators, and other service providers, as well as with creating more hands-on training for defenders and panel attorneys on eDiscovery. Such training, however, is the responsibility of the DSO Training Division, not FJC Education. Though the DSO Training Division partners with FJC Education for some training, such as training for federal defenders and their capital habeas units (CHUs), the two do not collaborate to train panel attorneys.<sup>1630</sup> Despite the statutory authority for the FJC to provide training for “other persons whose participation in such programs would improve the operation of the judicial branch,”<sup>1631</sup> expanding the scope of training to panel attorneys would require additional funding in order not to displace other educational priorities, including those described above.<sup>1632</sup> Thus, training of panel attorneys is not available through FJC Education. Below we focus on efforts by FJC Education to train FDO staff on the use of experts, capital litigation, and eDiscovery.

Circuit courts are charged with increasing training opportunities for attorneys appointed in capital cases in Recommendation 25. Though circuits historically had separate panels for capital appointments, most circuit plans assume continuity of counsel from the district court, meaning the training opportunities in district courts would apply<sup>1633</sup> and would need to include training on capital litigation. When district court counsel do not continue, some circuit plans include a preference for appointing FDOs from the circuit before offering the appointment to the panel.<sup>1634</sup> In these circuits, both the need for training and the opportunity for such appointments by panel attorneys is limited by administration of the CJA under the current plan.

All told, recommendations related to attorney training involve many different judiciary entities, from the organizations offering training to attorneys invited to attend. Examining the implementation of such recommendations therefore requires us to consider both what is offered and what is received. If training is offered but people do not avail themselves of it, regardless of their ability to do so, it would be difficult to conclude that the recommendations were implemented. Below we consider the training opportunities provided to attorneys (FDO and panel attorneys) by the DSO Training Division (with and without FJC Education) and locally supported training through FDOs. Throughout this discussion, we will examine how often attorneys are attending the trainings offered as well as which topics are covered in such programs.

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1628. See Chapter 5: Standards of Practice and Training.

1629. See Appendix C: District Court CJA Plan Analysis.

1630. In fact, many training materials available through FJC Education are only available on the Distributed Computer Network (DCN), making them inaccessible to panel attorneys in private practice (but available to FDO staff).

1631. 28 U.S.C. § 620(b)(3).

1632. In fact, the budget limitations for FJC Education were part of the argument for increasing funding in the CJA Revision of 1986 to allow DSO to provide training for those providing defense representational services. See 18 U.S.C. 3006A(i), “including funds for the continuing education and training of persons providing representational services under this section.” Revised in Public Law 99-651, Nov. 14, 1986. Since the creation of the separate DSO Training Division, the two agencies cooperate to provide training under an interagency agreement for some federal defender personnel programs, such as the orientation programs for newly appointed defenders. See email from FJC Staff, Apr. 20, 2021. On file with FJC.

1633. See Appendix D: Circuit Court CJA Plan Analysis.

1634. *Id.*

Examining the implementation of the recommendations regarding attorney training requires a wide array of data. Training budgets, program offerings, and program attendance all must be considered. These data are gathered from different sources within the judiciary, including DSO, local defender offices, FJC Education, and other sources. Using these sources of data, we can compare trainings offered and attended from FY 2017 through FY 2021.

## Training FDO Staff and CJA Panel Attorneys

Information available on trainings offered to FDO staff and panel attorneys comes from several sources. The DSO Training Division conducts in-person and online training for federal defenders, their staff, and panel attorneys. Additionally, FDOs offer training to their staff and local panel attorneys, both in person and, more recently, online.<sup>1635</sup> The DSO Training Division and local trainings sponsored by FDOs cover a wide range of topics relevant to the defense function.<sup>1636</sup> Using yearly reports submitted to the Defender Services Committee (DSC), we can determine the number and types of training opportunities available to defenders throughout the country. Looking at changes in the types, location, and scope of training, we can determine if there has been any change in the trainings offered since the Cardone Report recommendations.

### *DSO Training Division Reports*

DSO offers many training opportunities, in Washington, D.C., and across the country, online and in-person. Using the yearly reports to the DSC, we can see trends in the number and types of trainings, as well as locations and attendance. Detailed below are a summary of the findings from these reports. Beginning in March 2020, the COVID-19 pandemic resulted in the cancellation or conversion to online formats of the remaining in-person training offerings in FY 2020. The continuation of the pandemic into FY 2021 resulted in additional changes to DSO's offerings. Table 1 shows the number of programs by type of programming in general categories provided on the DSO Training Division Reports.<sup>1637</sup>

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1635. Though many districts routinely offered some online training, the COVID-19 pandemic required several districts, as well as DSO and the FJC, to convert some planned in-person training to online starting in March of FY 2020.

1636. A complete list of training programs offered, numbers of attendees, locations, and categorization of programming, FY 2017 through FY 2021, is on file with the FJC.

1637. The DSO program offering schedules refer to four types of programs: defender staff, panel representatives, FDO staff and private CJA attorneys, and death penalty. The more common way of referring to private CJA attorneys is to call them panel attorneys, as we do throughout this report, except where we use information from the training schedules, as in Table 1. The information included in Table 1 was current as of August 2022.

**Table 1.** DSO Programs Planned, Held, and In Person, Since FY 2017.

Fiscal Year	Type of Program	Number of Programs Planned	Total Programs Held	Total Programs Held In Person
2017	Defender Staff	11	11	11
	Panel Representatives	1	1	1
	FDO Staff & Private CJA Attorneys	20	20	14
	Death Penalty	13	13	13
	<b>Total</b>	<b>45</b>	<b>45</b>	<b>39</b>
2018	Defender Staff	11	11	11
	Panel Representatives	1	1	1
	FDO Staff & Private CJA Attorneys	26	26	19
	Death Penalty	13	13	12
	<b>Total</b>	<b>51</b>	<b>51</b>	<b>43</b>
2019	Defender Staff	9	9	8
	Panel Representatives	1	1	1
	FDO Staff & Private CJA Attorneys	25	25	18
	Death Penalty	14	14	13
	<b>Total</b>	<b>49</b>	<b>49</b>	<b>40</b>
2020	Defender Staff	12	4	4
	Panel Representatives	1	1	1
	FDO Staff & Private CJA Attorneys	50	37	9
	Death Penalty	20	11	5
	<b>Total</b>	<b>83</b>	<b>53</b>	<b>19</b>
2021	Defender Staff	6	6	0
	Panel Representatives	1	1	0
	FDO Staff & Private CJA Attorneys	43	39	0
	Death Penalty	35	35	0
	<b>Total</b>	<b>85</b>	<b>81</b>	<b>0</b>

Note: In FY 2021, the Federal Defender and Panel Attorney District Representatives held a combined national meeting. For consistency with prior years, the program is counted twice, once in the row for defender staff and once for panel representatives. The training reports provided to the DSC used the category “FDO Staff & Private Attorneys” when referring to trainings offered to attorneys on the CJA panels. To be consistent with the source, we have used the same label when drawing from information in those reports.

Though the first three fiscal years show a relatively stable number of programs offered, both overall and within each category, FY 2020 saw more programs on the schedule. Unfortunately, the pandemic resulted in programs being canceled or converted from in-person to online offerings. By FY 2021, the DSO Training Division was able to offer more training than in prior years, all of which was available virtually. Table 2 shows the full impact of the pandemic, both on the number of programs planned but canceled as well as those converted to an online format.<sup>1638</sup>

Not only were 46% of the programs planned in FY 2020 canceled or postponed, many more were held virtually rather than in person. The move to virtual learning was somewhat of an adaptation for the DSO Training Division. In prior fiscal years, more than 80% of programs held were in person. In FY 2020, only 38% of programs were held in person, almost all of which were held between the first week

<sup>1638</sup> The information included in Table 1 was current as of August 2022.

of October 2019 and the first week of March 2020, before lockdown orders were issued by state and local governments preventing or discouraging travel. In FY 2021, all programs were virtual.<sup>1639</sup>

Moving to an online format during the pandemic meant an initial shift to live webinars and prerecorded programming, which continues for some segments of virtual trainings to support synchronous and asynchronous viewing. The move online significantly increased attendance by allowing attorneys to view the content whenever it was convenient. Table 2 shows the number of people attending programs each fiscal year. Information on attendance was current through FY 2021, but despite gaps in attendance for some programs, the table shows an increase in attendance over time.<sup>1640</sup>

Table 2. DSO Programs Held and Attendance, Since FY 2017.

Fiscal Year	Type of Program	Total Programs Held	Total Attendance	In-Person Attendance	% of Total Attendance
2017	Defender Staff Programs	11	1,515	1,515	100%
	Panel Representatives	1	110	110	100%
	FDO Staff & Private CJA	20	2,711	1,511	56%
	Death Penalty	13	1,126	1,126	100%
	<b>Total</b>	<b>45</b>	<b>5,462</b>	<b>4,262</b>	<b>78%</b>
2018	Defender Staff Programs	11	1,630	1,630	100%
	Panel Representatives	1	110	110	100%
	FDO Staff & Private CJA	26	3,926	2,096	53%
	Death Penalty	13	894	894	100%
	<b>Total</b>	<b>51</b>	<b>6,560</b>	<b>4,730</b>	<b>72%</b>
2019	Defender Staff Programs	9	1,595	1,595	100%
	Panel Representatives	1	130	130	100%
	FDO Staff & Private CJA	25	2,400	1,996	83%
	Death Penalty	14	1,203	1,203	100%
	<b>Total</b>	<b>49</b>	<b>5,328</b>	<b>4,924</b>	<b>92%</b>
2020	Defender Staff Programs	4	365	365	100%
	Panel Representatives	1	139	139	100%
	FDO Staff & Private CJA	37	10,070	1,021	10%
	Death Penalty	11	1,809	747	41%
	<b>Total</b>	<b>53</b>	<b>12,383</b>	<b>2,272</b>	<b>18%</b>
2021	Defender Staff Programs	6	535	0	0%
	Panel Representatives	1	125	0	0%
	FDO Staff & Private CJA	39	12,452	0	0%
	Death Penalty	35	6,088	0	0%
	<b>Total</b>	<b>81</b>	<b>19,200</b>	<b>0</b>	<b>0%</b>

Note: This information comes from schedules of events for each fiscal year, provided by DSO. Each year's schedule can also be found in the materials for the DSC meeting. Attendance for the combined Federal Defender and Panel Representative Conference held in FY 2021 was divided evenly between the two groups.

1639. The information for FY 2022 was, as of this analysis, incomplete, but the trend shows continued use of the virtual training format. In-person programs resumed in March 2022, nearly halfway through the fiscal year, and the majority of programs planned for the remainder of the year were virtual.

1640. In FY 2022, the audience for virtual events was trending down, likely the result of the resumption of in-person work, including in-person court appearances. Though the first half of FY 2021 saw nearly 13,000 people attending events, by the second half attendance was down to nearly 7,000, and the first half of FY 2022 also shows 7,000 attendees. The number of attendees for the (largely) virtual programming was higher than attendance for prior years (both virtual and in person), but the downward trend likely indicates that attendance numbers were returning to prepandemic levels as people returned to their other responsibilities, which often inhibited their ability to attend training.



Table 2 demonstrates that, in FY 2020, DSO more than doubled the size of its audience relative to FY 2017.<sup>1641</sup> The increase was the result of online offerings. The percentage of in-person attendance fell from a high of 92% in FY 2019 to 18% in FY 2020—a marked change resulting from the pandemic. Though online training is not appropriate for all topics or all types of learners, the need to convert to an online format during the pandemic (and the increase in attorney time to attend training) had the unexpected benefit of increasing attendance. This was true even after the DSO Training Division canceled or postponed nearly half its planned programs for FY 2020.

It is worth noting that the DSO Training Division partners with FJC Education for several of the programs discussed above. Specifically, the Appellate Writing Workshop for Federal Defenders, the National Conference for Federal Defender Capital Habeas Units, the National Seminar for Federal Defenders, and the Orientation Seminar for Assistant Federal Defenders are all programs on which the DSO Training Division and FJC Education have worked together.<sup>1642</sup> Because these orientations and annual conferences occur on a semiregular schedule, and the training needs persist as new FDO staff are hired, there is little opportunity to increase the amount of training provided under the current memorandum of understanding and budget.<sup>1643</sup> These programs are well-attended, as they are both substantive (helping FDO staff stay current in their profession) and social (providing networking opportunities across offices).<sup>1644</sup> We will examine more closely the substance of the training in light of the Cardone recommendations regarding capital litigation, use of experts, and eDiscovery later in this report.

The reports used to gather information on the number of sessions offered by the DSO Training Division do not provide information on the home district of attendees, but the programs draw nationally. The absence of information about home districts limits what can be concluded about the reach of training efforts. DSO is working to collect this information in the future.

The best available information on the geographic scope of training, at least prior to the pandemic, is provided by the locations in which trainings were held. Shown below is a map of the locations in which trainings were held between the start of FY 2017 and the start of the pandemic in March 2020 (about

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1641. Attendance is an estimate of the number of people at each event (some of whom attended multiple programs), and not the total number of unique attendees across all programs (counting each person once). While the latter would be a better estimate of audience, the data are not available in such a format. Using total attendance across all events shows the maximum possible number of people attending training programs.

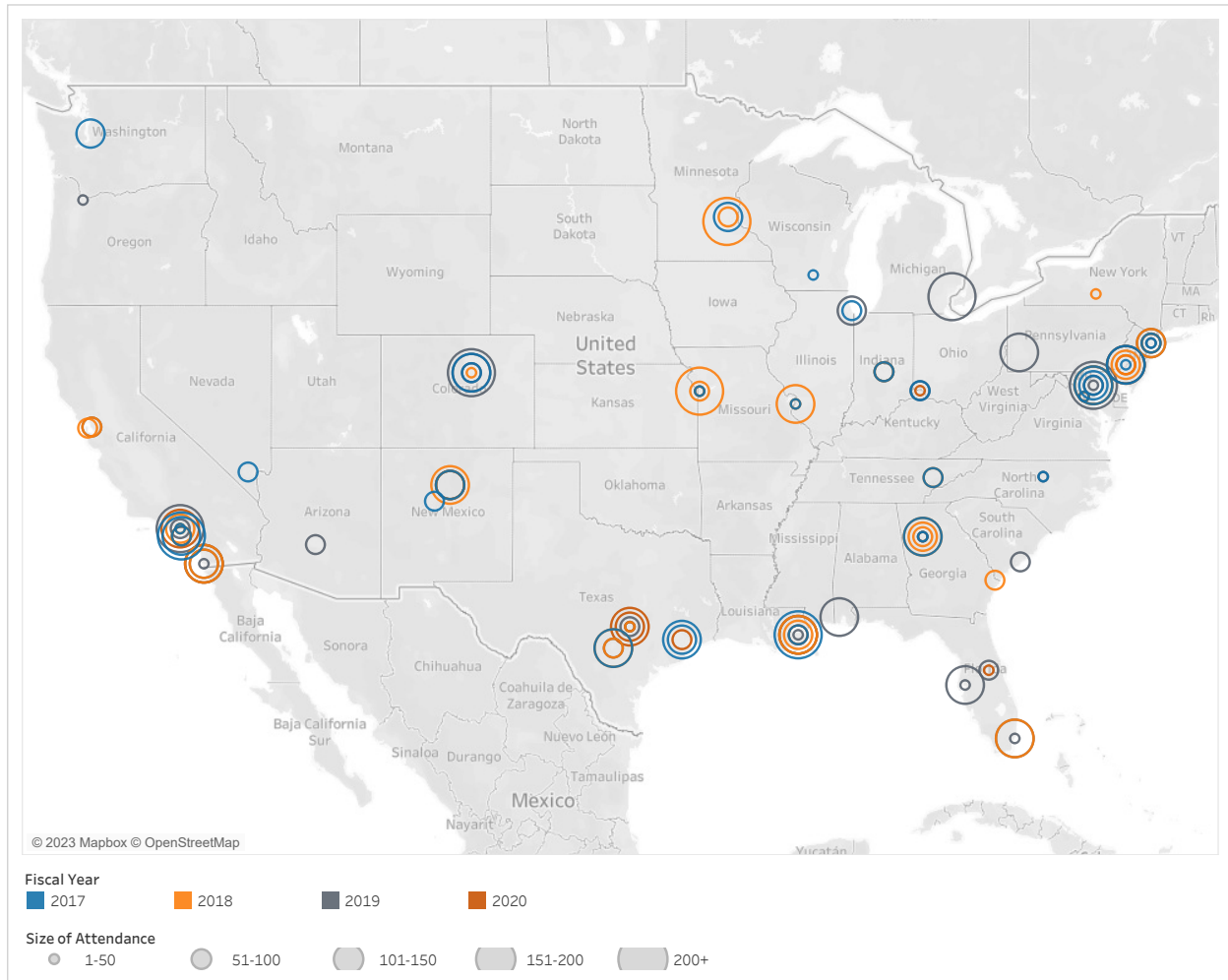
1642. The DSO and the FJC Education Division have a long-standing Memorandum of Understanding (MOU) regarding training efforts related to the defense function. Interview 59.1; Interagency Agreement, OAO 369, signed by Dana K. Chipman and Cait Clarke, Sept. 16–18, 2019, for FY 2020; and Memorandum of Understanding (MOU) and Respective Responsibilities Between the Administrative Office of the U.S. Courts and the Federal Judicial Center, Oct. 1, 2020, for FY 2021, on file with the FJC. Both the interagency agreement and the MOU detail the terms of training programs for federal defenders including the Orientation Seminar for Assistant Federal Defenders, National Advanced Seminar for Federal Defender Attorneys, Capital Habeas Unit Conference, and Appellate Writing Workshop. In addition to conferences held for federal defenders, FJC Education offers trainings relevant to the defense function more broadly. For example, since FY 2017, FJC Education held three Court Webs on defense-related issues—two regarding federal sentencing developments and one on emerging prisoners’ rights issues. The 2020 COVID-19 pandemic prompted the creation of some specific programs related to compassionate release that were open to all groups, including federal defenders but not panel attorneys. Information provided in emails from FJC staff, Nov. 24, 2020, on file with the FJC. As noted above, however, programming offered by FJC Education inside the DCN is not available to panel attorneys. *Supra* note 1630.

1643. In FY 2022, the Orientation for New Assistant Federal Defenders was held for the first time since FY 2019. Because of the halt in programming brought by the pandemic, the audience for the FY 2022 session was double the size of prior years.

1644. Appellate Writing Workshops are smaller, with typically thirty-five participants because of the hands-on nature of the training. The larger conferences are attended by hundreds of FDO staff. Not only are these programs well-regarded by the federal defenders who attend them, federal defenders are also more likely to attend these trainings than others offered because they are in person. See Attachment 1, Summary of Findings Regarding Training, 2015 DSO Program Surveys for more information.

halfway through the fiscal year). Each mark is sized by the number of people attending the training, and each color is for a separate fiscal year.<sup>1645</sup> The reach of online training far extends what is available in person; thus, the figure below is a better approximation of what the geographic reach of training was pre- rather than post-pandemic.

Figure 1. Location of DSO Training Programs, FY 2017–March 2020.



Like the number of attendees, the number of locations for training fluctuated over time, and the pandemic significantly reduced the number of training locations in FY 2020. The number of states in which trainings were held declined from a high of twenty-three in FY 2017 to nineteen in FY 2019, the last full year before the pandemic. As the map shows, training locations tend to cluster in certain areas, such as population centers or transportation hubs. They are also limited by the consideration of available meeting space. The map highlights the distances some panel attorneys must travel to attend in-person trainings, a task made more burdensome because they are unable to bill hours when they attend.<sup>1646</sup> Though

1645. In-person training returned in FY 2022; the two programs held as of April 2022 were in locations already included in the map (Long Beach, Cal., and Santa Fe, N.M.).

1646. In some limited circumstances, panel attorneys can bill for time spent working on a case during a workshop or consultation, but these limited circumstances do not represent most training programs offered. As Attachment 1, Summary of Findings Regarding Training, 2015 DSO Program Surveys notes, both the distance and cost of travel to training were cited by district panel representatives and panel attorneys as obstacles to attendance in the 2015 program surveys.

hybrid trainings are expensive and do not provide the same learning experience as training using a single format, they would allow for an in-person experience for those who were able to attend while providing an online option to those for whom travel and time costs prohibited attendance in person.

The Cardone training recommendations were not only about expanding offerings but also about specific substantive training needs of the defender program. Increased training on capital litigation, eDiscovery, and use of experts in criminal litigation were included in the recommendations. As detailed above, the DSO Training Division uses four categories to classify its programs. But the four categories generally highlight who is being trained and not necessarily the substance of the training offered. The need for eDiscovery training would cut across FDO staff and panel attorneys and would likely be offered to both groups, either in separate or combined sessions.

The exceptions are training programs related to capital litigation. A DSO Training Division category, capital litigation is available to FDO staff and panel attorneys who work in this area. Because this is a substantive category, we could identify both the number of offerings and the size of attendance with existing data. For all other categories, however, we sought additional information about the substance of training from the DSO Training Division and National Litigation Support Team (NLST) staff.<sup>1647</sup> Specifically, we asked them to identify trainings related to eDiscovery and use of experts and to provide information on the number of attendees and the locations of trainings (discussed above).

In analyzing this information, we first look at the number of DSO programs reported above in which NLST participated. Of the 279 DSO programs held between FY 2017 and FY 2021, NLST participated in thirty-six of them, holding at least one session at the event. The number of DSO programs in which NLST participated varied from year to year, as Table 3 demonstrates.

**Table 3.** DSO Programs with NLST Participation.

Fiscal Year	Total Events Held	Total Attendance	Events with NLST Participation	Percentage of Events	Total Attendance at Events with NLST	Percentage of Attendance
2017	45	5,462	8	18%	1,230	23%
2018	51	6,560	10	20%	1,660	25%
2019	49	5,328	10	20%	1,530	29%
2020	53	12,483	7	14%	1,810	14%
2021	81	19,200	1	1%	193	1%

<sup>1647</sup> NLST provides education, training, technology, and resources for CJA panel attorneys and FDO team members to help them develop strategies to efficiently manage and review eDiscovery and to effectively use litigation support technology. Through seminar presentations and hands-on workshops, NLST provides substantive training on eDiscovery review strategies and practices, tools to help attorneys manage and review discovery, as well as targeted training on specific case tools. Programs are offered for both FDO staff and panel attorneys and their staff, frequently in separate sessions for each group. NLST trainings are held both nationally and locally, in person and online. The two types of eDiscovery training offered by NLST differ. Seminar presentations offered to large groups cover general information about eDiscovery and available case tools. Workshops involve hands-on instruction to teach how to use specific case tools and implement eDiscovery search and review strategies. As the NLST administrator said, “We need hands-on programs, where people use the technology in similar ways they do their cases, or when possible, in their own cases. Sitting in a presentation or two on technology will not do the trick” to properly train defense attorneys. See Cardone Report, at 232–233. Recommendation 21 seems to focus on hands-on workshop trainings, which were more challenging to conduct during the pandemic. The work of NLST will be explored in more detail elsewhere, including information gleaned from interviews with NLST staff. Information on the substance of DSO Training Division programs (other than capital litigation, which is already categorized) was provided by DSO Training Division and NLST staff. Email from DSO staff, Jan. 8, 2021, re: FJC Study—information on local and national trainings FY 2017–present. On file with FJC.

The number of people attending trainings at which NLST participated increased between FY 2017 and FY 2020 but declined in FY 2021, likely the result of a change in data collection methods.<sup>1648</sup> The number of programs in which NLST participated increased from FY 2017 to FY 2018, consistent with the adopted recommendation, but the pandemic appears to have stalled any further increase.<sup>1649</sup> As a percentage of total attendance, the share of the audience reached by NLST fell in FY 2020. The drop is likely due to the increase in online offerings, which increased the number of attendees across all types of programs, not just eDiscovery training. NLST events held online in FY 2020 had the largest total attendance of all of its programs. Due to the challenges in data collection, we cannot reach definitive conclusions about the changes in training on eDiscovery. Still, we do find some evidence for an increase in offerings and participation at these programs until FY 2021.<sup>1650</sup>

In addition to the programs in which NLST participated, we asked DSO to provide information on the substance of their programs, in order to identify trainings in which the use of experts was discussed. Reported below are the number of and attendance for programs held each fiscal year with at least one session covering use of experts.

**Table 4.** DSO Programs, Including Use of Expert Training.

Fiscal Year	Total Events Held	Total Attendance	Events Discussing Use of Experts	Percentage of Events	Total Attendance at Events on Experts	Percentage of Attendance
2017	45	5,462	5	11%	650	12%
2018	51	6,560	4	8%	920	14%
2019	49	5,328	3	6%	470	9%
2020	53	12,483	4	8%	887	7%
2021	81	19,200	22	28%	6,473	34%

Program offerings on the use of experts ranged between 6% and 28% of all programs offered during this period. Between FY 2019 and FY 2020, attendance more than doubled. By FY 2021, attendance for events discussing use of experts as well as the frequency of those events was a larger percentage of the totals than in prior years. This increase occurred despite cancellation or conversion to online programs for events that were typically held in person. Overall, DSO found ways to integrate discussion of use of experts into several webinars, including the ones recently held on mental health. As Table 4 shows, training on use of experts expanded during this period of study.

1648. NLST reported participating in nineteen training events in FY 2021, eleven of which were national events. Only one of the eleven events on the NLST report was included in the DSO Schedule of Training Events (the source for the above data). A newer source of data on training, reported by FDOs through DSMIS, found FDOs reporting staff participation at all eleven NLST-reported events. Because the Schedule of Events is the source of information going back to FY 2017, we rely on it for this analysis, but we recognize that for FY 2021 this source likely underreports events and attendance for training on eDiscovery.

1649. Though the increase in access to such training may not be *because of* Cardone, the continued increase in access *since* Cardone is consistent with implementation of the interim recommendations.

1650. The increase in training offerings began well before the Cardone Report, prompted by changes external to both that report and this evaluation. As more data got stored electronically and discovery became more pronounced, attorneys sought more access to such training. Even as far back as 2015, attorneys were reporting a need for more training on eDiscovery. See Michele A. Harmon, Amy Dezember, and Carol A. Hagen, 2015 Survey of Federal Defenders and CJA Resource Counsel (Final Report), Dec. 1, 2015, p. B-42 reporting that 71% of respondents had expressed a need for more training on technology; Michele A. Harmon, Amy Dezember, and Carol A. Hagen, 2015 Survey of Criminal Judge Act Panel Attorney District Representatives and Individual Panel Attorneys (Final Report), Dec. 1, 2015, p. 67, reporting that 22.5% of panel attorneys said increased training on the use of technology for discovery/document management would improve their performance.

The pandemic also affected training on capital and capital habeas litigation. For FY 2020, twenty capital litigation training programs were originally planned, but only eleven were actually held. The increase to thirty-five programs in 2021 is notable because it was an increase not only in the number of capital litigation events but also in the percentage of such events among the total programs held. Table 5 shows that both the number of events and attendance at capital litigation programs fluctuated prior to FY 2020, fell during the pandemic, and rose again in FY 2021.

**Table 5. DSO Programs, Including Capital Litigation.**

Fiscal Year	Total Events Held	Total Attendance	Capital Litigation Events	Percentage of Events	Total Attendance at Capital Events	Percentage of Attendance
2017	45	5,462	13	29%	1,126	21%
2018	51	6,560	13	25%	894	14%
2019	49	5,328	14	29%	1,203	23%
2020	53	12,483	11	21%	1,809	14%
2021	81	19,200	35	43%	6,088	32%

In answering the question of whether DSO training programs have increased since adoption of the Cardone Report recommendations, we find too many confounding factors to reach firm conclusions at this time. Overall, the pivot in training from in person to online in light of the pandemic required some reimagining of training to fit a different platform. Also, the modification of existing programs took time and resources away from what could be offered and what was planned. The movement to online offerings increased overall attendance nonetheless, showing that more attorneys have been exposed to information on the use of experts and capital litigation but not necessarily on eDiscovery. But these trends occurred when no in-person training was available. Whether they will continue as training programs move back to in-person or hybrid formats remains to be seen.

### **Local Training Reports**

FDOs provide information on local training events sponsored or hosted by the FDO each fiscal year to the DSO Training Division.<sup>1651</sup> These individual reports are aggregated and provided to the DSC along with information on events hosted by the DSO Training Division, discussed above. Training provided by the FJC for newly appointed federal defenders is considered later. Here we focus on local training efforts sponsored by the local FDO for staff, panel attorneys, and others. Trainings available through state and local bar associations, private vendors, and other sources are beyond the scope of this analysis.

To examine local training, we disaggregated the DSO local training reports from FY 2017 through FY 2020 and sent the information back to local FDOs for clarification, correction, or confirmation of the events reported.<sup>1652</sup> Included in the reports was information about subject matter, attendance (by type

1651. Initially, the data were provided to DSO through an Excel form the FDO completed. Beginning in mid-2020, FDOs began reporting the information through DSMIS. All FDOs reported through DSMIS in 2021.

1652. FDO staff were extraordinarily helpful in verifying the information. We are grateful for the time they took to assist this project.

of attendee), and event dates. Also reported here are other educational resources provided by the FDO (webpages, newsletters, etc.).<sup>1653</sup>

All FDOs received a spreadsheet of their reported local events, as well as any information about local training provided by NLST.<sup>1654</sup> In addition to confirming the data and correcting any errors or omissions, we also asked the FDOs if the programs listed included information regarding eDiscovery, capital litigation, or use of expert services. All FDOs reported back with either supplemented data or confirming that what we sent was correct, at least to the best of their knowledge.<sup>1655</sup>

These efforts at data collection and quality control are important for two reasons. First, as detailed in the Attachment, FDOs saw staff turnover that resulted in lost information about past training programs (substance, dates, or attendance). Given that we were asking about events that occurred over four years ago, the data loss is not surprising but worth noting, nonetheless. The second reason is that we were asking for information about training programs that was not collected at the time of the program. Some programs did not include sign-in sheets, so attendance numbers were not recorded. Other programs had missing agendas and so there was no way to recall (many years after the program was held) if specific substantive areas were discussed.

Instead of eliminating events with missing details, we focus on data that can be reliably reported, such as the total number of programs held (both unique programs and total counts of programs, including those held multiple times) while coding details about those trainings conservatively. For example, we report that the three topics from the Cardone Report recommendations were not covered unless the FDO confirmed (or the program name suggested) that the topic was discussed. We treated attendance information as missing if the FDO was unable to provide information. For programs with missing dates, we report the program occurred once in the fiscal year, unless the report specified otherwise (e.g., listing cities where the program was held but not specific dates).

Because information is missing for a variety of reasons, what is reported below is a minimum of training programs offered by local FDOs. By FY 2021, the information was collected through DSMIS, which allowed for contemporaneous data collection and review. This significantly reduced the potential for errors, eliminating the need to ask FDOs to review their reports. This format, however, did not include information on training format (in person or online) and content (experts, eDiscovery, or capital) for FY 2021. The last fiscal year of data is, therefore, left out of the discussion of trends after general discussion of the aggregate participation.

Across the FDOs, 3,187 unique programs were held across the districts during this five-year period. The number of programs offered varied by fiscal year as did the number of sessions (when the same program was repeated on another day or for another audience). Figure 2 below shows the number of programs and the total number of sessions offered across these programs between FY 2017 and FY 2021.<sup>1656</sup> Programs and sessions could be live and in person, live and simulcast to other offices or divisions, online-only webinars, or prerecorded programs. All program formats are reported below.

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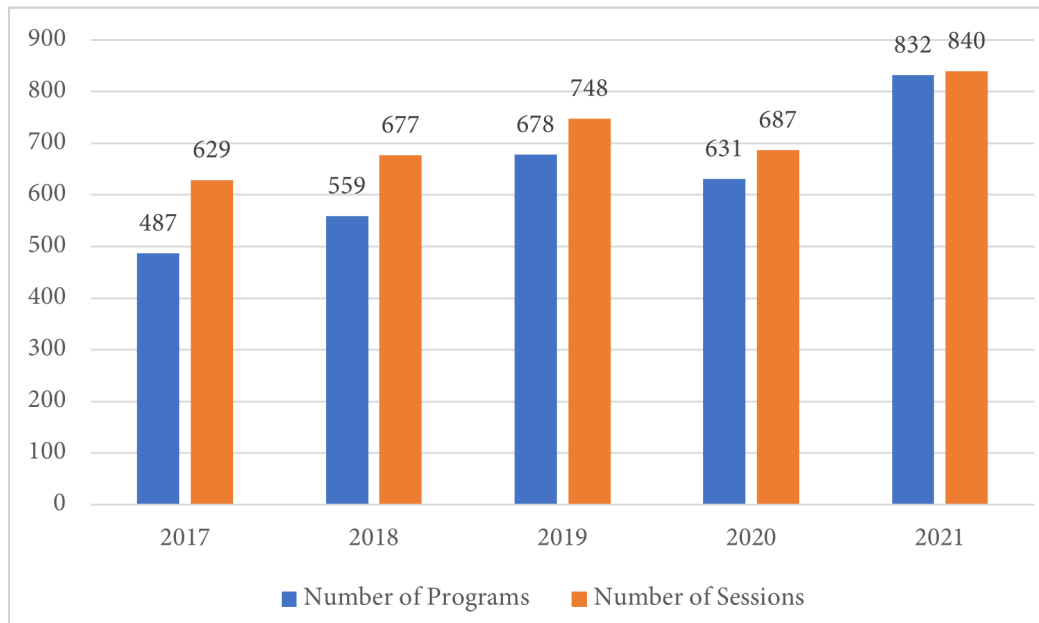
1653. Because other educational resources only need to be reported once for the fiscal year (yes/no for that fiscal year), we separate that information from the information on programs of which there may be many events each year. When we examined the confirmed information, we became concerned about data reliability. It would be odd, for example, for an FDO to invest in the creation of a webpage only to discontinue it the next fiscal year, and then again to spend more resources for it in the following year.

1654. Where the NLST training list and the confirmed local training list conflicted, we excluded the program from the count. Though NLST may have held a training, the local FDO did not have a record of the event. Until the discrepancies can be resolved, we excluded the event because of the conflicting pieces of information and to provide a conservative estimate of training.

1655. Two FDOs reported that no FDO-sponsored trainings were held in the district in this four-year period. Other FDOs did not have events for all four years.

1656. Of the 2,355 programs provided by FDOs, twenty-two were missing information on exact dates of events. For one, the FDO was unable to provide an approximate number of brown-bag lunches held during the fiscal year.

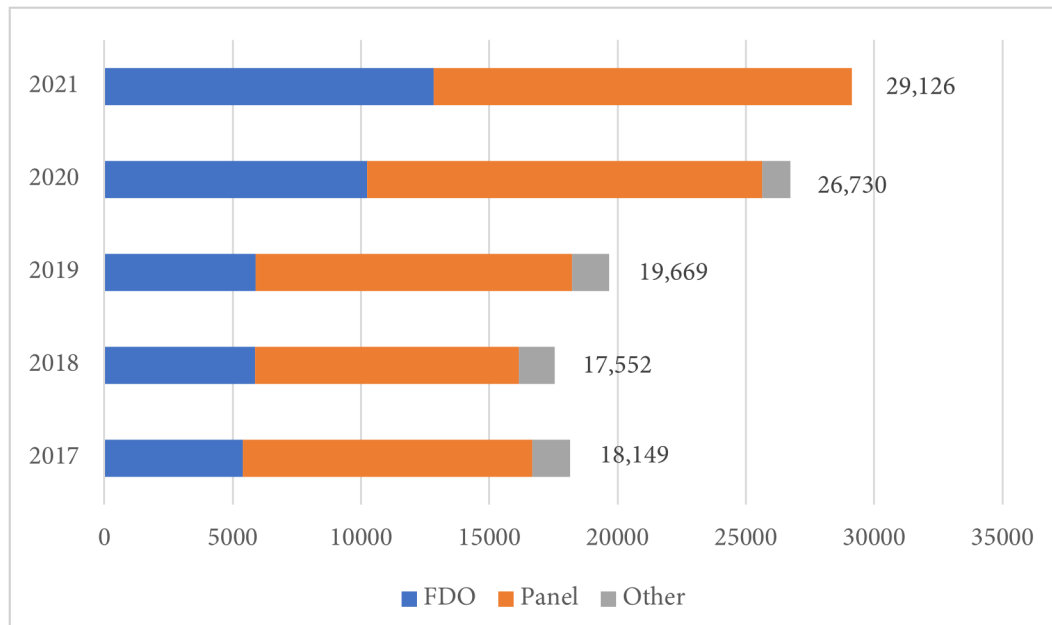
Figure 2. Local Training Programs and Sessions, FY 2017 through FY 2021.



The number of unique programs generally increased between FY 2017 and FY 2019. There was a slight decline in FY 2020, likely the result of the pandemic, but it rose again in FY 2021. The same pattern is shown for the number of sessions.

Like the number of events, attendance also changed over the years. FDOs reported attendance for FDO staff, panel attorneys, and “other attendees,” where such information was available. We summed across categories of attendees to estimate total attendance each fiscal year (labeled at the end of each bar). Figure 3 shows attendance by type of attendee for each fiscal year.<sup>1657</sup>

1657. Of the 2,355 programs provided by the FDOs, 207 were missing information on attendance.

**Figure 3.** Attendance by Type of Attendee (Total Attendance) at Local Training Programs, FY 2017 through FY 2021.

The audience for local training events was generally larger for panel attorneys than FDO staff, which is unsurprising given that panel attorneys are also a much larger group. Other attendees (often criminal litigators in the district who were not on the CJA panel) made up a small percentage of attendees at local training events.

Despite the COVID-19 pandemic, and the resulting cancellation or postponement of many in-person training events, local FDO training programs saw greater attendance in FY 2020 than in any prior fiscal year. In part, the increased attendance may have been because of the pandemic. With the pivot to online training and the delay in in-court proceedings, training was both easier to access and something attorneys could do while confined to their houses. Moreover, the training offered the opportunity to stay current on both the impact of the pandemic on court procedures specifically and changes in criminal litigation generally. Though online training may not be appropriate for all types of learners and content, continued online training may help increase access for some programs in the future, especially given the widespread familiarity with online formats since the pandemic.

In fact, looking at the percentage of programs offered that were virtual confirms that most attendees were participating in training on an online platform. Though local programs were in person between 89% and 95% of the time in prior years, that percentage dropped to 71% in FY 2020. Moreover, local FDOs did not move to prerecorded content during the same period (all fiscal years saw between 2% and 3% of programs prerecorded). Live programming, even on a virtual platform, was still the preferred format and was attended more in FY 2020 than it had been previously. In fact, though past years saw between 3% and 8% of the total audience at virtual events, in FY 2020, 27% percent of the total audience attended a virtual event.

Information provided by local FDOs highlights the frequency with which local training may focus on the areas of eDiscovery, capital litigation, or expert service providers. Though what is reported below are specific programs addressing these topics, many FDOs reported that these topics were covered to some degree in regularly held programs such as orientations for new attorneys (FDO or panel) or annual seminars. Unless the FDO reported the topic being covered at the specific event, we do not report it as such. Table 6 shows the percentage of programs covering the three topics for each fiscal year.



**Table 6.** Percentage of Local Training Programs on Topic, by Fiscal Year.

Fiscal Year	eDiscovery	Capital/ Capital Habeas	Expert Services
2017	7%	7%	6%
2018	4%	7%	5%
2019	3%	8%	7%
2020	6%	6%	6%

Note: This information is not collected in DSMIS, which is the source for reporting local FDO trainings in FY 2021.

As shown by Table 6, few local programs exclusively addressed the training topics called for by the adopted recommendations, nor did the amount of training in these areas change over time. Given the time and resources to create training programs and other educational content, it is perhaps not surprising that these topics were infrequently covered in the early years of our study period. The lack of programming on these topics in more recent years suggests that implementing the adopted recommendations regarding training content has been somewhat difficult for local FDOs. However, as Tables 3–5 above show, attendance across these programs has increased. Though local FDOs have not been able to offer more training (as a percentage overall) they have reached more people with existing training.

Lastly, our examination of district CJA plans found several requirements for training. It is possible that the number of programs and the level of attendance at local trainings is tied to these requirements. Where training is required for panel memberships, or where FDOs have an obligation to provide training or assessing training needs, more training may be offered and more attorneys may attend. We examined both the number of sessions and the number of attendees relative to the training responsibilities of FDOs but found no relationships that were statistically significant.

### Online Resources

FD.org serves as a final source of information and educational materials for federal defenders and panel attorneys. This curated resource includes material available through DSO Training Division programs and other sources to assist attorneys litigating in federal criminal court. Though the 2015 program surveys did not show a substantial reach for FD.org (23% of panel attorneys reporting use of FD.org resources very often or often), the audience has expanded.

On December 17, 2017, DSO began tracking hits to FD.org.<sup>1658</sup> The information, from a third-party provider, shows the amount of traffic the online training resource receives each year. Given below are the results of this data.

**Table 7.** Pageview for Online Resources, Since FY 2017.

Pageviews	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
	No data	576,387	733,173	798,431	814,004

As Table 7 shows, the total traffic to FD.org has increased over time. In fact, for FY 2021, FD.org exceeded the number of pageviews from prior years, reaching the highest hits since the site began measuring

<sup>1658</sup> Email from DSO staff, Mar. 20, 2021, re FJC Study—FD.org hit numbers, FY–present, on file with the FJC. Updated year provided in email from Sept. 15, 2022.

traffic. Though the available information does not capture what types of users are accessing which resources or for how long, the increase in web traffic generally suggests greater exposure to the available resources.

### Training Funding

Increasing training to implement the Cardone Report recommendations may require additional funding. In the spending plan, money approved for training is reported by DSO.<sup>1659</sup> Table 8 below shows the approved funding since FY 2017 by broad category.<sup>1660</sup>

**Table 8.** Spending Plan Training Funding Amount, Since FY 2017.

Program	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
CJA Admin	\$2,320,000	\$3,288,200	\$3,379,400	\$4,459,700	\$4,204,100
CJA FPDO	\$427,000	\$1,383,400	\$1,547,600	\$380,400	\$74,900
<b>Grand Total</b>	<b>\$2,747,000</b>	<b>\$4,671,600</b>	<b>\$4,927,000</b>	<b>\$4,840,100</b>	<b>\$4,279,000</b>

As Table 8 shows, the amount of money authorized for training has increased over time.<sup>1661</sup> Approved funding increased by over \$2 million between FY 2017 and FY 2020 and remained above \$4 million in FY 2021. Due to increases in costs (*see below*), increases in funding are necessary to provide the same level of training year after year. Even after accounting for inflation, funding has increased in recent years (cost adjustment alone would be only about \$500,000 between FY 2017 and FY 2020).

Though local training reports identify trainings sponsored by FDOs, they do not provide information on the costs associated with local trainings, which comes from two sources. Funds spent by DSO to support local training, including travel by DSO staff to serve as faculty at local training, are reported in the UD5 Report. Funds spent locally by FDOs are reported in the Finance and Budgeting Reports. Money allocated for training-related activities generally fall into three Budget Object Codes (BOCs): travel related to training (2125), rental space for training (2543), and training supplies (2603). Additionally, BOC 3112 is used to allocate funds for participant registration software.<sup>1662</sup> DSO also purchases law books for training, such as copies of the Sentencing Guidelines for panel attorneys. Where available, these costs are reported as well.

Local FDO training budgets for each fiscal year are estimated using the prior year's actual expenditures adjusted for inflation and any increase in FTE. These funds are used to send staff to trainings such as national programs, as well as to sponsor local training programs. From FY 2017 through FY 2019, FDOs were given a training allowance to cover training expenses, which each FDO could increase as much as 15% with notification to the DSO Training Division chief. Increases greater than 15% could be requested but had to be approved by the chief in consultation with the DSC Training Subcommittee chair.

1659. The spending plan shows the money available for DSO and its programs after DSO's estimate of program needs is modified by the DSC, the Budget Committee, Congress, and the Executive Committee. *See Appendix A: Defender Services Budgeting and Funding Process* for more detail.

1660. Source: ODS Plans FY 2017 through FY 2021, on file with the FJC. Information provided by DSO staff. BOCs 2125, 2543, and 2603 are included in the table. Reports numbers run for the first week in October, except FY 2021 where the report was run on July 25, 2022.

1661. Unspent funds become part of the carryforward that finances the DSO account. FDO funding lapses during the current year or supplemental allotments can create additional funds available for training. Thus, in some years, funds obligated can be greater than funds approved.

1662. Only allocations under BOC 3112 for UD5 reporting User ODS-R60 are included below.

Beginning in FY 2021, the DSC approved the addition of a new budget category for training comprising the three BOCs above. In addition, the DSC directed that FDOs could no longer reprogram funds out of that training budget category without DSO's advance approval.<sup>1663</sup> The purpose of this change was to set the training budget as a "floor" for training funding and not a ceiling. As a result, FDOs may add funds to the training budget but may not remove funds without DSO approval. The data do not differentiate funds spent to send FDO staff to trainings (possibly out of district) from those spent to sponsor local trainings (typically available to panel attorneys as well). Apart from money specifically allocated to the FDOs for training (including supplemental funding requested by the FDO), the only other available source of funding for training was lapsed funds in the office.

Using the above sources of information, we can derive the total obligation for training by each FDO since FY 2017.<sup>1664</sup>

**Table 9.** Summary of FDO Training Obligations by BOC, Since FY 2017.

Fiscal Year	Training-Related Travel (2125)	Rental Space & Training Supplies (2543 & 2603)	Total
2017	\$4,014,720	\$729,883	\$4,744,603
2018	\$4,113,472	\$872,362	\$4,985,834
2019	\$4,114,265	\$759,768	\$4,874,033
2020	\$1,393,150	\$575,522	\$1,968,672
2021	N/A	N/A	\$1,067,242

Note: Beginning in FY 2021 a new BOC was created for "Training" that combines all three prior BOCs. These categories are no longer disaggregated, so only total amounts are reported.

Looking just at the three BOCs most closely related to training, there does not appear to be more money obligated for training now than in prior years. Even leaving out the pandemic years of 2020 and 2021, the three prior years do not show an increasing trend for training obligations by local FDOs, whether for sending staff to trainings or sponsoring local trainings.

Using the UD5 reports, we identified DSO-held budgeted funds in the same BOCs as well as the DSO-held funds to support local training, including travel by DSO staff to serve as faculty. Table 10 shows the DSO-held funds for the training BOCs (plus the funds used to manage the training registration software),<sup>1665</sup> and Table 11 shows the total line item for each year in the spending plan to support local training.<sup>1666</sup> It should be noted that some categories appear across both tables.

1663. The change in policy regarding reprogramming training funds was part of a larger effort to encourage more training for FDOs, both local and national.

1664. From the Finance and Budget Report FY 2016 through FY 2020 Training BOCs only. This can be broken down by local FDOs for our analysis. The UD5 report includes the DSO-spent funds on training, including local training.

1665. This table reports money budgeted for national programs and for supporting local training. The spending plan information reports budgets, not actual obligations.

1666. UD5 report line item ODS-P9, one for each fiscal year, used October numbers. November numbers are generally the same for the spending plan totals but show different actuals. The amount of money remaining at the end of the fiscal year can be substantial (approximately 26% of the total spending plan, or between 1% and 51% for the individual allocations for BOCs 2125, 2543, 2603, and 3112 in FY 2018).

**Table 10.** DSO Spending Plan by Training BOC, All Line Items, Since FY 2017.

Fiscal Year	Training-Related Travel (2125)	Rental Space (2543)	Training Supplies (2603)	Training Software (3112)	Total
2017	\$1,553,500	\$1,188,500	\$5,000	\$50,900	\$2,797,900
2018	\$3,269,200	\$1,397,400	\$5,000	\$51,900	\$4,723,500
2019	\$3,417,000	\$1,505,000	\$5,000	\$51,900	\$4,978,900
2020	\$3,553,200	\$1,281,800	\$5,100	\$52,900	\$4,893,000
2021	\$3,073,500	\$1,195,200	\$10,300	\$175,400	\$4,454,400

The spending plans between FY 2017 and FY 2020 show an increase in training funds for DSO, especially when comparing the beginning of the period to the end (an increase of over \$2 million between 2017 and 2020). Much of the increase is related to travel to meet the increased costs.<sup>1667</sup>

The DSO spending plan also includes a line item for local training support. Table 11 reports the total line item as well as the amounts allocated by BOC.<sup>1668</sup>

**Table 11.** DSO Spending Plan, Local Training Support Line Item, Since FY 2017.

Fiscal Year	Training-Related Travel (2125)	Rental Services Not Otherwise Classified (2359) <sup>1669</sup>	Rental Space (2543)	Total
2017	\$41,000	\$6,000	\$19,900	\$66,900
2018	\$48,300	\$6,000	\$21,000	\$75,300
2019	\$50,600	\$6,000	\$16,000	\$72,600
2020	\$36,600	\$0	\$6,300	\$42,900
2021	\$37,300	\$0	\$6,900	\$44,200

Though the funding available in the DSO spending plan increased over time, the spending plans do not reflect a sustained increase in funds to support local training. Leaving aside the pandemic years, comparing 2017 and 2019 shows local training support funds increased by \$5,700. However, there was also a decline in funds between 2018 and 2019. It is worth noting that, given the changes in training brought by the pandemic (including a move to more expensive hybrid formats), past spending plans may not be the best predictors of future training needs.

Looking at the spending plan also allows us to determine the total spending plan allocation by DSO for miscellaneous spending across all training BOCs (not just the three main categories reported above). Table 12 reports the total amounts in the UD5 report.<sup>1670</sup>

1667. The AO Procurement Management Division began requiring DSO to pay for FPDO lodging costs centrally, which raised BOC 2125 expenditures at the national level while decreasing them at the local level. This change may also have resulted in increased travel costs during this period.

1668. This amount includes spending in three BOCs: 2125, 2359, 2543, summed for each fiscal year in the ODS-P9 local training line.

1669. This category reports the costs of AV rental equipment from hotels.

1670. The information reported here is from CJAADMIN UD5 ODS-N1A line item in the individual spending plan reports. BOCs included are Courier, Deliver and Misc. Transportation 2209; Printing—Forms, Stationery, Publications, and Other 2403; Training Services and Enrollment 2543; Other Contractual Services/Other Services Not Otherwise Classified 2559; Training-Related Supplies 2603; Office Automation Supplies 2606; and Legal Resources 3121. BOC 3121 is used for new book purchases.

**Table 12.** DSO Training Division Spending Plan Funding for Miscellaneous Training, All BOCs, Since FY 2017.

Fiscal Year	Total Line Item
2017	\$84,000
2018	\$84,000
2019	\$84,000
2020	\$85,700
2021	\$139,500

Note: The total line item in support of local training shows a large increase in FY 2021.

As detailed in the spending plans reported to DSC, funding for DSO-sponsored events has increased steadily since FY17, especially with respect to travel costs for DSO staff to attend and present at training events. Though the overall funding for national training programs increased, local budgets did not.<sup>1671</sup> Neither the money within the DSO to support local training nor the local training obligations themselves showed increases in funding for local programs.

### ***FJC Training for Federal Defenders***

One final source of training, discussed in the adopted recommendations and available to attorneys in FDOs, is that provided by FJC Education. As noted above, DSO partners with FJC Education to host training events, including orientation programs for newly appointed federal defenders, national seminars for defenders, appellate writing workshops, and national CHU conferences.

Similar to the programming created for judges, content for defender programs is developed with the input of a planning committee. The planning committee includes members from the DSO Training Division (who sit ex-officio), members of the Defender Services Advisory Group (DSAG), and other defenders.<sup>1672</sup>

Each of these programs is offered no more than once per year, and attendance varies year to year. Some programming (for both judges and defenders) planned for 2020 and 2021 was canceled due to the pandemic.<sup>1673</sup> In-person programming was not renewed for two years. The FJC Annual Report provides information on program offerings and their attendance each year.

1671. As noted above, the AO Procurement Management Division began requiring DSO to pay for FPDO lodging costs centrally, which raised BOC 2125 expenditures at the national level while decreasing them at the local level. As actuals decrease, the funding allotted to FDOs in the training allowance or in the training category (depending on fiscal year) also decreases.

1672. Interview 173.1.

1673. See, e.g., <https://fjc.dcn/content/360596/canceled-orientation-seminar-assistant-federal-defenders>, last accessed Apr. 26, 2023.

**Table 13.** FJC Education Division Offerings for Federal Defenders.

Fiscal Year	Metric	Defender Orientation	National Seminar	Appellate Writing	CHU Conference
2017	No. Programs	1	1	1	1
	Attendance	111	550	47	166
2018	No. Programs	1	1	1	1
	Attendance	111	550	47	166
2019	No. Programs	1	1	0	1
	Attendance	155	339	0	136
2020	No. Programs	0	0	1	0
	Attendance	0	0	35	0
2021	No. Programs	0	0	0	0
	Attendance	0	0	0	0

Table 13 indicates that training for federal defenders, either in the number of programs or attendance, did not change after publication of the Cardone Report.

Though the number of programs and the audience may not have changed, the content of the programming evolved to include information specific to the Cardone Report recommendations. While the last in-person meeting in February 2020 did not include material related to the recommendations,<sup>1674</sup> when in-person programming resumed in March 2022, topics included in the recommendations were covered more frequently. For example, the conference for CHU staff (attorneys, paralegals, and investigators) included content on mitigation and mental health issues.<sup>1675</sup> Other programming included information for defenders on eDiscovery.<sup>1676</sup> A May 2022 national seminar for federal defenders included a presentation from the National Litigation Support Team on eDiscovery and a session on mitigation.<sup>1677</sup> A November 2022 orientation program for defenders included information both on use of experts and eDiscovery.<sup>1678</sup>

In addition to the annual trainings held for FDO staff, FJC Education also sponsored several other trainings related to criminal litigation, all of which were open to FDO staff (numbers of FDO staff in attendance are not available). FJC Education held three Court Webs on defense-related issues including two about changes in federal sentencing and one on emerging prisoners' rights issues in civil litigation. The 2020 COVID-19 pandemic prompted the creation of some specific programs related to compassionate release that were open to all groups including federal defenders but not panel attorneys. Relatedly, the *Criminal eDiscovery Pocket Guide* is available to federal defenders as well.

No new educational resources related to the issues of eDiscovery, capital litigation, or use of experts was provided for attorneys by FJC Education after 2017. DSO and FJC Education have not discussed developing new material for federal defenders, though FJC Education feels moving to a competencies-based education program would benefit the defense function and could inform the development of best practices for the defense function consistent with the Cardone Report recommendations.<sup>1679</sup>

1674. See <https://fjc.dcn/content/344081/appellate-writing-workshop-federal-defenders>, last accessed Feb. 3, 2023.

1675. Interview 100.1.

1676. *Id.*

1677. See <https://fjc.dcn/content/367611/national-seminar-federal-defenders>, last accessed Feb. 3, 2023.

1678. See <https://fjc.dcn/content/370858/orientation-seminar-assistant-federal-defenders>, last accessed Feb. 3, 2023.

1679. FJC Staff email, Aug. 9, 2022. On file with FJC.

## Conclusion

The Cardone Report recommendations generally called for increases in training for attorneys. Included in the recommendations were calls for allocating more FDO resources to assist training, amending CJA plans to require training to serve on CJA panels, and increasing training on use of expert services, eDiscovery, and capital litigation. Using a variety of data sources, we examined changes to the number of training programs, the number of attorneys attending those programs, the content of the programs, and the budgets for such training.

Overall, we found that between FY 2017 and FY 2021, the number of training programs offered (nationally and locally) increased, as did the number of attendees. The DSO Training Division offered more training programs on use of experts and capital litigation, and more people attended those programs, as well as recent trainings on eDiscovery, though such training was less frequent. Increases in funding for training were more mixed. Though nationally the budget for training grew, neither the money within the DSO to support local training nor the local training obligations themselves showed substantial increases in funding for local programs.

Training provided in partnership with FJC Education continued to occur yearly after publication of the Cardone Report. Although the size of the audience did not increase, the content was adapted to include information related to the Cardone Report recommendations.

# Attachment 1

## Summary of Findings Regarding Training, 2015 DSO Program Surveys

In the 2015 program assessment surveys<sup>1680</sup> (administered by survey organization Westat), federal defenders, district panel representatives, and individual panel attorneys<sup>1681</sup> were asked about the training needs of attorneys appointed under the CJA.<sup>1682</sup> In addition to considering areas where attorneys might benefit from additional training, attorney groups were asked about whether they accessed existing training offerings, both locally through federal defender offices (FDOs) and nationally from the Defender Services Office Training Division (DSO Training Division). Summarized below are the findings of these surveys, which provide a baseline for understanding challenges to attorney training within the defender program.

### Federal Defenders<sup>1683</sup>

Of the eighty-one defender offices<sup>1684</sup> (serving ninety-one federal districts), seventy-six responded to the 2015 survey, though not all offices answer all questions. Questions about training covered both an assessment of the training needs of the defenders themselves as well as those of the assistant federal public defenders in the office. Initially, federal defenders were asked how often they consulted with panel attorneys to assess panel training needs. Of the seventy-four offices that completed the question, 83.7% reported they consulted panel attorneys always or often to assess their training needs.

In thinking about the training needs of the federal defender and the assistant federal defenders in the office, respondents selected areas where they felt additional training would improve the performance in the district. Reported below are the topics most frequently chosen by federal defenders.

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1680. The three survey reports are: Michele A. Harmon, Amy Dezember, and Carol A. Hagen, 2015 Survey of Criminal Judge Act Panel Attorney District Representatives and Individual Panel Attorneys (Final Report), Dec. 1, 2015 (hereinafter Panel Attorney Survey Report); Michele A. Harmon, Amy Dezember, and Carol A. Hagen, 2015 Survey of Federal Defenders and CJA Resource Counsel (Final Report), Dec. 1, 2015 (hereinafter Federal Defender Survey Report); and Michele A. Harmon, Amy Dezember, and Carol A. Hagen, 2015 Survey of Judges (Final Report), Dec. 1, 2015. Because judges were not asked about the training needs of attorneys, the information from that report is not included here.

1681. District panel representatives and individual panel attorneys were surveyed as a group using similar survey instruments. The main difference between the survey instruments was that the assessment of panel attorney training needs by the district panel representatives did not appear on the panel attorney version of the survey.

1682. Because not all questions were asked in prior surveys, and not all questions were asked in the same way across all surveys, comparison of the 2015 results with other years of surveys is only possible at the highest level, and generally is not helpful for purposes here.

1683. The information in this section was taken from Federal Defender Survey Report, Appendix B, pp. B-35 through B-88.

1684. There are currently eighty-two FDOs serving ninety-one districts. At the time of the 2015 survey, there were eighty-one FDOs.



**Table A1.** Training Needs by Frequency of Response, Federal Defender 2015 Survey Results.

Rank	Training Area	Number of Responses	Percentage of Responses (N=76)
1	Use of <b>technology</b> for discovery/document management	54	71.1%
2	Representing clients with mental health issues or other cognitive impairments	48	63.2%
3	Knowledge of immigration law	44	57.9%
4	<b>Use of experts</b>	40	52.6%
4	Use of <b>technology</b> for courtroom presentations	40	52.6%
6	Developing a mitigation case	33	43.4%
7	Motions practice	31	40.8%
8	Knowledge and application of the U.S. Sentencing Guidelines and related case law	29	38.2%
9	Legal research and writing skills	26	34.2%
9	Oral advocacy	26	34.2%

Note: Training areas that overlap with recommendations in the Cardone Report are in boldface.

When asked to rank the top three most important areas of training, federal defenders focused on use of technology for discovery and document management, representing clients with mental illness or other cognitive impairment, and developing a mitigation case. Using the same set of training areas but focusing on capital prosecutions or appeals shows a different set of training needs. In those particular areas, federal defenders highlighted training needs in death penalty substantive jurisprudence, defense advocacy in the Department of Justice death penalty authorization process, and mitigation case development. When thinking about capital habeas litigation, federal defenders reported training needs in death penalty substantive jurisprudence, knowledge, and application of federal habeas practice, and in representing clients with mental illness or other cognitive impairments.

Federal defenders were also asked to indicate their level of agreement with a statement about how well specific national training programs met the office's training needs. Using a five point, agree-disagree scale, the table below shows the number of respondents who strongly agreed or agreed that the program had met training needs. Also reported are the number of respondents who didn't know or hadn't attended such a program. The number of not applicable/don't know responses for these programs is considerable; thus, the amount of support for the programs should be interpreted with caution.

**Table A2.** National Non-Capital Program Evaluation, Federal Defender 2015 Survey Results (by frequency).

<b>DSO Program</b>	<b>Strongly Agree or Agree w/ Meeting Training Needs</b>	<b>%</b>	<b>Not Applicable/ Don't Know</b>	<b>%</b>
Orientation Seminar for New Assistant Federal Defenders & Research and Writing Specialists	68	89.5%	4	5.3%
Annual National Advanced Federal Defender Seminar	66	86.8%	2	2.6%
Law and Technology: Techniques in Electronic Case Management	61	80.3%	12	15.8%
Sentencing Advocacy Workshop	57	75.0%	12	15.8%
Annual Computer Systems Administrators Conference	53	69.7%	8	10.5%
Appellate and Persuasive Writing Workshop	53	69.7%	15	19.7%
Annual Seminar for Federal Investigators & Paralegals	52	68.4%	5	6.6%
Paralegal and Investigator Skills Workshop	47	61.8%	19	25.0%
Winning Strategies Seminar	46	60.5%	21	27.6%
Federal CJA Trial Skills Academy	44	57.9%	26	34.2%
Multi-Track Federal Criminal Defense Seminar	42	55.3%	25	32.9%
Recognizing and Confronting Mental Health Issues	31	40.8%	31	40.8%
Criminal History in Sentencing	26	34.2%	35	46.1%
Electronic Surveillance and Constitutional/ Legislative Protections	24	31.6%	38	50.0%
Financial Documents: They Are Not Just for Money Flow Anymore	19	25.0%	40	52.6%
Prosecutorial Misconduct	17	22.4%	39	51.3%

Though federal defenders consistently reported favorably that existing programs met the needs of the office, the lack of familiarity with some of the programs, especially the webinars, is somewhat troubling. It is difficult to conclude that a program meets the needs of the office when more people are unfamiliar with the content than were able to rate it.

The relative lack of familiarity with webinars might reflect defenders' preference for in-person training. When asked which types of training they found to be most effective, federal defenders tended to choose live presentations over webinars. In fact, when asked to choose the top three most effective types of training, the respondents chose the three types of live sessions over webinars or recorded seminars. The table below shows the results of the questions regarding training modes.

**Table A3.** Program Type Preferences, Federal Defender 2015 Survey Results.

Training Program Type	Number of Responses	Percentage of Responses (N=76)
Seminar/lecture/presentation	63	82.9%
Combination lecture/workshops that involve interactive exercises and/or focus on the application of skills	61	80.3%
Combination lecture/small group discussions	53	69.7%
Live webinar	15	19.7%
Recorded webinar	8	10.5%
Recorded seminar/lecture/presentation	5	6.6%
No strong preference	4	5.3%

Federal defenders were also asked to agree or disagree whether specific training programs for capital litigation met the training needs of FDO staff. Once again, the number of federal defenders unfamiliar with the programs suggests a need for caution in interpreting the results.

**Table A4.** National Capital Program Evaluation, Federal Defender 2015 Survey Results (by frequency).

DSO Program	Strongly Agree or Agree w/ Meeting Training Needs	%	Not Applicable/ Don't Know	%
Investigation and Integration of Mitigation Evidence Seminar	23	30.30%	43	56.60%
Federal Death Penalty Trial Strategy Session	22	28.90%	42	55.30%
Capital Habeas Unit Conference	19	25.00%	47	61.80%
Mitigation Skills Workshop	19	25.00%	45	59.20%
Annual National Federal Habeas Corpus Seminar	17	22.40%	45	59.20%
Authorized Cases Training	17	22.40%	48	63.20%
Supreme Court Practice Institute	15	19.70%	47	61.80%
Federal Capital Habeas Project Bring Your Own Case § 2255 Training	14	18.40%	49	64.50%
Persuasion Institute	11	14.50%	52	68.40%
“Amsterdam” Capital Post-Conviction Skills Seminar	10	13.20%	53	69.70%

Lastly, defenders were asked to assess format effectiveness for training in capital litigation. Of the three types of in-person sessions offered to the respondents—lecture/workshop, lecture/small group, seminar/lecture—they chose each with similar frequency—between 34% and 35%.

## District Panel Representatives

District panel representatives were asked to complete the survey reporting both their own experience and their assessment of the panel. All ninety-four districts have a district panel representative, and eighty-nine of them completed the survey.

Using the same list of twenty-four potential training areas (plus an “other: specify” option), panel representatives were asked to identify all the areas in which panel attorney representation could be improved through training.<sup>1685</sup> Technology and the use of experts ranked near the top.

Table A5. Training Needs by Frequency of Response, District Panel Representative 2015 Survey Results.

Rank	Training Area	Number of Responses	Percentage of Responses (N=89)
1	Use of <b>technology</b> for courtroom presentations	57	64.0%
2	Use of <b>technology</b> for discovery/document management	55	61.8%
3	Knowledge of immigration law	47	52.8%
4	Knowledge of how to request and obtain funds for necessary <b>expert services</b>	45	50.6%
5	Preparation of <b>case budgets</b>	45	50.6%
6	Knowledge of how to request and obtain funds for necessary <b>investigative services</b>	42	47.2%
7	Representing clients with mental health issues or other cognitive impairments	40	44.9%
8	<b>Use of experts</b>	39	43.8%
9	Knowledge and application of the U.S. Sentencing Guidelines and related case law	31	34.8%
10	Sentencing advocacy (oral and written)	29	32.6%

Note: Training areas that overlap with recommendations in the Cardone Report are in boldface.

Six of the top ten most frequently chosen categories are related to matters covered either in eDiscovery training or in use of experts (broadly defined). Though technology was chosen more often than use of experts, including ranking 1 and 2 in the top three areas where training could improve performance, training on use of experts and how to obtain experts (including case budgeting) were viewed as ways to improve panel attorney representation.

The “other” option was rarely chosen (only four panel representatives did so), but one additional category for training related to eDiscovery or use of experts was mentioned: social media evidentiary issues.

Trainings specific to capital litigation ranked near the bottom of the list, with training on defense advocacy in the DOJ death penalty authorization process and in death penalty substantive jurisprudence ranked 21 and 22 respectively and selected by only 9% of panel representatives. The low priority placed on capital litigation training is likely a function of the infrequency of such appointments, not the need for such training when appointments are made.

<sup>1685</sup> Information in this section is taken from Section 4.10 of the Panel Attorney Survey Report.

When panel representatives were asked about the support for local panel attorney training (as opposed to DSO-sponsored national programs) within FDOs, 88.3% believed the level of the training met the needs of the panel to a great or moderate extent.<sup>1686</sup>

For national programs, panel representatives were asked to consider the extent to which such programs met their own training needs, as well as those of panel attorneys generally.<sup>1687</sup> Sixty-seven percent of panel representatives said the national programs met their own training needs to a great or moderate extent, and 43.7% reported they had accessed online resources (through FD.org) very often or often. When asked to consider what barriers they saw to accessing national training programs themselves (from a list of five options), the main obstacle identified was an inability to get time away from their practice to attend such trainings, though distance to training and costs of attending were also frequently cited as well.

When assessing the extent to which panel attorneys access training through national programs, 22.3% of panel representatives believed panel attorneys accessed DSO Training Division programs to a great or moderate extent.

## Panel Attorneys

Individual panel attorneys were also asked to complete the survey. Because there is no comprehensive, national list of all panel attorneys, any attorney receiving at least two payments between January 1, 2013, and September 30, 2014 was considered a panel attorney and thus eligible to receive the survey. This group included 8,745 panel attorneys, of which 1,528 were sampled and 1,055 completed the survey.

Individual panel attorneys saw their training needs somewhat differently from the panel representatives. The comparison below shows the difference in ranking between the two groups on the same categories, as well as the differences in the percentage of respondents selecting those training areas.<sup>1688</sup>

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1686. Information in this section is taken from Section 4.11 of the Panel Attorney Survey Report.

1687. *Id.*, Section 4.12.

1688. *Id.*, Section 4.10.

**Table A6: Training Needs by Frequency of Response, Panel Attorney 2015 Survey Results**

Rank	Training Area	Number of Responses	Percentage of Responses (N=1,055)
1	Knowledge and application of the U.S. Sentencing Guidelines and related case law	646	61.2%
2	Use of <b>technology</b> for courtroom presentations	527	50.0%
3	Knowledge and application of federal criminal procedure and evidence rules	522	49.5%
4	Knowledge and application of federal criminal law	475	45.0%
5	Use of <b>technology</b> for discovery/document management	459	43.5%
6	Sentencing advocacy (oral and written)	420	39.8%
7	Knowledge of immigration law	396	37.5%
8	Knowledge of how to request and obtain funds for necessary <b>expert services</b>	376	35.6%
9	Representing clients with mental health issues or other cognitive impairments	367	34.8%
10	Knowledge of how to request and obtain funds for necessary <b>investigative services</b>	353	33.5%

Panel attorneys saw less of a need for training on use of experts generally (ranked 13 here) but saw benefit to additional training on requesting and obtaining specific kinds of experts, as shown in Table A6. Training on the preparation of case budgets fell outside the top ten (ranked 16 by panel attorneys). Of the six categories broadly related to either eDiscovery or use of experts, only training on the use of courtroom technology ranked among the top three needs. It is perhaps unsurprising that panel attorneys focused more on obtaining experts, while federal defenders focused more on using experts. The differences between the two offices in access to experts (the need to request permission of the court, concerns about voucher review and reductions, etc.) are highlighted in the training needs as well. Panel attorneys must first learn how to successfully request expert services.

The option to specify another type of training was selected by forty-two panel attorneys, but none of the specified options related to eDiscovery or use of experts.

Similar to the assessments by the panel representatives, panel attorneys were unlikely to state a need for training on capital litigation. Defense advocacy in DOJ death penalty authorization process and death penalty substantive jurisprudence ranking 22 and 23 respectively, with 13% of panel attorneys suggesting a need for the former and 12% suggesting a need for the latter. The lack of experience by the average panel attorney with capital litigation likely resulted in a lower priority for such training.

When panel attorneys were asked about support for their local training sponsored by FDOs, 68.1% believed the level of the training met the needs of the panel to a great or moderate extent.<sup>1689</sup> For national programs, 51.7% believed such offerings met their needs to a great or moderate extent.<sup>1690</sup> Twenty-three percent of panel attorneys reported using FD.org training materials very often or often. Almost 54% of panel attorneys reported having never attended a national training program, and another 34% reported attending only one or two times in a two-year period. In terms of the barriers to their participation in national training programs, panel attorneys cited the same three obstacles of time, distance, and cost.

<sup>1689</sup> *Id.*, Section 4.11.

<sup>1690</sup> *Id.*, Section 4.13, p. 72.

## Attachment 2

### Local Training Report Data Verification Process

As noted in the text, we obtained information about local training events from the DSO Training Division, which aggregates individual local training reports from the eighty-one FDOs. The information was disaggregated and sent back to local FDOs (emailing the administrative contact and the federal defender) and seeking their help in verifying the information provided. In addition to their verifying the provided information, we asked for additional detail about programming on eDiscovery, capital and capital habeas litigation, and expert services. We also asked for clarification regarding when events occurred.

All FDOs responded to the requests for help, though they varied in how successful they were with the verification process. Staff turnover, lost records, and a host of other factors affected the ability of the FDOs to verify all information from the local reports. Where data were not affirmatively reported, such as topics covered or numbers of attendees, we report frequencies as conservatively as possible (with attendance considered missing and topics not being included in the training event). When districts counted each part of the training as a separate session or multiday event, we recoded the data to conform to the distinction made elsewhere in the data.

Based on the information provided by the FDOs, we generated some additional variables. Events that occurred over multiple days were recorded (but not reported above) to distinguish between programs that extended over days from those that were repeated multiple times (often over different days). Dichotomous variables were created to note programs where attendance or dates were missing.

Reported below are specific issues of data collection reported by each FDO. FDOs that served multiple districts are reported together. The variation in these shared offices regarding office autonomy and training responsibility is considerable. The FDOs generally described the issues in the notes below, but we find generalizing across shared offices is impossible, as every arrangement appears to differ. Additionally, eleven programs were co-sponsored by separate FDOs. For example, the Eastern District of Missouri and the Southern District of Illinois have been co-sponsoring training for attorneys who are frequently members of panels in both districts. The same is true for other districts where panel attorney membership crosses district lines. Since we are reporting numbers nationally, these programs were not assigned to a specific FDO but are reported in the analysis.

District	Notes on Data Collection
AK	The FDO confirmed and corrected information in the original spreadsheet. Deleted the rows that they struck through as errors.
ALM	The FDO confirmed and corrected information in the original spreadsheet. The FDO listed the same event on multiple lines when it occurred across different days.
ALN	The FDO confirmed and corrected information in the original spreadsheet. They provided some detail on the events in the original report listed too generally.
ALS	The FDO confirmed and corrected information in the original spreadsheet.
ARE	The person currently working on training didn't join the FDO until 2019, so they are unfamiliar with how things worked prior to that year. To help fill in the details on their local events, they sent the original spreadsheets given to DSO regarding local training. We used those to confirm their list of local training. The full report conflicted with information about the NLST training.
ARW	The FDO confirmed and corrected information in the original spreadsheet. The current person in charge of training wasn't there prior to 2019 (in fact, the prior person moved to ARE), but the paralegal who was there confirmed all the information.

District	Notes on Data Collection
AZ	The FDO confirmed and corrected information in the original spreadsheet. They are unaware of any other attendees at their training events. One event from FY 2018 listed the year as 2001. We assumed this to be a typo and corrected the year.
CAC	The FDO sent the original reports for FY 2017 and FY 2018. The original list was missing quite a few lines from those reports. Some information remained missing, as it was not collected at the time. The “trainings-various” entries from 2018 could not be detailed.
CAE	The FDO confirmed and corrected information in the original spreadsheet. They did not have information about the other attendees at their annual conferences, but they know that there are other attendees at those events. They don’t have the old paper records to confirm the NLST events. They had some detail on the events originally described as “various.” The attendance numbers on the original list don’t sum to the detailed rows.
CAN	The FDO confirmed and corrected information in the original spreadsheet, but they did not add any detailed information about the brown bags or peer-to-peer or what was discussed. The rows were deleted.
CAS	The FDO confirmed and corrected information in the original spreadsheet. They provided detail on the new attorney training schedule and the all-attorney training events that weren’t clear. They don’t have MCLE for the new attorney training sessions and don’t have sign-in as a result. Attendance is required for all new attorneys. Dozens of events are held each year, between three and six new attorneys are hired each year.
CO/WY	The FDO confirmed and corrected information in the original spreadsheet. They noted that the CO office runs training for FDO staff and that there is training for panel attorneys, but the WY panel is independent of the FDO. There has been training on experts and eDiscovery but nothing on capital in the districts. They don’t typically open training to attorneys outside the FDO/panel groups.
CT	The FDO confirmed and corrected information in the original spreadsheet. They do not track other attendees.
DC	The FDO confirmed there were no local trainings held between FY 2017 and FY 2020.
DE	They did not revise the spreadsheet but sent some updated information over email. They did not have a record of the NLST event. Most other years had no events, except for two non-capital habeas trainings in 2017.
FLM	The FDO confirmed and corrected information in the original spreadsheet. The FDO noted that events put on by the Florida Bar or the Central Florida Association of Criminal Defense Lawyers included other attendees. Before COVID, the FDO routinely held the same training events in offices across the district. In 2020, they started recording sessions so they could be viewed elsewhere. They detailed information about luncheons/midafternoon events that were combined on the original list.
FLN	The FDO confirmed and corrected information in the original spreadsheet. The FDO did not add any information to the NLST event, but they didn't strike it either, so the partial information for that event was left in.
FLS	The FDO confirmed and corrected information in the original spreadsheet. They struck the NLST event, so we deleted that row.
GAM	The FDO confirmed there were no local trainings held between FY 2017 and FY 2020.
GAN	The FDO confirmed and corrected information in the original spreadsheet. Recoded x as a yes for the cells regarding topics and other educational resources.
Guam	The FDO confirmed and corrected information in the original spreadsheet.



District	Notes on Data Collection
HI	The FDO confirmed and corrected information in the original spreadsheet. The FDO held trainings in 2017 and 2019 only. COVID prevented trainings in 2020. The NLST event looked like two instances of the same training, so the rows were combined.
IAN/IAS	The FDO confirmed and corrected information in the original spreadsheet. They see the two districts as one FDO, so everything is co-hosted by both. Only three trainings were specific to one district.
ID	The FDO confirmed and corrected information in the original spreadsheet. The person in charge of training did not start until 2019, so older information could not be verified. They saw their training offerings reduced in 2020 due to COVID. They did not have a record of the NLST event, so we deleted it.
ILC	The FDO confirmed and corrected information in the original spreadsheet. They were able to detail the information.
ILN	The FDO confirmed and corrected information in the original spreadsheet. They mistakenly counted the number of sessions within a program as calculated programs. We corrected this.
ILS	There is a lot of overlap between ILS and MOE attorneys (practice and training). The FDO confirmed and corrected information in the original spreadsheet. They added ethics training, but that is not relevant to this analysis, hence not reported here.
INN	The FDO confirmed and corrected the information in the original spreadsheet, including adding an event from Feb. 2016. This is outside our analysis, so we dropped the event.
INS	The FDO confirmed and corrected information in the original spreadsheet. They struck the NLST event, so we deleted that row.
KS	The FDO confirmed and corrected information in the original spreadsheet. They also noted that there are some events co-sponsored with MOW, and events are often open to attorneys from both districts. They also have a summer internship program for law students, which doesn't offer CLE but does provide training. Dropped the NLST event that was from 2021. It will be included in the update.
KYW	The FDO confirmed and corrected information in the original spreadsheet. There was no information provided for FY 2020.
LAE	The FDO confirmed and corrected information in the original spreadsheet. The FDO coded an event on forensic DNA as "somewhat" for expert services. We recoded that to a yes. They also split out live-virtual events as either live or virtual, and we recoded to correct.
LAM/LAW	The FDO confirmed and corrected information in the original spreadsheet. They noted that the old format for collecting training information wasn't particularly conducive to recording events for shared FDOs. Also noted that geography is a bit misleading because Baton Rouge (in LAM) is only an hour from the LAW office, so there is a lot of blurring of the boundaries historically (both practice and training). Other attendees are typically presenters, and they did not count them in the total.
MA/NH/RI	The FDO confirmed and corrected information in the original spreadsheet. There were several missing programs, so they went back to the original reports to find those. They generally simul-cast all Boston trainings to other divisions, and recently to the NH and RI offices as well. They generally open trainings to any criminal lawyer, but they don't take attendance.
MD	The FDO confirmed and corrected information in the original spreadsheet. One event that was clearly eDiscovery was not coded as such, and we corrected that.
ME	The FDO confirmed and corrected information in the original spreadsheet.
MIE	The FDO confirmed and corrected information in the original spreadsheet.
MIW	The FDO confirmed and corrected the information in the original spreadsheet, including separating out the topics for their lunch-and-learn sessions, panel training, CJA training, etc. They included speakers in the other attendees.

District	Notes on Data Collection
MN	The FDO confirmed and corrected information in the original spreadsheet.
MOE	The FDO confirmed and corrected information in the original spreadsheet.
MOW	The FDO confirmed and corrected information in the original spreadsheet. They noted that information was missing but that this was the best they could do. The FD handles all the training and noted that record keeping isn't a priority. The task has been assigned to an admin, so hopefully that will be easier moving forward. The FDO also noted that the spreadsheet does not account for the hours they spend working with individual and small groups of attorneys when they reach out for help. They didn't have the NLST event, so we deleted it.
MSS/MSN	The FDO confirmed and corrected information in the original spreadsheet. The FDO did not detail the information on CJA panel training seminar subjects, so we have no additional information on those events.
MT	The FDO confirmed and corrected information in the original spreadsheet. We needed to correct their information on multiday vs. multiple sessions.
NCE	The FDO confirmed and corrected information in the original spreadsheet. They did not have a record of the NLST event, so we deleted it.
NCM	The FDO reported that for three seminars, they co-hosted with the FDO in NCW. They said the list was complete as far as they knew, and no other attendees were at these events. For a few of the entries, the original report says "see agenda," but there is no agenda provided. We were not able to infer more about the events because there was no information.
NCW	The FDO confirmed and corrected information in the original spreadsheet. They co-host with NCM, which the other district already noted.
NE	The FDO confirmed and corrected information in the original spreadsheet. They included distributing daily slip opinions to attorneys in the district, but without an estimate of number of times or number of attorneys, we excluded this from the analysis.
NJ	The FDO confirmed and corrected information in the original spreadsheet. They put in unknown for the number of other attendees, so we converted this to zero.
NM	The FDO confirmed and corrected information in the original spreadsheet. The FDO took over panel management in 2018, so the number of trainings they offered increased that year as well. COVID halted most of their 2020 offerings.
NV	The FDO confirmed and corrected information in the original spreadsheet. They noted that the CLEs are only available to FPD and panel attorneys, so there aren't other attendees. They were able to detail some of the information in the original reports that was listed as "various."
NYN	The FDO confirmed and corrected information in the original spreadsheet. One event spanned two fiscal years, but it was only on one report, so we corrected the date. Confirmed the NLST event.
NYS/NYE	The FDO confirmed and corrected information in the original spreadsheet. They noted that all events other than NYS panel orientation and NYE mentee events are open to attorneys from both districts. They also invite members of the appellate, capital, and habeas panels to all events.
NYW	The FDO confirmed and corrected information in the original spreadsheet. Rows that were struck through were deleted.
OHN	The FDO confirmed and corrected information in the original spreadsheet. They provided some additional documentation to support their corrections to the report, including the original information provided to DSO. This information was used to detail some of the "various" lines in the original spreadsheet. Removed cities from datelines, but they are in original document. They hold same session in each office.
OHS	The FDO confirmed and corrected information in the original spreadsheet. They confirmed the NLST event but had no additional information about it. They did not code iPro litigation support training as eDiscovery.

District	Notes on Data Collection
OKN/OKE	The FDO confirmed and corrected information in the original spreadsheet. They added detail on the 2018 events. They noted all trainings are offered to attorneys in both districts.
OKW	The FDO confirmed and corrected information in the original spreadsheet. Deleted the rows that they struck through as errors. They did not have additional information on the NLST event. They did fill in detail on the “CJA Trial Training Panel” events.
OR	The FDO confirmed and corrected information in the original spreadsheet. They added in some weekly events (calls, meetings with resource counsel, etc.) but didn’t necessarily detail the frequencies for when the events occurred. Other rows were referencing ad hoc meetings, which were deleted.
PAE	The FDO confirmed and corrected information in the original spreadsheet. The FDO detailed the “Legal Training” lines from the original sheet. They noted that the information about website, newsletter, and other was missing for 2018, but they had those programs. They also noted that they cover use of experts at CHU trainings typically.
PAM	The FDO confirmed and corrected information in the original spreadsheet. Though they initially thought they did not cover the specific topics, they emailed later to add that two programs included eDiscovery. The supplemental information was included.
PAW	The FDO confirmed and corrected information in the original spreadsheet. They noted that some of the canceled 2020 programs were held virtually in 2021 and will appear on that report. They also noted that the clerk’s office provides eVoucher training for new panel attorneys, also covering experts, but that isn’t included in the report. Some of their training is attended by mentees and potential panel attorneys. They do not have a count of the number, but it could be as many as a dozen. Added detail to the lunch-and-learn events.
PR	The FDO confirmed and corrected information in the original spreadsheet. They did not detail the information on specific dates for the 2017 events. They also did not add any events to the 2018 report, so we took that to mean no programs were offered.
SC	The FDO confirmed the list of trainings was correct. They also noted that the NLST event on the list was the same as the FY 2020 seminar in Charleston, so we deleted the duplicate record.
SD/ND	The FDO was unable to confirm all the information in the spreadsheet due to staff turnover. They noted that every orientation includes discussion of use of investigators, which counts as expert services. They did not indicate if the ND attorneys were also included in the trainings. They could not detail how many brown bags they had in 2018.
TNE	The FDO confirmed and corrected information in the original spreadsheet. They confirmed a training on iPro Eclipse but didn’t code it as eDiscovery. We converted it to that category. The FDO also made one-day trainings multiday, and we corrected that.
TNM	The FDO confirmed and corrected information in the original spreadsheet, including itemizing their sessions for lunch-and-learn and CLE.
TNW	The FDO confirmed and corrected information in the original spreadsheet. One webinar looked like it was held three different times, not for three days. This was corrected.
TXE	The FDO confirmed and corrected information in the original spreadsheet. There were no trainings held in 2018 or 2020.
TXN	The FDO confirmed and corrected information in the original spreadsheet. They confirmed the NLST events and added info about eDiscovery training generally.
TXS	The FDO confirmed and corrected information in the original spreadsheet. They provided some detail on the events in the original report listed as “brown bag.”
TXW	The FDO confirmed and corrected information in the original spreadsheet. They added detail to the 2017 and 2018 events listed as “CJA Panel Seminars.”

District	Notes on Data Collection
UT	The FDO confirmed and corrected information in the original spreadsheet. The original report did not include 2020 events, so they were added here. The person who completed the report (CJA panel administrator) has since left the position, so they were unable to confirm.
VAE	The FDO confirmed and corrected information in the original spreadsheet. They didn't have information on the NLST event in Oct. 2017, so it is missing attendance.
VAW	The FDO confirmed and corrected information in the original spreadsheet regarding events, but they had no available information regarding attendance. The three NLST events were all on the same day, so those rows were combined, and calculated sessions was set at three.
VI	The FDO confirmed and corrected information in the original spreadsheet, including a confirmation that there were no training events in 2019.
VT	The FDO confirmed and corrected information in the original spreadsheet. They were able to detail the information requested.
WAE	The FDO confirmed and corrected information in the original spreadsheet. Noted that they only had sessions on experts, and those were added to the list.
WAW	The FDO confirmed and corrected information in the original spreadsheet. They were able to detail the lines listed as "brown bag," "CLE," "webinar," and "WACDL." They didn't hold any training on capital, but they did on the other two topics and noted those.
WIE/WIW	The FDO confirmed and corrected information in the original spreadsheet. They had a different date for the NLST event, so it was corrected. The FDO didn't seem to distinguish between districts, so we treated all training as hosted and attended by both.
WVN	The FDO confirmed and corrected information in the original spreadsheet.
WVS	The FDO sent a revised file. We converted "x" to yes.

# Appendix H

## Training and Education for Federal Judges on the Criminal Justice Act

By statute, district and circuit judges make administrative decisions affecting the litigation of criminal cases when counsel are appointed under the Criminal Justice Act (CJA).<sup>1691</sup> From appointment of counsel in capital and non-capital criminal cases, to selection of attorneys to serve on local CJA panels, appointment of federal public defenders, and authorization of expert services and approval of panel attorney payments, judges are responsible for determining the resources available in CJA cases and administration of the CJA in their courts. As the Cardone Report<sup>1692</sup> makes clear, however, judges making decisions lack familiarity with the defense function generally, as well as in specific areas of criminal litigation such as eDiscovery, use of experts, and capital litigation. The lack of familiarity with defense needs often leaves cases underfunded.<sup>1693</sup>

To address these challenges, the Cardone Report recommended training and education for judges making decisions about resourcing cases where counsel is appointed under the CJA.

### Recommendation 20 (approved)<sup>1694</sup>

The Federal Judicial Center (FJC) and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

### Recommendation 21 (approved)<sup>1695</sup>

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.

### Recommendation 22 (approved)<sup>1696</sup>

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.

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1691. Pub. L. 88-455, § 1, 78 Stat. 552 (Aug. 20, 1964), codified at 18 U.S.C. § 3006A.

1692. Cardone Report, p. 195. “Many federal judges are not familiar with the nature of criminal defense.”

1693. Cardone Report, p. 40. “Therefore, those who ultimately must approve funding for the defender services program are unable to make fully-informed decisions about the needs of that program.” *See also*, Cardone Report, p. 42. “Indeed, analysis of the judiciary’s budget over ten years, from FY 2005 to 2015, shows that the courts’ budget has grown more rapidly than that of defenders. As shown in the graph above, while court costs rose quickly, the defender program was targeted to contain costs, even though its costs were growing at small, predictable rates each year.”

1694. JCUS-SEP 18, p. 40.

1695. JCUS-SEP 18, p. 40.

1696. JCUS-SEP 18, p. 40.

## Recommendation 23 (approved)<sup>1697</sup>

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.

## Recommendation 29 (approved)<sup>1698</sup>

FJC should provide additional judicial training on:

- a. The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
- b. 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.

The judiciary received notification of the Judicial Conference of the United States' (JCUS) adoption of Cardone Report recommendations in September 2018<sup>1699</sup> and March 2019.<sup>1700</sup> In addition to general transmittal of the JCUS reports, in August 2019 members of the judiciary received a letter from James C. Duff, director of the Administrative Office of the Courts (AO), and Judge Raymond J. Lohier, then chair of the Defender Services Committee (DSC), reporting the actions of the JCUS regarding administration of the CJA. The letter states that adopting the recommendations recognized “the important role that judges play in administering the CJA.”<sup>1701</sup> Implementing these recommendations would be a combined effort, requiring the coordination of the Defender Services Committee (DSC), the Defender Services Office (DSO), and the Federal Judicial Center (FJC) “to expand judicial training on these matters” and identify appropriate outlets for this training.<sup>1702</sup>

This appendix examines implementation of the five above recommendations after their adoption by the JCUS and notification throughout the judiciary of the adoption and of the importance of a coordinated effort to implement them.

Judges receive training from many sources, both inside and outside the judiciary, but the focus of the recommendations, and of this analysis, is the FJC. By statute, the FJC creates and conducts educational and training programs for judges.<sup>1703</sup> The Education Division of the FJC (FJC Education) is responsible for this part of the FJC's mission and is the primary source of training for judges within the judiciary. We examined all training and educational efforts available to judges created by FJC Education between the start of FY 2017 and the end of FY 2021. Due to the delays in programming caused by the COVID-19 pandemic, some programming held outside the evaluation period is included as well.

1697. JCUS-SEP 18, p. 40.

1698. JCUS-SEP 18, p. 41.

1699. JCUS-SEP 18.

1700. JCUS-MAR 19.

1701. Memorandum, James C. Duff, Director, Administrative Office of the United States Courts, and Hon. Raymond J. Lohier, Jr., Chair, Judicial Conference Committee on Defender Services, re: Judicial Conference Action on Criminal Justice Act Policies (IMPORTANT INFORMATION), Aug. 14, 2019. On file with FJC.

1702. *Id.*

1703. Under 28 U.S.C. §§ 620–629, “The Center shall have the following functions . . . to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government and other persons whose participation in such programs would improve the operation of the judicial branch, including, but not limited to, judges, United States magistrate judges, clerks of court, probation officers, and persons serving as mediators and arbitrators.”

DSO is “an independent office within the Executive Offices at the Administrative Office” whose focus is “supporting the defender community, independent from the AO Department of Program Services, whose primary mission is to support the courts, judges and court executives.”<sup>1704</sup> The movement of DSO outside the Department of Program Services was in response to Recommendation 4b from the Cardone Report and was intended to increase the independence of the defense function by allowing DSO to focus on the unique needs of the defender community. Working with the DSC, DSO has also created training and educational materials for judges, sometimes in coordination with FJC Education. We also explore those efforts below.

Information was collected through interviews conducted by members of the research team with FJC Education staff and DSO staff, as well as from resources routinely available on the web.

## FJC Education

FJC Education staff are divided into teams, each of which is responsible for training different groups or coordinating a type of content. Teams train magistrate judges, district judges, and appellate judges, including different training for newly appointed judges and midcareer judges.<sup>1705</sup> As described,

“The Center works closely with its Board, education advisory committees, the courts, and other experts to identify educational needs and to develop and produce learning opportunities in various formats. These include interactive in-person programs, audio and video conferences, e-learning programs, instructional videos, podcasts, publications, and discussion forums.”<sup>1706</sup>

These formats, which are the means through which FJC Education staff can implement the Cardone Report recommendations to provide training to judges, are briefly described below and then evaluated for evidence of implementation.

## Types of Content

- *Orientation programs.* FJC Education holds orientation programs for new district court judges and for new magistrate judges.<sup>1707</sup> These programs, consisting of two week-long sessions (Phase I and Phase II), are held throughout the year, as new judges join the bench.<sup>1708</sup> Judges newly appointed to the courts of appeals may also attend the Phase I Orientation for District Court Judges. Appellate judges have their own orientation program.<sup>1709</sup>

1704. [Memorandum, James C. Duff, Director, Administrative Office of the United States Courts, re: Defender Services Office, Sep. 17, 2018.](#)

1705. Though FJC Education also provides training for bankruptcy judges, this training was outside the scope of this discussion. FJC Education coordinates with the DSO Training Division to provide training for federal defenders. Those training efforts are described in Appendix G: Attorney Training and Resource Challenges.

1706. <https://www.fjc.gov/education>, last accessed Jan. 20, 2023.

1707. <https://www.fjc.gov/education/programs-and-resources-judges>, last accessed Jan. 20, 2023.

1708. In addition to in-person training, written materials are provided for newly appointed judges, such as A New Judge’s Introduction to Federal Judicial Administration, 2d. ed. (2020). This guide includes two references to the CJA: one noting that circuit judicial councils approve district CJA plans and another noting that courts as a collective body implement the CJA (pp. 21 and 29).

1709. A session was scheduled for April 2023. See, <https://fjc.dcn/content/375735/orientation-seminar-newly-appointed-us-court-appeals-judges>, last accessed Mar. 14, 2023. In addition to orientation training conducted by FJC Education, new appellate judges are invited to attend a week-long seminar for new state and federal judges at New York University Law School. “Topics in this six-day program include oral argument, conferencing and collegiality, styles of judicial reasoning, the process of decision making, and opinion writing.” See <https://www.fjc.gov/education/programs-and-resources-judges>, last accessed Jan. 20, 2023.

- *National workshops.* These programs for district and magistrate judges are held in two locations around the country every other year for district judges and every year for magistrate judges.<sup>1710</sup> The national workshops involve large plenary sessions for all attendees and smaller breakout sessions on specific topics selected by the participant.<sup>1711</sup> In the year when district judge national workshops are not held, circuit-based workshops (described below) occur. FJC Education holds a separate symposium for appellate judges every three years.<sup>1712</sup>
- *Circuit workshops.* Circuit judicial education planning committees, in consultation with FJC Education staff, hold workshops for appellate and district judges of individual circuits.<sup>1713</sup> Topics of particular interest to judges of the circuit are emphasized in the workshops, which are held in years opposite the national workshops described above.<sup>1714</sup>
- *Special-focus programs.* The Center offers a variety of small seminars designed to provide an in-depth look at a topic of particular interest to judges.<sup>1715</sup> Faculty members are experts in their fields and share the latest research and current understanding of the topic. The topics offered vary from a general mid-career seminar for judges to a specific session held on eDiscovery, co-sponsored with the Electronic Discovery Institute.
- *On-demand resources.* In addition to the programs described above, FJC Education offers numerous resources judges can access at any time on a variety of topics. Content format varies from written material such as manuals, monographs, and guides<sup>1716</sup> to audio and video formats such as video and podcasts.<sup>1717</sup>

## Implementation

The array of formats provided by FJC Education presents varied opportunities for implementing the Cardone Report recommendations. Detailed below is the content (newly created or adapted) to address either the specific recommendations or the general need for judges to be more familiar with their responsibilities under the CJA described in the Cardone Report.

### Orientation Programs

The Orientation Program for New District Court Judges included some information about the responsibilities of judges under the CJA even before the recommendations were adopted. One interviewee stated, “We have two hypotheticals that deal specifically with CJA attorneys, one of which goes to essentially the sequential appointment of attorneys, and the second which talks about expert witnesses and whether the judge is going to approve and allow the testimony ....”<sup>1718</sup> As part of discussing those scenarios, issues

1710. See <https://fjc.dcn/content/331501/national-workshop-district-judges-ii>, last accessed Jan. 20, 2023.

1711. *Id.*

1712. Created by FJC Education staff and the Appellate Judge Education Advisory Committee, content varies and has included ethics, Supreme Court litigation, and the rule of law. See, “National Symposium for U.S. Court of Appeals Judges,” <https://www.fjc.gov/education/programs-and-resources-judges>, last accessed Jan. 20, 2023.

1713. See <https://fjc.dcn/content/373034/workshop-judges-ninth-circuit>, last accessed Apr. 18, 2023, for an example of content available in circuit workshops.

1714. See <https://fjc.dcn/content/331501/national-workshop-district-judges-ii>, last accessed Jan. 20, 2023.

1715. See <https://www.fjc.gov/education/programs-and-resources-judges>, last accessed Jan. 21, 2023.

1716. See <https://www.fjc.gov/education/manuals-monographs-guides>, last accessed Jan. 21, 2023.

1717. See <https://www.fjc.gov/education/fjc-videos-podcasts>, last accessed Jan. 21, 2023.

1718. Interview 98.1.



of reasonableness (a component of voucher review) may arise, depending on the mentor judges leading the discussion and the questions of the attendees.

When the Cardone Report was published, FJC Education staff reached out to Judge Cardone, and she was able to participate as a mentor judge in the Phase I Orientation program shortly after release of the report.

We had the good fortune of having Judge Cardone as one of our mentor judges very soon after the report came out. And so even though we had a CJA hypothetical, she was able to really help us, help inform the way that we could guide that discussion.<sup>1719</sup>

Discussion of the CJA and the specific recommendations are limited in Phase I training by Judge Cardone's availability and the format of the orientation programs.<sup>1720</sup> "When she's a mentor judge, we have a rich discussion of the Cardone Committee recommendations. We're not always blessed with her as one of our mentor judges."<sup>1721</sup>

Mentor judges play a key role in the discussion of program materials at orientations:

Every district does things differently. The same process is handled so differently across the country, and every district has its own culture. So we have to be really cognizant of that, and our goal, obviously, is to address the needs of the individuals in the room at the time. One of the ways that happens is for our mentor judges to be very sensitive to that, even though they come from their own worlds."<sup>1722</sup>

When Judge Cardone is not a mentor judge, content varies because, "some [mentor judges] will choose to focus more on CJA than others."<sup>1723</sup>

In addition to the hypotheticals used, interviewees described other methods for training judges about their responsibilities under the CJA at the orientation programs. For example, one interviewee commented, "We also have a series of polling questions that raise initial awareness for the judges: Who is it in your district who is responsible for appointing attorneys? Do you know how many years they serve on a panel? Who conducts the voucher reviews?"<sup>1724</sup> The polling questions prompt judges to think about issues of CJA administration.

The content included in the orientation programs is fairly stable. "It is the nuts-and-bolts introductory orientation, and there are just key topics that we do our best to have presented consistently for each cohort of new judges, even though we have different mentor judge teams, so there's civil case management, the conduct of a civil trial, criminal case management, conduct of a criminal trial, sentencing."<sup>1725</sup> The amount of content judges need to know when they first take the bench is substantial and leaves little opportunity for adding new material, including from the Cardone Report recommendations. "In roughly thirty-six hours of content, there's probably four to five hours unscripted for editorial comments by the mentor judges."<sup>1726</sup>

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1719. Interview 98.1.

1720. Because Judge Cardone cannot always attend the Phase I training, FJC Education staff worked with her to make her materials available through its on-demand programming (described below). Interview 98.1 and Interview 96.1.

1721. Interview 96.1.

1722. Interview 98.1, speaking about the development of content generally.

1723. Interview 96.1.

1724. Interview 98.1.

1725. Interview 98.1.

1726. Interview 96.1.

Though FJC Education staff make an effort to consider presenters of diverse backgrounds,<sup>1727</sup> and diversity considerations weigh in the selection of advisory committee members,<sup>1728</sup> interviewees asked about experience litigating under the CJA as a criteria for presenter selection often did not feel it was necessary for such training. As one interviewee said, “You don’t have to be a former federal defender or an assistant federal public defender to have expertise in a given area .... Certainly, filling out things as far as vouchers and things of that nature—that’s not like a subject matter expertise. That’s something that all judges know.”<sup>1729</sup>

Other interviewees felt differently.

I think that’s not known widely enough, that there are judges who are not at all qualified to assess what is zealous representation on the behalf of a certain defendant or a class of cases. And so many of the judges have been appointed either from academia or from a non-criminal experience background. It’s not that they don’t want to do well; they just haven’t had the context or the experience, that effective part of representing somebody.<sup>1730</sup>

Additionally, some interviewees felt that programming for newly appointed judges may not be the best forum for presenting information about the CJA. “It’s the question of the immediate versus the urgent, and the challenge for us is, we can mention CJA issues, [but it’s] probably not the first thing that’s going to hit new judges straight out of the gate.”<sup>1731</sup>

The question of priorities notwithstanding, some material developed outside FJC Education was integrated into recent orientation programs to highlight changes resulting from adoption of the Cardone Report recommendations. For example, DSC and DSO developed a video about the newly adopted standard in Recommendation 8 (discussed below). The video was shown at a Phase II Orientation Program for New District Judges in February 2020 and at a 2022 Orientation Program for Magistrate Judges,<sup>1732</sup> and it is included among the resources available through FJC Education program webpages.<sup>1733</sup>

In February 2020, FJC Education added a session to the Phase II<sup>1734</sup> Orientation Program for District Judges on the work of the Cardone Committee and the findings of its report.<sup>1735</sup> This was the first program of its kind. The presentation was made by Judge Kathleen Cardone (W.D. Tex.), chair, and Judge Landya McCafferty (D.N.H.), a member of the Defender Services Committee. Though the orientation program did not cover the topics in the adopted recommendations specifically, it discussed the responsibilities of judges in administering the CJA generally. Future programs for the Phase II Orientation for Judges will include either a presentation by Judge Cardone or a broadcast of the recent FJC podcast “Please Proceed” with Judge Cardone (*see below*). Judge Cardone participated again at the December 2021 Phase II Orientation and discussed similar information.<sup>1736</sup>

1727. Interview 97.1.

1728. *Id.*

1729. Interview 101.1.

1730. Interview 96.1.

1731. Interview 96.1.

1732. See <https://fjc.dcn/content/366375/phase-i-orientation-seminar-newly-appointed-us-magistrate-judges>, last accessed Jan. 21, 2023.

1733. See <https://fjc.dcn/content/366375/phase-i-orientation-seminar-newly-appointed-us-magistrate-judges>, last accessed Jan. 21, 2023.

1734. Judges attending the Phase II Orientation program have typically been on the bench less than a year. See, <https://www.fjc.gov/education/programs-and-resources-judges#ODJ>, last accessed Jan. 21, 2023.

1735. See <https://fjc.dcn/content/341627/phase-ii-orientation-district-judges>, last accessed Jan. 21, 2023.

1736. Email from Interview 97.1, re CJA follow-up, Oct. 12, 2022. On file with the FJC. Judge Cardone participated again in December 2022, outside our period of study. See <https://fjc.dcn/content/372271/phase-ii-orientation-us-district-judges-2022>, last accessed Jan. 21, 2023.

Similar to district court judge content, some orientation material for magistrate judges addressed the issues raised in the Cardone Report but predated the recommendations themselves. For example, magistrate judge orientations have often included sessions on eDiscovery, but the focus is on civil litigation.<sup>1737</sup> Some changes in programming to discuss criminal eDiscovery were made after the recommendations but outside our period of study. For example, in November 2021, during an online Phase I/II Orientation for magistrate judges, a session on eDiscovery was offered.<sup>1738</sup> Additionally, at the March 2022 and August 2022 Phase I Orientations eDiscovery was on the agenda,<sup>1739</sup> as was voucher review.<sup>1740</sup>

While interviewees estimated that the Cardone Report was referenced in about a dozen sessions since its publication,<sup>1741</sup> the presentations were abbreviated due to the move to online programming during the pandemic. “I think the impact of the pandemic has been to narrow the focus, narrow the amount of time available to cover stuff, so even though we will touch on CJA in criminal, the amount of time has been cut in half or more.”<sup>1742</sup>

In identifying discussion facilitators for magistrate judge programming, the focus on diverse perspectives was somewhat different from that described above for district court judges. “In the orientation programs, we’re careful to assemble former prosecutors and former defenders at the same table for the express purpose of making sure that there’s somebody who can add value on topics on either side.”<sup>1743</sup>

Orientation programming for judges on the courts of appeal occurred outside our study period.<sup>1744</sup>

## National Workshops

Development of the content for the national orientation programs can take twelve to eighteen months,<sup>1745</sup> during which FJC Education staff work with their respective advisory committees to narrow a list of topics. The list includes suggestions from prior session attendees,<sup>1746</sup> suggestions provided to FJC leadership,<sup>1747</sup> and FJC Education staff.<sup>1748</sup> Judicial issues that are currently in the news are also considered for sessions.<sup>1749</sup> When agreement on content is reached,<sup>1750</sup> programming is vetted within the FJC.<sup>1751</sup> “The bottom line [is], we rely very heavily on our constituents, and we work hand in hand with them in developing the topics that they think are most valuable and important to them. Even if they don’t

1737. Interview 99.1. “We included [eDiscovery] in our case management and civil discovery training at the orientations.”

1738. Email from Interview 96.1, re: Cardone Study Evaluation Follow-up, Aug. 9, 2022. On file with FJC.

1739. *Id.*

1740. See <https://fjc.dcn/content/366375/phase-i-orientation-seminar-newly-appointed-us-magistrate-judges>, last accessed Jan. 21, 2023.

1741. Interview 99.1, “We’ve managed to work references to Cardone into probably a dozen different sessions over the last two or three years.”

1742. Interview 99.1.

1743. Interview 99.1.

1744. See <https://fjc.dcn/content/372489/orientation-seminar-newly-appointed-us-court-appeals-judges>, last accessed Jan. 21, 2023. As the program indicates, the recommendations from the Cardone Report were not part of the planned discussion.

1745. Interview 101.1. “If you’re planning a program that’s one year out, you pretty much spend that total year—and sometimes a year and a half out—not only coming up with topics. And again, you’re coming up with these topics with a committee, your advisory committee.”

1746. Interview 101.1.

1747. Interview 96.1 and Interview 99.1.

1748. Interview 97.1 and Interview 99.1.

1749. Interview 96.1, Interview 98.1, Interview 97.1, and Interview 101.1.

1750. Interview 97.1, “They [committee members] generally come to a friendly consensus. Not to say they don’t have different ideas about things at all, but I don’t see myself having to referee.”

1751. Interview 97.1. “Topic and speaker suggestions are also somewhat vetted internally, the [FJC] director always sees them.”

think it's something they need, if [we feel that they do need it], we'll make sure to incorporate it into the programming."<sup>1752</sup> For example, workplace conduct,<sup>1753</sup> judicial security,<sup>1754</sup> and financial disclosures<sup>1755</sup> were all topics recently added to national workshops.<sup>1756</sup> Incorporating this content was expedited due to the urgency of the issues.<sup>1757</sup>

Interviewees thought these other topics were more pressing and out-competed CJA topics, at least in the short term.

So we don't have a stand-alone [CJA] program specifically, [a] 'We're Going to Teach You on the Criminal Justice Act' panel. It's worth a plenary session from time to time, a breakout from time to time, but can I say it's more critical than judicial security right now? Financial disclosure right now? Workplace conduct? All of these are going to compete for limited resources."<sup>1758</sup>

The investment of the time, the competition among topics, and the infrequency of these programs creates challenges for adapting national workshop content to address the Cardone Report recommendations. National workshops for district and magistrate judges are offered less often than the orientation programs described above (once every other year and once per year, respectively), meaning there have been fewer opportunities to implement the adopted recommendations through this format. Additionally, the COVID-19 pandemic resulted in the cancellation of the 2020 programs, further reducing opportunity to provide relevant material. When programming resumed in 2021 for magistrate judges and in 2022 for district court judges, neither the Cardone Report recommendations nor the responsibilities of the CJA generally were included.<sup>1759</sup>

## Circuit Workshops

Similar to the national workshops described above, the creation of content for circuit workshops, the infrequency of the sessions, and the ongoing pandemic limited the extent to which programming could be adapted to address the recommendations identified in the Cardone Report. FJC Education staff working with a Ninth Circuit education committee on the circuit workshop in 2021 planned to have Judge Cardone participate.<sup>1760</sup> The session was canceled due to the pandemic,<sup>1761</sup> and the rescheduled event (for January 2023) did not include Judge Cardone, the Cardone Report recommendations, or the CJA generally on the agenda.<sup>1762</sup> A program for the Fourth Circuit held in the fall of 2022 included a thirty-minute session on case budgeting, with a presentation by the circuit's case-budgeting attorney.<sup>1763</sup>

1752. Interview 173.1.

1753. Interview 98.1 and Interview 96.1.

1754. Interview 96.1.

1755. Interview 96.1.

1756. Interview 96.1, "Workplace conduct [has] gotten more emphasis. We will incorporate more on judicial security in light of the attack on [a judge's] family and financial disclosure, which got some recent media attention. We will include more on financial disclosure in our ethics session with new judges."

1757. Interview 97.1, speaking of workplace conduct, "It became a judicial priority, not just for the Center but AO. You know, everyone was, like, 'We've got to do this.' And so, still, it wasn't like two months ahead of a national [program] we put it in, but it was shorter than usual."

1758. Interview 96.1.

1759. See <https://fjc.dcn/content/365395/national-workshop-us-magistrate-judges-i-2022> for magistrate judge programming and <https://fjc.dcn/content/360197/national-workshop-district-judges-i-2022> for district court judges.

1760. Interview 99.1.

1761. See <https://fjc.dcn/content/350388/workshop-judges-ninth-circuit>, last accessed Jan. 21, 2023.

1762. See <https://fjc.dcn/content/373034/workshop-judges-ninth-circuit>, last accessed Apr. 18, 2023.

1763. See <https://fjc.dcn/content/371101/workshop-judges-fourth-circuit-2022>, last accessed Feb. 2, 2023.

In November 2022, outside of our period of study, a workshop for Seventh Circuit judges included a session on CJA litigation, including case budgeting and approving requests for resources.<sup>1764</sup> The program featured Judge Candace Jackson-Akiwumi (Seventh Circuit),<sup>1765</sup> Judge Jane Magnus-Stinson (S.D. Ind.),<sup>1766</sup> Clarke Devereux (case-budgeting attorney for the Seventh Circuit), and federal defender Monica Foster (S.D. Ind.).

## Special-Focus Programs

Similar to the above scenarios from ongoing orientation programs discussing CJA issues, FJC Education has long had a special focus program on eDiscovery consistent with Recommendation 21. The focus of the program tends to be more on civil rather than criminal litigation. A session of the program scheduled for 2021 that would have covered criminal eDiscovery was canceled because of the ongoing pandemic, and it was unclear when it would be rescheduled.<sup>1767</sup>

Interviewees recognized the ongoing need for eDiscovery training, especially in criminal litigation,<sup>1768</sup> but fitting the specifics of the Cardone Report into the existing program was challenging because of judges' lack of familiarity with eDiscovery overall. For example, one interviewee stated, "In general, in the electronic discovery area, judges are not as up to speed as practitioners on the tools and techniques available. And so our programs that are more on a technical focus, some of those will fill in some gaps on what judges ought to start looking at. But that's a work in progress."<sup>1769</sup>

Related to Recommendation 29, but before publication of the Cardone Report, FJC Education offered a special-focus program on capital and capital habeas litigation (available to all judges).<sup>1770</sup> Interviewees reported no new sessions of the program had been held during our period of evaluation, and none were planned for the future.<sup>1771</sup> (Training for pro se law clerks and death penalty attorneys occurred during this period<sup>1772</sup> but is not within the scope of the Cardone Report recommendations.)

Thus, eDiscovery is the only existing special-focus program related to the Cardone Report recommendations, and training on the recommendations did not occur at this program due to the pandemic. It is unclear whether the eDiscovery program will cover the Cardone Report recommendations in the future, and no other program on the recommendations has been created.

## On-Demand Resources

On-demand resources offer greater flexibility for creating new, specific content for judges than the orientations and workshops described above, allowing FJC Education staff to "find a home for some of the really good topics that don't fit in with other things."<sup>1773</sup> Providing content as "how-to series"<sup>1774</sup> and

1764. See <https://fjc.dcn/content/373024/workshop-judges-seventh-circuit>, last accessed Jan. 21, 2023.

1765. Judge Jackson-Akiwumi is also a former staff attorney from the Illinois Northern FDO. See <https://www.fjc.gov/history/judges/jackson-akiwumi-candace-rae>, last accessed Jan. 21, 2023.

1766. Judge Magnus-Stinson is a former DSC member. See DSC June 2022 List of Attendees, p. 8.

1767. Interview 96.1. "The session that was to be offered this year [was] going to include a session on criminal eDiscovery, [but] that seminar's been pushed off. I don't know when we'll next convene Electronic Discovery Institute."

1768. Interview 96.1. "Obviously, criminal eDiscovery is something that judges increasingly need to know about."

1769. Interview 96.1.

1770. Interview 97.1.

1771. Interview 97.1.

1772. Interview 101.1.

1773. Interview 97.1.

1774. Interview 97.1.

“skills development,”<sup>1775</sup> the on-demand format offers “a more manageable chunk [of content] that one can bite off and develop.”<sup>1776</sup> Fewer staff may be involved in their creation,<sup>1777</sup> the production quality may differ,<sup>1778</sup> and the content may come to FJC Education having been developed outside the division,<sup>1779</sup> but “if it’s a good topic, and the education committee says on-demand is a good option, we’ll do it.”<sup>1780</sup>

On-demand content can be written, audio, or video. Described below are the on-demand offerings relevant to the Cardone recommendations that have been made available since its publication.

### ***Online Program Materials***

Program materials for workshops and orientations are archived on the FJC Education webpage. After Judge Cardone’s participation as a mentor judge at the Phase I Orientation for New District Judges, FJC Education staff worked with her to make her resources available to all judges through the program webpage.<sup>1781</sup> Putting these resources online means judges can access the content regardless of Judge Cardone’s ability to participate in the orientation, and it is available for attendees who want to refer back to what they learned at a training session.

### ***“Please Proceed”***

FJC Education recently recorded a podcast with Judge Cardone for its “Please Proceed” series covering her work on the committee she chaired and some of the findings detailed in the Cardone Report. Though new judges all receive a copy of the CJA Handbook<sup>1782</sup> (discussed below), mid-career judges may not know about the Cardone Report. The episode was intended to reach this broader audience.<sup>1783</sup> The flexibility of the podcast format made it possible to create content quickly<sup>1784</sup> for a narrow group, in this case to notify these judges of the Cardone Committee’s work. The webpage for the episode included links to the CJA Handbook<sup>1785</sup> as well as the Executive Summary from the Cardone Report.<sup>1786</sup>

### ***CJA Handbook for Judges***

General information on the CJA is provided in a print publication called *Presiding Over District Court Cases with Appointed Criminal Justice Act (CJA) Counsel: A Handbook for New Judges*, published in 2019.<sup>1787</sup> Written by two case-budgeting attorneys, the handbook could be described as an all-purpose guide to the CJA. This high-level look at judicial responsibilities under the CJA covers appointment of counsel,

1775. Interview 97.1.

1776. Interview 96.1.

1777. Interview 97.1, speaking of podcasts, “It is low production. But that’s the whole idea, that we can really do it, and it doesn’t require a cast of thousands.”

1778. *Id.*

1779. Interview 97.1 and 96.1.

1780. Interview 96.1.

1781. Interview 98.1. “We have materials that she provided as a mentor judge that we have continued to provide as background materials for every program since then.”

1782. Blair Perilman and Cari Dangerfield Waters, “Presiding Over District Court Cases with Appointed Criminal Justice Act (CJA) Counsel: A Handbook for New Judges” (2019).

1783. Email from Interview 97.1, re: Brief CJA Interview with Judge Cardone, Feb. 25, 2021. On file with the FJC.

1784. Interview 97.1.

1785. *Supra* note 1782.

1786. The 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program Executive Summary is available at <http://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20Exec%20Summary.2018.pdf>.

1787. *Supra* note 1782.

voucher review, case budgeting, and attorney requests for using expert services. Available on the FJC Education webpage, the handbook is also provided to all new district court judges at their orientation. Education staff felt the material was beneficial due to its ability to address “regional isolation” with problems of voucher review and provide “examples of what is and isn’t reasonable.”<sup>1788</sup>

The handbook represents FJC Education’s efforts to implement the Cardone recommendations by tapping the experience of outside subject matter experts through coordination with DSO. Though distributed through FJC Education programming, the division did not create the content and relied on DSO to review it.<sup>1789</sup> “We were not in a position to editorially review it. So, it went to DSO, who reviewed it, and our role was essentially coordination.”<sup>1790</sup>

### **Capital Litigation**

FJC Education offers some on-demand resources for judges regarding the management of capital cases, that have been available since before the publication of the Cardone Report. Two of these are print resources, one on death penalty trials<sup>1791</sup> and the other on capital habeas cases.<sup>1792</sup> A special-topics page on managing capital cases<sup>1793</sup> includes links to both print publications, contact information for the Federal Death Penalty Resource Counsel program provided through DSO,<sup>1794</sup> a link to Habeas Assistance Training (also provided through DSO),<sup>1795</sup> a pocket guide on § 2254 litigation,<sup>1796</sup> and a video overview of state capital convictions.<sup>1797</sup> Changes were not made specific to the Cardone Report or its recommendations.<sup>1798</sup> In addition to these resources, FJC Education provides updates on changes in capital litigation through webinars, podcasts, pocket guides, and breakout sessions at training events, such as at the orientation programs for district and magistrate judges described above, though no sessions were held during our period of study.<sup>1799</sup>

Similar to the issues of court culture described above,<sup>1800</sup> concerns about variation among the courts impact the development of content on capital litigation.

There are differences in courts’ funding and approach to these issues, where the standard of practice and representing even a capital litigation case in [one jurisdiction] is not the same as representing a capital litigation case elsewhere. So, I think there’s absolutely a need for further education on this, but the judges in many cases are not the best initial gatekeepers for these assessments.<sup>1801</sup>

1788. Interview 971.

1789. Interview 971. “When the primer initiative came to us, it was like, let’s see if we can find a home for this. We were not the editors of this, but let’s see what we can do.”

1790. Interview 971.

1791. See <https://www.fjc.gov/content/resource-guide-managing-capital-cases-volume-i-federal-death-penalty-trials>, last accessed Jan. 21, 2023.

1792. See <https://www.fjc.gov/content/resource-guide-managing-capital-cases-volume-ii-habeas-corpus-review-capital-convictions-0>, last accessed Jan. 21, 2023.

1793. See <https://www.fjc.gov/content/managing-capital-cases>, last accessed Jan. 21, 2023.

1794. See <https://www.fjc.gov/content/managing-federal-death-penalty-trials-federal-death-penalty-resource-counsel-assistance>, last accessed Jan. 21, 2023.

1795. See <https://hat.capdefnet.org/>, last accessed Jan. 21, 2023.

1796. See <https://www.fjc.gov/content/capital-%C2%A7-2254-habeas-cases-pocket-guide-judges-no-visibility-flag-review-dup>, last accessed Jan. 21, 2023.

1797. See <https://www.fjc.gov/content/managing-habeas-corpus-review-capital-convictions-additional-resources>, last accessed Jan. 21, 2023.

1798. The most recent material is dated 2012. See, <https://www.fjc.gov/content/managing-capital-cases>, last accessed Jan. 21, 2023.

1799. See descriptions of orientation programs, national workshops, circuit workshops, and special-focus programs above.

1800. See *CJA Handbook for Judges* discussed above.

1801. Interview 96.1.

Concerns about court variation in both familiarity with capital litigation and the quality of representation available is what prompted the Cardone Report recommendations.<sup>1802</sup> Thus, while resources are available on capital litigation, they have not been updated to address the issues identified in the Cardone Report.

### *Criminal e-Discovery Pocket Guide*

A combined effort of DSO, the FJC, and DOJ, the *Criminal e-Discovery Pocket Guide*, initially sent in print to all judges when first published in 2015, is currently available online.<sup>1803</sup> Covering common issues of eDiscovery, including volume and formats for production, the pocket guide provides judges with best practices for facilitating the discovery process between prosecution and defense. The pocket guide is being revised but missed the expected 2021 release due to changes in DOJ staffing.<sup>1804</sup> (Judges can access another resource for eDiscovery best practices through the FJC webpage.<sup>1805</sup>)

The general availability of the pocket guide and the effort to keep it current provide evidence for the implementation of Recommendation 23, and by doing so, Recommendation 21 as well.

### Other Resources

Though most training available for judges, including training regarding the Cardone Report recommendations, is conducted by FJC Education, other sources are available within the judiciary. Some resources described below are affiliated with FJC Education programming detailed above.

Some training for judges on using eVoucher is provided by eVoucher staff in the district courts (not FJC Education staff). This training does not cover defense best practices consistent with Recommendations 20–22, but it does discuss the four reasons for reduction included in Recommendation 8.<sup>1806</sup>

DSC members, working with DSO staff, created an educational video for judges, titled “What the Committee to Review the Criminal Justice Act Program Wants You to Know about the Criminal Justice Act,”<sup>1807</sup> regarding recent changes to the eVoucher payment system for CJA litigation. The video included information about the new standard for reviewing vouchers (Recommendation 8), and the process by which it was implemented in the eVoucher payment system.

DSC members were also scheduled to participate in circuit workshops (described above) after the publication of the Cardone Report, many of which were canceled due to the COVID-19 pandemic.<sup>1808</sup>

1802. Cardone Report, p. xxi, and Recommendations 24–29.

1803. See <https://www.fjc.gov/content/309106/criminal-e-discovery-pocket-guide-judges>, last accessed Jan. 21, 2023.

1804. See DSC Dec. 2020 Agenda Item 2G, p. 8, and Interview 59.2.

1805. See Douglass Mitchell and Sean Broderick, “Recommended E-Discovery Practices for Federal Criminal Justice Act Cases” (n.d.), available at <https://fjc.dcn/content/recommended-e-discovery-practices-federal-criminal-justice-act-cases-1>.

1806. See, CJA eVoucher Judge Manual 2021, available at [https://training.sdso.ao.dcn/trainingmaterials/DC/CJA\\_eVoucher/page1296/jobaids/Judge\\_Manual.pdf](https://training.sdso.ao.dcn/trainingmaterials/DC/CJA_eVoucher/page1296/jobaids/Judge_Manual.pdf), last accessed June 2, 2021.

1807. The video is available at “[What the Committee to Review the Criminal Justice Act Program Wants You to Know about the Criminal Justice Act](#).” The video describes the problem of voucher reductions detailed in the Cardone Report, the new standard for voucher review adopted by JCUS, and how judges will utilize a new module in the eVoucher system to list the reasons for the proposed voucher reduction.

1808. See CR-DEFSVS-MAR 20, p. 10, describing the work of the Communications Task Force “to developed communications strategies for the judiciary about Judicial Conference Policies related to the Defender Services program,” including “a PowerPoint presentation for Committee members who, in coordination with their respective Circuit Executives, will share it at upcoming 2020 circuit conferences or other appropriate venues.”



## Summary

- FJC Education provided information regarding the responsibilities of judges under the CJA to district and magistrate judges through recurring orientation programs, especially when Judge Cardone participated as a mentor judge.
  - Judge Cardone’s materials from the program are available on demand.
- Material developed in coordination with the DSO, such as the CJA Handbook and the video on voucher standards of review, were integrated into orientation programs and are available for on-demand viewing as well.
- Three circuit workshops were held, one of which included discussion of the CJA, including use and approval of experts.
  - Materials from the program are available on demand.
- No national workshops included material on the CJA.
  - Some planned national workshops were canceled due to the pandemic.
- Special-focus programming on eDiscovery, intended to address criminal eDiscovery, was planned but canceled due to the pandemic.
- FJC Education developed one new piece of on-demand content—a podcast regarding the Cardone Committee and its work.
  - The podcast is available online and has been integrated into orientation programs when Judge Cardone is not available to participate.
- The *Criminal e-Discovery Pocket Guide* was distributed in print to all judges in 2015 and has been available online since before Recommendation 23 was made.
  - Revision is ongoing.
- Available on-demand information regarding capital and capital habeas litigation was not updated to address the issues of capital litigation identified in the Cardone Report.
- Information regarding capital litigation was not integrated into recent orientations, workshops, or special-focus programs since publication of the Cardone Report but was conducted prior to it.

Apart from the resources described above, no additional material regarding use of experts (Recommendation 20), eDiscovery (Recommendation 21), voucher review of experts and defense best practices (Recommendation 22), or capital and capital habeas litigation (Recommendation 29) were created or adapted to address the issues identified in the Cardone Report.

# Technical Appendix 1

## Acronym List

ABA . . . . .	American Bar Association	FPDO . . . . .	Federal Public Defender Organization
AFPD . . . . .	Assistant Federal Public Defender	FLAS . . . . .	Financial Liaison and Analysis Staff [of the Administrative Office of the U.S. Courts]
AO . . . . .	Administrative Office [of the United States Courts]	FTE . . . . .	Full-Time Equivalent (describes amount of time a position is filled during a FY)
ATF . . . . .	Alcohol Tobacco and Firearms	FY . . . . .	Fiscal Year
BAPO . . . . .	Budget, Accounting, and Procurement Office	HAT . . . . .	Habeas Assistance and Training Counsel Project
CBA . . . . .	Case-Budgeting Attorney	IT . . . . .	Information Technology
CDA . . . . .	Coordinating Discovery Attorney	JETWG . . . . .	Joint Working Group on Electronic Technology
CDO . . . . .	Community Defender Organization	JCUS . . . . .	Judicial Conference of the United States
CHU . . . . .	Capital Habeas Unit	JRC . . . . .	Judicial Resources Committee
CJA . . . . .	Criminal Justice Act	MOU . . . . .	Memorandum of Understanding
CMSO . . . . .	Case Management Systems Office	NITOAD . . . . .	National IT Operations and Applications Development
CRC . . . . .	Capital Resource Counsel	NLST . . . . .	National Litigation Support Team
DAWG . . . . .	Defender Services Automation Working Group	OGC . . . . .	Office of General Counsel
DSAG . . . . .	Defender Services Advisory Group	OLA . . . . .	Office of Legislative Affairs
DSMIS . . . . .	Defender Services Management Information System	PADR . . . . .	Panel Attorney District Representative
DOJ . . . . .	Department of Justice	PCDO . . . . .	Post-Conviction Defender Organization
DSC . . . . .	Defender Services Committee	PSID . . . . .	Policy and Strategic Initiatives Division [of the AO's Human Resources Office]
DSO . . . . .	Defender Services Office	S&E . . . . .	Salaries and Expenses
ESI . . . . .	Electronically Stored Information	US . . . . .	United States
FDO . . . . .	Federal Defender Office	USC . . . . .	United States Code
FDPRC . . . . .	Federal Death Penalty Resource Counsel		
FJC . . . . .	Federal Judicial Center		
FPD . . . . .	Federal Public Defender		

# Technical Appendix 2

## Status of Implementation

Listed below are the Interim Recommendations detailed in the [Report of the Ad Hoc Committee to Review the Criminal Justice Act \(2017\)](#). The original recommendation is listed along with the status of the recommendation (approved, moot, etc.) and any modification made. References to [September 2018](#) or [March 2019](#) are to the Reports of the Judicial Conference of the United States.

### Structural Changes

1. The Defender Services Committee should have:
  - a. Exclusive control over defender office staffing and compensation.
  - b. The ability to request assistance of Judicial Resources Committee staff on work-measurement formulas.
  - c. Control over development and governance of eVoucher in order to collect data and better manage the CJA program.
  - d. Management of the eVoucher program and the interface with the payment system.
  - e. Exclusive control over the spending plan for the defender services program.

**Modified 1a):** Exclusive control over defender office compensation and classification and qualification standards.

*Status: a) approved in part with qualifications, [September 2018](#); b) Executive Committee declared moot, [September 2018](#); c) Executive Committee approved, [September 2018](#); d) AO director determined AO staff working on day-to-day support of the e-Voucher program would remain in CMSO, [March 2019](#); e) Executive Committee deferred consideration until final recommendation of independence is considered.*

2. For any period during which the Administrative Office and Judicial Conference 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 Defender Services Committee, the matter should be placed on the discussion calendar of the full Judicial Conference.

*Status: Executive Committee declined to adopt, [September 2018](#).*

3. The composition of the Defender Services Committee should include the co-chairs of the Defender Services Advisory Group, both as voting members.

*Status: The Executive Committee determined not to make any recommendation on the request, as the decision rests solely within the Chief Justice's discretion, [March 2019](#).*

4. The 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:
  - a. Exclusively control hiring and staffing within DSO.
  - b. Operate independently from the AO Department of Program Services or any other department that serves the courts.
  - c. Retain exclusive control with National Information Technology Operations and Applications Development Branch (NITOAD) over defender IT programs.
  - d. Retain ultimate discretion with DSC in setting the agenda for DSC meetings—no requirement of approval from other AO offices.

*Status: a) No action taken; b) approved by AO Director, [September 2018](#); c) approved by AO Director [March 2019](#), exclusive control became effective as of October 25, 2019,<sup>1809</sup> d) no action taken.*

5. DSO should be made a member of the AO Legislative Council to consult on federal legislation.

*Status: Acted on by AO Director, [September 2018](#); endorsed by JCUS, [March 2019](#).*

6. Representatives from DSO should be involved in the Congressional appropriations process.

**Modified:** Representatives of the Defender Services program should be involved in pursuing Defender Services-related legislative and appropriations priorities, provided such involvement is consistent with the judiciary's overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress.

*Status: Acted on by AO director, [September 2018](#); endorsed as modified by JCUS, [March 2019](#).*

## Compensation and Staffing for Defenders and CJA Panel Attorney

7. The annual budget request must reflect the highest statutorily available rate for CJA panel attorneys.

**Modified:** The annual budget request should reflect the highest statutorily authorized rate for Criminal Justice Act panel attorneys, unless adverse fiscal conditions require the Defender Services budget request to reflect less than the highest statutorily available rate.

*Status: Approved as modified, [March 2019](#).*

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1809. Memorandum to James C. Duff, thru Lee Ann Bennett, from Cait T. Clarke, "Defender Information Technology (IT) Governance," Oct. 15, 2019, signed Oct. 25, 2019, on file with FJC.

8. To provide consistency and discourage inappropriate voucher cutting, the Judicial Conference should:
  - a. 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.
  - b. Provide, in consultation with the Defender Services Committee, comprehensive guidance concerning what constitutes a compensable service under the CJA.

**Modified:** The Cardone Committee has identified a number of problems relating to voucher cutting. The Judicial Conference should:

- a. Adopt the following standard for voucher review—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.
- b. Provide, in consultation with the Defender Services Committee, comprehensive guidance concerning what constitutes a compensable service under the CJA.

*Status: Approved as modified, [September 2018](#).*

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.

**Modified:** Every circuit should have available at least one case-budgeting attorney and reviewing judges should give due weight to their recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from the case-budgeting attorney's recommendations.

*Status: Approved as modified, [March 2019](#).*

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.

*Status: No action taken.*

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.

*Status: Approved, [September 2018](#).*

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.

**12 and 13 Modified:** Circuit court judges should give due weight to Defender Services Office recommendations and Judicial Conference-approved Judicial Resources Committee staffing formulas when approving the number of assistant federal defenders in a district.

*Status: Approved as modified, [March 2019](#).*

14. Modify the work-measurement formulas to:
  - a. Reflect the staff needed for defender offices to provide more training for defenders and panel attorneys.
  - b. 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.

**Modified:** Modify the work-measurement formulas, or otherwise provide funding to reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and 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.

*Status: Approved as modified, [September 2018](#).*

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.

*Status: Approved, [September 2018](#).*

16. Every district should have an appeal process for panel attorneys who wish to challenge any non-mathematical voucher reductions.
  - a. Every district should designate a CJA committee that will determine how to process appeals.
  - b. Any proposed reasonableness reduction shall be subject to review by the designated CJA review committee that will issue a recommendation to the judge.

**Modified:** Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge. Any challenged reduction should be subject to review in accordance with this independent review process.

All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid pursuant to 18 U.S.C. § 3006A(d).

*Status: Approved as modified, [March 2019](#).*

## Standards of Practice and Training

17. The Defender Services Office (DSO) should regularly update and disseminate best practices.

*Status: Approved, [September 2018](#).*

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.

*Status: Approved, [September 2018](#).*

19. All districts must develop, regularly review and update, and adhere to a CJA plan as per Judicial Conference policy. Reference should be made to the most recent model plan and best practices. The plan should include:

- a. Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
- b. A training requirement to be appointed to and then remain on the panel.
- c. A mentoring program to increase the pool of qualified candidates.

*Status: Approved, [September 2018](#).*

20. The Federal Judicial Center (FJC) and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators, and other service providers.

*Status: Approved, [September 2018](#).*

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.

*Status: Approved, [September 2018](#).*

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.

*Status: Approved, [September 2018](#).*

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.

*Status: Approved, [September 2018](#).*

## 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.

**Modified:** Local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district or cross-circuit representation should not be imposed without good cause. Every district should have access to a CHU.

*Status: Approved as modified, [March 2019](#).*

25. Circuit courts should encourage the establishment of Capital Habeas Units (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.

*Status: Approved, [September 2018](#).*

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 case-budgeting attorneys (CBAs) and/or resource counsel where appropriate.

*Status: Approved, [March 2019](#).*

27. In appointing counsel in capital cases, judges should defer to recommendations by federal defenders and resource counsel absent compelling reasons to do otherwise.

**Modified:** In appointing counsel in capital cases, judges should consider and give due weight to the recommendations by federal defenders and resource counsel and articulate reasons for not doing so.

*Status: Approved as modified, [March 2019](#).*

28. Modify work-measurement formulas to:

- a. 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.
- b. Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.
- c. Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

*Status: Approved, [September 2018](#).*



29. FJC should provide additional judicial training on:
- a. The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
  - b. 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.

*Status: Approved, [September 2018](#).*

## Defender Information Technology

30. Adequately fund and staff the National Information Technology Operations and Applications Development Branch to control and protect defender IT client information, operations, contracts, and management.

*Status: Approved, [September 2018](#).*

## 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.

*Status: Approved, [September 2018](#).*

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.

*Status: Approved, [September 2018](#).*

33. Develop a national policy requiring the use of qualified interpreters whenever necessary to ensure defendants' understanding of the process.

*Status: Approved, [September 2018](#).*

## 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.

*Status: Approved, [September 2018](#).*

35. Congress must amend the Criminal Justice Act to eliminate circuit court review of attorney and expert fees exceeding current statutory caps.

*Status: Deferred, [March 2019](#).*

# Technical Appendix 3

## Project Interviews

To understand implementation of the interim recommendations from the Cardone Report, the FJC research team contacted 234 people from across the judiciary to participate in an interview. Some participants suggested we contact someone else, either in lieu of speaking with them or in addition to doing so, and we contacted the suggested person.

Groups contacted for interviews include AO leadership and staff, current or former Executive Committee members, DSO leadership and staff, DSAG members, district court stakeholders (including federal defenders, chief district judges or their designees, and CJA district panel representatives), circuit court stakeholders, (including chief circuit judges or their designees, circuit executives and other circuit staff, and law clerks), Death Penalty Resource Counsel, CJA supervising attorneys, circuit case-budgeting attorneys, litigation support staff for defenders and prosecutors, and FJC Education Division staff.

Interview participants received the questions in advance, allowing them to prepare answers, and additional information was provided over email to supplement responses, to update information, and to respond to clarifying questions.

In total, 215 people participated in an interview, 208 of the originally identified participants (89%). Detailed below are the number of people in each group participating in interviews for this project. Interviews were generally conducted over the phone, and interviewees were given the option for the call to be recorded or for another research team member to take notes.

We promised interviewees that they would not be identified by name in our report, that results would be presented in the aggregate, and that interview notes and transcripts would remain confidential to the research team. Accordingly, when reporting information from the interviews, identifying details about the speaker, and the subject of discussion, have been redacted or masked to protect the anonymity of the participants. Footnotes referencing specific interviews have a randomly selected number from 1.1 to 215.1, with the number after the decimal indicating the number of times we spoke to the same individual (i.e., Interview 52.2 is the second time we spoke with interviewee number 52).<sup>1810</sup> Where necessary, interview subjects were grouped together to protect anonymity, using “Interview with” to indicate a response for the group, not attributed to a single speaker.

When reading the substantive chapters, a nonresponse to any particular question should not be looked upon as a denial, as not every question was relevant, not every interviewee answered every question, and some interviewees did not cover the topic in detail. Moreover, where we compare the answers of interviewees, to each other or to information collected elsewhere for this project, we are not suggesting interviewees were incorrect in any way.

The protocols for each group of interviews are listed at the end of this appendix.

### *AO Leadership and Staff*

We contacted twelve people in the Administrative Office of the U.S. Courts (AO) to participate in interviews with members of the FJC research team. We sought interviews with leadership of the AO and staff, including from the Budget Division, the Office of Legislative Affairs, the Financial Liaison and Analysis Office, and the Policy and Strategic Initiatives Office.

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1810. These references allow us to verify the source of our interview without identifying the speaker.

Ten of twelve agreed to participate in an interview, either individually or as a group. Interviews lasted approximately one hour.

#### *Executive Committee Members*

We contacted two current or former members of the Executive Committee to participate in interviews with the FJC research team. Both agreed to participate. Interviews lasted between 60 and 90 minutes.

#### *Defender Services Office Leadership and Staff*

We contacted ten members of the DSO staff. Everyone agreed to participate in an interview. Initial interviews were held in April 2020, and a final interview was held in October 2022. Some interview sessions were held as group interviews, while others were individual. Sessions lasted between 30 and 90 minutes.

#### *Defender Services Advisory Group Members*

We contacted three members of the Defender Services Advisory Group (DSAG). All three agreed to participate in a group interview. The interview lasted one hour.

#### *CJA Supervising Attorneys/CJA Coordinating Attorneys*

We contacted eleven CJA supervising attorneys (or CJA coordinating attorneys). All those contacted agreed to participate in an interview. Interviews were conducted between February and March 2022, and all interviews lasted approximately one hour.

#### *Case-Budgeting Attorneys*

We contacted the eleven CBAs serving in fall 2021. All those contacted agreed to participate in an interview. The interviews lasted approximately one hour.

#### *FJC Education Division Staff*

We contacted seven members of the FJC Education Division to participate in an interview. Everyone contacted participated in a group interview in October 2021. The interview lasted approximately two hours. We followed up the interview with a request for any changes in programming as of August 2022, and information was provided over email at that time.

#### *Litigation Support for Defenders and Prosecutors*

We contacted three people familiar with the eDiscovery needs of prosecutors and defenders to participate in an interview about their experiences. All three agreed to participate, and a fourth interview participant was added at the request of those working within the Department of Justice. Initial email conversations with one interviewee were held in late 2021, and a group interview with all participants was held in early 2022. The group interview took place over two days, each session lasting 90 minutes. Additional information was later provided over email, both in response to initial questions (where information was not readily available) and to answer clarifying questions.

#### *Death Penalty Resource Counsel Projects*

Between March 2022 and August 2022, the FJC research team interviewed attorneys and support staff from the Death Penalty Resource Counsel projects, a collection of national and contract positions working in capital litigation.<sup>1811</sup>

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1811. DPRC projects include the 2255 Project, Capital Resource Counsel, Capital Appellate Resource Counsel, the National Mitigation Coordinator, Sentencing Resource Counsel, and the national and regional Habeas Assistance Training Units (HATs).

Attorneys serving in national positions (those housed within an FDO) as resource counsel take appointments in capital cases, while those who work under contract may not take such appointments as part of their project responsibilities. Even among attorneys prohibited from taking direct representations under their contracts, appointments as CJA counsel through a private practice are not uncommon, meaning all those working in resource counsel projects have a wide array of experiences from which to discuss the Cardone Report recommendations.

There are six projects under the general label of Death Penalty Resource Counsel projects (described below). Staff on all six projects were eligible to be contacted for an interview, irrespective of their employment status (full-time vs. part-time, director vs. staff, attorney vs. administrative support). We contacted fifteen people working in national positions and fifteen contractors, and conducted interviews with twenty people, for an overall response rate of 66% (73% for contractors and 60% for national positions).<sup>1812</sup>

The response rate for these interviews is lower than for others in this project, but the universe of interview subjects is smaller.<sup>1813</sup> By the end of the study period, we had interviewed 25% of all possible resource counsel. Moreover, the diverse backgrounds and experiences of these interviewees suggest they are a representative sample from which to draw conclusions about implementation of the adopted interim recommendations. The basic protocol for all interview participants was the same across projects, but details were modified and questions omitted to address the experiences of the specific interviewee.<sup>1814</sup>

- Capital Resource Counsel Project (CRC)
  - FDO staff; work nationwide; DSC authorization 2001
  - Administratively hosted from TNM FDO
  - Provides expert assistance in federal capital prosecution cases; advises judges; consults with and trains appointed counsel; provides direct representation in some federal capital trials
- Federal Death Penalty Resource Counsel Project (FDPRC)
  - Part-time contractors; work nationwide; DSC authorization 1992
  - Provides expert assistance in federal capital prosecution cases; monitors cases; assists judges by identifying qualified counsel; consults with assigned counsel; researches and drafts model pleadings; conducts capital trainings
- Federal Capital Appellate Resource Counsel Project
  - FDO staff; work nationwide; DSC authorization 2008
  - Administratively hosted from NY(N) FDO
  - Assists with federal direct appeals of convictions and death sentences; recruits and recommends qualified appellate counsel to the courts; consults with attorneys; provides resource materials and training; monitors the status of every federal capital appeal; provides direct representation in federal capital appellate cases

1812. Five Resource Counsel project members did not respond to multiple requests for interviews, which we considered a declination to participate. Four Resource Counsel project members formally declined to participate, citing a lack of information or experience with the adopted recommendations, as well as concerns about threatening resources for the projects overall by participating in the interview. One Resource Counsel project member initially agreed to participate but did not respond to additional requests to set a date for the interview.

1813. Seventy-seven national and contract positions work exclusively on capital litigation, compared to the ninety-four district chief judges plus federal defenders and district panel representatives eligible for interviews about district CJA plans. Sentencing Resource Counsel are separated from this total, as their work is not exclusively in capital litigation.

1814. For example, interviewees who were not attorneys were not asked about their experiences litigating capital cases in federal courts, or the resource needs of such cases. Likewise, questions about resourcing the projects overall were asked of leadership, while questions about additional resources to manage current workload were asked of other staff.

- § 2255 Project (28 U.S.C. § 2255 cases)
  - FDO staff; work nationwide; DSC authorization 2004
  - Administratively hosted from MD FDO
  - Monitors the cases of every federal death row prisoner after direct appeal; recruits qualified counsel; consults with appointed counsel; conducts trainings; provides direct representation in some federal capital § 2255 cases
- National Mitigation Coordinator
  - FDO staff; works nationwide; DSC authorization 2004
  - Administratively hosted from IN(S) FDO
  - Conducts training; consults with capital defense teams; creates resource materials; prepares declarations; testifies during federal capital proceedings
- State Death-Sentenced Habeas Representation (28 U.S.C. § 2254 cases)
  - National Habeas Assistance & Training Counsel Project (National HAT)
    - Part-time contractors; work nationwide; DSC authorization 1995
    - Provides consultation and training to assigned counsel; participates in moot courts; researches and prepares resource materials; assists with SCOTUS capital habeas litigation; monitors “opt-in” litigation
  - Regional Habeas Assistance and Training Counsel Projects (Four Regional HATs)
    - Texas Regional HAT, part-time contractors working in Texas and the Fifth Circuit, DSC authorization 1998
      - Monitors cases; recruits counsel; consults and assists assigned counsel; provides training and resource materials
    - Mississippi Regional HAT, part-time contractor working in Mississippi and the Fifth Circuit, DSC authorization 1998
      - Monitors cases; recruits counsel; provides consultation, training, and resources
    - Missouri Regional HAT, part-time contractor; works in Missouri and the Eighth Circuit, DSC authorization 1998
      - Monitors all death-sentenced individuals in the Eighth Circuit and provides assistance, consultation, training, and resources to appointed counsel
    - Alabama Regional HAT, part-time contractor; works in Alabama and the Eleventh Circuit, DSC authorization 1998
      - Monitors cases; recruits counsel; provides consultation, training, and resources to appointed counsel

### *District Court Stakeholders*

In early 2020, we drew a stratified sample to identify districts for interviews. The purpose of the interviews was to ask key district stakeholders about specific provisions of the CJA plans, recent revisions, upcoming revisions, and differences between plans and practices related to CJA administration. Both the process of drawing the sample and the response rates are discussed below.

The sample was chosen to represent both the general diversity of the ninety-four federal district courts and key circumstances related to the CJA, such as whether they had a federal defender office

(FDO) and, if so, whether it was a federal public defender’s Office (FPDO)—a government entity—or a nonprofit community defender organization (CDO).<sup>1815</sup> Specifically, we looked at the following criteria—each of which has the potential to affect the administration of the CJA within a district—to draw a sample of forty districts to ensure that the complexities of the defense function across the ninety-four federal district courts were represented.<sup>1816</sup> The bullets show the variation among all ninety-four districts on the stated characteristics.

- Circuit
  - At least one district from each of the twelve circuits.
- District size (number of authorized judges and geographic size)
  - Districts ranged in size from one to twenty-eight authorized judgeships.
  - Districts ranged from zero to eighty-seven vacant judgeship months.
  - Districts ranged from zero to twenty-four full-time magistrate judges.
  - Districts ranged from sixty-eight to over 663,300 square miles.
- Caseload (weighted filings per authorized judgeship, percentage of the criminal caseload with CJA counsel, percentage of the caseload assigned to FDO vs. panel)
  - Criminal filings ranged from twenty-two to over 10,418 in a year.
  - Appointments made under the CJA ranged from thirty-one to over 21,708.<sup>1817</sup>
    - Districts ranged from 11% to 100% of appointments assigned to the panel.
- FDO structure
  - Ninety-one districts are served by FDOs, with seventeen CDOs serving nineteen districts and sixty-four FPDOs serving seventy-two districts.
    - Three districts do not have an FDO.
    - FDOs range in size from 5.0 full-time equivalent positions (FTE) to over 200 FTE.
- U.S. attorney office size
  - U.S. attorney offices range from eleven to 316 attorney FTE.

Between September 2020 and January 2021, we conducted interviews with chief district judges, district judges, magistrate judges, federal defenders, CJA district panel representatives,<sup>1818</sup> and court staff from our sample of forty courts. Generally, we sought to speak with a representative of the district court, a representative of the FDO (if the district had one), and a representative of the panel.

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1815. See [18 § U.S.C. 3006A \(g\)\(2\)](#). FPDOs are federal entities staffed by federal employees. CDOs are nonprofit defense counsel organizations incorporated under state laws.

1816. The variation among the courts is from FY 2019, the last full year of data available when we drew our sample.

1817. The number of CJA appointments is greater than the number of criminal defendant filings because such appointments cover a wider number of representations. See [18 § U.S.C. 3006A](#).

1818. “The CJA Panel Attorney District Representative (PADR) is a member of the district’s CJA Panel who is selected by the local [federal public defender/community defender], with acquiescence from the chief judge, to serve as the representative of the district’s CJA Panel for the national Defender Services CJA PADR program and local CJA committees.” See *Guide to Judiciary Policy*, Vol. 7A, Appx 2A, p. 13, fn.2.

We contacted 118 people to participate in interviews. Potential interviewees were contacted by email, with a description of the project and a request for their participation in a telephone interview.<sup>1819</sup> We followed up multiple times by email or phone to secure participation, ultimately treating any outstanding interview requests in January 2021 as declinations to participate. Some potential interviewees suggested we contact someone else, either in lieu of speaking with them or in addition to agreeing to participate in the interview themselves. Additional interviewees were suggested because they were involved in the district plan revision, served on the district’s criminal law or CJA committee, or were involved in a specific aspect of panel administration, such as voucher review, that made them particularly knowledgeable. Some interviewees opted to participate in a joint interview.

Prior to the interview, all interview participants received a summary of their district CJA plan (as coded by the research team) and a list of questions we planned to ask in the interview. This was provided in advance to allow respondents to prepare.<sup>1820</sup> Attorney participants also received a summary of the allocation of appointments between the FDO and the panel since 2017.

Overall, 111 people participated in interviews (104 (88%) of the 118 initially identified participants), as well as additional interviewees suggested to us. The breakdown of interviewee by type is detailed in Table 1. Interviews lasted 30 to 90 minutes, with most lasting approximately one hour.

**Table 1.** Interview Participants by Type.

Interviewee Type	No. of Respondents
Chief Judge/Designee	46
Federal Defenders (FPDs)	34 (27)
(Exec. Dir. of CDO)	(7)
Panel Representative	31
<b>Total</b>	<b>111</b>

### *Circuit Court Stakeholders*

Between August and October 2022, we contacted circuit chief judges and circuit executives to discuss CJA administration in the courts of appeals, including details of the CJA plan for the courts of appeals.

- All twelve courts of appeals agreed to provide additional information about plans (if they had one)<sup>1821</sup> and CJA administration practices.

1819. The initial research design provided for the FJC research team to travel to all forty district courts and conduct the interviews in person. The COVID-19 pandemic prevented travel and in-person interviewing. To keep the research plan on schedule as much as possible, we opted to modify the research design and conduct interviews over the phone. Telephone interviews provided the benefit of making transcripts of the interviews available when the interview participants consented to recording. Transcripts were lightly edited to ensure that information was captured accurately (correcting names or obvious mistakes in transcription) and to ease readability by removing interjections such as “you know.” At least two members of the research team participated in each interview, and all team members participating in the interview read, edited, and agreed on a final version of the transcript. Where transcripts were not available, one team member took notes while another asked the interview questions. A final version of interview notes was agreed on by all team members participating in the interview.

1820. All interviews were semi-structured, in that they generally followed the protocol, though not every question applied to every interviewee. For instance, questions pertaining to divisional offices were not asked in districts that did not have separate divisions.

1821. Some circuits administered the CJA through a local rule and provided a manual with detailed information about the CJA. See Appendix D: Circuit Court CJA Plan Analysis.



- One circuit provided written responses in lieu of an interview.
- Three circuits provided written answers in advance of the interview.
- Two circuits provided supplemental information after the interview.
- In total, twenty-seven people provided information about the administration of the CJA in the courts of appeals.
  - Results of the interviews are reported at the circuit level to protect the anonymity of individual respondents (such as “Interview with [anonymous ID numbers]”).
- For ten of twelve courts of appeals, multiple people (between two and four) participated in an interview, often a group interview, and every court of appeals reported gathering information to answer our questions from multiple sources.
- Interviews lasted 30 to 60 minutes.

# Attachment 1

## Coded Panel Management Responses

### Coding Methodology

Two members of the research team quantified the information provided in the district stakeholder interviews regarding panel management tasks<sup>1822</sup> by reviewing each interview and coding eleven characteristics using the coding guide at the end of this attachment. The two data sets created by the two independent coders were compared and reconciled through seven stages until a final agreement set was produced. See Table 1, which shows the results from the first stage of reconciliation.

Table 1. First Stage Intercooder Reliability.

Characteristic	Disagreement		Agreement	
	Number	Percentage	Number	Percentage
Selection criteria	0	0.0%	106	100%
CJA committee present	1	0.9%	105	99.1%
Appointment rotation	4	3.8%	102	96.2%
Panel terms	4	3.8%	102	96.2%
Selection process	8	7.5%	98	92.5%
Retention criteria	9	8.5%	97	91.5%
Removal process	11	10.4%	95	89.6%
Appointment process	12	11.3%	94	88.7%
Retention process	12	11.3%	94	88.7%
Judge on committee	15	14.2%	91	85.8%
Committee advises judges	15	14.2%	91	85.8%

1822. Defined in Recommendation 15 as the selection, appointment, retention, and removal of panel attorneys.

## Results Tables

The following tables summarize aspects of the final agreement set which were referred to in Chapter 3: Panel Attorney Compensation of this report.

**Table 2.** Processes Managed by a Panel Administrator.

Response (N=106)	Number	Percentage
<b>Selection</b>		
Managed by panel administrator	77	72.6%
Not managed by panel administrator	9	8.5%
Not discussed or unclear	20	18.9%
<b>Appointment</b>		
Managed by panel administrator	32	30.2%
May be managed by panel administrator	13	12.3%
Not managed by panel administrator	26	24.5%
Not discussed or unclear	35	33.0%
<b>Retention</b>		
Managed by panel administrator	57	53.8%
Not managed by panel administrator	1	0.9%
Not discussed or unclear	36	34.0%
Not applicable/no process	12	11.3%
<b>Removal</b>		
Managed by panel administrator	53	50.0%
Not managed by panel administrator	6	5.7%
Not discussed or unclear	46	43.4%
Not applicable/no process	1	0.9%

**Table 3.** Process Inclusion of Judicial Input.

<b>Response (N=106)</b>	<b>Number</b>	<b>Percentage</b>
<b>Selection</b>		
Includes judicial input	73	68.9%
May include judicial input	1	0.9%
Does not include judicial input	6	5.7%
Not discussed or unclear	26	24.5%
<b>Appointment</b>		
Includes judicial input	28	26.4%
May include judicial input	17	16.0%
Does not include judicial input	25	23.6%
Not discussed or unclear	36	34.0%
<b>Retention</b>		
Includes judicial input	46	43.4%
May include judicial input	7	6.6%
Does not include judicial input	7	6.6%
Not discussed or unclear	34	32.1%
No process	12	11.3%
<b>Removal</b>		
Includes judicial input	54	50.9%
May include judicial input	6	5.7%
Does not include judicial input	2	1.9%
Not discussed or unclear	43	40.6%
No process	1	0.9%

**Table 4.** Processes as Described by Stakeholder Interviewees.

Response (N=106)	Number	Percentage
<b>Selection Authority</b>		
Judge, with committee recommendation	47	44.3%
CJA committee	27	25.5%
Judge	9	8.5%
Defender	2	1.9%
Defender and judge	1	0.9%
Not discussed or unclear	20	18.9%
<b>Appointment Authority</b>		
Defender	25	23.6%
Magistrate judge	14	13.2%
Clerk or court staff	13	12.3%
Presiding judge	10	9.4%
Other	9	8.5%
Not discussed or unclear	35	33.0%
<b>Retention Process and Authority</b>		
Apply to committee, who advises judges	34	32.1%
Apply to committee, who decides	22	20.8%
Apply to defender, who decides	1	0.9%
Apply to judge(s), who decide(s)	1	0.9%
Other	1	0.9%
No process	12	11.3%
Not discussed or unclear	35	33.0%
<b>Removal Authority</b>		
Judge(s), with input*	35	33.0%
CJA Committee	15	14.2%
Judge(s), without input	6	5.7%
Defender	1	0.9%
Informal process^	3	2.8%
No process	1	0.9%
Not discussed or unclear	45	42.5%

\* Input could be from the CJA committee or defender.

^ For example, a court's CJA committee may *request* that a panel attorney leave the panel but cannot remove the attorney.

**Table 5. Judicial Input Inclusion and Mechanism, by Process.**

Judicial Input Inclusion and Mechanism (N=106)	Number	Percentage (All)	Percentage (Processes with Input)
<b>Selection</b>			
Includes judicial input	73	68.9%	100%
Authority with committee input	47	44.3%	64.4%
Committee seat	15	14.2%	20.5%
Sole authority	9	8.5%	12.3%
Other	2	1.9%	2.7%
Possible judicial input	1	0.9%	
No judicial input	6	5.7%	
Not discussed	26	24.5%	
<b>Appointment</b>			
Includes judicial input	28	26.4%	100%
Sole authority	24	22.6%	85.7%
Other input	4	3.8%	14.3%
Possible judicial input	17	16.0%	
No judicial input	25	23.6%	
Not discussed	36	34.0%	
<b>Retention</b>			
Includes judicial input	46	43.4%	100%
Authority with committee input	34	32.1%	73.9%
Committee seat	11	10.4%	23.9%
Sole authority	1	0.9%	2.2%
Possible judicial input	7	6.6%	
No judicial input	7	6.6%	
No process	12	11.3%	
Not discussed	34	32.1%	
<b>Removal</b>			
Includes judicial input	54	50.9%	100%
Authority with committee/defender input	35	33.0%	64.8%
Committee seat	9	8.5%	16.7%
Sole authority	6	5.7%	11.1%
Other input	4	3.8%	7.4%
Possible judicial input	6	5.7%	
No judicial input	2	1.9%	
No process	1	0.9%	
Not discussed	43	40.6%	

**Table 6.** Appointment Rotation Process.

<b>Response</b>	<b>Number</b>	<b>Percentage</b>
Yes	48	45.3%
Process in place but unused	8	7.5%
Not used	8	7.5%
Not discussed or unclear	42	39.6%
<b>Total</b>	<b>106</b>	<b>100.0%</b>

Table 7. Management by Panel Administrator and Inclusive of Judicial Input, by Process.

	Includes Judicial Input	May Include Judicial Input	Does Not Include Judicial Input	No Process	Not Discussed or Unclear	Total
<b>Selection Processes</b>						
Managed by a panel admin.	64	1	6		6	77
May be managed by a panel admin.						
Not Managed by a panel admin.	9					9
Not discussed or unclear					20	20
<b>Total</b>	<b>73</b>	<b>1</b>	<b>6</b>		<b>26</b>	<b>106</b>
<b>Appointment Processes</b>						
Managed by a Panel Admin.	3	4	25			32
May be Managed by a Panel Admin.		13				13
Not managed by a panel admin.	25				1	26
Not discussed or unclear					35	35
<b>Total</b>	<b>28</b>	<b>17</b>	<b>25</b>		<b>36</b>	<b>106</b>
<b>Retention Processes</b>						
Managed by a panel admin.	45	5	7			57
May be managed by a panel admin.						0
Not managed by a panel admin.	1					1
No process				12		12
Not discussed or unclear		2			34	36
<b>Total</b>	<b>46</b>	<b>7</b>	<b>7</b>	<b>12</b>	<b>34</b>	<b>106</b>
<b>Removal Processes</b>						
Managed by a panel admin.	48	3	2			53
May be managed by a panel admin.						0
Not managed by a panel admin.	6					6
No process				1		1
Not discussed or unclear		3			43	46
<b>Total</b>	<b>54</b>	<b>6</b>	<b>2</b>	<b>1</b>	<b>43</b>	<b>106</b>



## Coding Guide

1. Interviewee
  - a. ID number
2. Role
  - a. Chief judge or designee
  - b. Defender
  - c. PADR
3. Court
  - a. Three-digit district abbreviation
4. CJA committee present (selection, appointment, retention, removal tasks)
  - a. Yes
  - b. Yes, but unused
  - c. No
  - d. Not discussed or unclear
5. Judge sits on CJA committee
  - a. Yes
  - b. No
  - c. No committee
  - d. Not discussed or unclear
6. Committee provides a recommendation to judges, who make final decision
  - a. Yes
  - b. No
  - c. No committee
  - d. Not discussed or unclear
7. Selection process
  - a. Committee advises judge(s)
  - b. Committee selects
  - c. Defender selects
  - d. Judge(s) select
  - e. Other
  - f. No process
  - g. Not discussed or unclear

8. Selection criteria present
  - a. Yes
  - b. No
  - c. Not discussed or unclear
9. Appointment process
  - a. Clerk or other court staff appoint
  - b. Defender appoints
  - c. Magistrate judge appoints
  - d. Presiding judge appoints
  - e. Other
  - f. No process
  - g. Not discussed or unclear
10. Rotation/wheel appointment process
  - a. Yes
  - b. No
  - c. Yes, but unused
  - d. Not discussed or unclear
11. Panel terms
  - a. Yes
  - b. No
  - c. Not discussed or unclear
12. Retention/reapplication process
  - a. Apply to committee, who decides
  - b. Apply to committee, who refers to judge(s)
  - c. Apply to judge(s), who decide
  - d. Apply to defender, who decides
  - e. Other
  - f. No process
  - g. Not discussed or unclear
13. Retention/reapplication criteria
  - a. Yes
  - b. No
  - c. Not discussed or unclear

14. Removal process

- a. By committee, who decides
- b. By committee, who refers to judge(s)
- c. By judge(s), who decide with committee recommendation
- d. By judge(s), who decide
- e. By defender, who decides
- f. Other
- g. No process
- h. Not discussed or unclear

15. Notes

## Interview Protocols

All interviews began by staff reading the following text:

Thank you for taking time to speak with us today. As you already know, the FJC Research Division has been tasked with evaluating the implementation of the interim recommendations from the Cardone Report. As part of that evaluation, we are talking to stakeholders within the judiciary about their experiences with the interim recommendation implementation process.

Though we are taking notes in this interview, our notes, including your answers today, will remain confidential within the FJC. No speaker will be identified by name or title in our reports, and we will summarize the results at the aggregate level. As you know, our findings from this analysis of the implementation of the interim recommendations will be provided to the Defender Services Committee in a final report in June of 2023. Do you have any questions before we begin?

Interview participants were asked about recording the conversation. For those who declined to be recorded, FJC research team staff took notes by hand.

# AO Leadership Protocol

## JCUS Policy Implementation and the Cardone Committee

- In general, what factors lead to a periodic review being done?
  - Why was review conducted in 2015?
  - From the judiciary's perspective, what had changed since 1993, when the last review occurred?
- How are changes to JCUS policy typically conveyed to the judiciary?
  - Are there ever exceptions for specific changes?
  - After adoption of the interim recommendations by the JCUS, what steps did JCUS and/or the AO take to promote implementation?
    - What information was included in training?
      - Who were those trainings intended to reach (judges, court staff, etc.)?
        - ◆ Why was that audience chosen?
      - Are any trainings planned for the future?
    - How were educational materials modified?
      - Are any modifications to existing materials planned for the future?
- When JCUS adopts changes to policy, what is the expectation for changing policy and practices at the local level? Does the JCUS expect that courts will vary in their implementation?
  - Do any examples come to mind where JCUS policy changes were easy for courts to implement?
    - What do you think make this change possible?
  - What about a time when compliance with JCUS policy was more challenging for the courts to achieve?
    - Why do you think this change was more challenging to implement than the one above?
  - Are there any methods available to the AO or the JCUS to promote compliance with changing policy?
    - If yes, have you employed those methods?
      - Were they successful? If yes, how so?
    - Are there any methods that the JCUS or AO would like to have available?
      - What are the barriers to utilizing those methods?
  - Are you satisfied with the judiciary's implementation of the recommendations so far? If no, why not?
- Did the AO or the JCUS receive any feedback from the courts about the Cardone recommendations or the implementation process?
  - If so, what was the nature of that feedback?
  - Who was it from?

## Recommendations on Governance, Appropriations, and Legislative Goals of the Defense Function

- As you likely know, Recommendation 6 says “Representatives from DSO should be involved in pursuing Defender Services related legislative and appropriations priorities, provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress.” Starting with funding, how are program needs identified and included in requests for funding across the AO?
  - When making budget requests, how does the AO balance competing interests?
    - For example, if the Budget Committee Guidance is not to request more than 4% over the prior year, but the caseload growth required a division to make a budget request over that percentage, how would you manage those competing interests?
  - After putting all the requests together, are requests provided by the AO divisions modified?
    - If so, how are those changes conveyed to the division?
    - Is there any process in place for programs to appeal or ask for reconsideration of their modified budget request? If so, please describe how that works.
    - As you know, Recommendation 2 called for placement on the JCUS discussion calendar when DSC, Budget or the Executive Committee disagreed over the budget request. Given this wasn’t adopted, how should those disagreements be addressed when they occur?
- What about funding requests outside the typically appropriations process? For example, with funding from the CARES Act, how was the judiciary’s request assembled for Congress?
  - Who was involved in the creation of the CARES Act request?
  - Were the requests reported to Congress as they were provided by the AO divisions, or were modifications made?
    - If so, how were requests modified and by whom?
- When program needs require substantive legislation (either introduction or modification), how are these needs identified and reported to Congress?
  - What stakeholders are involved in creating the request?
  - Does it vary by division within the AO? If yes, how so?
- Given the varied interests across divisions of the judiciary, conflict is bound to occur. When two interests within the judiciary conflict, how is that addressed?
- How do you manage when judicial independence conflicts with JCUS policy?
  - For example, what can the JCUS or the AO do about the preference of some districts to not open an FDO when the conference policy is that districts should open one if the caseload supports it?
  - Has your response differed when the policy has less room for discretion, such as the requirement that districts must (not should) regularly review, update, and adhere to their CJA plans?
- As you know, the JCUS took no action on Recommendation 4d regarding DSO retaining discretion over the DSC meeting agenda. To better understand the issues described in the Cardone Report, it would help to understand the agenda creation process. When there is disagreement

over meeting agendas between AO leadership and one of the divisions of the AO, how is that typically resolved?

- Do any modifications to the agenda creation process need to be made to promote greater independence for the defense function?
- Can you describe the role of the Legislative Council? Who decides who should attend the meeting?
  - How does it differ from Executive Management Group?
- The Cardone Report discussed the role of defenders in oversight of the defense program nationally, including hiring and staffing DSO (4a) and operating independently from program services (4b). From your perspective, how do defenders participate in the oversight of the defense function?
  - Do you think that role needs to be modified?
  - Are there places where DSO could be more involved than they currently are? If so, where?
- How do you resolve differences between divisions of the AO over shared programs, such as eVoucher?
  - What about disagreements between the judiciary and the PSID staff determining work-measurement formulas? How are those resolved?
- Is there anything else you would like to tell us about implementation of the adopted interim recommendations from the perspective of the JCUS or the AO generally?
- Is there anything else you'd like us to know?

# Protocol for Budget Division Staff

## Background

- Could you each briefly describe your position and responsibilities within the AO?
- How long have you been in your current positions?

## Budget Requests, Financial Plan, Supplemental Funding Requests

- Are you involved in creating the budget guidance that is distributed to the spending committees in advance of their budget requests?
  - If yes, please describe that process.
  - What is the purpose of the budgeting guidance?
    - How often do spending committees submit budget requests that differ from the guidance?
      - If requests differ, are they usually for a larger or smaller amount?
      - How often are those requests successful?
  - Is the 4% growth cap for the defender services program from 2015 still in effect?
    - How does this cap differ from those set for other programs?
      - Does it differ because it doesn't include increases in CJA rates?
- Please describe the process for creating the budget request for the judiciary.
  - When do spending committees have a chance to state the needs of their programs?
    - After spending committee requests are submitted to the Budget Committee, how can they be changed in the process of creating the budget?
      - How are spending committees notified of these changes?
      - At what stages of budget formulations can spending committee members participate in the decision making?
        - ◆ About how often do they participate?
  - How are budget requests evaluated? In other words, what is the standard for determining the reasonableness of a budget request?
    - For how many of the spending committees are changes in budget based on changes in caseload?
    - If budget requests are not driven by caseload, what data are provided by spending committees to support their budget requests? (e.g., Judicial Security).
      - What about funding requests that are not based on formulas? How do spending committees make budget requests?
        - ◆ What role does the JRC have in vetting budget requests for staffing (both formula-based and those without a formula)?
    - How does the budget process account for the delays in the funding, hiring, and staffing processes that might occur?



- As you likely know, Recommendation 6 says “Representatives from DSO should be involved in pursuing Defender Services related legislative and appropriations priorities, provided such involvement is consistent with the judiciary’s overall legislative and appropriations strategies and is a coordinated effort with Administrative Office legislation and appropriations liaison staffs and not a separate approach to Congress.” What opportunities does DSO have to pursue defender services appropriations priorities within the AO processes?
- In the past five years, have there been any instances where the DSC request as presented to the Budget Committee differed from what was ultimately submitted?
  - If so, what were the circumstances and how was the difference resolved?
  - As you know, Recommendation 2 called for placement on the JCUS discussion calendar when the Defenders Services, Budget, or Executive Committees disagree over the DSC budget request, but that was not adopted. How are those disagreements typically resolved?
- What role does your office have in creating the financial plan?
  - Does it work any differently if the appropriation is less than the full budget request?
    - Are spending committees involved in the discussion of creating a spending plan?
    - How does the AO balance competing interests when creating a financial plan when the total appropriation is for less than the full budget request?
- What about funding requests outside the typical appropriations process? For example, with funding from the CARES Act, how was the judiciary’s request assembled for Congress?
  - Who was involved in the creation of the CARES Act request?
    - How was DSO involved in pursuing its legislative and appropriations priorities during the CARES Act request process?
  - Were the requests reported to Congress as they were provided by the AO divisions, or were modifications made?
    - If so, how were requests modified and by whom?
- Is there any process in place for programs to appeal or ask for reconsideration of their modified budget requests, changes brought by the financial plan, or requests for supplemental funding?
  - If so, please describe how that works.

## Conclusion

- Has anything about the process of requesting budgets or determining the spending plan changed since the publication of the Cardone Report?
  - If so, what has changed?
- Is there anything that I haven’t asked that you think policy makers should know?

# Interview Protocol for Office of Legislative Affairs (OLA) Staff, AO

## Professional Background

1. What is your professional background?
2. Please describe the work of the Office of Legislative Affairs.
3. Please describe your work in OLA.
  - a. How long have you served in this role?
  - b. Besides issues of the defense function, what other legislative interests are in your portfolio?

## Legislative Initiatives

4. What is the process for presenting the legislative needs/interests of the judiciary on the Hill?
  - a. Does it differ if you are discussing budget requests vs. substantive policies?
    - i. If so, how what is the process for discussing budget initiatives during the normal budget cycle?
    - ii. Could you explain the process for requesting funding under the CARES Act?
      1. How were the needs of the defense function determined?
5. When you talk with people on the Hill about the legislative interests of the judiciary, do you ever bring other AO staff (such as those in the specific program affected by the legislation, or people from the field) with you?
  - a. If so, can you please describe that process?
  - b. If not, why not?
  - c. Is your approach the same across all issues in your portfolio?
  - d. What if a congressional hearing is held?
    - i. Is the process any different?
    - ii. Do you provide support for those called to testify?
6. How is the Judiciary's Criminal Legislative Wishlist developed?
  - a. What is the purpose of the Criminal Legislative Wishlist?
  - b. The DSC jurisdiction was recently revised to say, "To oversee the *implementation of the Criminal Justice Act and other matters related to the criminal defense function.*" Other matters related to the criminal defense function can include criminal legislative needs. Are the views of DSO/DSC sought out when formulating the Wishlist or other legislative priorities?
  - c. Who decides the order in which the items are listed?
  - d. Are there any legislative interests not currently on the Wishlist on which you are working?

7. Do you serve on the AO Legislative Council?
  - a. Please describe the work of the Legislative Council.
    - i. How often does it meet?
    - ii. Who serves on the Council?
    - iii. How is the agenda for the meeting created?
      1. Can those who serve on the Legislative Council place items on the agenda? If so, what is that process?
  - b. Has the addition of DSO staff to the Legislative Council changed the representation of defense interests by the Legislative Council? If so, how? If not, why not?
8. In your experience, do the legislative needs of the defense function ever compete with the needs of the judiciary overall?
  - a. If so, how do you manage the situation to balance those needs?

## Adopted Interim Recommendations

9. Adopted interim recommendation 34 calls for revision of 18 U.S.C. 4285 to pay 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. This revision was adopted by the JCUS in the 1980s. Do you have any sense why the legislative process hasn't moved forward?
  - a. Is there any expectation progress will be made in the current session?
  - b. What do you think is necessary to create the legislative change?
10. Is there any work being done to amend the CJA to address circuit court review of fees above the caps?
  - a. How do you reconcile JCUS not adopting recommendation 35 with the 2003 adopted policy to allow for greater delegation of authority to review these requests?
  - b. The 2003 policy delegating authority appears to be part of the Criminal Judicial Administration Act of 2021. Is that correct?
11. In the various bills proposed regarding criminal justice reform, what issues specific to the defense function have been included (e.g., defender representative on the Sentencing Commission)?
12. What legislative activity is underway to support establishment of Federal Defender Organizations in the two qualifying districts still lacking FDOs (Kentucky Western and Georgia Southern)?

# Protocol for Financial Liaison & Analysis Staff

## Background

1. How long have you served as Chief of Financial Liaison & Analysis Staff?
2. What is your professional background?

## FLAS Responsibilities

3. Please describe the work of the Financial Liaison & Analysis Staff.
4. Do you have staff who specialize in the defender program?
  - a. If so, what other programs are within their portfolio?
5. Are Financial Liaison & Analysis Staff involved with the development of the Budget Committee's target budget guidance each year?
  - a. If so, what goes into these formulations and who else is involved?

## Committee Agenda Items

6. When programs within the AO create agenda items for their committees, how is your office involved?
  - a. What types of items trigger your involvement?
  - b. How does the review of agenda items flow within FLAS, i.e., who takes the first look and who else has to sign off?
  - c. Against what standards/norms/formats do you review agenda items?
    - i. Has this changed since 2017?
  - d. Can you provide some recent examples of work you've done on DSC agenda items?
7. How does the agenda item formulation process move back and forth between the AO program, (such as DSO), the Budget Division, and your staff?
  - a. Who reviews in what sequence?
  - b. If Budget is first, what version of the item do you review?
  - c. How do you coordinate/consult with the Budget Division and/or the DSO throughout the process?
  - d. Have you noticed any change in this review/consultation process since 2017 because of the Cardone recommendations?
8. Over the last five years, how often has your office objected to a proposed DSC agenda item?
  - a. What was the basis for the objection?
  - b. How was it resolved?

9. When, in the JCUS committee and subcommittee schedule, do the Judicial Resource and Budget Committees take up the recommendations of other committees such as the DSC?
  - a. What role does your staff play in formulating items for, and presenting them to, these committees and their subcommittees?

## Budget Requests

10. Please describe the respective roles of your staff, the DSC, Budget Division, and Office of Legislative Affairs in formulating defender services appropriation requests to Congress in the “Yellow Book” and any subsequent supplemental based on the spring and fall reassessments of defender program resource needs.
  - a. Does the process differ for the original and supplemental requests?
  - b. How often is a supplemental requested?
    - i. What influences this decision?
11. How did the process of developing legislation differ when formulating the supplemental request for CARES funding as initiated by Congressional committee staff?

## Financial Plan

12. What role does your staff play in developing/presenting financial items to the Executive Committee for its consideration when developing the financial plan?
  - a. How does DSO provide input to this process?
  - b. How do you coordinate with Budget Committee staff?
13. Is there anything else we should understand about your staff’s role in the budgeting process?

# Questions for PSID Staff

## Background

- What is your role at PSID?
- How long have you served in this capacity?
- Please describe the work of PSID
  - For what components of the judiciary does PSID create staffing formulas?
  - How are staffing formulas created generally?
  - Given the reliance on average case filings over multiple years, how do you adjust the formula for anomalies such as substantial changes in caseload? (e.g., pandemics that lower filings, or Supreme Court decisions that increase them)
  - Do you have any sense of how changes in staffing affect space issues? For example, if the formula changes such that substantially more staff are needed, how does that play into requests for additional office space or build outs?
  - How often are formulas updated?
    - Did the pandemic change the timeline for any programs?

## FDO Work-Measurement Formula

- Was the FDO work-measurement formula created differently from what you described above? If so, how?
  - What prompted the creation of the work-measurement formula for FDOs originally?
  - Who was involved in the creation of the formula initially?
  - How were the original factors selected? Have these/how have these changed over time?
    - How were the staffing ratios for constants determined? For example, how was it decided to use a 1:20 ratio for the CSA position? How does it differ from other IT positions in other court units, such as the Clerk's Offices?
    - Could you explain the logic behind the 2-year stabilization factor, including why increases and decreases are treated the same way?
      - Were there any concerns that requiring 2 consecutive years of changes may not account for the time necessary to hire and train new staff to manage workload increases?
- Is there any expectation that the formula or process will change in the 2022 update?
  - If so, what is expected to change?
  - What prompted the changes?
- Do you think the formula fully accounts for the workload of FDOs? If not, what is missing? (e.g., training? panel management and voucher review?)

- What are the challenges of having a work-measurement formula for FDOs? What are the benefits?
  - How does the formula account for the variation in the responsibilities of FDOs under their CJA plans?
  - Were court CJA plans considered when creating the measures included in the formula?
  - How do the formulas account for differences between cohorts? Is there a practical way for cohorts adjust their WCO over time, or will they stay close to their initial WCO levels?
  - How does PSID work to ensure that staffing formulas support high-quality representations and related goals of the Defender Services program?
- What do you see as the benefits to creating the FDO staffing formula inside PSIO? What are the downsides?
- Given the reliance on formulas in requesting budgets, do PSIO staff participate in the creating the budget request for FDO or other judiciary programs?
  - If so, how?
  - If not, do you think there would be any benefit to doing so?

### Capital Habeas Unit Work-Measurement Formula

- Was the CHU work-measurement formula created differently from what you described above? If so, how?
  - What prompted the creation of the work-measurement formula for CHUs originally?
  - Who was involved in the creation of the formula initially?
- Is the CHU formula scheduled to be updated the same time as the traditional units? If not, when is the next update?
  - Is there any expectation that the formula or process will change in the next update?
    - If so, what is expected to change?
    - What prompted the changes?
- What are the challenges of having a work-measurement formula for CHUs? What are the benefits?
- Do you think the formula fully accounts for the workload of CHUs? If not, what is missing?

### NITOAD Work-Measurement Formula

- Was the NITOAD work-measurement formula created differently from what you described above? If so, how?
  - What prompted the creation of the work-measurement formula for NITOAD originally?
  - Who was involved in the creation of the formula initially?
  - How was the ratio of NITOAD to FDO staff determined?

- Is the NITOAD formula scheduled to be updated the same time as the traditional units? If not, when is the next update?
  - Is there any expectation that the formula or process will change in the next update?
    - If so, what is expected to change?
    - What prompted the changes?
- What are the challenges of having a work-measurement formula for NITOAD?
  - What are the benefits?
- Do you think the formula fully accounts for the NITOAD workload? If not, what is missing?

## Concluding Questions

- Are there other programs within the defender community that would benefit from a work-measurement formula?
  - If so, which ones?
  - Is there any plan to create those formulas?
- Is there anything you'd like to add?



## Executive Committee Members

### Background

This first set of questions request foundational information about the work of the Executive Committee and its role in judicial administration. Given that the potential audience for this evaluation includes those who don't work on the day-to-day operations of the judiciary, some background information on the Executive Committee and its purpose will provide important context.

We understand the Executive Committee's responsibilities to include acting on behalf of the JCUS between sessions, preparing calendars, committee jurisdiction, coordinating legislation, making recommendations, and creating the financial plan with the AO.

- We have some follow-ups on those, but first, are there any other routine responsibilities for the Executive Committee not listed as part of its jurisdiction?
- When JCUS Committees propose changes to their jurisdictional statements or to their committee structure, what is the process for reviewing the suggestions and making changes?
  - How are issues of overlapping jurisdiction addressed?
  - How can committees propose new members?
- The Executive Committee has delegated authority to set the consent and discussion calendars for the JCUS, correct?
  - And under existing procedure, any committee chair can suggest an item for the discussion calendar of the JCUS when the committee report is submitted, correct?
  - And committees can request items for the Executive Committee's agenda, correct?
    - How often do committees or committee chairs suggest items for either the discussion calendar or the Executive Committee's agenda?
- It appears that JCUS Committees have authority to set their own agendas except when matters are referred by the Chief Justice, the Judicial Conference, or the Executive Committee. Is that correct?
  - How often are items added to committee agendas based on one of these exceptions?
- Is the Executive Committee typically involved in the process of implementing JCUS policy changes?
  - If so, what role does it play?
    - How does the Executive Committee typically monitor the progress of implementation?
    - When policy changes, what is the expectation for change at the local/court level?
      - Is there an expectation that implementation will vary? If so, how?
  - Are there any methods available to the JCUS or the Executive Committee to promote compliance with changing policy?
    - If yes, have those methods been employed for any recent policy changes?
      - If yes, what changes?
        - ◆ Were they successful? If yes, how so?

- Are there any methods that the JCUS or Executive Committee would like to have available to promote compliance with JCUS policy?
    - What are the barriers to utilizing those methods?
- What is the process for creating the financial plan for the judiciary?
  - How does that process differ when the appropriation is less than the judiciary's budget request?
  - What is the process for changing budget requests to match appropriated amounts?
    - Do spending committees have an opportunity to discuss potential changes before the plan is finalized?

## Adopting Cardone Recommendations

Leaving aside the ultimate recommendation for an independent defender organization, which is obviously a legislative matter, we'd like to focus on the process of adopting and implementing the interim recommendations from the Cardone Report. First, we have some general questions.

- The interim recommendations were adopted in two batches. What distinguishes the recommendations adopted in September 2018 from those adopted in March 2019?
  - Why were those adopted in March 2019 initially deferred?
- What about the recommendations that were not adopted? Some saw no action taken (such as recommendation 10 on reappointment of federal public defenders) while others were deferred, or the Executive Committee declined to adopt them. What is the distinction among these outcomes?
  - Is there an expectation that the Executive Committee will return to any of these recommendations?
    - If so, what would you say is the expected timeline?
    - If not, why not?
- Since the Ad Hoc Committee was unique among the JCUS committees (spanning multiple committee jurisdictions and the authority of circuit judicial councils), did the approach for notification of policy changes by the JCUS differ for the adopted recommendations from the typical practice you described earlier?
  - Implementing some of the recommendations requires court and even judge-level changes in practice. How does the Executive Committee communicate policy changes that may affect judge-level changes in practice?
- Was the expectation of the Executive Committee a full implementation of the adopted recommendations?
  - What challenges did the Executive Committee foresee?
  - What recommendations could easily be implemented?
  - Did the Executive Committee expect differences for those recommendations affecting decisions by individual judges, as opposed to courts or committees?
- [You described the ability to promote compliance by...] Were any of the methods discussed earlier used to promote implementation of the Cardone recommendations?
  - If so, which ones?

- Have those efforts been successful?
- How else has the JCUS or the Executive Committee promoted implementation of the Cardone recommendations?
  - Is there anything else the JCUS or the Executive Committee might do to promote implementation either by the relevant JCUS committees or the courts themselves?

## Implementation of the Cardone Recommendations

The final set of questions ask about the recommendations specifically under the jurisdiction of the Executive Committee, or those related to structure and governance of the defense function.

- While you were on EC after the publication of Cardone, were DSC budget requested changed during the creation of the financial plan?
  - If so, was the matter discussed with DSC before changes were made?
  - Did DSC agree to the change(s)?
- Since the publication of the Cardone Report, how often has the DSC requested inclusion of an item on the Executive Committee calendar?
  - What was the nature of the item(s)?
- How often has the Executive Committee added items to the DSC agenda since the publication of the Cardone Report?
  - What was the nature of the item(s)?
- In the September 2018 Report of the JCUS meeting, it was noted that the Executive Committee would await the survey of JCUS Committees to learn the perspective of the DSC regarding adding DSAG members to the Committee, but in the March 2019, the Report notes that the Executive Committee declined to adopt the recommendation because “the decision rests solely within the Chief Justice’s discretion.” What changed to prompt the decision?

## Conclusion

- Is there anything else about the implementation of the Cardone Report recommendations that you would like us to know?

# Defender Services Office Leadership and Staff Protocol

## 2020 Initial Interview

### *Governance*

1. Describe the transition back to being under the AO Director. Is it like it was before the reorganization or something else? Has it improved your ability to control DSO staffing and funding? What about your relationship with the rest of the AO? Is it any easier to set the agenda for the DSC in this environment?
2. What role do you see DSAG playing on the DSC?
3. Describe the process for obtaining control of eVoucher? Were there any issues? What does it mean, in practice, for you NOT to have management control of eVoucher?

### *Budget*

4. What was the last budget cycle like? Were you able to gain more resources for National Litigation positions? Coordinating discovery attorneys? New litigation support positions? Did the budget reflect the maximum statutory amount? What about funding and staffing for NITOAD? Were there any disagreements over budgets that you would have preferred the JCUS discuss? If so, please describe, to the extent you can, the nature of the disagreements?
5. Once the money is budgeted and appropriated, are there limits on your spending ability? If so, please describe them.

### *Legislative Participation*

6. Who is participating in the Legislative Council? What has been the reaction of the counsel? Have the new participants been able to meaningfully engage with the Counsel and further (or at least amplify) the legislative goals of the DSO?
7. Who is pursuing appropriations issues? Has there been any conflict between the goals of DSO and AO on legislative and appropriations issues? How were those conflicts resolved?
8. How are the legislative efforts regarding paying the costs of stays for appearances and amending the CJA going?

### *Staffing*

9. What about work measurement? Have you been able to alter the formula to include money for training and recruitment tasks that FDOs do? What about increased staffing for CHUs? Are they being brought into work measurement? Would the ability to request JRC staff help with the work-measurement process? Why?
10. How does the reappointment of FDs vary across the circuits? Are there some places where reappointment is a more difficult process for the FD to navigate? What drives that?

11. Has the process for hiring new CBAs started yet? Do all circuits have access to a CBA now? If no, which circuits do not?
12. How do the circuits vary in their approach to AFPD staffing? Have circuits been more receptive to your advice regarding the appropriate number of AFPDs? If not, do you know why?

### ***CJA Plans***

13. In looking at the CJA plans, it appears that most districts already have a CJA committee and most include judicial input. Are there specific plans or districts that the Cardone Committee had in mind when making this recommendation?
14. Most districts don't yet appear to have an independent process for voucher review. Are you aware of any districts that are making efforts to create this process?
15. We've noticed several districts updating their plans. Are you aware of any issues with the revision of CJA plans as districts work on updating? What changes are easy to make? Which are more difficult? What role, if any, is the circuit playing in this process?

### ***Education, Training, and Best Practices***

16. Have you (with or without the assistance of the FJC) held or planned new trainings on use of experts, e-discovery, defense best practices, or capital habeas?
17. Have you developed guidance on compensation for services, apart from changing eVoucher itself to include the only reasons for reduction? What about best practices, including those on recruiting, interviewing, and hiring? What about diversity efforts? In your opinion, what matter(s) are proving to be the most challenging? Why?
18. Is there anything we should know about the implementation of the interim recommendations?

## **2022 Follow-Up**

### ***Governance***

1. After the adoption of the Cardone recommendations by the JCUS in 2018 and 2019 and the Conference Secretariate divided up responsibility for carrying out the changes, which recommendations were considered the responsibility of DSO?
  - a. What were the DSC/DSO responsibilities for implementing the changes to JCUS policy?
    - i. Did you report progress back to the Executive Committee, the JCUS, or the Conference Secretariate staff?
  - b. How did the DSC (or DSO working on their behalf) convey the changes to the judiciary (other than changes to the *Guide*)?
2. Last we talked, you indicated that the re-re-organization to restore DSO to directorate status had little impact on your ability to control program funding or DSO staffing, and you gave examples of a) the Executive Committee action in 2020 to adopt the recommendation of the Budget Division to address the shortfall through FDO staffing rather than yours to split the shortfall by also postponing CJA payments and b) the request for supplemental CARES funding.

- Have things gotten any better in terms of your input to or control over funding and FDO staffing decisions? Do you now have direct access to the Executive Committee? Who does? How do you get items/positions before it?
  - Do you have additional examples of how things are now better or the same in the appropriations arena, i.e., whether there have been other areas of conflict between the goals of DSO and AO and if so, how these were resolved?
  - Has giving you authority over your own staffing led to any changes in staffing levels, types of positions or office organization? Has this improved your ability to serve the defender community? You mentioned in 2020 that you were still subject to certain AO limits to the number of staff you could hire even if you had the positions. Is that still true?
3. You further indicated in 2020 that your proposed DSC agenda items are still subject to many levels of review within the AO and that this can and has resulted in modifications and, in at least one case removal from the agenda (the NITOAD position request in 2015). Is this still true? Have any items been significantly modified or removed from more recent DSC agendas? Specifically, can you describe the process for including the June 2022 Agenda Item related to electronic fund transfers to pay panel attorneys?
  4. Now that you've had a few more years of experience, have you been able to meaningfully engage with the Legislative Council and further (or at least amplify) the legislative goals of the DSO?
  5. Are there other working groups or committees within the AO where you lack a meaningful seat at the table?
    - Do you see a role for you to play on the EMG? If so, have you asked to be included?
  6. Could you walk us through how you engage with AO staff who review requests for initial and supplemental defender program funding from Congress? Does your approach differ across Financial Liaison and Analysis Staff, the Budget Division, and the Office of Legislative Affairs in terms of formulating and presenting these legislative requests?
    - a. At the June meeting of the DSC, Ray C. mentioned that the DSC can appeal the Budget Committee's recommendation. How often has that happened since 2017?
  7. What types of revisions were made to the Defender Program Model Dispute Resolution Plan approved by the DSC in September 2020 before its adoption in September 2021?

### ***FDO Staffing***

8. Please walk us through how you develop the hiring guidance. How do you determine an FDO's "base level?" How and when in the process do you allocate "additional" FTEs? Who makes these decisions?
9. Could you give us a little more information on what happened after the Executive Committee approved a strategy to reallocate surplus resources in the fiscal year 2019 final financial plan to fund additional Defender Services, and supported creation of a "staffing reserve" in your appropriation?
  - Is this reserve now included as a separate piece of the financial plan?
  - How is the number determined? Does it, how does it, affect FDOs base staffing levels?

- From the staffing information we have received, it looks as though these are in addition to the positions you may allocate under your delegated authority. Is that correct? How do the two interact? Is one a fallback for the other?
  - Once approved, how do the FDOs go about recruiting for these positions? About how long does it take to fill them? What type of training/orientation is usually involved before new staff can contribute meaningfully? For how long after approval/hire are the positions funded? Does any of this differ depending on whether the position is from your delegated authority or the reserve pool? Do staff hired for these temporary positions stay on additional years provided the FDO has FTEs available (from any source)?
  - Can either of these positions be used to allocate new positions to Resource Counsel to address changes in caseload brought by changes in use of the federal death penalty?
10. Do you track the requests FDOs make of their circuits for additional AFPD positions, including when they requested, how many positions were requested, whether it was supported by formula, and what the outcome was?
  11. Do FDOs still have to go to the DSC budget subcommittee for mega case funding? Is this being tracked by DSO?

### ***National Positions***

12. Do you have an annual (or more or less frequent) “staff call” for your national programs? Can the programs themselves initiate the staffing request?
  - We see from the flow chart which office in DSO reviews requests from the various programs, but what criteria are used to recommend moving forward, or not, at this initial review?
  - Does DSO management then assess each of these first level review recommendations on its own merit or are they evaluated as a package? What criteria are used to move the request along the road to the DSC agenda?
13. The wording of the national position description section of Judicial Resources Committee report is that it recommends that \_\_ positions “be considered for inclusion in the FY \_\_ budget request.” If the JCUS approves this recommendation, are these positions then to definitely be included . . . or does Budget get a say?
14. Except as you previously described for the NITOAD position agenda item for the DSC’s December 2015 meeting (which was for the 2017 budget request), were all of the positions you at DSO recommended passed along by the DSC to Judicial Resources?
  - Do you have written responses from JRC and Budget for increases in staffing for NITOAD, NLST, Resource Counsel or any FTE not governed by WM since 2017? [It would speak to the recommendations to show the request, the response from JRC, and what was funded by Budget.]
15. Are contracts with litigation support tools funded centrally, or do they come from FDO local budgets?
16. SRC positions are housed in the FDO in Arizona, correct? But they are funded centrally and governed by the same procedures as NLST, etc. for staffing increases, correct?

**Status of the Work-Measurement Formula update**

17. Part of the challenge of the WM formula historically was that it didn't address issues of caseload surge well. With the creation of the staffing reserve and the national positions, there is some flexibility to get resources where they are needed more quickly.
  - Has this been sufficient? Why or why not?
  - What would be a better way to address the fluidity of caseloads from a national perspective?
    - For example, the judiciary expanded the use of magistrates and has the visiting judges program to address both surges and conflicts. Would that model be appropriate?

**Update to Education, Training, and Best Practices**

18. What is the status of the effort to create the best practices for hiring? Is that PMWG's jurisdiction? What is the process for creating them?
19. Could you explain the steps necessary to create the capital and non-capital fellowships programs? What stakeholders were involved? How long did the process take? Are you concerned that the creation of these positions will hurt efforts to increase FDO staffing overall (including modification of the WM formula to increase diversity consistent with the Cardone recommendation)?
20. Since we last spoke, have you communicated with the FJC Education Division regarding training for judges to implement the adopted interim recommendations?
  - If so, what has been the result of those efforts?
21. Have you developed a national policy requiring the use of qualified interpreters?
  - If so, how was it conveyed to the courts?

**Program Administration**

22. Describe your work for DSO, specifically working with districts on CJA plans.
23. Prior to the Cardone Report, were you monitoring CJA plans and consulting with districts on modifications to their plans?
  - a. If yes, please describe this process.
24. Are Judicial Councils accepting proposed/modified district CJA plans without revising them?
  - a. If not, what types of revisions are they making and why?
25. What is the process like for courts undergoing the CJA plan revision process? Do you have any examples?
26. In looking at the CJA plans, it appears that most districts already have a CJA committee and most include judicial input. Are there specific plans or districts that the Cardone Committee had in mind when making this recommendation? Have there been any issues with the role judges are playing on the committees to select panel members? What was the thinking about how judges further the goal of independence?
  - a. Are districts open to changing training requirements?
  - b. Are districts open to creating mentoring programs?
    - i. What about making diversity a goal of the mentorship program?



27. Most districts don't yet appear to have an independent process for voucher review. Are you aware of any districts that are making efforts to create this process? Do you anticipate any problems in implementing that recommendation?
28. We've noticed several districts updating their plans. Are you aware of any issues with the revision of CJA plans as districts work on updating? What changes are easy to make? Which are more difficult? What role, if any, is the circuit playing in this process?
29. Are you aware of any issues in the districts regarding the division of work between panel attorneys and defenders? Does the specificity of the CJA plan play a role in how much litigation experience panel attorneys are able to gain? What about the role of the FD in managing the panel?
30. Are you aware of any instances where the district was not following the CJA plan as written?
  - a. How did you find out?
31. For the three districts without federal defender organizations, can you talk about the efforts to create one? Are you facing any barriers? If so, what? What concerns are the districts expressing?
  - a. Specifically, it appears that GAS relied on the Georgia Appellate Practice and Educational Resource Center (a CDO) to handle capital cases in 1987. Was this one of the de-funded Death Penalty Resource Centers? Were they all CDOs?
32. What do you think is the biggest factor determining the extent to which districts incorporate the Cardone recommendations into their plans?

### *eVoucher*

33. Regarding the eVoucher Legal and Policy Point Paper: how were the issues of judicial authority to review/approve vouchers and the issues of capturing the data electronically reconciled?
34. Regarding the eVoucher/eCJA software comparison, it appears that the two programs were put through a fairly rigorous set of paces. How did eVoucher get away with "puffery" regarding the reporting features and national roll-out? Weren't there demonstrations of the programs?
35. If DSO was boxed out of the eVoucher adoption/implementation process after it was selected, who was thought to be the key user group for the information being collected? Put differently, if this wasn't supposed to collect data for DSO, for whom was eVoucher collecting data?
36. When you came back to DSO after the eVoucher selection, how did you move past the battle scars that remained from the selection process. Was all of DSO on board with putting the past behind and moving on? What about the AO?
37. What aspects of the eVoucher system are under the full or effective oversight of DSC?
  - a. Of those that are not, do you have a sense of which ones the Committee feels are important to gain control over?
38. Describe the process for obtaining control of eVoucher? Were there any issues? What does it mean, in practice, for DSO NOT to have management control of eVoucher?
39. We understand you are attending the eVoucher meetings. Who is represented at these meetings? How is that going? What have been the biggest issues you've faced?
40. What data is DSO collecting through eVoucher?
  - a. How will the data be used by DSO?
  - b. Who owns the eVoucher data? Who can access it?

41. Have the changes to eVoucher rolled out to all the courts? Have you heard anything about that process?
42. Are there any differences in the voucher review process between FPDO and CDO offices?
43. Are there any other aspects to your work that you think it is important for us to know?

### ***Case-Budgeting Attorneys***

44. Describe your portfolio at DSO. You manage both the CBAs and eVoucher, correct? Anything else?
45. Has the process for hiring new CBAs started yet? Do all circuits have access to a CBA now? If no, which circuits do not?
  - a. If there is a delay in hiring, do you know the nature of the delay?
46. CBAs are employees of the circuit, correct?
47. How do the roles of the CBAs vary across the courts?
  - a. Do they still budget capital, capital habeas, and mega cases?
    - i. Are they involved in more case types now compared to the past? If so, describe the change.
  - b. Are there any responsibilities undertaken by the current CBAs that surprised you?
48. The CBA program is just over a decade old. Has there been a lot of turnover in the personnel? How has their role evolved?
49. What data is DSO collecting through eVoucher?
  - a. How will the data be used by DSO?
  - b. Who owns the eVoucher data? Who can access it?
50. We understand you are attending the eVoucher meetings. Who is represented at these meetings? How is that going? What have been the biggest issues you've faced?
51. Describe the process for obtaining control of eVoucher? Were there any issues? What does it mean, in practice, for DSO NOT to have management control of eVoucher?
52. What aspects of the eVoucher system are under the full or effective oversight of DSC?
  - a. Of those that are not, do you have a sense of which ones the Committee feels are important to gain control over?
53. Have the changes to eVoucher rolled out to all the courts? Have you heard anything about that process?
54. Are there any differences in the voucher review process between FPDO and CDO offices?
55. Are there any other aspects to your work that you think it is important for us to know?

### ***Work Measurement***

56. Describe the process you undertake for the work-measurement formula. Who has influence over this process?
57. Where is RAND in the process of updating the weights?
58. Who decides when the weights need to be updated?
59. How do you move from the weights to the work-measurement formula?

60. Who decides when the WM formula needs to be updated?
  - a. Would the ability to request JRC staff help with the work-measurement process? Why?
61. Describe the process of working with the JRC on the WM formula.
62. Where are you in the process of putting together the steering committee/working group to assist with WM?
63. Have you been able to alter the WM to include:
  - a. money for defender office training, both of their own staff and panel attorneys?
  - b. Support for defender office recruitment out of law school to increase staff diversity?
  - c. Support defender office work on panel management?
64. What about staffing for CHUs? Are they being brought into work measurement?
  - a. Has WM been modified to dedicate funding for mentorship?
  - b. Has WM been modified to increase resources for capital cases?
  - c. Has WM been modified to fund CHU to take more cases?
65. Does the work measure formula affect FDOs and CDOs differently? If yes, how so? What is the nature of the differences? Are these differences being addressed?
66. The movement to a WM formula resulted in an increase in staffing for defender offices last time. What is your expectation for this time?
67. Are you involved in the budget process? If so, how?
  - a. How do weights and WM fit into budget requests?
68. You mentioned that there are two competing recommendations on budget, and the AO picks which one is presented. One would be based on formula. What is the source of the other one?
69. You mentioned that you were going to speak with Cait about the FDs who were forced to open branch offices by their districts. Did you have a chance to do that?

## **Budget**

70. What is your role at DSO and how long have you served in it?
71. What are all the steps of the budgeting process? Start to finish, how many stops are there along the way and how many chances are there for someone not in DSO or on DSC to make changes?
  - a. Who at the AO is involved in running the formulas for presentation to the DSC? Once the numbers are in hand, are there any additional hoops to jump through at the AO before the agenda item passes to the committee? Has any of this changed?
  - b. Are there any measures in place to confirm the accuracy of the numbers before the information is presented to the committee? If yes, how does that work?
  - c. Have there been instances where you were notified of changes to the budget after the entire process was over?
  - d. Once JRC makes its decision, is this passed directly to the budget committee or is it incorporated into DSO budget request? Does budget committee normally defer to human resources on staffing funding? How does all of this move to the JCUS? To the Executive Committee?
  - e. What role, beyond its current one, would you like to see DSO play in the budget process? Or put another way: What challenges, if any, currently exist that make your job more difficult?

72. Define “interim financial plan.” Who at the AO is involved in developing the interim financial plan? To what extent and at what stages is DSO involved in this process?
73. Define “hiring guidance.” How does DSO develop hiring guidance for defender offices? What is the timing of this vis-à-vis the interim financial plan?
74. Define spending plan. What does it mean in practice that DSO doesn’t have control over the spending plan for the defender program?
75. How does the Executive Committee guidance provide flexibility in the budgeting process?
76. The JCUS in 2016 approved additional FTEs for nine national position FTEs and additional FTEs for defender offices that have responsibility for CJA panel management. What was the impetus and process for moving these requests to Conference approval? Can this same process be used to implement the Cardone recommendations for additional national positions or to organizations for training and mentoring needs? What were the 15 districts that got the panel management FTEs in 2017 & 2018. Were these continued? Under what process?
77. The JCUS in 2016 approved additional FTEs for nine national position FTEs and additional FTEs for defender offices that have responsibility for CJA panel management. What was the impetus and process for moving these requests to Conference approval? Can this same process be used to implement the Cardone recommendations for additional national positions or to organizations for training and mentoring needs? What were the 15 districts that got the panel management FTEs in 2017 & 2018. Were these continued? Under what process?
78. Recently there was some disagreement over deferring panel payments to offset shortfall. Please describe the issue and how it played out with respect to the overall budget request. Were you pleased with the end result? If not, why not?

### **Training**

79. What are the responsibilities of the DSO Training Division?
80. How many FTE are available for training? How has that changed since 2017?
81. What is the budget? How has the budget changed since 2017?
82. Do you ever partner with the FJC on training for judges regarding defense best practices?
83. What trainings have been held since 2017? How many? Where? How many people attend? Is there a breakdown between FD staff and panel attorneys attending the trainings? Do you hold trainings online? If so, what is the attendance like there?
84. Are there substantial differences in the estimated vs. actual attendance at trainings?
85. What resources do you have available for the time between trainings? How are they accessed?
86. Do you coordinate trainings with FD offices to hold trainings? What is that process like?
87. Have you (with or without the assistance of the FJC) held or planned new trainings on use of experts, e-discovery, defense best practices, or capital habeas?
88. Describe any efforts to work with the FJC on training issues.
89. Have you developed guidance on compensation for services to go along with changing eVoucher itself to include the only reasons for reduction?
90. Does your training cover best practices, including those on recruiting, interviewing, and hiring?
91. What about diversity efforts?
92. In your opinion, what matter(s) are proving to be the most challenging for the training division? Why?

# DSAG Members Protocol

## Background

- What position do you hold?
- What are your responsibilities?
- How long have you worked there?
- How long have you served on DSAG?
- In your own words, what is the purpose of DSAG?

## Structure and Governance of the Defense Function

- To the best of your understanding, why did the Cardone Committee recommend that DSAG co-chairs be voting members of the DSC?
- From your perspective, how does not having a vote on the DSC affect the influence you have over the work of the Committee?
  - Does the absence of a vote affect the weight given to your comments/perspective during DSC meetings?
- The Cardone Report noted that because DSAG members are advisory, the voices of the defense are subordinated to the needs of the judiciary. Have there been any instances in the past five years where your position on the needs of the defense community was different from that of the DSC?
  - If so, can you give an example?
  - If not, what would being added to the DSC as a voting member give you that you aren't already accomplishing?
- Since FY 2017, have there been any instances where defense needs (as conveyed by the DSC) were not addressed by the judiciary because the needs of the judiciary were considered paramount?
- From your perspective, what are the biggest legislative issues facing the defender community today?
  - Are these issues making their way through the AO for advocacy on the Hill?
  - If so, can you give an example?
  - If not, do you know why not?
- Two recommendations discussed modification of the work-measurement formula, one to addressing training work by FDOs and the other to allow for more resources for capital and capital habeas litigation. What is the role of DSAG in the modification of work measurement?
  - What is the status of the effort to capture this work in the new formula?
  - What other defender work isn't being captured but should be?
- How does use of the work-measurement formula affect the ability of FDOs to staff their offices?
  - What are the benefits?
  - What are the challenges?
  - What modifications could address those challenges?

## Panel Management

- Some of the recommendations related to panel management call for removing judges from or reducing their role in panel selection or panel payment. Since the adoption of these recommendations, are judges less involved in these processes?
  - Why or why not?
- Has there been any discussion in the districts about creating or requesting CJA Supervising Attorney positions to assist with panel management or voucher review?
  - If so, where?
  - What districts would most benefit from having these positions?
- What role, if any, does DSAG have in revising court practices regarding panel selection and payment?

## Training

- Has DSAG been involved in the creation of best practices for representation or for hiring and recruiting a diverse workforce?
  - If so, please describe your involvement.
- Several of the adopted interim recommendations call for increased training for judges and attorneys on issues such as use of experts, eDiscovery, and capital litigation. Based on what you are hearing from the districts and your own experiences, how interested are panel attorneys in increased training in these areas?
  - Does panel attorney interest in training differ from the 2015 program surveys?
    - If so, how?
    - What prompted the change?
- Is there expectation within the defender community that revisions to CJA plans requiring training for panel admission and retention will be enforced by the court?
  - Is there evidence of enforcement so far?

## Voucher Reduction and Review

- Again, based on what you hear out in the field and your own experiences, what is the impact of the recommendation to limit voucher reduction to the four stated reasons?
  - Are panel attorneys reporting more transparency in voucher review processes?
  - Are they satisfied with the reasons given for voucher reduction (even if they'd prefer not to be reduced)?
- Are attorneys using available processes to appeal voucher reductions?
  - If so, how is it going?
  - If not, why not?

## Capital Litigation

We'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
  - In your experience, is this recommendation consistently followed?
    - Please explain why or why not.
  - Where are restrictions still imposed?
    - Do courts typically demonstrate good cause for imposing the restriction?
      - What are the reasons?
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
  - Are there districts/circuits currently without a CHU in which you think a CHU would be helpful?
    - If yes, where?
  - Are efforts being made to increase access to resource counsel and other resources in districts that do not have access to a CHU?
- Where CHUs have been established, in your experience, are they receiving sufficient funding to handle the capital habeas caseload, consistent with Recommendation 28 calling for adequate resources and allowing CHUs to take more of the cases?
- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Has there been any change in the use of these caps since 2017?
- Are CBAs actively participating in budgeting capital, capital habeas and mega cases in your circuit?
  - What work beyond budgeting do they do?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
- Recommendation 29 calls for 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

- Has the approval of funding requests for use of mitigation, investigation, and expert services changed since 2017?
- In your opinion, are the issues of adequately resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.

## **Conclusion**

- Is there anything else you'd like to tell us about the implementation of the adopted interim recommendations?



# CJA Supervising Attorney Interview Protocol

## [Substitute CJA Coordinating Attorney for Alternate Title]

### Professional Background

1. What is your professional background?
2. How long have you served as the CJA Supervising Attorney?

### Responsibilities

3. What are your responsibilities as a CJA Supervising Attorney?
  - a. Have any decision-making responsibilities been delegated to you?
  - b. To whom do you report?
4. Have the responsibilities changed over time? If so, how?
5. How do your responsibilities compare to those of your counterparts in other courts?
6. How would you describe your relationship with the panel attorneys in your court?
7. How would you describe your relationship with the judges (all levels) in your court?
8. How would you describe your relationship with the FDO?
9. How would you describe your relationship with court staff (clerk's office, chamber's staff, etc.)?
10. How would you describe your relationship with the circuit CBA?

### Voucher Review

11. Are you involved in the process of reviewing district court vouchers submitted for payment when the amount billed is below the statutory case maximum?
  - a. If so, please describe your role in non-excess compensation voucher review.
    - i. To what extent do you get involved, formally or informally, in resolving issues when a voucher is being considered for reduction or has been reduced?
    - ii. Based on your experience, what are the biggest challenges, if any, to attorneys and experts seeking compensation for their work in CJA representations?
  - b. If not, in your opinion, would the review of district court vouchers for representations below the statutory maximum benefit from your participation? If so, how?
  - c. Are any non-chambers staff involved in non-excess compensation voucher review? If so, who?
12. Are you involved in the review of excess compensation vouchers?
  - a. If so, please describe your role in excess compensation voucher review.
    - i. To what extent do you get involved, formally or informally, in resolving issues when a voucher is being considered for reduction or has been reduced?
    - ii. Based on your experience, what are the biggest challenges, if any, to attorneys and experts seeking compensation for their work in CJA representations when they are above the statutory maximum?

- b. If not, in your opinion, would the review of excess compensation vouchers benefit from your participation? If so, how?
  - c. Are any non-chambers staff involved in excess compensation voucher review? If so, who?
13. Are you involved in the review of vouchers for appellate representations?
- a. If so, please describe your role in appellate appointment voucher review.
    - i. To what extent do you get involved, formally or informally, in resolving issues when a voucher is being considered for reduction or has been reduced?
    - ii. Based on your experience, what are the biggest challenges, if any, to attorneys and experts seeking compensation for their work in appellate CJA representations?
  - b. If not, in your opinion, would the review of appellate appointment vouchers benefit from your participation? If so, how?
  - c. Are any non-chambers staff involved in appellate appointment voucher review? If so, who?
14. Is training provided to the staff who perform voucher review at any level (mathematical/technical/compensability/reasonableness)?
- a. If so, who provided the training?
  - b. How often are these trainings held?

## Case Budgeting

15. Do you play a role (formally or informally) in case budgeting (e.g., drafting case budgets, consulting with attorneys, consulting with the Circuit CBA, answering questions)?
- a. If so, can you describe the case budgeting process in your court?
  - b. What are the biggest challenges, if any, panel attorneys face when budgeting their cases?
    - i. Do panel attorneys face any challenges securing expert services for their cases when they are budgeted?
    - ii. Do panel attorneys face any challenges securing expert services for their cases when they are NOT budgeted?
  - c. What effect, if any, has case budgeting had on the voucher review process at both the district and circuit levels?
16. Are there any formal or informal non-statutory budgetary caps on capital cases?
- a. If so, what are they?
  - b. Are you aware of any problems or challenges such caps have caused?
    - i. If yes, please describe.

## Administration of the CJA

17. Are you involved in the management of the CJA panel in your court? If so, please describe your role.
18. Have you participated in any CJA plan revision processes in your court? If so, please describe your role.
- a. What provisions were under consideration for revision?

- b. What provisions were ultimately revised?
  - c. Which stakeholders are involved in this process?
19. In your opinion, regardless of whether or not the plan is being revised, are there certain aspects of the district/circuit plan that you believe should be revised? If so, which aspects?
  20. Thinking about your position overall, what changes, if any, could be made that would assist you in carrying out your responsibilities as a CJA Supervising Attorney?
  21. In your opinion, what changes to the responsibilities of a CJA Supervising Attorney, if any, would improve the independence of the defense function?

# CBA Interview Protocol

## Professional Background

1. What is your professional background?
2. How long have you served as the CBA in the circuit?

## CBA Responsibilities

3. What are the responsibilities of case-budgeting attorneys in your circuit?
  - a. Does the CBA participate in the appointment/reappointment of federal defenders for districts in the circuit? If so, please describe that process.
  - b. Have you been involved in reviewing district CJA plans for circuit approval?
  - c. Do you serve on the circuit CJA committee?
4. Have any other decision-making responsibilities been delegated to the CBA in the circuit?
5. Have the responsibilities changed over time? If so, how?
6. How do your responsibilities compare to those of your counterparts in other circuits?
7. Are you expected to travel out in the districts as part of your responsibilities?
  - a. What is the purpose of this travel (training attorneys, meeting with judges in the districts, etc.)?

## Case Budgeting

8. Can you describe the case budgeting process in your circuit?
9. What are the biggest challenges, if any, panel attorneys face when budgeting their cases?
  - a. Do panel attorneys face any challenges securing expert services for their cases when they are budgeted?
  - b. Do panel attorneys face any challenges securing expert services for their cases when they are NOT budgeted?
10. What effect, if any, has case budgeting had on the voucher review process at both the district and circuit levels?
11. Since 2017 have you been asked to work on case budgeting in other circuits?
  - a. If so, please describe the circumstances.
12. How would you describe your relationship with panel attorneys in the districts in your circuit?
  - a. Are they receptive to working with you on case budgeting?
13. How would you describe your relationship with the judges (all levels) in your circuit?
  - a. Are they receptive to working with you on case budgeting?
14. Do you work with panel administrators in the district courts?
  - a. If so, please describe your work with them.

15. Do you work with Resource Counsel when capital cases are budgeted?
  - a. If yes, please describe that work.
  - b. If not, why not?
16. Are there any formal or informal non-statutory budgetary caps on capital cases?
  - a. If so, what are they?
  - b. Are you aware of any problems or challenges such caps have caused?
    - i. If yes, please describe.

## Voucher Review

17. Are you involved in the process of reviewing district court vouchers submitted for payment when the representation is below the statutory case maximum?
  - a. If so, please describe your role in district court voucher review.
    - i. Based on your experience, what are the biggest challenges, if any, to attorneys and experts seeking compensation for their work in CJA representations?
  - b. If not, in your opinion, would the review of district court vouchers for representations below the statutory maximum benefit from your participation? If so, how?
18. Are you involved in the review of excess compensation vouchers?
  - a. If so, please describe your role in excess compensation voucher review.
    - i. Based on your experience, what are the biggest challenges, if any, to attorneys and experts seeking compensation for their work in CJA representations when they are above the statutory maximum?
  - b. If not, in your opinion, would the review of excess compensation vouchers benefit from your participation? If so, how?
19. Are you involved in the review of vouchers for appellate representations?
  - a. If so, please describe your role in appellate appointment voucher review.
    - i. Based on your experience, what are the biggest challenges, if any, to attorneys and experts seeking compensation for their work in appellate CJA representations?
  - b. If not, in your opinion, would the review of appellate appointment vouchers benefit from your participation? If so, how?
20. As you may know, interim recommendation 9 called for reviewing judges to give due weight to your recommendations when reviewing vouchers and expert service requests, and articulate their reason(s) for departing from your recommendations. In your experience, is this recommendation being followed consistently? Why do you say so? Can you describe any specific instances where the interim recommendation was not followed?

## 90-Day Report

21. We understand from DSO that CBAs are now receiving 90-day reports to show vouchers delayed in the payment process. Can you please describe how you use this information?
22. Is there any additional information that would be helpful to be included in the report?
  - a. If so, what?

## Administration of the CJA

23. To the best of your knowledge, is the circuit in the process of revising/updating the circuit CJA plan?
  - a. If so, are you involved in that process?
    - i. If yes, please describe your role.
    - ii. What aspects of the plan are being considered for revision?
    - iii. Which other stakeholders are involved in the revision process?
  - b. If you are not, do you know who is participating in the process?
    - i. Do you know what aspects of the plan are being considered for revision?
  - c. In your opinion, regardless of whether or not the plan is being revised, are there certain aspects of the plan that you believe should be revised? If so, which aspects?
24. Thinking about your job overall, are any changes necessary to help you better carry out your responsibilities as CBA?
25. In your opinion, what changes, if any, to the responsibilities of the CBAs would improve the independence of the defense function?

## FJC Education Division Staff Protocol

### Training Development—Judges

1. Could you briefly describe how you develop programming and educational materials for judges?
  - a. How do you develop ideas for content?
    - i. Do you take suggestions from potential participants?
      1. If yes, how do you evaluate their suggestions?
  - b. Does it differ between programs routinely offered (new judge orientation, mid-career training, national workshops) and programming that is either ad hoc or on demand?
  - c. What role, if any, do the Education Committees play in developing content?
    - i. If a role is played, how do you use the information?
    - ii. Do you ever feel compelled to include the committees' suggested content?
  - d. Does the development of training and educational materials differ by the judges to be trained?
  - e. About how long does it take to move from concept for a program to holding the program?
    - i. What does the process entail?
  - f. How do you develop goals for the training or educational programs?
    - i. How do you determine if the goals were met at the conclusion of the programs?
    - ii. When evaluating goals, do you consider the impact on litigation?
      1. If so, how do you measure impact?
2. How do you make the decision to add a topic to general trainings such as orientation programs?
  - a. How do you decide a topic needs a stand-alone program?
3. What challenges, if any, do you face in creating education materials and training about criminal litigation for judges?
  - a. What has been your biggest challenge, and how was it addressed?
    - i. Were you satisfied with the outcome?

### Training Development—Defenders

4. What about defenders? How do you create training and education programs for them?
  - a. How do you develop ideas for content?
    - i. Do you take suggestions from potential participants?
      1. If yes, how do you evaluate their suggestions?
      2. How do you determine whether or not to include the suggestion?
  - b. Does it differ between programs routinely offered (new defender orientation, appellate writing, national workshops) and programming that is either ad hoc or on demand?
  - c. What role, if any, do the Education Committees play in developing content?
    - i. If a role is played, how do you use the information?
    - ii. Do you ever feel compelled to include the committees' suggested content?

- d. About how long does it take to move from concept for a program to holding the program?
  - i. What does the process entail?
- e. How do you develop goals for the training or educational programs?
  - i. How do you determine if the goals were met at the conclusion of the programs?
  - ii. When evaluating goals, do you consider the impact on litigation?
    1. If so, how do you measure impact?
5. How do you make the decision to add a topic to general trainings such as orientation programs?
  - a. How do you decide a topic needs a stand-alone program?
6. What challenges, if any, do you face in creating education materials and training about criminal litigation for defenders?
  - a. What has been your biggest challenge, and how was it addressed?
    - i. Were you satisfied with the outcome?
7. Could you please describe the partnership with DSO to provide training and educational materials?
  - a. What are your responsibilities versus those of DSO?
    - i. Does DSO play a role in content creation or determining topics covered at training?
      1. If yes, do you always include their suggested topics?
  - b. Is there any plan to expand offerings under this partnership?
    - i. If yes, in what ways?
  - c. What are some of the challenges you've faced in working with DSO to develop content for federal defenders?
    - i. How did you address those challenges?

## Evaluating Training Needs

8. How do you evaluate the training needs of judges and defenders across the courts (surveys, examining biographical information, etc.)?
9. When responsibilities of judges and defenders vary across the courts, how do you address their disparate training needs?
  - a. Do some training needs have priority over others?
    - i. If so, which need(s)?
  - b. Apart from training specific to criminal litigation, does Education offer any training for judges or defenders on their administrative responsibilities?
    - i. If yes, how do you address the variation in administrative responsibilities across courts in developing these training and educational programs?

## Selection of Training Faculty

10. What is the process for selecting training faculty?



11. When training judges on issues of criminal litigation, how often are criminal defense attorneys included in the program or creation of materials?
  - a. What about prosecutors?
  - b. Do you feel that judges are open to training provided by practitioners?
    - i. Do you see any differences in the willingness of participants to listen to defenders versus prosecutors?

## FJC Training Recommended in the Cardone Report

12. In your experience, how familiar are judges with criminal litigation when they are appointed to the bench?
  - a. What about their obligations under the CJA, such as approving requests for experts, reviewing vouchers, appointment of counsel, etc.?
13. As you may recall, several of the recommendations list specific areas of training or educational resources for judges and attorneys. We'd like to work through each one and ask what resources or programs have been available since 2017 and what is planned for the future. As we work through these items, please think about programming specifically targeted to the topic (panels, breakouts, podcasts, pocket guides, etc.), not general programming where these topics might come up in open discussions.
  - a. eDiscovery (i.e., training; we understand the pocket guide is already being revised)
    - i. The requirement here is specifically for hands-on training. Do any of the training offerings include that type of experiential learning?
      1. If yes, what does that training look like?
      2. If not, are there any plans to include such training?
  - b. Capital litigation
    - i. The requirement here speaks to the need to generate extra-record information, the role of experts, investigators, and mitigation specialists, and best practices for funding these services early to allow for presentation of mitigation information to the Attorney General.
    - ii. When we spoke with people in the courts, this area was of particular concern, not because there were cases but because there might be. How do you address potential training needs like that?
  - c. Use of experts, investigators, and other service providers
  - d. Defense best practices (this could be case budgeting, use of experts, etc.)
  - e. Four reasons permitted to reduce vouchers (not compensable, clearly in excess, not undertaken or completed, or mathematical errors)
14. Is there any plan to increase training or educational materials on the obligations of judges under the CJA, such as a video companion to the handbook?
  - a. Under the CJA there are several other responsibilities district and magistrate judges may have. Have you given any thought to training judges about serving on district CJA committees, panel attorney selection or retention, case budgeting, or review of financial affidavits?
  - b. What about training or education provided to appellate judges on review of excess compensation vouchers or the appointment of federal defenders?

15. How many programs have been planned or held to date that specifically address the recommendations from the Cardone Report?
  - a. Was any programming specific to the recommendations in the Cardone Report canceled because of the pandemic?
    - i. If so, how many programs?
    - ii. Will they be rescheduled?
16. What prompted the decision to have Judges Cardone and McCafferty present at the Orientation for New Judges in 2020?
17. What was the goal of creating the Please Proceed episode with Judge Cardone?
  - a. Was the goal met?
    - i. If not, are there plans to do anything more in the future?
      1. If yes, what?

# Defender eDiscovery Point of Contact Interview Protocol

## Professional Background

1. What is your professional background?
2. Please describe your job.
  - a. How long have you served in this role?

## Workload

3. Please describe the work of the National Litigation Support Team.
  - a. How many people work in the program?
    - i. What types of positions are on staff of the NLST?
    - ii. How are staffing levels determined for the NLST?
    - iii. How has the number of staff changed since 2017?
    - iv. In what circuits/districts/offices are NLST staff located?
      1. How has the number of districts with NLST staff present changed since 2017?
  - b. How has your budget changed since 2017?
  - c. How many cases does the NLST work on each year?
  - d. How many districts do you assist in, on average?
    - i. How has the number of districts NLST has assisted in changed since 2017?
  - e. In what types of cases are NLST staff asked to assist? Which are the most typical?
  - f. What types of case assistance does the NLST provide (discovery, forensics, interpreters)?
4. Adopted interim recommendation 31 calls for an increase in staff and funding for NLST. What additional staff and/or resources are needed to meet demand? (budget, staffing, technology?)
  - a. What about increased funding for contracts for Coordinating Discovery Attorneys (CDAs)? Is that necessary?
  - b. What barriers do you see to obtaining more resources for the NLST?
  - c. Can you talk about the recent effort to request additional resources for NLST/CDA contracts?
    - i. Was that the first request since 2017? If not, can you describe other efforts?
5. Are there additional support services that NLST would like to offer attorneys/districts if more resources were available?
  - a. If yes, please describe which additional resources would be useful.
6. NLST works both with individual defenders (FD and panel attorneys) as well as courts. How do the needs for NLST assistance differ across groups?

7. Adopted interim recommendation 32 calls for the creation of support positions in each district (or at the circuit level) to assist with discovery and evaluating forensic evidence. Can you please describe the need?
  - a. To the best of your knowledge, has there been any progress on this effort?
    - i. If not, do you know why there has been no progress?

## Training

8. NLST provides both workshops and presentations at national workshops. Could you please describe the differences between the two and what they are each intended to accomplish?
  - a. How frequently are each offered?
  - b. How many people typically attend each?
  - c. Do you partner with anyone in offering training?
    - i. If yes, please describe those partnerships?
9. Are there training programs NLST has not been able to offer because of resource limitations?
  - a. If yes, what are they?
  - b. If no, are there additional programs you would offer if resources were available?
10. Do you feel the training currently offered by NLST is sufficient to meet the eDiscovery needs of the defender community?
  - a. If no, what needs are unmet?
  - b. How should those needs be addressed?
11. What challenges exist to increasing training offerings?

# Department of Justice eDiscovery Protocol

## Background

- What is your role at DOJ?
- How long have you served in this capacity?
- What was your professional background prior to joining DOJ?

## Litigation Technology Service Center

We'd like to begin by asking about the Litigation Technology Service Center.

- Could you please describe its work?
  - When was it created?
    - How long was the time between proposing the idea and opening the doors of the LTSC?
    - How much of that time was to secure funding?
      - Were new funds requested, or were existing funds available?
  - What were the goals of the LTSC, and how have they evolved?
    - Are any of the Center's goals more difficult to achieve than others?
      - If so, why?
  - How many people staff the Center?
    - What are the different positions and the role of each position?
  - A coordinated national response can have both costs and benefits to the U.S. Attorney's program overall. What do you see as the benefits of the LTSC?
    - What do you see as the challenges?
  - Are any of the following eLitigation resources offered through the LTSC? If yes, please describe the nature of the resource.
    - Case-related assistance
    - Assistance regarding interpreters
    - Discovery management
      - Does this also include discovery analysis, e.g., making judgments on the significance of discovery material?
    - Discovery tools, e.g., digital forensics/evidence
    - Contract management for software
    - Contract management for hardware or cloud-based storage needs
    - Training and education
    - Helpdesk/Technical Support
    - Any others?

- What type of assistance is the most time consuming?
- Which resources are requested most often?
  - Are most requests handled?
    - If not, which ones and why?
  - Are certain requests given priority due to deadlines or subject matter?
  - Are there additional kinds of assistance you would like to provide?
- How many cases does LTSC work on each year?
- Are there certain types of cases or cases with specific characteristics that are routinely assigned to the LTSC, e.g., complex cases, multidefendant cases?
  - If yes, please describe.
  - Are there specific markers for identifying these types of cases?
    - If yes, how does that work?
- Other than LTSC, are there eLitigation services available to prosecutors?
  - If so, please describe them.

## eLitigation Needs Assessments

Now we'd like to ask more generally about how DOJ assesses the eLitigation needs of the U.S. Attorney's program overall.

- How are eLitigation needs assessed?
  - Please describe those involved and the role(s) they play.
  - How do you adapt to the evolving nature of technology as it relates to discovery?
    - Is there a periodic review of DOJ's technology tools?
      - If so, please describe that process.
- How do the eLitigation needs of the prosecution compare with that of the defense?
- How do you see the eLitigation needs of the prosecution and defense changing over the next 5-10 years?
  - Are you concerned about obtaining the resources you believe you'll need to meet changing needs?

## eLitigation Staffing and Funding

Thinking about needs assessment, and how needs might change, raises questions about the current budget and staffing to address eLitigation needs, so we'd like to transition and ask about that.

- What are the current budget and staffing for eLitigation needs in the U.S. Attorney's program?
  - What is the division of resource needs between civil and criminal litigation?
    - How is this determined?
    - Does it change depending on current cases/litigation, e.g., the January 6th cases?

- What is the process for requesting increases in resources, both routinely and when unexpected needs arise?
  - How does the Mega-V Automated Litigation Support (ALS) contract factor into resource requests?
- Are requests for resource increases generally funded?
  - If not, why?
  - If they are funded, how quickly are those funds made available?
- When requesting resource increases, do any other divisions within DOJ have an opportunity to comment/modify the requests?
  - If so, who and what is their role?

## Working with the Defense

Lastly, we'd like to ask about working with the defense, specifically resource sharing and how joint eLitigation issues are addressed.

- What is the working relationship like between the defense and the prosecution for addressing common eDiscovery problems?
  - What are some of the most common problems?
    - Are some problems more challenging than others?
      - If yes, which ones and why?
      - How are these problems addressed?
  - Do the problems or challenges differ if representation is by a federal defender vs. a CJA attorney who is a solo practitioner or in a small firm?
    - If yes, please describe the differences and how they are addressed.
- When the prosecution is providing discovery to the defense, is there a standard protocol used for indexing/categorizing voluminous discovery?
  - If yes, please describe that process.
  - Does case type matter?
- What opportunities are there for sharing resources to solve common eLitigation problems?
  - Based on your experience, can you provide some examples of successful resource sharing between the prosecution and defense?
  - Are there more opportunities for coordination or resource sharing that could facilitate litigation?
    - If so, what else can be done?
  - In your opinion, is resource sharing one way to address the disparity between funding available to the prosecution and public defense?
  - What barriers do you see regarding resource sharing in the future?

# Death Penalty Resource Counsel Interview Protocol

## Federal Capital Habeas Project (2255 Project)

### *Background*

- What position do you hold at the 2255 Project?
- What are your responsibilities?
- When was the 2255 Project established?
- How long have you worked there?
- What was your professional experience before the 2255 Project?

### *Resource Counsel*

We'd like to begin by understanding more about the work of the 2255 Project.

- Could you please describe the scope of the 2255 Project's work and the type of cases the Project works on?
- Can you please describe the nature of your particular work?
- Are you involved in the recruitment of counsel for federal capital habeas cases (2255)?
- Do you serve as a consultant in cases litigated under the CJA?
  - If so, how many?
  - Can you give some examples of the substantive issues on which you consult?
  - Do you assist attorneys in locating experts?
  - Do you testify as an expert and/or provide declarations in CJA cases?
- Do you participate in or provide training for attorneys and/or judges?
  - If so, please describe this work for both groups separately.
- Do you undertake direct representation appointments in cases litigated under the CJA?
  - If so, how many?
  - If so, are these direct representation appointments undertaken as part of your 2255 Project work or are they separate from your 2255 Project work?
- Is there any other aspect of the Project's work or your particular work that you want to mention?

### *Budget and Staffing*

Next, we have some questions about resources for the 2255 Project, specifically budget and staffing.

- How many attorneys and other professionals work for the Project?
- What is the budget?
- Have budgets and staffing changed since 2017?
  - If so, how?



- Are budget and staffing sufficient to meet the caseload demands?
  - Please explain why or why not.
  - If not, how do you manage requests that you do not have the resources to support?
  - If not, describe the resources you would need in order to meet caseload demands
- Are we correct in understanding that you do not have a staffing formula?
  - How do you support requests for increases in funding or staffing?
  - Are requests for increased staffing or budgets routinely approved?
  - How long does it generally take from the initial request to approval?
- How does the 2255 Project recruit the next generation of well-qualified attorneys to represent defendants in federal capital habeas (2255) cases?
  - Does the Project have a mentorship program?
  - If yes, does the mentorship program have dedicated funding that does not diminish funding otherwise available for capital representation?
  - Are there efforts to increase the diversity of capital counsel available to take appointments?
    - If so, what are they?
  - Are there efforts to increase the diversity of 2255 Project staff?
    - If so, what are they?

### ***Cardone Recommendations***

Lastly, we'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
  - While this recommendation explicitly mentions CHUs, it speaks to the broader need to provide out-of-district and out-of-circuit representation in capital cases. Are there any issues you see with respect to the ability of FDOs and panel attorneys to provide out-of-district or out-of-circuit representations in federal capital habeas (2255) cases (including CHUs and other FDOs?)
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
  - Are there districts/circuits currently without a CHU in which you think a CHU would be helpful? If yes, where?
  - Are efforts being made to increase access to resource counsel and other resources in districts that do not have access to a CHU?
    - Do these efforts assist in capital habeas cases where CHUs have not been established?
    - Do you see a need to expand further the reach of resource counsel in districts that do not have access to a CHU? If so, how?

- Where CHUs have been established, in your experience, are they receiving sufficient funding to handle the capital habeas caseload, consistent with Recommendation 28? Recommendation 28 calls for modifying work-measurement formulas to reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs and to fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.
- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Are these caps limited to specific districts and circuits?
  - Has there been any change in the use of these caps since 2017?
- Recommendation 26 also calls for capital cases to be budgeted with a case-budgeting attorney and/or resource counsel.
  - Are federal capital (2255) cases typically budgeted with the CBA?
  - Do you participate in case budgeting?
  - If so, does that include your own direct representation cases, your recruitment, consultation, and training cases, or both?
  - Are you working with the CBA?
    - If so, please describe the nature of the collaboration.
    - If there is no CBA in the circuit, are cases still budgeted?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
  - Is there any difference in the weight given by courts to the recommendations of the federal defender versus those of resource counsel?
  - How do you know that your recommendation has been conveyed to the court?
  - Is resource counsel's recommendation generally subsumed within the federal defender's recommendation?
    - Has deference to the defender's recommendations and/or your recommendations for appointed counsel changed since 2017? If so, how?
    - If the defender's recommendation or your recommendation is not followed, are you given an explanation for why it was not?
- Recommendation 29 calls for increased training for judges on best practices for funding mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigation information to the Attorney General.

- Recommendation 29 also calls for 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
  - How have the issues of funding requests for use of mitigation, investigation, and expert services changed since 2017?
  - In your opinion, are the issues of adequately resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.
  - In your experience, is the amount of training currently offered to judges sufficient to meet the needs? Please explain.
  - Are there specific areas you think judges need to be educated on?
  - Are there any steps other than judicial training that are necessary to resolve issues of resourcing capital cases?
- Do you want to tell us anything else you think would be helpful for us to know in making this evaluation of the interim recommendations?

# Death Penalty Resource Counsel Interview Protocol

## Capital Resource Counsel Project (CRC)

### *Background*

- What position do you hold at CRC?
- What are your responsibilities?
- When was CRC established?
- How long have you worked there?
- What was your professional experience before CRC?

### *Resource Counsel*

We'd like to begin by understanding more about the work of CRC.

- Could you please describe the scope of CRC's work and the type of cases CRC works on?
- Can you please describe the nature of your particular work?
- Are you involved in the recruitment of counsel for federal capital prosecution cases?
- Do you serve as a consultant in cases litigated under the CJA?
  - If so, how many?
  - Can you give some examples of the substantive issues on which you consult?
  - Do you assist attorneys in locating experts?
  - Do you testify as an expert and/or provide declarations in CJA cases?
- Do you participate in or provide training for attorneys and/or judges?
  - If so, please describe this work for both groups separately.
- Do you undertake direct representation appointments in cases litigated under the CJA?
  - If so, how many?
  - If so, are these direct representation appointments undertaken as part of your CRC work or are they separate from your CRC work?
- Is there any other aspect of CRC's work or your particular work that you want to mention?

### *Budget and Staffing*

Next, we have some questions about resources for CRC, specifically budget and staffing.

- How many attorneys and support staff work for CRC?
- What is the budget?
- Have budgets and staffing changed since 2017?
  - If so, how?
  - Are budget and staffing sufficient to meet the caseload demands?

- Please explain why or why not.
- If not, how do you manage requests for assistance that you do not have the resources to support?
- If not, describe the resources you would need in order to meet caseload demands
- Are we correct in understanding that you do not have a staffing formula?
  - How do you support requests for increases in funding or staffing?
  - Are requests for increased staffing or budgets routinely approved?
  - How long does it generally take from the initial request to approval?
- How does CRC recruit the next generation of well-qualified attorneys to represent defendants in federal capital prosecution cases?
  - Does CRC have a mentorship program?
  - If yes, does the mentorship program have dedicated funding that does not diminish funding otherwise available for capital representation?
  - Are there efforts to increase the diversity of capital counsel available to take appointments?
    - If so, what are they?
  - Are there efforts to increase the diversity of CRC staff?
    - If so, what are they?

### ***Cardone Recommendations***

Lastly, we'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
- While this recommendation explicitly mentions CHUs, it speaks to the broader need to provide out-of-district and out-of-circuit representation in capital cases. Are there any issues you see with respect to the ability of FDOs and panel attorneys to provide out-of-district or out-of-circuit representations in federal capital prosecution cases?
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
- Are there particular districts and circuits that need additional resources, including resource counsel and training?
  - If yes, please explain where they are and what the specific need is
- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Has there been any change in the use of these caps since 2017?

- Recommendation 26 also calls for capital cases to be budgeted with a case-budgeting attorney and/or resource counsel.
  - Are federal capital prosecution cases typically budgeted with a CBA?
  - Do you participate in case budgeting?
  - If so, does that include your own direct representation cases, your recruitment, consultation, and training cases, or both?
  - Are you working with the CBA?
    - If so, please describe the nature of the collaboration.
    - If there is no CBA in the circuit, are cases still budgeted?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
  - Is there any difference in the weight given by courts to the recommendations of the federal defender versus those of resource counsel?
  - How do you know that your recommendation has been conveyed to the court?
  - Is resource counsel's recommendation generally subsumed within the federal defender's recommendation?
    - Has deference to the defender's recommendations and/or your recommendations for appointed counsel changed since 2017? If so, how?
    - If the defender's recommendation or your recommendation is not followed, are you given an explanation for why it was not?
- Recommendation 29 calls for increased training for judges on best practices for funding mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigation information to the Attorney General.
  - How have the issues of funding requests for use of mitigation, investigation, and expert services changed since 2017?
  - In your opinion, are the issues of adequately resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.
  - In your experience, is the amount of training currently offered to judges sufficient to meet the needs? Please explain.
  - Are there specific areas you think judges need to be educated on?
  - Are there any steps other than judicial training that are necessary to resolve issues of resourcing capital cases?
- Do you want to tell us anything else you think would be helpful for us to know in making this evaluation of the Cardone interim recommendations?

# Death Penalty Resource Counsel Interview Protocol

## Federal Capital Appellate Resource Counsel Project (FCARC)

### *Background*

- What position do you hold at FCARC?
- What are your responsibilities?
- When was FCARC established?
- How long have you worked there?
- What was your professional experience before FCARC?

### *Resource Counsel*

We'd like to begin by understanding more about the work of the Appellate Project.

- Could you please describe the scope of FCARC's work and the type of cases FCARC works on?
- Can you please describe the nature of your particular work?
- Are you involved in the recruitment of counsel for federal capital appellate cases?
- Do you serve as a consultant in cases litigated under the CJA?
  - If so, how many?
  - Can you give some examples of the substantive issues on which you consult?
  - Do you testify as an expert and/or provide declarations?
- Do you participate in or provide training for attorneys and/or judges?
  - If so, please describe this work for both groups separately
- Do you undertake direct representation appointments in cases litigated under the CJA?
  - If so, how many?
  - If so, are these direct representation appointments undertaken as part of your FCARC work or are they separate from your FCARC work?
- Is there any other aspect of FCARC's work or your particular work that you want to mention?

### *Budget and Staffing*

Next, we have some questions about resources for the Appellate Project, specifically budget and staffing.

- How many attorneys and other professionals work for FCARC?
- What is the budget?
- Have budgets and staffing changed since 2017?
  - If so, how?
  - Are budget and staffing sufficient to meet the caseload demands?

- Please explain why or why not.
  - If not, how do you manage requests that you do not have the resources to support?
  - If not, describe the resources you would need in order to meet caseload demands .
- Are we correct in understanding that you do not have a staffing formula?
  - How do you support requests for increases in funding or staffing?
  - Are requests for increased staffing or budgets routinely approved?
  - How long does it generally take from the initial request to approval?
- How does FCARC recruit the next generation of well-qualified attorneys to represent defendants in appeals of federal capital prosecution cases?
  - Does FCARC have a mentorship program?
  - If yes, does the mentorship program have dedicated funding that does not diminish funding otherwise available for capital representation?
  - Are there efforts to increase the diversity of capital counsel available to take appointments?
    - If so, what are they?
  - Are there efforts to increase the diversity of FCARC staff?
    - If so, what are they?

### ***Cardone Recommendations***

Lastly, we'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
  - While this recommendation explicitly mentions CHUs, it speaks to the broader need to provide out-of-district and out-of-circuit representation. Are there any issues you see with respect to the ability of FDOs and panel attorneys to provide out-of-district or out-of-circuit representations in federal capital appellate cases?
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
  - Are there particular districts and circuits that need additional resources, including resource counsel and training?
    - If yes, please explain where they are and what the specific need is
- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Has there been any change in the use of these caps since 2017?



- Recommendation 26 also calls for capital cases to be budgeted with a case-budgeting attorney and/or resource counsel.
  - Are federal capital appeal cases typically budgeted with the CBA?
  - Do you participate in case budgeting?
  - If so, does that include your own direct representation cases, your recruitment, consultation, and training cases, or both?
  - Are you working with the CBA?
    - If so, please describe the nature of the collaboration.
    - If there is no CBA in the circuit, are cases still budgeted?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
  - Is there any difference in the weight given by courts to the recommendations of the federal defender versus those of resource counsel?
  - How do you know that your recommendation has been conveyed to the court?
  - Is resource counsel's recommendation generally subsumed within the federal defender's recommendation?
    - Has deference to the defender's recommendations and/or your recommendations for appointed counsel changed since 2017? If so, how?
    - If the defender's recommendation or your recommendation is not followed, are you given an explanation for why it was not?
- Recommendation 29 calls for increased training for judges on best practices for funding mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigation information to the Attorney General.
  - How have the issues of funding requests for use of mitigation, investigation, and expert services changed since 2017?
  - In your opinion, are the issues of resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.
  - In your experience, is the amount of training currently offered to judges sufficient to meet the needs? Please explain.
  - Are there specific areas you think judges should be educated on?
  - Are there any steps other than judicial training that are necessary to resolve issues of resourcing capital cases?
- Do you want to tell us anything else you think would be helpful for us to know in making this evaluation of the interim recommendations?

# Death Penalty Resource Counsel Interview Protocol

## National and Regional Habeas Assistance & Training Counsel Projects (HATs)

### *Background*

- What position do you hold at HAT?
- What are your responsibilities?
- When was HAT established?
- How long have you worked there?
- What was your professional experience before HAT?

### *Resource Counsel*

We'd like to begin by understanding more about the work of HAT

- Could you please describe the scope of HAT's work and the type of cases HAT works on?
- Can you please describe the nature of your particular work?
- Are you involved in the recruitment of counsel for federal capital habeas cases (2254)?
- Do you serve as a consultant in cases litigated under the CJA?
  - If so, how many?
  - Can you give some examples of the substantive issues on which you consult?
  - Do you assist attorneys in locating experts?
  - Do you testify as an expert and/or provide declarations in CJA cases?
- Do you participate in or provide training for attorneys and/or judges?
  - If so, please describe this work for both groups separately.
- Do you undertake direct representation appointments in cases litigated under the CJA?
  - If so, how many?
  - If so, are these direct representation appointments undertaken as part of your HAT work or are they separate from your HAT work?
- Is there any other aspect of HAT's work or your particular work that you want to mention?

### *Budget and Staffing*

Next, we have some questions about resources for HAT, specifically budget and staffing.

- How many attorneys and other professionals work for HAT?
- What is the budget?
- Have budgets and staffing changed since 2017?
  - If so, how?
  - Are budget and staffing sufficient to meet the caseload demands?

- Please explain why or why not.
- If not, how do you manage requests that you do not have the resources to support?
- If not, describe the resources you would need in order to meet caseload demands
- How do you support requests for increases in funding or staffing?
- Are requests for increased staffing or budgets routinely approved?
- How long does it generally take from the initial request to approval?
- How does HAT recruit the next generation of well-qualified attorneys to represent defendants in federal capital habeas (2254) cases?
  - Does HAT have a mentorship program?
  - If yes, does the mentorship program have dedicated funding that does not diminish funding otherwise available for capital representation?
  - Are there efforts to increase the diversity of capital counsel available to take appointments?
    - If so, what are they?
  - Are there efforts to increase the diversity of HAT staff?
    - If so, what are they?

### ***Cardone Recommendations***

Lastly, we'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
- While this recommendation explicitly mentions CHUs, it speaks to the broader need to provide out-of-district and out-of-circuit representation in capital cases.
  - In your experience, is this recommendation consistently followed?
    - Explain why or why not
  - Where are restrictions still imposed?
    - Do courts typically demonstrate good cause for imposing the restriction? What are the reasons?
  - Are there any issues you see with respect to the ability of FDOs and panel attorneys to provide out-of-district or out-of-circuit representations in federal capital habeas (2254) cases (including CHUs and other FDOs?)
  - Are there districts/circuits where restrictions have been removed?
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
  - Are there districts/circuits currently without a CHU in which you think a CHU would be helpful? If yes, where?
  - Are efforts being made to increase access to resource counsel and other resources in districts that do not have access to a CHU?

- Do these efforts assist in capital habeas cases where CHUs have not been established?
- Do you see a need to expand further the reach of resource counsel in districts that do not have access to a CHU? If so, how?
- Where CHUs have been established, in your experience, are they receiving sufficient funding to handle the capital habeas caseload, consistent with Recommendation 28? Recommendation 28 calls for modifying work-measurement formulas to reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs and to fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.
- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Has there been any change in the use of these caps since 2017?
- Recommendation 26 also calls for capital cases to be budgeted with a case-budgeting attorney and/or resource counsel.
  - Are federal capital (2254) cases typically budgeted with the CBA?
  - Do you participate in case budgeting?
  - If so, does that include your own direct representation cases, your recruitment, consultation, and training cases, or both?
  - Are you working with the CBA?
    - If so, please describe the nature of the collaboration.
    - If there is no CBA in the circuit, are cases still budgeted?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
  - Is there any difference in the weight given by courts to the recommendations of the federal defender versus those of resource counsel?
  - How do you know that your recommendation has been conveyed to the court?
  - Is resource counsel's recommendation generally subsumed within the federal defender's recommendation?
    - Has deference to the defender's recommendations and/or your recommendations for appointed counsel changed since 2017? If so, how?
    - If the defender's recommendation or your recommendation is not followed, are you given an explanation for why it was not?
- Recommendation 29 calls for increased training for judges on best practices for funding mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigation information to the Attorney General.

- Recommendation 29 also calls for 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.
  - How have the issues of funding requests for use of mitigation, investigation, and expert services changed since 2017?
  - In your opinion, are the issues of adequately resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.
  - In your experience, is the amount of training currently offered to judges sufficient to meet the needs? Please explain.
  - Are there specific areas you think judges need to be educated on?
  - Are there any steps other than judicial training that are necessary to resolve issues of resourcing capital cases?
- Do you want to tell us anything else you think would be helpful for us to know in making this evaluation of the interim recommendations?

# Death Penalty Resource Counsel Interview Protocol

## Federal Death Penalty Resource Counsel Project (FDPRC)

### *Background*

- What position do you hold at FDPRC?
- What are your responsibilities?
- When was FDPRC established?
- How long have you worked there?
- What was your professional experience before FDPRC?

### *Resource Counsel*

We'd like to begin by understanding more about the work of FDPRC.

- Could you please describe the scope of FDPRC's work and the type of cases FDPRC works on?
- Can you please describe the nature of your particular work?
- Are you involved in the recruitment of counsel for federal capital prosecution cases?
- Do you serve as a consultant in cases litigated under the CJA?
  - If so, how many?
  - Can you give some examples of the substantive issues on which you consult?
  - Do you assist attorneys in locating experts?
  - Do you testify as an expert and/or provide declarations in CJA cases?
- Do you participate in or provide training for attorneys and/or judges?
  - If so, please describe this work for both groups separately.
- Do you undertake direct representation appointments in cases litigated under the CJA?
  - If so, how many?
  - If so, are these direct representation appointments undertaken as part of your FDPRC work or are they separate from your FDPRC work?
- Is there any other aspect of FDPRC's work or your particular work that you want to mention?

### *Budget and Staffing*

Next, we have some questions about resources for FDPRC, specifically budget and staffing.

- How many attorneys and other professionals work for FDPRC?
- What is the budget?
- Have budgets and staffing changed since 2017?
  - If so, how?
  - Are budget and staffing sufficient to meet the caseload demands?

- Please explain why or why not
- If not, how do you manage requests for assistance that you do not have the resources to support?
  - If not, describe the resources you would need in order to meet caseload demands
- How do you support requests for increases in funding or staffing?
- Are requests for increased staffing or budgets routinely approved?
- How long does it generally take from the initial request to approval?
- How does FDPRC recruit the next generation of well-qualified attorneys to represent defendants in federal capital prosecution cases?
  - Does FDPRC have a mentorship program?
  - If yes, does the mentorship program have dedicated funding that does not diminish funding otherwise available for capital representations?
  - Are there efforts to increase the diversity of capital counsel available to take appointments?
    - If so, what are they?
  - Are there efforts to increase the diversity of FDPRC staff?
    - If so, what are they?

### ***Cardone Recommendations***

Lastly, we'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
- While this recommendation explicitly mentions CHUs, it speaks to the broader need to provide out-of-district and out-of-circuit representation in capital cases. Are there any issues you see with respect to the ability of FDOs and panel attorneys to provide out-of-district or out-of-circuit representations in federal capital prosecution cases?
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
- Are there particular districts and circuits that need additional resources, including resource counsel and training?
  - If yes, please explain where they are and what the specific need is
- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Has there been any change in the use of these caps since 2017?

- Recommendation 26 also calls for capital cases to be budgeted with a case-budgeting attorney and/or resource counsel.
  - Are federal capital prosecution cases typically budgeted with the CBA?
  - Do you participate in case budgeting?
  - If so, does that include your own direct representation cases, your recruitment, consultation, and training cases, or both?
  - Are you working with the CBA?
    - If so, please describe the nature of the collaboration.
    - If there is no CBA in the circuit, are cases still budgeted?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
  - Is there any difference in the weight given by courts to the recommendations of the federal defender versus those of resource counsel?
  - How do you know that your recommendation has been conveyed to the court?
  - Is resource counsel's recommendation generally subsumed within the federal defender's recommendation?
    - Has deference to the defender's recommendations and/or your recommendations for appointed counsel changed since 2017? If so, how?
    - If the defender's recommendation or your recommendation is not followed, are you given an explanation of why it was not?
- Recommendation 29 calls for increased training for judges on best practices for funding mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigation information to the Attorney General.
  - How have the issues of funding requests for use of mitigation, investigation, and expert services changed since 2017?
  - In your opinion, are the issues of adequately resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.
  - In your experience, is the amount of training currently offered to judges sufficient to meet the needs? Please explain.
  - Are there specific areas you think judges need to be educated on?
  - Are there any steps other than judicial training that are necessary to resolve issues of resourcing capital cases?
- Do you want to tell us anything else you think would be helpful for us to know in making this evaluation of the Cardone interim recommendations?



# Death Penalty Resource Counsel Interview Protocol

## National Mitigation Coordinator

### *Background*

- What position do you currently hold?
- What are your responsibilities?
- When was the NMC project established?
- How long have you worked there?
- What was your professional experience before the NMC project?

### *National Mitigation Coordinator*

We'd like to begin by understanding more about the work of the NMC project.

- Could you please describe the scope of the NMC project's work and the type of cases you work on?
- Can you please describe the nature of your particular work?
- Are you involved in the recruitment of mitigation specialists for federal capital prosecution cases and federal capital habeas cases (2244 & 2255)? Please explain for each type of case.
- Do you serve as a consultant in cases litigated under the CJA?
  - If so, how many?
  - Can you give some examples of the substantive issues on which you consult?
  - Do you assist attorneys in locating mitigation experts?
  - Do you testify as an expert and/or provide declarations in CJA cases?
- Do you participate in or provide training for attorneys, mitigation specialists, or judges?
  - If so, please describe this work for each group separately.
- Do you directly serve as a mitigation specialist in cases litigated under the CJA?
  - If so, how many?
  - If so, are do you serve as a mitigation specialist in cases undertaken as part of your NMC project work or are they separate from your NMC project work?
- Is there any other aspect of the project's work or your particular work that you want to mention?

### *Budget and Staffing*

Next, we have some questions about resources for the National Mitigation Project, specifically budget and staffing.

- How many staff members work with you?
- What is the budget?
- Have budgets and staffing changed since 2017?

- If so, how?
- Are budget and staffing sufficient to meet the caseload demands?
  - Please explain why or why not.
  - If not, how do you manage requests that you do not have the resources to support?
  - If not, describe the resources you would need in order to meet caseload demands
- Are we correct in understanding that you do not have a staffing formula?
  - How do you support requests for increases in funding or staffing?
  - Are requests for increased staffing or budgets routinely approved?
  - How long does it generally take from the initial request to approval?
- How does the NMC project recruit the next generation of well-qualified mitigation specialists for federal capital cases?
  - Does the NMC project have a mentorship program?
  - If yes, does the mentorship program have dedicated funding that does not diminish funding otherwise available for capital representation?
  - Are there efforts to increase the diversity of mitigation specialists who work in federal capital cases?
    - If so, what are they?
  - Are there efforts to increase the diversity of the NMC project staff?
    - If so, what are they?

### ***Cardone Recommendations***

Lastly, we'd like to ask you about the implementation of the adopted interim recommendations that discuss capital litigation.

- According to Recommendation 24, district and circuit courts are not to impose restrictions on cross-district or cross-circuit CHU appointments without good cause.
  - While this recommendation explicitly mentions CHUs, it speaks to the broader need to provide out-of-district and out-of-circuit representation in capital cases. Are there any issues you see with respect to the ability of FDOs and panel attorneys to provide out-of-district or out-of-circuit representations in federal capital cases?
- Recommendation 25 calls for the creation of CHUs where they do not already exist and making other resources more widely available to attorneys, including resource counsel, other resources, and training.
  - Are there districts/circuits currently without a CHU in which you think a CHU would be helpful? If yes, where?
  - Are efforts being made to increase access to resource counsel and other resources in districts that do not have access to a CHU?
  - Looking at federal capital prosecution cases as well as federal capital habeas cases nationwide, are there particular districts and circuits that need additional resources, including resource counsel and training?
  - If yes, please explain where they are and what the specific need is

- Recommendation 26 calls for the removal of any formal or informal non-statutory budgetary caps on capital litigation.
  - Where do budgetary caps still exist? Are they limited to specific districts and circuits?
  - What types of cases do the caps apply to?
  - Are the caps still enforced?
  - Do the caps apply to counsel fees, experts, or both?
  - Are these caps limited to specific districts and circuits?
  - Has there been any change in the use of these caps since 2017?
- Recommendation 26 also calls for capital cases to be budgeted with a case-budgeting attorney and/or resource counsel.
  - Are most of the cases you are involved in budgeted with the CBA?
  - Do you participate in case budgeting?
  - Are you working with the CBA?
    - If so, please describe the nature of the collaboration.
    - If there is no CBA in the circuit, are cases still budgeted?
- Recommendation 27 calls for judges appointing counsel in capital cases to consider and give due weight to the recommendations of federal defenders and resource counsel and articulate reasons for not doing so.
  - In your experience, is this recommendation consistently followed?
  - Is there any difference in the weight given by courts to the recommendations of the federal defender versus those of resource counsel?
  - Is resource counsel's recommendation generally subsumed within the federal defender's recommendation?
    - Has deference to the defender's recommendations and/or resource counsel's recommendations for appointed counsel changed since 2017? If so, how?
    - If the defender's recommendation or resource counsel's recommendation is not followed, is an explanation for why it was not provided?
- Recommendation 29 calls for increased training for judges on best practices for funding mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigation information to the Attorney General.
- Recommendation 29 also calls for 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
  - How have the issues of funding requests for use of mitigation, investigation, and expert services changed since 2017?
  - In your opinion, are the issues of adequately resourcing capital litigation discussed in the Cardone Report best resolved by increased judicial training? Please explain.
  - In your experience, is the amount of training currently offered to judges sufficient to meet the needs? Please explain.

- Are there specific areas you think judges need to be educated on, including the importance of the mitigation function?
- Are there any steps other than judicial training that are necessary to resolve issues of re-sourcing capital cases?
- Do you want to tell us anything else you think would be helpful for us to know in making this evaluation of the interim recommendations?

## Questions for the District Chief Judge

### CJA Plan

We sent along a summary of your CJA plan from [year]. Did you notice any issues with how we have categorized various aspects of your plan? If so, what are they?

1. In general, how often is the CJA plan discussed or reviewed in your district? Please describe the process.
  - a. Is the district's CJA currently being reviewed?
    - i. If so, what prompted the review?
    - ii. What revisions are being considered, if any?
2. Who maintains the list of panel attorneys in your district (adding and removing attorneys eligible for appointment)?

### Panel Attorney Selection and Retention

3. Does your district have one or more CJA Committees?
  - a. Are they district, divisional, or both?
  - b. Do you serve on a CJA Committee?
  - c. Who else serves on the CJA Committee(s)?
  - d. How often does the CJA Committee meet?
4. Please describe the process for selecting attorneys to serve on the CJA panel?
  - a. What are the criteria by which panel attorneys are selected?
  - b. What informs the selection process (applications, recommendations, best practices)?
5. Is there a term of membership for attorneys on the panel?
  - a. If yes, what is it and what, if any, are the criteria for renewing membership?
  - b. Do panel members have to fill out an application for renewal or does the committee automatically review membership?
6. What is the process for removing attorneys from the panel list?
  - a. How frequently does the CJA Committee meet to review new or renewal applications?
7. Does the current size of the panel meet the needs of the district? If not, why not?
8. What are the greatest challenges the district faces in finding qualified attorneys to serve on the CJA panel?
  - a. Does your district have a mentorship program for attorneys who want to serve on the panel?
    - i. Who administers the mentorship program?
    - ii. What are the goals of the program?
      1. Is the program achieving its goals?
    - iii. What are the criteria for becoming a mentor or a mentee?
9. Does the district face any other challenges related to CJA representation?

## Voucher Submission, Review, and Payment

10. Does the voucher review process described in the plan mirror the practice of the district?
  - a. Please describe the voucher submission process for panel attorneys in your district
    - i. How many levels of voucher review are there, and who performs the review(s) at each level?
    - ii. Is training offered on voucher review, including guidance on the new standard reasons for reduction (mathematical error, work clearly in excess, etc.) and definition of compensable services?
  - b. At what stage are attorneys notified of potential changes to submitted vouchers? How are they notified?
    - i. Does the process differ for changes to excess compensation vouchers? If so, how?
  - c. Are there any types of vouchers that are more likely to be reduced than others? If so, what are they?
  - d. Are attorneys ever asked to make adjustments that are not due to mathematical errors to their vouchers before submitting them? If yes, please describe the process.
  - e. Is there a process for attorneys who wish to appeal voucher reductions? If yes, please describe the process.
    - i. How often do panel attorneys appeal reductions in vouchers?
  - f. Do you feel that the current CJA statutory maximum is sufficient compensation for panel attorney work? Why or why not?
    - i. Is it sufficient compensation to attract attorneys to the panel?

## Relationship with Federal Defender Office

11. Does the circuit seek your input when appointing/reappointing the federal defender in your district?
  - a. If so, do you solicit the views of other judges on your court?
12. Does the defender's office provide training or educational materials to panel attorneys?
13. Do you believe that the defender's office has sufficient resources to provide training? If not, please explain.

## Judicial Training

14. Has your court ever been offered training on any of the following:
  - a. The use of experts in criminal litigation?
  - b. E-discovery?
  - c. Capital litigation, including the requirements under 2254 and 2555 or best practices for use of experts in capital litigation?
15. Are there other training programs related to the defense function that you would like to see offered? If yes, on what topic?

## Capital and Capital Habeas Litigation

16. Since 2017, have you presided over any capital or capital habeas cases?  
[only continue if yes]
17. Did you appoint counsel in that case?
  - a. If yes, did you consult with anyone in making the appointment (e.g., Death Penalty Resource Counsel (DPRC), the Federal Defender, DSO)? If so, please describe that experience.
18. Is there a requirement in the district that any counsel appointed in a capital/capital habeas case work with DPRC?
19. What are the biggest challenges to securing counsel for capital cases in this district?
  - a. Do you have any suggestions for improvement?
20. What are the biggest challenges to securing expert services for capital cases in this district?
  - a. Do you have any suggestions for improvement?
21. Have you ever appointed a CHU for capital habeas cases?
22. Are there any formal or informal compensation caps on capital cases (death, direct appeal, or collateral appeal)?
23. Are Case-Budgeting Attorneys used in capital cases in this district?
  - a. Are they appointed in non-capital complex cases?

## Concluding Questions

24. What are the strengths/weaknesses/challenges of your district's CJA plan? In your opinion, do the interim recommendations address any of these issues?
25. In your opinion, have the interim recommendations changed the workload of the court or changed how things are done? If yes, in what ways?
26. Based on your experience with the interim recommendations, is there anything I haven't asked that you think the policy makers should know?

## Questions for the Panel Attorney District Representative (PADR)

### CJA Plan

1. In reviewing the summary of the district CJA plan, did you notice any issues with our analysis?
2. In general, how often is the CJA plan discussed or reviewed in your district? Please describe the process.
  - a. Is the district's CJA plan currently being reviewed?
    - i. If so, what prompted the review?
    - ii. What revisions are being considered, if any?

### Introduction

3. How long have you served in this position?
4. Please describe your professional background
5. How many attorneys are in your firm?
6. Do you serve on any national committees, expert panels, working groups, or advisory groups?
  - a. If yes, what national issues have you worked on?

### Workload

7. Who maintains the list of panel attorneys in your district from which attorneys can be appointed?
8. What does the case appointment process look like?
9. To the best of your knowledge, what percentage of representations are assigned to panel attorneys vs. federal defenders each year?
  - a. Do you believe the allocation of work between panel attorneys and defenders allows for panel attorneys to remain proficient in criminal defense while providing high quality representation?
  - b. Are there specific types of cases or representations that are more or less likely to go to panel attorneys?
  - c. Are you aware of any instances of panel attorneys declining appointments? If so, why?
  - d. In general, do you feel the judges in your district are sensitive to the workloads of panel attorneys? If no, please explain.
10. How many clients do you serve, on average, each year?
  - a. What support staff, if any, are available to you in your office?
  - b. Is this a good workload for you? Why or why not?
  - c. Since 2017, have you declined any appointments. If so, why?



## Panel Attorney Selection and Retention

11. What is the process for selecting panel attorneys in this district?
  - a. Are panel attorneys chosen by a committee?
    - i. If so, who serves on that committee? What are the terms of service for that committee?
  - b. What are the criteria by which panel attorneys are selected?
  - c. Is there a list of best practices for selecting panel attorneys that inform the selection process?
12. Is there a term of membership on the panel?
  - a. If yes, what is it and what, if any, are the criteria for renewing membership?
  - b. Do panel members have to fill out an application for renewal or does the committee automatically review membership?
13. Is the size of the panel sufficient to meet the needs of the district and help attorneys maintain proficiency? If not, why not?
14. Does your district have a mentorship program for attorneys who want to serve on the panel?
  - a. Who administers the mentorship program?
  - b. What are the goals of the program?
    - i. Is the program achieving its goals?
  - c. What are the criteria for becoming a mentor or a mentee?

## Voucher Submission, Review, and Payment

15. Please describe the process for submitting vouchers in your district
  - a. How many levels of review are there, and who performs the review(s) at each level?
  - b. At what stage are you notified of potential changes to your vouchers? How are you notified?
  - c. Are there any types of vouchers that are more likely to be reduced than others? If so, what are they?
  - d. Is it the practice in your district to informally encourage attorneys to keep voucher amounts under a specific limit, such as to avoid circuit review?
  - e. Is there a process for the attorney to appeal voucher reductions? If yes, what does that process look like?
    - i. How often do panel attorneys appeal?
    - ii. Is there concern about reprisal if attorneys appeal voucher reductions?
  - f. Do you feel that the current CJA statutory max is sufficient compensation for your work?
    - i. Is it sufficient compensation to attract attorneys to the panel?

## Relationship with Federal Defender Office

16. Describe the relationship between the defender's office and the panel.
17. What role does the defender's office play in the appointment of attorneys in the district?
18. Does the defender's office provide training or educational materials to panel attorneys?
  - a. Are panel attorneys aware of these resources and do they use them?

## Training and Education

19. How is panel attorney training conducted in your district?
20. Does your district require panel attorneys to participate in training to be appointed, remain on the panel, or to be reappointed? If yes, what are the requirements?
21. How frequently do panel attorneys attend training?
  - a. Are there challenges to panel attorneys attending training in your district? If so, what are they (travel, costs of participation, time)?
22. How many trainings are typically held each year (since 2017)?
23. Does the location of training vary?
  - a. Are there online trainings available?
24. What topics have recently been addressed in training?
  - a. Have there been specific trainings on the use of expert service providers of eDiscovery?
25. Has a DSO-run training event been held in the district since 2017? If so, which one(s)?
26. Who is responsible for assessing the training needs of panel attorneys?
  - a. What do you think are the biggest training needs of panel attorneys?
27. Apart from training, what educational resources does the defender's office provide panel attorneys? Brief banks? Hotlines?
  - a. Do panel attorneys use them?
28. What educational resources does the DSO Training Division provide panel attorneys?
  - a. Do panel attorneys use them?

## National Litigation Support

29. Have you worked with any national litigation support teams on any of your cases? If yes, please describe the process.
30. Do you think panel attorneys are generally aware of the assistance of national litigation support positions?

## Capital Litigation

31. Since 2017, have there been any capital cases in the district?
  - a. [only continue if yes]
32. Have you been appointed in any capital cases since 2017?
  - a. If yes, did you work with Death Penalty Resource Counsel when you were appointed in capital cases? If so, please describe that experience.
33. Is there a requirement in the district that any counsel appointed in a capital case work with DPRC?
34. Is the defender consulted on the appointment of counsel in capital cases?
35. What are the biggest challenges to securing counsel for capital cases in this district?
  - a. Do you have any suggestions for improvement?
36. What are the biggest challenges to securing expert services for capital cases in this district?
  - a. Do you have any suggestions for improvement?

# Questions for the Federal Defenders

## Introduction

1. How long have you been in this position?
2. Please describe your professional background.
3. Do you serve on any national committees, expert panels, working groups, or advisory groups?
  - a. What national issues you have worked on?

## Workload

4. Talk about your workload. How many clients does your office serve, on average, per attorney?
  - a. Does your office have the resources you need to manage your workload? If not, what do you need?
  - b. Is your office working above your staffing formula? If so, by how much for how long? How does this affect client representation?
5. What is the percentage of defender appointments relative to panel attorney appointments?
  - a. Is there a preference for appointing the FD office first, or in specific types of cases?
6. Have you ever been told by a court that you have to take appointments even when you feel your office was not able to handle the additional workload? If yes, how was that situation handled? Is this situation common?
  - a. Do you feel that the judges in your district are sensitive to your workload?
7. Are you ever asked to make an appearance in court for a panel attorney client when the panel attorney can't make the appearance?
8. Are there any responsibilities routinely assigned to your or your office for which you do not receive workload credit? If yes, please describe the responsibilities. When you are pressed for time, are these the tasks most likely to be triaged? Does the lack of credit impact office morale?

## Responsibilities of the Office

9. Does your office have a mentorship program for your office? If yes, please describe it.
  - a. What is the goal/are the goals of the mentorship program?
10. Does your office assist defendants in filling out the financial eligibility affidavit? If no, is someone on your staff assigned this responsibility?
  - a. How burdensome is the task of assisting defendants with financial eligibility forms?
11. Does your office work with the US Attorney, U.S. Marshal's Service, and Probation office to ensure timely appointment of counsel? If no, how do you ensure timely appointment?
12. What is your relationship like with the US Attorney's office in your district?
13. What is your role, if any, in reviewing vouchers? Are you responsible for reviewing CJA vouchers for technical accuracy before they go to the presiding judge? In addition to checking

- for mathematical errors, does this also include a review for adherence to local and national voucher policies?
- a. If yes, did you receive training for this responsibility?
  - b. If no, who is?
14. Are you consulted about vouchers by the presiding judge (or other reviewing authority in your district), specifically when they are considering reductions?
- a. If no, does another person or group review vouchers?
    - i. If yes, who?
    - ii. If no, do you see this as a problem?
  - b. If yes, were you trained for this responsibility, how often does it occur, and under what circumstances?
15. Are you responsible for administering the CJA panel? If no, who is?
- a. Who maintains the list of CJA attorneys?
16. Do you or does someone from your office serve on the CJA Committee?
- a. Are you (or they) a voting member?
    - i. If no, do you think it would have an impact for your office or for the panel if you were?
17. What is the process for appointing panel attorneys in a case? Who determines who is chosen for appointment and how? Do you make a recommendation?
- a. If a rotation system, how often are attorneys appointed out of rotation due to the unique demands of the case?

### Staffing

**QUESTIONS NOT RELEVANT TO CDOs. Can ask comparison with other defenders in approach to AFPD staffing, branch offices, and additional funding.**

18. **What is your circuit's approach to AFPD staffing?**
- a. **Has your circuit ever authorized fewer AFPD positions when were authorized by the financial plan, the AO's hiring guidance, or the staffing formula?**
    - i. **If so, were you able to hire other types of staff to handle some part of the excess caseload?**
  - b. **What information does it rely on or from whom do they solicit advice?**
    - i. **How receptive is the circuit to advice?**
    - ii. **What appears to influence the circuit the most?**
  - c. **Has the approach of the circuit changed since 2017? If so, how?**
  - d. In your interactions with other defenders, does it seem as though the circuits vary in their approach to AFPD staffing?
    - i. Do some circuits seem more receptive to advice about the appropriate number of AFPDs? If not, do you know why?
19. Do you have any branch offices? Has it been suggested you open one? What determines whether a branch office is opened? Realistically, what is the minimum level of staffing required to operate a branch office?
20. Have you ever asked for additional funding for staff from DSO? If so, what happened?

## Hiring

21. How do you find candidates for hire and what is the process interviewing those candidates?
22. What are the biggest challenges you face when hiring?
23. Have you been reappointed? If so, what was the reappointment process?
  - a. Did you know what to expect? Did it work as you thought it would?
  - b. What changes would you make to the reappointment process?
24. How would you compare your hiring/appointment to that of the other defenders that you know?

## Training and Education

25. What does training look like in your district?
  - a. Is your training budget sufficient to cover the needs of your office?
  - b. How many trainings do you typically hold each year (2017 to today)?
  - c. How many locations do you use?
  - d. Do you ever offer trainings online?
  - e. What topics do you cover?
  - f. Does your district require panel attorneys to participate in training to be appointed to or remain on the panel? What are the requirements? What is the attendance like for panel attorneys at your sessions?
  - g. Have you hosted a DSO-run training event since 2017? If so, which one(s)?
  - h. Are there additional trainings you would like to hold or host if you had more resources?
26. Are you responsible for assessing the training needs of your staff?
  - a. How do you assess the training needs of your staff?
  - b. What do you think are the biggest training needs of your staff?
27. Are you responsible for assessing the training needs of the panel?
  - a. How do you assess the training needs of the panel?
  - b. What do you think are the biggest training needs of the panel?
  - c. What type of feedback have you received, if any, re: any of the training provided by your office, DSO, or the FJC?
28. What staff in your office are responsible for coordinating, developing and/or delivering training programs?
29. What educational resources do you have available for your staff or panel attorneys? Brief banks? Hotlines?
  - a. What staff are responsible for maintaining and distributing these materials?
  - b. Do panel attorneys have access to them? Do they use them?

## Capital Litigation

30. Does the court consult you when appointing counsel in capital cases? Do they follow your recommendation? If they don't, do they ever tell you why?
  - a. Does the court's willingness to consult you depend on whether it is capital prosecution or capital habeas litigation?
31. Do you consult with Death Penalty Resource Counsel when making appointment recommendations? Do you work with them when you are appointed in capital cases? If so, what percentage of the time?
32. Is there a requirement in the district that any counsel appointed in a capital case work with DPRC?
33. What are the biggest challenges for your office in securing counsel for capital cases? Any suggestions for improvement beyond the Cardone recommendations?

# Protocol for Circuit Chief Judges (or Designee) and Circuit Executives

## Circuit CJA Plan Revision

In looking at circuit CJA plans, we wanted to make sure we had the most current version. Is the current CJA plan for your circuit the one adopted in [insert year]?

1. In general, how often is the CJA plan discussed or reviewed in your circuit? Please describe the process.
  - a. Is the circuit's CJA plan currently being reviewed?
    - i. If so, what prompted the review?
    - ii. What revisions are being considered, if any?
    - iii. What is the timeline for review?
    - iv. Who will be involved in the review process?

## CJA Administration

Next, we'd like to focus on some of the specific provisions of CJA panel management, including those often detailed in court CJA plans ...

2. Within the circuit, who is responsible for administration of the CJA?
  - a. When district court counsel is unable or unwilling to continue on appeal, how is new counsel chosen?
    - i. Who tracks these appointments?

## CJA Panel Attorney Selection

Next we'd like to discuss selection of panel attorneys in the circuit.

3. Is there a CJA Committee?
  - a. If yes, who serves on it?
  - b. How often does the CJA Committee meet?
  - c. What are the duties of the CJA Committee?
4. Please describe the process for selecting attorneys to serve on the CJA panel?
  - a. What are the criteria by which panel attorneys are selected?
  - b. What informs the selection process (applications, recommendations, best practices)?
  - c. How often are attorneys added to the panel?
5. What is the term of membership on the CJA panel?
  - a. What are the criteria, if any, for renewing membership?
  - b. Do panel members have to fill out an application for renewal or does the committee automatically review membership?

6. What is the process for removing attorneys from the panel list?
  - a. How often are attorneys removed?
7. How frequently does the CJA Committee meet to review new or renewal applications?
8. Does the current size of the panel meet the needs of the circuit? If not, why not?
9. What are the greatest challenges the circuit faces in finding qualified attorneys to serve on the CJA panel?
  - a. Is there a mentorship program to bring new attorneys onto the circuit's CJA panel?

## Voucher Review

Now, we'd like to discuss voucher review processes in the circuit, both for district court vouchers in excess of the statutory amounts (requiring approval by the chief judge or designee), and those for appointments in appellate representations.

10. Does your court require submission of vouchers through eVoucher?
  - a. If so, what are the steps for voucher review in the circuit (both excess compensation and for appellate appointments)?
  - b. If not, your circuit does not require the use of eVoucher
    - i. What is the process for submitting for compensation?
    - ii. How can panel attorneys track the status of their submissions?
11. Who is responsible for reviewing district court vouchers in excess of statutory limits?
  - a. Was any training for voucher review provided?
  - b. Has anyone been delegated authority to approve vouchers that are in excess?
12. Who is responsible for reviewing vouchers in appellate representations?
  - a. Was any training for voucher review provided?
  - b. Has anyone been delegated authority to approve vouchers in appellate representations?
13. When reviewers are considering reducing voucher requests (either district court excess or appellate appointments) what is the process for notifying counsel?
  - a. What are the reasons vouchers are typically reduced?
  - b. Are submissions after the deadline grounds for reduction?
14. Do attorneys have an opportunity to appeal reductions to someone other than the original reviewer?
  - a. If so, to whom can they appeal?
  - b. What is that process?
15. Are there any formal or informal caps on the costs of capital litigation in the circuit?
16. Is there any requirement that capital cases, capital habeas cases, or especially complex cases be budgeted?



## Case-Budgeting Attorneys

The question about case budgeting moves us into the next section about the responsibilities of the CBA in the circuit ...

[Note: do not ask in the 11th or DC Circuits]

17. What are the responsibilities of the Case-Budgeting Attorney?
  - a. Has any authority for voucher approval, including compensation or authorization for use of expert services, been delegated to the CBA?
    - i. If so, what authority has been delegated?
18. Is there any need to increase the number of staff working on case budgeting or working with the CBA?
  - a. If so, how should staffing increase?

## Appointment/Reappointment of Federal Defenders

The role of the circuit in selecting federal defenders and staffing FDOs were also included in the Cardone Report recommendations, though not all were adopted by the JCUS. Nonetheless, understanding the selection of federal defenders and resourcing the FDOs are important to our evaluation, and we'd like to ask about both topics, starting with selection of the federal defender.

19. What is the process for appointing/reappointing federal defenders in the districts of the circuit?
  - a. Who is involved in the process?
  - b. Do you solicit input from the district where the defender will serve?
20. Is there a presumption in favor of reappointment?

## FDO Staffing

21. What is the process for making staffing decisions about the number of assistant federal public defenders in an FDO?
22. Does the circuit routinely approve the number of AFPD positions determined by the staffing formula?
  - a. If not, how do the two numbers differ?
23. Do the districts in the circuit currently have adequate staff to maintain their caseload?
  - a. If not, how does staffing need to change to address caseload?
24. Do the FDOs in the district have sufficient staffing to provide training?
  - a. If not, how does staffing need to change to address training?

## Training

A number of the adopted interim recommendations call for increased training of judges, and we'd like to ask about training opportunities in the circuit since the publication of the Cardone Report.

25. Has your court ever been offered training for judges on any of the following:
  - a. The use of experts in criminal litigation?
  - b. EDiscovery?
  - c. Capital litigation, including the requirements under 2254 and 2555 or best practices for use of experts in capital litigation?
26. Are there other training programs related to the defense function that you would like to see offered for judges? If yes, on what topic?

## Capital Litigation

27. If counsel from the district court did not continue for the appeal, how would judges appoint counsel in capital and capital habeas litigation?
  - a. Do judges consult the local federal defender or Resource Counsel?
  - b. Is there a preference for appointing a CHU in capital habeas litigation?
    - i. Is cross-jurisdictional appointment of CHUs permitted?

## Concluding Questions

28. What are the strengths/weaknesses/challenges of your circuit's CJA plan?
  - a. In your opinion, do the interim recommendations address any of these issues?
29. In your opinion, have the interim recommendations changed administration of the CJA in the circuit?
  - a. If yes, in what ways?
30. Based on your experience with the interim recommendations, is there anything I haven't asked that you think the policy makers should know?

# Technical Appendix 4

## Survey of Panel Attorney Experiences with Voucher Review

### Survey Development, Sample Selection, Response Rate, and Representativeness

Detailed below is the process for creating the survey, drawing the sample, and information on the representativeness of the data collected.

#### Survey Development

The survey instrument developed by the FJC allowed attorneys to discuss their experiences with voucher review in a recently paid case. The goal of the survey was to ask attorneys about their experiences and perceptions of the voucher review process after vouchers were submitted for payment, as well as gather information on how attorneys adjusted vouchers before submitting them in eVoucher.

The online questionnaire began with four screening questions, and the answers to those four questions determined what else the attorneys would be asked. Different sections of the survey (discussed in more detail below) corresponded to these four screening questions:

1. Whether attorneys submitted a voucher for less than the full costs of the litigation
2. Whether anyone proposed a reduction to the voucher after submission
3. Whether a reduction was made after voucher submission
4. Whether the attorney requested the use of expert services in the representation

Attorneys who indicated that they submitted vouchers for less than the full cost of the litigation (a practice referred to as “self-cutting” in the Cardone Report<sup>1823</sup>) answered a series of questions about those practices. Any attorney who indicated that a voucher reduction was proposed, but not ultimately made, answered a separate set of questions than those whose vouchers were ultimately reduced. Attorneys whose vouchers were reduced (regardless of whether they were notified in advance of the potential reduction) were asked about those experiences. A fourth section of the survey asked about attorneys’ requests for expert services, including if such requests were approved or why experts were not requested.

All attorneys answered a set of general questions about voucher review in the referenced court, as well as a series of demographic questions about their experience litigating under the CJA, practicing law generally, and practicing in the appointing court for the representation in question. The survey ranged from sixteen to forty-seven questions and typically took twenty to thirty minutes to complete. The final survey instrument can be found in Attachment 1.

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1823. Cardone Report, p.104.

## Sample Selection Process

To create a pool of attorneys to survey about their experiences with voucher review processes, we identified the attorneys receiving the 315,406 CJA appointments with final payments made between FY 2017 and March 31, 2021 (the date of the latest eVoucher extract from which the appointments were identified).

While surveys may randomly sample observations from an entire population, the nature of the data from eVoucher presented a sampling challenge, as many attorneys were appointed in more than one representation with a final payment since FY 2017. The range was considerable, with some attorneys appointed only once, while others had substantial numbers of appointments with final payments—as many as 2,671.<sup>1824</sup> Taking a random sample of the population of appointments during the selected time frame would result in some attorneys being selected multiple times, either requiring them to generalize across their experiences or increasing the burden to answer specific questions about each representation, likely decreasing the overall response rate.

To reduce the burden on responding attorneys while allowing us to ask about a representative sample of experiences, we stratified the sample by the appointed attorney and randomly sampled one representation for each attorney. This resulted in a final sample of 11,193 representations.<sup>1825</sup>

## Survey Testing and Implementation

Before sending the survey to panel attorneys, we asked a small group of CJA district panel representatives to review the survey instrument and provide feedback. Modifications to the survey were made based on these comments.

All of the panel representatives were asked to notify the panel attorneys in their districts about the upcoming survey and encourage their participation. After our initial email invitation on September 28, 2021, the Defender Services Office chief emailed all panel attorneys asking for their participation in the survey. We sent a reminder to participants who had not yet completed the survey two weeks later, and some panel representatives sent a final reminder before the survey closed on November 8, 2021.

## Response Rate

Of the over 11,000 attorneys contacted, we received responses from 4,262 (39%), varying by court from 20% to 60% of contacted attorneys.<sup>1826</sup> Reported below are the results of the survey from the attorneys who completed at least the four primary screening questions of the survey. The number of responses for each survey item varies because attorneys were shown different combinations of questions depending on how they answered the screening questions. Additionally, attorneys could skip individual questions throughout.

Of the 4,262 responses in this analysis, 4,023 were fully complete (the attorney took the survey from beginning to end), and 239 others answered at least the first four questions. From just these four questions, the survey yielded court-level information about reductions to vouchers before and after submission that was previously unavailable, as well as national information regarding the frequency of requests for expert services.

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1824. In some districts along the southern border of the United States, substantial numbers of appointments are not uncommon because of the frequency of CJA panel attorneys appointed in illegal reentry cases.

1825. Some additional data cleaning was required to account for attorneys whose name, email, or firm changed since FY 2017. Despite our best efforts to identify duplicate attorneys, two attorneys received more than one invitation to complete the survey.

1826. The 39% response rate accounts for removing attorneys from the pool who never received the survey invitation because they were deceased, the email bounced back, or an out-of-office reply indicated they were unavailable during the survey period (such as those on maternity/paternity leave).

## Representativeness of Response

The results from the demographic questions asked at the end of the survey show that respondents differed along several dimensions, including familiarity with the court (measured as being a member of the CJA panel), years of panel membership (among those reporting they were members of the panel in question), and years practicing law.

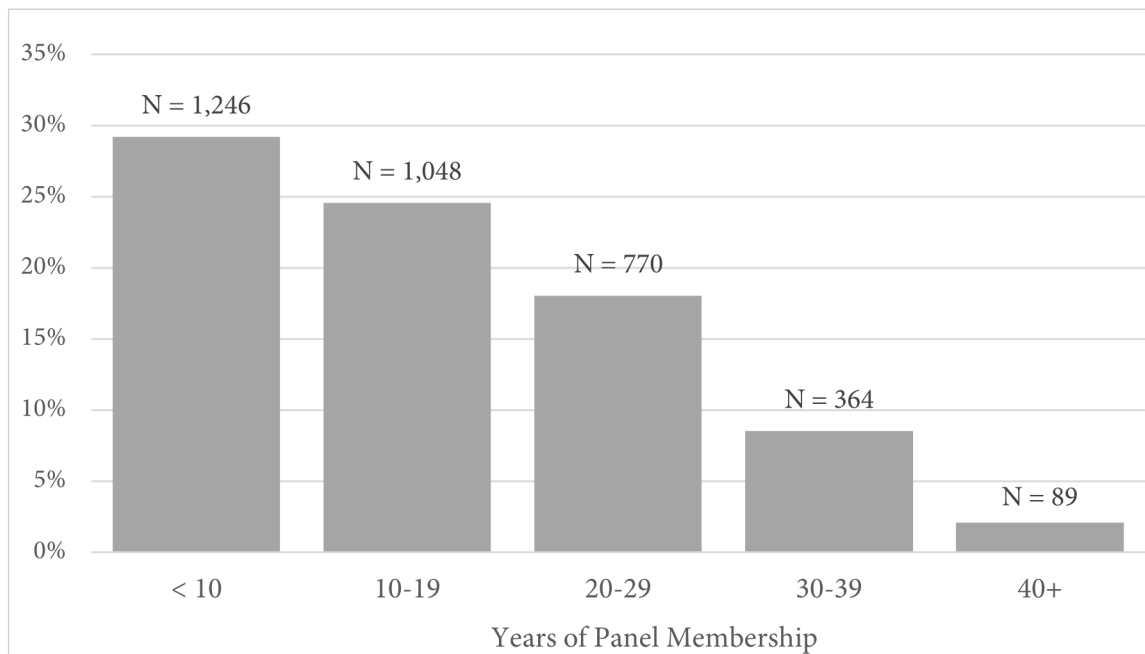
**Table 1.** Are/were you a member of the CJA panel in the [Name of Court]?

	Number	Percentage
Yes	3,728	87%
No	274	6%
Unanswered	260	6%
<b>Total</b>	<b>4,262</b>	<b>100%</b>

Note: In this and all following tables, “Unanswered” refers to responses that were either blank or contained text that was not responsive to the question.

Most attorneys (87%) reported being members of the CJA panel in the court appointing them to the representation in question. While members of CJA panels go through different selection processes across courts, and attorneys are chosen based on different criteria, being on the panel suggests some familiarity with the court’s voucher review practices, as the attorney is eligible to take CJA appointments routinely in the court. We also asked attorneys who reported being on the court’s panel how long they had served. The figure below summarizes the results.

**Figure 1.** Years of Panel Membership.

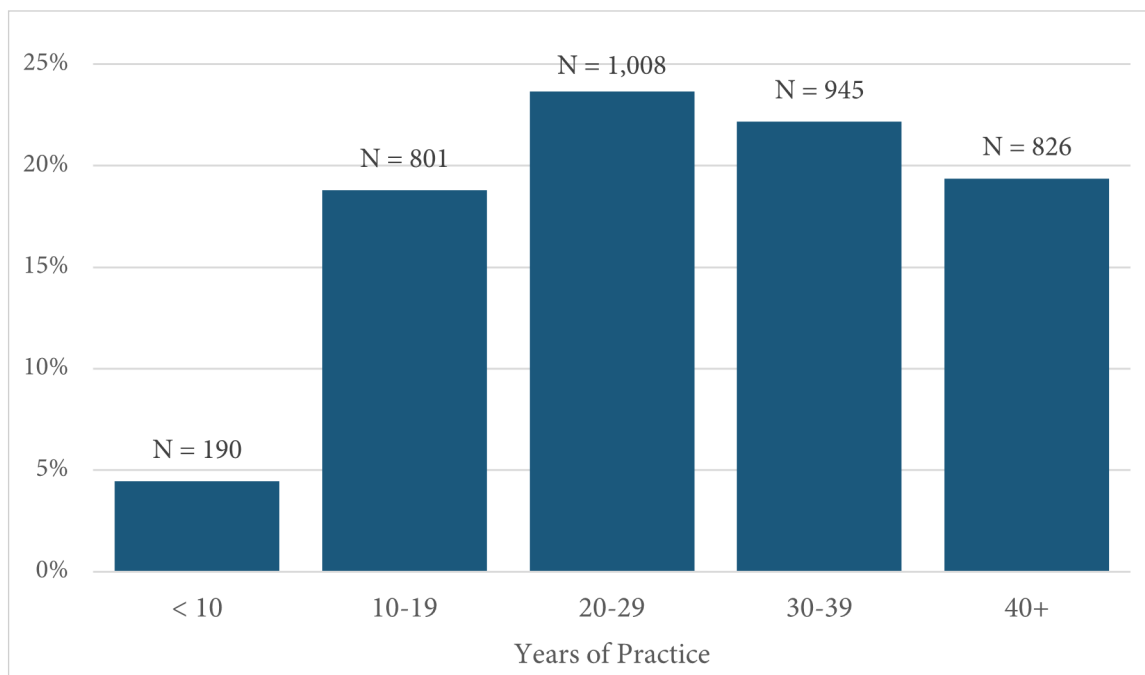


Most often attorneys were members of the court's CJA panel for ten years or fewer, and as reported experience increased, the number of attorneys in the group decreased. At the highest level, 3% of attorneys reported forty years or more of panel service. The average number of years of service was fifteen, ranging from less than one year to fifty years of service. The median was thirteen years of experience. The average and range likely underestimate lengthy service, as nearly 1% of attorneys (twenty-six attorneys who were panel members) reported being on the panel for extended but undefined periods of time, such as "since its creation."

We also asked attorneys if they were members of CJA panels in a court other than where the appointment occurred. Only 19% of attorneys reported being member of another court's CJA panel, suggesting that, for most responding attorneys, the court in which the appointment was made is the court with which they had the most experience.

We also asked attorneys about the number of years they had been practicing law. Figure 2 shows the results.

Figure 2. Years of Law Practice.



Though attorneys most often reported serving on their CJA panels for ten years or less, most had been practicing law for a longer time. The most common range was twenty to twenty-nine years practicing law, the average and median being twenty-eight, with a minimum of less than one year and a maximum of sixty-three years. Consistent with other surveys of CJA panel attorneys, most attorneys responding here were experienced in the practice of law.<sup>1827</sup> Lawyers newer to the practice of law were also members of CJA panels—of the 190 attorneys practicing law for less than ten years, 85% reported being members of the CJA panel.

We can also conclude that the data gathered regarding voucher review represents typical experiences: we asked this directly, and three-quarters of respondents said it was.

1827. Margaret S. Williams, "Criminal Justice Act Attorney 2019 Demographics Survey," Federal Judicial Center (2020).

**Table 2.** Thinking about all your CJA appointments since October of 2016 in the (Name of Court) would you say your experience in this case is representative of your other experiences with voucher submission and review?

	Number	Percentage
Yes	3,207	75%
No	796	19%
Unanswered	259	6%
<b>Total</b>	<b>4,262</b>	<b>100%</b>

The 19% of attorneys who answered no were asked how it was not representative. Forty-two percent (294) indicated that the representation was easier than their typical appointment, seventy-four (10%) said the appointment was harder, and the remaining did not discuss the difficulty of the case or provided no comment at all.

## Coding Rules for Panel Attorney Comments

Of the 4,262 respondents completing the survey, 2,487 provided comments about their experience in the specific appointment. Specific topics mentioned in the comments included voucher review and submission, eVoucher, specific reviewers, the facts of the case, professional experiences, and several other issues.

We reviewed each comment to determine if the attorney overall felt satisfied (positive), dissatisfied (negative), or neutral about their experiences with the selected representation. For example, a comment such as “this was my first case” was considered neutral because there was no further information to indicate if the appointment was particularly challenging or if cases became more difficult after that one; the value of the experience was unclear. If, however, the attorney said, “This was the first case where I used eVoucher, and it was easy,” the response was coded as positive. In comparison, if the attorney said, “This was my first case, and my voucher was cut by 50%,” the response was coded as negative.

In addition to comments about their experiences in the selected appointment, respondents provided 3,289 comments about voucher review generally. These comments were coded into specific positive/negative/neutral categories. Comments were often coded into multiple categories because of the amount of detail provided. The results of this coding are described in Appendix F: Survey of Panel Attorney Experiences with Voucher Review.

## Additional Tables of Survey Results

The results presented in Appendix F: Survey of Panel Attorney Experiences with Voucher Review highlight the main findings of our analysis of the implementation and impact of the relevant recommendations from the Cardone Report on voucher review practices. Additional tables were created to explore detail in the results but were not included because they provided no new information or were based on very small numbers of observations. The information from this analysis is reported below to allow for replication of this survey in the future.

## Proposed and Actual Reductions After Submission

Table 3. Frequency of Attorney Responses: Proposed and Actual Reductions to Vouchers.

		Actual Reduction					
		Yes		No		Total Respondents	
Proposed Reduction		Number	Percentage	Number	Percentage	Number	Percentage
	Yes	449	69%	67	2%	557	13%
	No	155	24%	2,528	93%	2,930	69%
	<b>Total Respondents</b>	<b>654</b>	<b>15%</b>	<b>2,710</b>	<b>64%</b>	<b>4,262</b>	<b>100%</b>

Note: Attorneys who did not know if the appointment involved a proposed or actual reduction are not presented in the table for visual clarity but are included in the total numbers reported. In this and all following tables, “Total Respondents” is listed when attorneys were allowed to choose multiple, or no, responses.

## Appealing Voucher Reductions

Table 4. Did you appeal the reduction?

	Vouchers with proposed reductions		Vouchers with actual reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Yes	11	16%	35	5%
No	42	63%	529	81%
I don't recall	8	12%	27	4%
Unanswered	6	9%	63	10%
<b>Total Respondents</b>	<b>67</b>	<b>100%</b>	<b>654</b>	<b>100%</b>

Note: Respondents in the “Vouchers with proposed reductions” column did not have vouchers reduced.



Table 5. To whom did you appeal?

	Vouchers with proposed reductions		Vouchers with actual reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Clerk's Office Staff	4	36%	3	9%
CJA Supervising Attorney	1	9%	7	20%
CJA Panel Administrator	1	9%	2	6%
Federal Defender Office Staff			1	3%
Chambers Staff			4	11%
Presiding Judge	4	36%	11	31%
CJA Committee				
Non-presiding District Judge	1	9%		
Non-presiding Magistrate Judge				
Case-Budgeting Attorney			2	6%
Circuit Chief Judge			2	6%
Circuit Judge (other than Circuit Chief Judge)	2	18%	2	6%
Other			5	14%
Unanswered	1	9%	4	11%
<b>Total Respondents</b>	<b>11</b>		<b>35</b>	

Note: Respondents in the "Vouchers with proposed reductions" column did not have vouchers reduced.

Table 6. What was the outcome of appealing the proposed/actual reduction(s)/reduction(s)?

	Vouchers with proposed reductions		Vouchers with actual reductions	
	Number	Percentage of Respondents	Number	Percentage of Respondents
Voucher reduction was not made	10	91%	5	14%
Voucher reduction was made at the originally proposed amount			15	43%
Voucher reduction made for smaller amount			9	26%
Appeal pending			2	6%
Other	1	9%	2	6%
I don't recall/unanswered			2	6%
<b>Total Respondents</b>	<b>11</b>		<b>35</b>	

Note: Vouchers with actual reductions often involved multiple reductions across different line items. The results in the table suggest that attorneys may be successful in appealing one, but not all reductions, hence being in the actual reduction group while also reporting reductions were not made. Respondents in the "Vouchers with proposed reductions" column did not have vouchers reduced.

## Expert Services

Table 7. Why were expert services not requested for this representation? (by response frequency).

	Number	Percentage of Respondents
Expert services were not necessary given the facts of the case.	2,266	81%
I need more training on the use of expert services and/or how to request them.	50	2%
The time necessary to seek authorization meant it was more efficient for me and/or my staff to do the work.	41	1%
Expert services are not typically authorized by this court.	20	1%
I was not able to find a qualified expert to submit for authorization willing to work for the compensation amount typically approved by the court.	13	<1%
I was not able to find a qualified expert to submit for authorization by the court.	6	<1%
The qualified expert I found declined the work after they determined the amount of compensation authorized by the court was not sufficient.	3	<1%
Categorized Other		
Attorney was not lead counsel	97	3%
Attorney was replaced	84	3%
Representation was an appeal	58	2%
Expert paid for elsewhere	31	1%
Representation was a type not requiring experts	25	1%
Nothing contested	15	1%
Representation of limited duration	11	<1%
Partnered with FDO	7	<1%
Uncategorized Other	8	<1%
Unanswered	278	10%
<b>Total Respondents</b>	<b>2,795</b>	

Note: Seventeen respondents (1%) provided an “other” response indicating that at least one expert had been requested but was not used or whose services were not submitted for payment (for various reasons).

# Attachment 1

## Survey Instrument

### Introduction

We'd like to ask you about your experiences with the voucher submission and review process, including requests for use of expert services, during your representation of (Person Represented) in case number (Case Number) We will be asking about your experiences submitting any CJA 20, 21, 24, 30, or 31 vouchers in this case. Additionally, we are seeking your feedback on the voucher submission and review process in the district more generally, as well as your suggestions for how the process might be improved.

Note that our focus is on processes for submitting vouchers and requesting experts, NOT the specific facts of the case or litigation strategy used. No information identifying the case, you as appointed counsel, or your participation in this survey will be reported in the analysis. All findings will be presented in the aggregate, and any information that could potentially identify the representation, or you, will be redacted in any report distributed outside the FJC.

We have created a Frequently Asked Questions document, which is available at <https://www.fjc.gov/content/361968/cja-voucher-survey>.

If you have technical problems, please contact Dr. Carly Giffin, Esq. (202-502-4141, [cgiffin@fjc.gov](mailto:cgiffin@fjc.gov)). If you have questions about the project, please contact Dr. Margaret Williams (202-502-4080, [mwilliams@fjc.gov](mailto:mwilliams@fjc.gov)).

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Throughout this survey, you will have several options which communicate that you are unable to answer a question. Please think of these options as indicating the following:

“I don't recall”: answers that you once knew but have since forgotten.

“I don't know”: information you were never privy to.

"It was unclear": when steps in voucher review were not transparent.

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### Screening

1. Some attorneys do not request reimbursement for the full costs of litigation, while others do. Thinking about this representation, did you bill for all the time and expenses you or other members of your defense team spent on this CJA appointment?
  - Yes
  - No
  - I don't recall

- 
2. During this representation, for any vouchers submitted, did anyone notify you of a proposed reduction to any voucher amount for any reason during the review process?
- Yes
  - No
  - I don't recall
- 
3. During this representation, for any vouchers submitted, did anyone ultimately reduce any voucher amount for any reason during the review process?
- Yes
  - No
  - I don't recall
- 
4. Did you request the use of expert services in this representation, even if such requests were denied?
- Yes
  - No
  - I don't recall
- 

## Self-Reductions

The questions in this section ask about the reductions you made to one or more vouchers (whether as requested or on your own initiative) during your representation of (Person Represented) in case number (Case Number).

Note that our focus in this survey is on the voucher submission and review processes, NOT the specific facts of the case or litigation strategy used. Your answers will be kept confidential.

1. For which categories did you bill less than you or other members of your defense team spent on this representation? (Select all that apply)
- Attorney out of court hours
  - Expert hourly rates
  - Expert fees
  - Other expenses
  - Travel expenses
  - Other (please specify): \_\_\_\_\_
  - I don't recall

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2. Some attorneys decide to submit reduced vouchers on their own, and others are encouraged to make reductions before submission. Which circumstance best describes the reason the vouchers for this representation were reduced prior to submission?

- I reduced one or more voucher requests myself
- I was asked/encouraged to reduce one or more voucher requests

2.a. Who asked/encouraged you to reduce the voucher request(s)? (Select all that apply)

- Clerk's Office Staff
- CJA Supervising Attorney
- CJA Panel Administrator
- Federal Defender Office Staff
- Chamber's Staff
- Presiding Judge
- Other (please specify): \_\_\_\_\_

2.b. Did you reduce the voucher(s) yourself based on your prior experience with voucher submission and review in the (Name of Court)?

- Yes
- No

If you would like to provide additional information, please do so below.

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3. Why did you submit one or more vouchers for less than the full cost of the litigation? (Select all that apply)

- To stay below the statutory maximum for attorney compensation.
- To stay below the statutory maximum for expert services.
- The voucher was likely to be reduced after submission.
- I did not want to oppose the request to reduce the voucher.
- I did not think opposing the request to review the voucher would change the result.
- The effort required to support the request for full cost was too burdensome.
- Other (please specify): \_\_\_\_\_

- 3.a. Staying below the statutory maximum for attorney compensation was important because... (Select all that apply)
- it avoided delays in payment caused by additional review at the circuit.
  - the circuit was likely to cut the voucher.
  - the additional work to request compensation above the cap was not worth my effort.
  - it reduced the work required of the district court to support the request for compensation above the cap.
  - the effort required to support the request for full cost was too burdensome.
  - other (please specify): \_\_\_\_\_

- 3.a.1. Was your belief that the circuit was likely to cut the voucher(s) for attorney compensation based on your prior experience with voucher submission and review in the (Name of Circuit) Circuit?
- Yes
  - No

If you would like to provide additional information, please do so below.

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- 3.b. Staying below the statutory maximum for expert services was important because... (Select all that apply)
- it avoided delays in payment caused by additional review at the circuit.
  - the circuit was likely to cut the voucher.
  - the additional work to request compensation above the cap was not worth my effort.
  - it reduced the work required of the district court to support the request for compensation above the cap.
  - the effort required to support the request for full cost was too burdensome.
  - other (please specify): \_\_\_\_\_

- 3.b.1. Was your belief that the circuit was likely to cut the voucher(s) for expert services based on your prior experience with voucher submission and review in the (Name of Circuit) Circuit?
- Yes
  - No

If you would like to provide additional information, please do so below.

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3.c. Who did you think was likely to reduce the voucher(s)? (Select all that apply)

- Clerk's Office Staff
- CJA Supervising Attorney
- CJA Panel Administrator
- Federal Defender Office Staff
- Chamber's Staff
- Presiding Judge
- CJA Committee
- Non-presiding District Judge
- Non-presiding Magistrate Judge
- Case-Budgeting Attorney
- Circuit Chief Judge
- Circuit Judge (other than Circuit Chief Judge)
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

3.c.1. Was your belief that one or more of the following were likely to cut the voucher(s) based on your prior experience with voucher submission and review?

(List of entities that attorney selected in 3.c)

- Yes
- No

If you would like to provide additional information, please do so below.

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## Proposed Reductions

The questions in this section ask about the proposed reduction(s) to one or more vouchers completed for your representation of (Person Represented) in case number (Case Number).

Note that our focus is on voucher submission and review processes, NOT the specific facts of the case or litigation strategy used. Your answers will be kept confidential.

1. What amount(s) were proposed for reduction during the voucher review process? (Select all that apply)

- Attorney out of court hours
- Expert hourly rates
- Expert fees
- Other expenses
- Travel expenses
- Total compensation amount
- Other (please specify): \_\_\_\_\_
- It was not clear
- I don't recall

---

2. At what stage of review were the reduction(s) proposed? (Select all that apply)

- Mathematical/Technical Review
- Reasonableness Review
- Excess Compensation Review
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know



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3. Who proposed reducing the voucher(s)? (Select all that apply)

- Clerk's Office Staff
- CJA Supervising Attorney
- CJA Panel Administrator
- Federal Defender Office Staff
- Chamber's Staff
- Presiding Judge
- CJA Committee
- Non-presiding District Judge
- Non-presiding Magistrate Judge
- Case-Budgeting Attorney
- Circuit Chief Judge
- Circuit Judge (other than Circuit Chief Judge)
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

---

4. What was the stated reason for the proposed reduction(s)? (Select all that apply)

- Mathematical/technical error
- Work was not compensable
- Work was not undertaken or completed
- Hours billed were clearly in excess of what was reasonably required to complete the task
- No reason given
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

---

5. How were you notified of the proposed reduction(s)? (Select all that apply)

- Phone
- Email
- In-person
- eVoucher notice
- Other (please specify): \_\_\_\_\_
- I don't recall

6. Did you appeal the proposed reduction(s)?

- Yes
- No
- I don't recall

6.1. To whom did you appeal? (Select all that apply)

- Clerk's Office Staff
- CJA Supervising Attorney
- CJA Panel Administrator
- Federal Defender Office Staff
- Chamber's Staff
- Presiding Judge
- CJA Committee
- Non-presiding District Judge
- Non-presiding Magistrate Judge
- Case-Budgeting Attorney
- Circuit Chief Judge
- Circuit Judge (other than Circuit Chief Judge)
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

6.1.a. Were any of the following person(s) to whom you appealed the reviewer who proposed the reduction(s)?

	Yes	No	I don't recall	I don't know
Clerk's Office Staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Federal Defender Office Staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Chamber's Staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Non-presiding District Judge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Non-presiding Magistrate Judge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Circuit Judge (other than Circuit Chief Judge)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (text provided in 6.1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

6.1.b. What was the outcome of appealing the proposed reduction(s)?

- No reduction: voucher was paid at the originally requested amount.
- Amount increased: voucher was paid for more than the originally requested amount.
- The appeal is still pending.
- Other (please specify): \_\_\_\_\_
- I don't recall

6.2. Why did you not appeal? (Select all that apply)

- No appeal process was available
- Appeal process takes too much time
- I did not believe the appeals process would be successful
- I believed the appeals process would negatively affect future appointments or interactions with judges or court staff
- The effort required to support the appeal was too burdensome
- Other (please specify): \_\_\_\_\_
- I don't recall

---

## Actual Reductions

The questions in this section ask about the reduction(s) made to one or more vouchers submitted for your representation of (Person Represented) in case number (Case Number).

Note that our focus is on voucher submission and review processes, NOT the specific facts of the case or litigation strategy used. Your answers will be kept confidential.

1. What amount(s) were reduced during the voucher review process? (Select all that apply)

- Attorney out of court hours
- Expert hourly rates
- Expert fees
- Other expenses
- Travel expenses
- Total compensation amount
- Other (please specify): \_\_\_\_\_
- It was not clear
- I don't recall

---

2. At what stage of review were the voucher(s) reduced? (Select all that apply)

- Mathematical/Technical Review
- Reasonableness Review
- Excess Compensation Review
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

---

3. Who reduced the voucher(s)? (Select all that apply)

- Clerk's Office Staff
- CJA Supervising Attorney
- CJA Panel Administrator
- Federal Defender Office Staff
- Chamber's Staff
- Presiding Judge
- CJA Committee
- Non-presiding District Judge
- Non-presiding Magistrate Judge
- Case-Budgeting Attorney
- Circuit Chief Judge
- Circuit Judge (other than Circuit Chief Judge)
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

---

4. What was the stated reason for the reduction(s)? (Select all that apply)

- Mathematical/technical error
- Work was not compensable
- Work was not undertaken or completed
- Hours billed were clearly in excess of what was reasonably required to complete the task
- No reason given
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

---

5. How were you notified of the reduction(s)? (Select all that apply)

- Phone
- Email
- In-person
- eVoucher notice
- Other (please specify): \_\_\_\_\_
- I was not notified of the reduction prior to receiving payment
- I don't recall
- I don't know

---

6. Did you appeal the reduction(s)?

- Yes
- No
- I don't recall

6.1. To whom did you appeal? (Select all that apply)

- Clerk's Office Staff
- CJA Supervising Attorney
- CJA Panel Administrator
- Federal Defender Office Staff
- Chamber's Staff
- Presiding Judge
- CJA Committee
- Non-presiding District Judge
- Non-presiding Magistrate Judge
- Case-Budgeting Attorney
- Circuit Chief Judge
- Circuit Judge (other than Circuit Chief Judge)
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

6.1.a. Were any of the following person(s) to whom you appealed the reviewer who made the reduction(s)?

	Yes	No	I don't recall	I don't know
Clerk's Office Staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Federal Defender Office Staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Chamber's Staff	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Non-presiding District Judge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Non-presiding Magistrate Judge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Circuit Judge (other than Circuit Chief Judge)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (text provided in 6.1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

6.1.b. What was the outcome of appealing the reduction(s)?

- No change: voucher was reduced by the initially proposed amount
- Smaller reduction: voucher was reduced by less than the initially proposed amount
- Larger reduction: voucher was reduced by more than the initially proposed amount
- No reduction: voucher was paid at the originally requested amount
- Amount increased: voucher was paid for more than the originally requested amount
- The appeal is still pending
- Other (please specify): \_\_\_\_\_
- I don't recall

6.2. Why did you not appeal? (Select all that apply)

- No appeal process was available
- Appeals process takes too much time
- I did not believe the appeals process would be successful
- I believed the appeals process would negatively affect future appointments or interactions with judges or court staff
- The effort required to support the appeal was too burdensome
- Other (please specify): \_\_\_\_\_
- I don't recall

## Expert Services

The questions in this section ask about your experience requiring, requesting, and gaining approval for expert services during your representation of (Person Represented) in case number (Case Number).

Note that our focus is on voucher submission and review processes, NOT the specific facts of the case or litigation strategy used. Your answers will be kept confidential.

1. Sometimes expert services are requested, but not approved by the court. Thinking about the representation in case number (Case Number) what type(s) of experts did you request and what type(s) were approved by the court?

	Requested	Approved
Investigator	<input type="checkbox"/>	<input type="checkbox"/>
Interpreter/Translator	<input type="checkbox"/>	<input type="checkbox"/>
Paralegal Services	<input type="checkbox"/>	<input type="checkbox"/>
Mitigation Specialist	<input type="checkbox"/>	<input type="checkbox"/>
Psychologist/Psychiatrist	<input type="checkbox"/>	<input type="checkbox"/>
Medical	<input type="checkbox"/>	<input type="checkbox"/>
Accountant	<input type="checkbox"/>	<input type="checkbox"/>
Computer	<input type="checkbox"/>	<input type="checkbox"/>
Forensics	<input type="checkbox"/>	<input type="checkbox"/>
Legal/Jury Consultant	<input type="checkbox"/>	<input type="checkbox"/>
Administrative Support	<input type="checkbox"/>	<input type="checkbox"/>
eDiscovery	<input type="checkbox"/>	<input type="checkbox"/>
Other (please specify):	<input type="checkbox"/>	<input type="checkbox"/>

- 1.a. To the best of your knowledge, please explain why any of your request(s) for expert services were not approved.

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- 
2. Why were expert services not requested for this representation? (Select all that apply)
- Experts services were not necessary given the facts of the case.
  - Experts services are not typically authorized by this court.
  - I need more training on the use of expert services and/or how to request them.
  - I was not able to find a qualified expert to submit for authorization by the court.
  - I was not able to find a qualified expert to submit for authorization willing to work for the compensation amount typically approved by the court.
  - The qualified expert I found declined the work after they determined the amount of compensation authorized by the court was not sufficient.
  - The time necessary to seek authorization meant it was more efficient for me and/or my staff to do the work.
  - Other (please specify): \_\_\_\_\_
  - I don't recall

---

## General

The questions in this section ask about your experience with the review process for vouchers submitted in your representation of (Name of Person) in case number (Case Number).

Note that our focus is on voucher submission and review processes, NOT the specific facts of the case or litigation strategy used. Your answers will be kept confidential.

1. Were the voucher(s) you submitted in this representation reviewed for mathematical/technical errors?
- Yes
  - No
  - I don't recall
  - I don't know
  - It was not clear



1.a. Who reviewed the voucher(s) for mathematical/technical errors? (Select all that apply)

- Clerk's Office Staff
  - CJA Supervising Attorney
  - CJA Panel Administrator
  - Federal Defender Office Staff
  - Chamber's Staff
  - Presiding Judge
  - CJA Committee
  - Non-presiding District Judge
  - Non-presiding Magistrate Judge
  - Case-Budgeting Attorney
  - Circuit Chief Judge
  - Circuit Judge (other than Circuit Chief Judge)
  - Other (please specify): \_\_\_\_\_
  - I don't recall
  - I don't know
- 

2. Were the voucher(s) you submitted in this representation reviewed for reasonableness?

- Yes
- No
- I don't recall
- I don't know
- It was not clear

## 2.a. Who reviewed the voucher(s) for reasonableness? (Select all that apply)

- Clerk's Office Staff
  - CJA Supervising Attorney
  - CJA Panel Administrator
  - Federal Defender Office Staff
  - Chamber's Staff
  - Presiding Judge
  - CJA Committee
  - Non-presiding District Judge
  - Non-presiding Magistrate Judge
  - Case-Budgeting Attorney
  - Circuit Chief Judge
  - Circuit Judge (other than Circuit Chief Judge)
  - Other (please specify): \_\_\_\_\_
  - I don't recall
  - I don't know
- 

## 3. Were the voucher(s) you submitted in this representation sent to the circuit for review of excess compensation?

- Yes
- No
- I don't recall
- I don't know
- It was not clear

## 3.a. Who reviewed the voucher(s) for excess compensation at the circuit court? (Select all that apply)

- Case-Budgeting Attorney
- Circuit Chief Judge
- Circuit Judge (other than Circuit Chief Judge)
- Other (please specify): \_\_\_\_\_
- I don't recall
- I don't know

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## Conclusion

This last set of questions asks for your feedback on the voucher submission and review process in the district/circuit more generally, as well as your suggestions for how the process might be improved. Your answers will be kept confidential.

1. Thinking about all your CJA appointments since October of 2016 in the (Name of Court) would you say your experience in this case is representative of your other experiences with voucher submission and review?
  - Yes
  - No

Please explain why you think so.

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2. Since October 2016, based on your experience, how has the voucher review process changed in the (Name of Court)?

Voucher review has...

- Greatly improved
- Slightly improved
- Not changed
- Slightly worsened
- Greatly worsened

Is there anything else you would like us to know about the voucher review process (including voucher reductions or authorizations) in the (Name of Court)?

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3. What suggestions do you have for improving any part of the voucher submission and review process (e.g., reviewing appeals to reductions, requesting experts, voucher submission, etc.)?

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4. Are/were you a member of the CJA panel in the (Name of Court)?

- Yes
- No

4.1. For about how many years have you been/were you a member of this panel?

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5. Are/were you a member of the CJA panel in another district?

- Yes
- No

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6. For about how many years have you been practicing law?

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Thank you for your time. Please click the "Submit Survey" button below to submit your responses.

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