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3 June 2016

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

Dear Judge Cardone,

On behalf of the National Association of Criminal Defense Lawyers (NACDL) and its Federal Indigent Task Force, I write to express appreciation to you and the entire Ad Hoc Committee for the opportunity to appear before you at the hearing in Santa Fe and to provide this supplemental submission. I also want to convey the gratitude of the criminal defense bar for the time, effort, and dedication that you and the Committee have devoted to this task. A fundamental recommendation in NACDL's report on federal public defense, *Federal Indigent Defense 2015: The Independence Imperative* ("NACDL Report"), was a call for a comprehensive review of the CJA program. (NACDL Report, at 60 – 61). The Ad Hoc Committee has conducted such a review, and NACDL commends the Committee for its impressive efforts in soliciting broad input and for the transparency of the hearings and process. We reiterate, as in the conclusion of our report, that the timetable for review "must be sufficient to allow every significant topic to be assessed."

Since our Task Force on Federal Indigent Defense issued its report last September and I testified before the Committee in

November, we have had an opportunity to review the voluminous testimony and submissions to the Committee and to discuss whether additional or more specific recommendations are warranted. As explained below, NADCL emphatically believes that the only solution to the significant concerns raised in our report and during your hearings is the creation of an independent defense entity, wholly separate from the judiciary, which insulates the defense function from judicial control over the selection, retention, or payment of federal public and community defenders and CJA panel lawyers.

Overall, the dozens of witnesses and the testimony they provided to the Committee confirm that the problems and concerns expressed in the NACDL Report are real and pervasive. And while there is much to celebrate about the current state of federal public defense, the variation in practice and experience from one venue to another is striking and raises the disturbing specter that equally situated accused persons do not uniformly enjoy access to equivalently resourced defense services. Additionally, even as the Committee has conducted its inquiry, we have heard new accounts of inexplicable and arbitrary voucher cutting, including efforts to recoup compensation, even without any suggestion that the compensation requested, authorized, and paid was improper or inaccurate. NACDL also learned judges of the Fourth Circuit eliminated a community defender office for nebulous reasons that raise serious concerns about independence of the defense function. Against this backdrop, it was illuminating to note that, for the most part, even those who do not support fundamental change recognize that judges are generally ill-equipped, either by experience or by the nature of their role in the process, to select, supervise, and evaluate defense providers. Indeed, judges who are directly involved in defense oversight expressed discomfort with discharging that responsibility.

Accordingly, NACDL's renewed assessment, in the months since the release of its report and my testimony, compels the Association to go beyond the recommendation that "control over federal indigent defense services must be insulated from judicial interference."

Ensuring independence—the ABA's first and most important principle on which so much else rides—requires fundamental change at the national, circuit, and district level. At the national level, the defense function should not be part of

the judiciary or the judiciary's administrative bureaucracy. A separate entity, over which judges exercise no control and have no role, must be created. Specifically, at the circuit and district levels, judges should have no role in the selection and retention of CJA panel members or federal defenders, neither should they have any role in determining attorney compensation, access to or compensation for ancillary services, nor the determination of staffing levels for federal or community defender offices. Any new entity must ensure accountability and possess full authority to audit the invoices submitted by attorneys and ancillary service providers—but not from a judicial perspective. The overarching governing body must include individuals with a strong background in criminal defense, should embody political and geographical diversity, and should have overall responsibility for the management of the CJA program and direct access to congressional appropriators.

In making these recommendations, we note that while federal public defenders have not endorsed any specific structure they overwhelmingly support the fundamental principles that are essential to ensure independence. (See Letter from Jon M. Sands and Leigh Skipper, March 25, 2016).

NACDL recognizes that many forces tend to resist fundamental change. But change is long overdue. As has been noted, it was never contemplated that the defense function would permanently be placed within the judiciary. (See NACDL Report, page 14-15). That change will not occur unless the Ad Hoc Committee leads the way. We urge it to do so. It has developed a record that makes it abundantly clear that change is necessary.

Independence of the defense function is the imperative. The precise contours of a proposed structure for an independent defense entity, which ultimately will require congressional action, are at this point less important than judicial recognition of this fundamental principle. In this regard, NACDL urges the Ad Hoc Committee not to be limited by what it considers politically feasible, but rather to seek the best possible system. The Committee should articulate a path that is constrained neither by concerns about the Judicial Conference's will to embrace change, nor Congress's will to enact it.

As a final point, NACDL again expresses its appreciation to the many judges who have devoted so much time, effort, and passion to the cause of federal public

defense. NACDL's report and my testimony noted that with their fundamental role as umpires in an adversarial system, judges should not be integrally involved in oversight of the defense function. Nevertheless, NACDL hopes that judges will continue to support efforts to ensure that those who face charges in federal court are provided with strong, effective representation.

Sincerely,



E. G. "Gerry" Morris