

GOOD PRACTICES FOR PANEL ATTORNEY PROGRAMS IN THE U.S. COURTS OF APPEALS

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Executive Summary

More than 9,000 criminal defendants who file appeals in United States federal courts each year are financially eligible for government-funded counsel under the Criminal Justice Act (CJA).¹ In more than half of these cases, the defendants are represented by attorneys from a federal defender organization, and the others are assigned a private attorney, commonly referred to as a “CJA panel attorney.” Each of the nation’s 12 geographic circuit courts of appeals has its own system for assigning counsel. Each has a written plan that provides a broad outline of how it will manage this process; subsection (a)(3) of the CJA provides for each circuit judicial council to supplement its district court CJA plans with appellate provisions. Many details of a court of appeals’ practices, however, are not captured in these plans, or in court rules or other documents, and there is no nationwide compilation of court of appeals practices.

The Administrative Office of the U.S. Courts contracted with the Vera Institute to explore circuit panel attorney systems and to identify those practices that promote quality representation and efficient administration of the CJA panel attorney program at the circuit level. To that end, Vera researchers reviewed CJA-related documents and conducted telephone interviews with a number of judges, court administrators, CJA panel attorneys, and federal defenders in every circuit. In addition, researchers conducted in-person interviews to examine circuit-specific practices in the three circuits—the Second, the Tenth, and the Eleventh—that were selected for in-depth inquiry.

The judges, administrators, and practitioners discussed both the challenges they face and the practices that have proven effective in responding to them. The following “good practices” for the administration of court of appeals CJA panel attorney programs were identified:

- *Continuity of counsel on appeal.* The circuit rules that govern the appointment, withdrawal, and/or substitution of counsel for criminal appeals should provide for a flexible approach, rather than mandating that the CJA counsel appointed at the district level continue to represent the defendant on and through the appeal. There should be significant deference to the position of trial counsel regarding whether continuity is (1) in the best interests of the client and (2) consistent with counsel’s professional skills and obligations. Courts of appeals should develop mechanisms for addressing motions to withdraw by CJA trial counsel that are made in the district court at the conclusion of the case; such mechanisms must assure that the defendant is continuously represented.

¹ 18 U.S.C. §3006A.

- *Circuit CJA panels.* Circuits should establish panels of well-qualified attorneys for appellate-level appointments. These panels should be established and maintained circuit-wide—or, in very large circuits, in some or all of the districts within the circuit—rather than by individual circuit or district judges. Courts of appeals should encourage training opportunities for new members of CJA appellate panels, and consider whether to mandate training as a qualification for membership on the panel.
- *Federal defender organization appellate specialists.* In conjunction with the circuit CJA panels, courts of appeals should encourage the establishment of, and reliance on, appellate specialist positions within one or more federal defender organizations in the circuit.
- *Appellate CJA panel size.* Courts of appeals should periodically adjust appellate panel size by finding the appropriate balance between attorney skills and appeals court appointment needs (including the number of “cold-record” appeals), thereby maximizing quality and ensuring efficiency.
- *Selection process.* The selection and review process for appellate CJA panel attorneys should be overseen by a committee made up primarily or entirely of criminal defense attorneys, including experienced appellate practitioners. The selection process should be rigorous, and all attorneys who serve on the panel should undergo periodic review.
- *Appointment process.* Appellate CJA panel attorneys should be assigned to cases on a rotating basis. However, the appointment system also should be flexible, to allow for appointments that pair complex cases or challenging defendants with qualified attorneys with the appropriate skills. Courts of appeals should develop a process—such as through appointments administered by a CJA supervising attorney or a federal defender office that also oversees selection and review—for evaluating the special skills of attorneys and the needs of the case and the defendant.
- *Compensation review.* Courts of appeals should explore limiting the nature and extent of the judicial role in reviewing compensation requests and streamlining the second-level review of excess compensation claims for both trial and appeals court representations. A single individual or coordinated team—well-grounded in the practical and legal challenges of appellate defense practice—should administer the attorney compensation process. Consideration should be given to the use of a CJA supervising attorney or a federal defender office in the circuit. In court rules or in advice-to-counsel letters sent with each appointment, courts of appeals should provide information reflecting pertinent Judicial Conference Guidelines and the court’s procedure for voucher review. Attorneys should be notified of proposed voucher reductions and the reasons for them, and should be provided with an opportunity to

explain why reconsideration is appropriate. Courts of appeals should make it a priority to process compensation requests as expeditiously as possible.

This report will discuss the development of these good practices and examine how they are being implemented in the federal courts of appeals.

Acknowledgments

We are grateful to the judges, attorneys, and administrators who work and practice in the federal courts of appeals. This report is based on their insights. Those who work in the Second, Tenth, and Eleventh Circuits—sites of our most in-depth analysis—were especially generous with their time, making themselves available for consultation and providing us with data for our review. For guidance, we often turned to the panel attorney representatives on the Administrative Office of the U.S. Courts’ Defender Services Advisory Group (comprised of eight federal defenders and seven CJA panel attorney district representatives) and to the staff of the Office of Defender Services of the Administrative Office, both of which provided critical assistance. They share a commitment to improving the quality of representation for clients with court-appointed counsel. We also are very grateful for the generous and always top-notch assistance of Lisa Yedid Hershman.

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Introduction

Every year in the federal circuit courts of appeals, there are more than 9,000 criminal appeals in which defendants are financially eligible for court-appointed counsel under the Criminal Justice Act (CJA) and related statutes.² Slightly more than half are represented by attorneys employed by federal defender organizations, and the others are assigned to panel attorneys—private attorneys appointed by the court from a formal or informal list, or “panel.”³ Although the CJA determines who is eligible for publicly-funded representation—and establishes the hourly rates and maximums that govern attorney compensation and reimbursement—each of the 12 courts of appeals establishes its own administrative procedures for managing the system by which counsel are assigned and paid.

This model has allowed the development of circuit-specific assigned counsel practices, but at the same time has led to a lack of uniformity. The methods by which CJA attorneys are selected, appointed, and compensated for appellate representation vary significantly among the circuits. The Administrative Office of the U.S. Courts⁴ contracted with the Vera Institute of Justice to conduct a study of the courts of appeals’ CJA panel attorney programs.⁵ This report flows from that study; it describes the significant features of these programs and sets out what judges, practitioners, and administrators have identified as good practices for panel attorney systems.

After describing our methodology, we discuss various elements of court of appeals’ CJA plans. Turning to circuit practices, the report begins with the subject of continuity of representation—the extent to which counsel appointed to represent a person at trial is required to continue the representation on appeal. This overarching issue, about which there are differing opinions, is key to determining how an appellate panel attorney system is structured. Next, the report considers various administrative matters that are central to panel

² 18 U.S.C. §3006A; 18 U.S.C. §3005; and 21 U.S.C. §848(q). See U.S. Constitution, Amendment VI (“In all criminal prosecutions, the accused shall enjoy the right ... to have Assistance of Counsel for his defense”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”).

³ In fiscal year 2004, defenders were assigned to 4,950 appeals. In the same period, panel attorneys submitted 4,453 vouchers for appellate representations.

⁴ The Administrative Office of the United States Courts is the administrative arm of the federal judiciary. Its Director is responsible for overseeing the expenditure of funds appropriated by Congress for the administration and operation of federal circuit and district courts, as well as various programs and activities placed under the judiciary’s supervision, including the Defender Services Program.

⁵ A similar study addressing panel attorney practices in the district courts was conducted in 2002. Jon Wool, K. Babe Howell, and Lisa Yedid, *Good Practices for Federal Panel Attorney Programs: A Preliminary Study of Plans and Practices* (New York: Vera Institute of Justice, December 2002) (hereafter referred to as *District Court Good Practices*). After analyzing that report, the Committee on Defender Services of the Judicial Conference of the United States endorsed a set of *Core Principles for Criminal Justice Act (CJA) Panel Management and Administration* (hereafter referred to as *Core Principles*.) Available on-line at <<http://www.fd.org/pac/coreprinLRM.pdf>> (accessed October 19, 2005).

management: whether to use a CJA specialized appellate panel; the optimal size of such a panel; the ways in which attorneys are selected and their performance is monitored for continued membership on the panel; how attorneys are appointed to CJA appeals; and the many issues involved in compensating panel attorneys for their services.

Although the good practices set forth in this report are successful models, one size necessarily does not fit all, and it may not be appropriate to incorporate specific practices into another circuit without adaptation. Each circuit has different resources and challenges that require individualized strategies for implementation. Nonetheless, this report offers a framework for addressing circuit needs and provides an array of good practices to consider in developing effective circuit programs.

Methodology of the Study

Our mandate was to conduct a study of “the structure, administration, and management of the CJA panel attorney system at the appeals court level.” To achieve these goals, the study team undertook the following examination of all 12 courts of appeals’ practices:

- A review of the court of appeals’ panel plans, relevant local rules and orders, and materials and forms specific to panel management, such as attorney applications for panel membership, and “advice-to-counsel” letters;⁶
- Within each circuit, telephone interviews (principally conducted between October 2004 and April 2005) with one court of appeals judge, one or more court administrators, at least one, and often two or three, experienced CJA panel attorneys, and one federal public defender or community defender;⁷
- Correspondence with the 18 respondents to an e-mail letter from the Vera Institute soliciting information relevant to this study, sent to every chief federal public and community defender and every CJA panel attorney district representative nationwide;⁸
- Conversations with CJA panel attorney district representatives and a small number of district and magistrate judges during the CJA panel attorney district representatives’ annual conference in February 2005; and

⁶ Advice-to-counsel letters are provided by the court of appeals to CJA panel attorneys upon their appointment as counsel. The letters contain specific information about CJA processes, such as the method by which an attorney may seek to withdraw from representation and the rules guiding compensation.

⁷ A federal public defender organization is an office of federal employees of the judicial branch and is headed by a chief federal public defender appointed by the court of appeals for the circuit in which the office is located. 18 U.S.C. §3006A(g)(2)(A). Community defender organizations are nonprofit legal service providers established and administered by groups authorized by the district CJA plan. 18 U.S.C. §3006A(g)(2)(B). Unlike a federal public defender, a community defender operates under an independent board of directors and is not employed by the federal judiciary. As those we interviewed did not distinguish between attorneys at federal public defender and community defender organizations, we refer henceforth to both as federal defenders, without distinction.

⁸ In each of the 94 federal districts, one CJA panel attorney is designated as the “district representative” to act as the point of contact between members of the district’s panel and other components of the judiciary.

- A collection of data from circuit administrators, where available, and from the Office of Defender Services, including the number of CJA appellate appointments made annually, the proportion of those made to new counsel on appeal, and the frequency and degree of reductions made to circuit CJA panel attorney compensation claims.⁹

The study design called for a more extensive review of appellate CJA panel attorney programs in three circuits, which were chosen for their diversity in size and geography. Accordingly, in the Second, Tenth, and Eleventh Circuits, we conducted in-person interviews of additional CJA attorneys and court personnel.

Our interviews focused on identifying good practices for the management and administration of circuit CJA panel programs. The main criteria for designating a good practice are: (1) the extent to which it promotes quality representation of the accused; and (2) the degree to which the practice enhances the efficiency of attorneys, judges, or court personnel.

⁹ The circuits vary widely in the range of data that they collect and analyze. A number of circuit administrators expressed frustration at not having better means for efficiently collecting data about appointment and compensation practices and the difficulty of comparing their circuit's practices with others'.

The Circuit Plans

Each of the 94 federal judicial districts has established a system to appoint publicly-financed lawyers for those who are charged with crimes but unable to afford an attorney. The CJA, which provides the statutory framework for those systems, requires each district court to promulgate a plan for providing representation to defendants who are eligible for government-funded counsel.¹⁰ Most districts are served by a federal public or community defender organization, which provides the majority of these services at the district court level. About 40 percent of financially eligible persons are appointed counsel from a “district CJA panel” of private attorneys, pursuant to the district’s CJA plan.

The CJA further requires the judicial council of the circuit to supplement its district court plans with provisions for appellate representation.¹¹ All 12 courts of appeals have fulfilled this requirement with a written CJA plan. Generally, the CJA plans, along with relevant local rules, orders, and memoranda from the court of appeals or its clerk of court, articulate who can be appointed to appellate cases; the scope of an appointed CJA trial counsel’s duty to continue representation on appeal; an appointed attorney’s obligations regarding a client’s request to pursue an appeal and U.S. Supreme Court review; and guidance related to compensation processes for attorneys and other providers of defense services. Although the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines) contain a model CJA plan for district courts,¹² there is presently none for courts of appeals. Many of the courts of appeals’ plans expand little on the language of the Act.

Our study indicates that most court of appeals CJA plans are not regularly reviewed and updated. Three courts of appeals—those of the First, Second, and Tenth¹³ Circuits—have reexamined and extensively revised their plans within the past four years; several others have not significantly updated theirs since the 1970s. Often, the plans are supplemented by local rules and advice-to-counsel letters. In the Ninth Circuit, for example, the CJA plan dates from 1972, but Circuit Rule 4-1, instituted in 1995 and amended in 1999 and 2001, reflects current policy. In addition, we found that actual practices in many circuits often vary markedly from published policies, and that the plans state only very broad rules that do not capture important details about courts of appeals’ practices. This situation may be due to the difficulty—perhaps

¹⁰ 18 U.S.C. §3006A(a).

¹¹ 18 U.S.C. §3006A(a)(3).

¹² The Model Plan consists of two parts. The first part, the Model Criminal Justice Act Plan (Model CJA Plan) sets out who is entitled to appointed counsel, who will provide it (a defender office, panel attorneys, or both), the duties of appointed counsel, and other matters. The second part, the Model Plan for the Composition, Administration, and Management of the Panel of Private Attorneys Under the Criminal Justice Act (Model Panel Plan) details the operation of a panel system. Both plans are published in the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, *Guide to Judiciary Policies and Procedures*, Appendix G.

¹³ The new Criminal Justice Act plan for the Court of Appeals for the Tenth Circuit became effective January 1, 2006.

even inadvisability—of “codifying” each aspect of evolving practices, rather than to inattention.

Although the written plan and related rules may not be a comprehensive source for discerning a court of appeals’ practice, they can be used to articulate and communicate a court’s priorities and expectations. A few courts of appeals have used their written directives to signal the court’s respect for the services of panel attorneys and to announce their intention to ease one or another burden of CJA practice. The Court of Appeals for the Tenth Circuit, for example, recently introduced language into its plan that expressly states its policies with respect to attorney voucher reductions: “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. Consequently, it is the court’s policy not to cut or reduce claims which are reasonable and necessary. If the court determines a claim must be cut it will provide the attorney notice and an opportunity to cure the defect.”¹⁴ It is evident from speaking with judges and administrators that the changes in the text are intended to reflect developing practices and signal a renewed commitment to supporting panel attorneys and their critical work.

Unless otherwise indicated, the observations in this report are based on the actual practices reported to us rather than solely on the courts of appeals’ CJA plans. We adopted this approach because, quite simply, how a court functions is more meaningful than what is written in the plan. Nevertheless, comprehensive, up-to-date plans can serve an important purpose. A number of judges and administrators from courts of appeals engaged in revisiting their practices explained that, of the few ways to learn from the other courts’ efforts and experiences, the two most helpful are speaking with their counterparts elsewhere and reviewing the plans of other courts of appeals. An accurate written plan can serve as an important general resource, both for local practitioners and for others across the country. Most importantly, up-to-date plans communicate the court’s policies and expectations to CJA panel attorneys, and enhance the consistency of decisions based on established published procedures. They positively affect perceptions of the fairness of the CJA panel appointment, selection, and payment processes, and can improve overall efficiency in management and administration of the CJA panel attorney program. Regular plan review is also a useful mechanism for courts to examine and improve their own practices.

¹⁴ Criminal Justice Act Plan, United States Court of Appeals for the Tenth Circuit, §VIII(A).

Continuity of Representation

Traditionally, it was understood that an attorney's acceptance of an appointment in the trial court would include appellate representation, absent a conflict of interest that rendered such representation legally untenable. Most courts of appeals' CJA plans included provisions requiring trial counsel to continue on appeal "absent extraordinary circumstances," or presented similarly restrictive grounds.¹⁵ Recently, however, some courts of appeals—such as those for the Seventh and Tenth Circuits—have amended their CJA plans to reflect more flexible policies toward the continuity of an attorney's representation from trial through appeal. There is considerable variation among the courts of appeals in continuity policy and practice. In the First Circuit, for example, where the court of appeals has for some time acceded to CJA trial counsel's requests to withdraw from representation on appeal, new counsel was appointed in 73 percent of CJA appellate representations in 2001. In other circuits, however, the great majority of appellate appointments are of attorneys who had represented the defendant at trial.

A court of appeals' policy regarding continuity of representation—the extent to which it is presumed that CJA attorneys appointed at the trial level will continue to represent a defendant on appeal—presents a critical issue for appeals court CJA practices. The continuity policy largely determines the extent to which a court of appeals will need to rely on a panel of appellate attorneys. The need to appoint new CJA counsel on appeal will vary with the degree to which a presumption of continuity is applied. Moreover, a court of appeals' decisions regarding continuity of representation may reflect its sensitivity to the autonomy and obligations of panel attorneys. The strength of a continuity rule can affect district court practices and trial attorneys' willingness to accept district court assignments. A court of appeals is free to adopt the continuity rule that is most suitable to local practice and the needs of the court, practitioners, and the clients served. The CJA provides that, "A person for whom counsel is appointed shall be represented *at every stage of the proceedings* from his initial appearance before the United States magistrate judge or the court *through appeal*, including ancillary matters appropriate to the proceedings."¹⁶ The CJA does not require, however, that CJA trial counsel continue to provide representation at later stages of the proceedings, or even that they should be presumed to do so.¹⁷ Nor do CJA trial counsel have an ethical obligation

¹⁵ Until recently, one circuit had imposed a continuity rule even on retained counsel, generally declining to appoint appellate CJA counsel to replace retained counsel even after a defendant had exhausted all resources at the trial level.

¹⁶ 18 U.S.C. §3006A(c) (emphasis added).

¹⁷ The Model CJA Plan for the district courts and the CJA Guidelines take no position with regard to trial counsel continuing on appeal. The Model CJA Plan, in addressing "Continuing Representation," does not require that counsel continue representation through the appeal, but only until new counsel is appointed. "Once counsel is appointed under the CJA, counsel shall continue the representation until the matter, including appeals or review by certiorari ..., is closed; until substitute counsel has filed a notice of appearance; until an order has been entered allowing or requiring the person represented to proceed *pro se*; or until the appointment is terminated by court order." Model CJA Plan, §VIII.D. The CJA Guidelines provide, "An order extending

to continue representation; in some circumstances, in fact, they have an obligation to seek to withdraw. For example, an attorney who feels he or she is not competent to handle an appeal must acquire the necessary competence or withdraw from representation.¹⁸ Nonetheless, every court of appeals presumes continuity of representation from trial through appeal by CJA counsel, although the strength of the presumption varies significantly. The rationales offered for the various continuity rules tend to balance efficiency concerns against those of quality. The tensions between these interests, to be explored in the subsequent sections, are not as stark as they might seem at first glance.

Promoting Efficiency in Appellate Practice

The principal argument for a strict continuity rule is that it is inefficient to have new counsel, who has no familiarity with the client, the record, and other circumstances in the trial court, undertake an appeal. This position is shared by roughly half of the judges we interviewed. Even those who disagree noted that support for a strong presumption of continuity is based upon a broadly-held assumption that it takes additional time, and thus costs more in attorney compensation, for new counsel to become familiar with an extensive record. However, no one interviewed was able to cite empirical evidence supporting this assumption.¹⁹ More than one judge based the preference for continuity on a different sort of efficiency concern. They described their frustration with a newly appointed appellate counsel who answers at oral argument that, because he or she was not the lawyer at trial, he or she does not know what happened in the trial court or where in the record to find a factual reference.²⁰

An opposing efficiency argument (offered mostly, but not exclusively, by CJA practitioners) supports a relaxed continuity rule. They note that an attorney who handles many federal appeals—whether an appellate specialist or not—will know how to review a record more quickly than many trial attorneys and will more efficiently research and prepare the legal issues to be presented. In addition, those who regularly practice in the court of appeals

Appointment on Appeal (CJA 20) should be executed for each appellant for whom counsel was appointed by a United States district judge or magistrate judge for representation at the trial level.” Paragraph 2.12.

¹⁸ The American Bar Association’s *Model Rules of Professional Conduct* state: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1. Competence. However, a “lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.” Rule 1.1, Comment 4. Nevertheless, the ABA rules have been interpreted to suggest, “A lawyer who does not feel competent to handle a criminal case, but who is appointed to represent a criminal defendant, should ask the court to excuse him or her from appointment.” *ABA/BNA Lawyers Manual on Professional Conduct*, Ethics Opinions 1991-1995, 1001:8101 Opinion 92-F-128(a) (12/11/92). See also Rule 6.2, Accepting Appointments, Appointed Counsel. Comment 2 (“A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.”).

¹⁹ An informal study by one circuit’s clerk’s office suggested that compensation requests made by new counsel were insignificantly greater than those for attorneys continuing on from the district court.

²⁰ It should be noted—as many practitioners did—that this burden of continuity is not imposed equally on others. Generally, judges do not direct individual federal defenders, prosecutors, or retained attorneys to continue on appeal. But see footnote 15. Indeed, many federal defender and U.S. Attorney’s offices have separate trial and appellate divisions, presumably because they find it more efficient or effective, or both.

may be able to navigate more effectively the particularized rules of appellate practice. On the other hand, as an experienced appellate practitioner in a federal defender office observed, an appellate specialist may delve deeper and further develop arguments in ways that take more time. On balance, and especially in appeals involving complex legal research, practitioners said they expect greater efficiency from the use of attorneys specializing in, or at least broadly experienced with, appellate work.

Promoting Quality Appellate (and Trial Court) Representation

Most of the practitioners we interviewed are concerned more with ensuring high-quality representation than with efficiency, both at trial and on appeal. They are not alone; judges and administrators also viewed the continuity question through the lens of quality. “There used to be an argument that it costs less to have trial counsel stay on,” said an administrator who has worked in more than one circuit. “It’s probably true because they are more familiar with the case. Today we’re more concerned with quality, however, than saving those nickels.” Some judges, however, expressed frustration with the notion that a strong continuity rule at times conflicts with the expectation of quality appellate work. “There’s no reason on the green earth why a good trial lawyer can’t file a good appellate brief,” noted one judge, although conceding that good trial lawyers don’t always do so.

Practitioners interviewed for this study strongly support a rule that allows the attorney to determine in each case whether to continue the representation on appeal or withdraw. This is because the reasons an attorney may seek to withdraw—such as believing he or she is less than fully qualified to handle the appeal, feeling unable to afford the time or limited compensation available, or recognizing a breakdown in the attorney/client relationship after trial—are difficult, if not inappropriate, to present to the court. Notwithstanding the view that trial counsel should make the determination of whether to continue on appeal, a significant number of attorneys stated their belief that, as a general matter, continuity promotes quality representation. The principal argument for this position is that the best lawyers are expert both at trial and on appeal; their expertise derives in part from having experience with both. As noted by one appellate specialist, however, this does not necessarily mean that an appellate lawyer needs to carry a trial caseload, but rather that an appellate lawyer can benefit from trial experience and likewise, a trial lawyer from appellate experience. In particular, a trial lawyer with appellate experience is more likely to anticipate and prepare for appellate issues at trial. A few practitioners noted that continuity promotes quality by demonstrating to attorneys the benefits of setting up the appellate issues at trial and the results of their failure to do so; it is a reminder that the legal burden is theirs alone and cannot be passed on.

Some practitioners consider continuity of representation to be an obligation owed to the client, viewing it as important that defendants not be shuttled from one lawyer to another and that they know the relationship is “for the long haul.” One chief federal defender who organizes her office around this principle—all attorneys continue with the representation of their clients on appeal, with assistance from a few seasoned appellate practitioners—strongly

believes that defendants are entitled to no less. “We want the client to feel like he or she has a lawyer, especially if a good relationship has developed at the trial stage,” she said. In contrast, other defense attorneys stressed that the client deserves the best lawyer for each stage of the case.

The principal argument for a flexible withdrawal policy is that having a fresh review on appeal promotes quality. “If the same counsel who represented at trial represents at appeal, they may not recognize if they missed something below,” a court of appeals judge noted. “A fresh look is important.” A defender went further: “Even if it’s more cost-effective to have trial counsel continue, that’s a reason not to do it. It means that the attorney is not thinking with a fresh mind.” A smaller number of advocates for a relaxed continuity rule stressed that appellate practice is a specialty. They contend that framing issues in briefs and arguing to judges on appeal demand different skills than those required for effective representation at the trial level, such as framing issues for trial, negotiating plea agreements, examining witnesses, and arguing to a jury. “Appellate work is a whole different way of thinking from trial work,” said one practitioner, echoing a fairly common view. While the majority of those we interviewed said they hope that most panel attorneys are sufficiently expert at both sets of skills, they doubt this is the case.²¹ “When an appellate brief is bad,” said an Assistant U. S. Attorney who specializes in appeals, “it’s usually [the work of] trial counsel.”

Many practitioners agreed with this assessment. Although they expressed no lack of confidence in their trial skills, they candidly stated that they do not feel fully competent to handle appeals and strongly resist being obligated to do so. Others simply expressed the difficulty, and at times impossibility, of balancing the two types of practice. Not only must they be masters of both specialties and knowledgeable about two sets of rules, they must be able to comply with very different, often inflexible, timelines. Trial work can require an attorney to devote weeks or even months of fully concentrated time, making it very difficult to meet briefing deadlines in appellate matters. Moreover, many CJA attorneys noted the apparent lack of sympathy some court of appeals judges show to this dilemma, evidenced by their denial of requests for extensions of filing deadlines. Similarly, appellate work is most efficiently performed if the attorney dedicates concentrated time to transcript review, research, and writing, something that the multiple tasks of trial work make difficult to achieve.

The small number of district judges we spoke with during this study indicated that they generally support providing trial attorneys with the ability to withdraw on appeal,

²¹ A survey of judges conducted for the Administrative Office of the U.S. Courts in 2004 revealed that court of appeals judges responding to the survey held a markedly less favorable view of panel attorneys’ performance than did district court or magistrate judges. A representative nationwide sample of 51 appeals court judges (including 12 chief circuit judges) was selected for the survey. Seventy-five percent of the chief circuit judges and 51 percent of the full appeals court judges’ sample responded to the survey. Of the circuit judges, 50 percent rated panel attorney performance as “very good” or “excellent,” as compared to 68 percent of district court judges and 80.8 percent of the magistrate judges completing the survey. Defender Services Program Surveys: Survey of Judges, 3.2, 3.3, and 4.3.1 (WESTAT, November 2004).

principally so that good trial attorneys will not be dissuaded from serving on the district panel. A few interviewees said that they know of highly qualified trial practitioners who did not join the district CJA panel, or had ceased accepting CJA appointments because they did not feel comfortable being required to continue a CJA representation on appeal or did not want to do it.

There is general agreement that trial attorneys should have considerable leeway to withdraw at the commencement of the appellate process. Most administrators and half or more of the judges with whom we spoke also take the position that little is to be gained, and much may be compromised, by requiring trial counsel to continue. “I think it is fair to say that the lawyers we drag through appeals kicking and screaming are generally not the ones providing the most helpful briefs,” noted an administrator involved in reviewing her circuit’s continuity rule. “In my mind, if we create an avenue for appointing only those lawyers who want to be doing appeals we will receive a better quality product. I think it will be a win-win situation for the judges, for the attorneys, and for the clients.”

Approaches to Continuity of Representation

Given the competing rationales for and against applying a strong presumption in favor of continuity, it is not surprising that practices vary considerably. Several broadly stated principles have emerged, however. First, the continuity rule should be flexible. It should be responsive to the dictates of the case, the wishes of the defendant, and the attributes of the trial attorney, such as expertise in appellate representation, present relationship with the client, and workload. Second, continuity should be encouraged and supported, but only to the extent that a trial attorney is able and willing to provide effective representation on appeal. Third, as a general matter, deference should be given to the position of the attorney as to whether to continue representation or to withdraw from the case. Finally, the court of appeals, in conjunction with the district courts, should establish clear procedures for managing requests by trial counsel to withdraw, including when counsel should move to do so, and how, when, and by whom new counsel is to be appointed.

Although every court of appeals has some form of presumed continuity of representation—arguably, it is necessary to assure that there are no gaps in a defendant’s representation—the trend is clearly away from a strictly applied rule. Roughly half of the courts of appeals allow trial attorneys to withdraw from CJA appeals with little or no explanation, whether as a matter of clearly stated policy or as a matter of practice. Some have relaxed their continuity rules because they believe it is the better practice, acknowledging the realities of trial and appellate defense work and the sacrifices made by panel attorneys; others have done so to avoid the burden of “litigating” whether counsel may withdraw. Whatever the impetus, where the court of appeals had embraced a flexible approach, almost everyone with whom we spoke expressed satisfaction with it.

Two courts of appeals—for the First and Seventh Circuits—have formally adopted flexible continuity rules. The Court of Appeals for the District of Columbia Circuit has no

generally applicable presumption in favor of continuity. Although each of these circuits approaches continuity in a different way, they all readily permit a change of counsel and facilitate timely processing of new appointments.

The CJA plan for the Court of Appeals for the Tenth Circuit requires appointed CJA counsel to continue representation “until relieved by the court of appeals.”²² However, it also expressly states that “trial counsel’s request to be relieved from representation on appeal shall be given due consideration” and “[s]ubstitution of counsel shall not reflect negatively in any way on the conduct of the lawyer involved.”²³ The justification for these provisions also appears in the text of the plan: “While the court recognizes there may be benefits to maintaining continuity of counsel, it also recognizes that the skills necessary to proceed as appellate counsel may differ from those required for trial counsel.”²⁴ As these changes had not yet taken effect at the time of our study, one cannot gauge their practical impact, but we are told that the new plan signals a significant change in policy for the Court of Appeals for the Tenth Circuit, which has previously adhered to a stricter presumption of continuity.

Since the mid-1990s, the Court of Appeals for the Seventh Circuit has embraced a flexible continuity rule. According to its CJA plan, upon docketing an appeal in which the defendant has had CJA counsel appointed at trial, the trial attorney is asked “to advise the Court whether he desires to continue such representation throughout the appeal.”²⁵ If counsel does not want to continue representation, the court enters an order effecting withdrawal, followed by a new CJA appointment. We were told that, in adopting this policy, the court of appeals’ goal was to improve the quality of appellate argument by ensuring that only attorneys who believed they were qualified to represent clients on appeal were doing so. The approach also was intended to address breakdowns in client/attorney relationships quickly and efficiently without having to ask a judge to rule on a motion to withdraw. CJA attorneys we interviewed expressed concern that requiring trial counsel to state specific reasons for withdrawing on appeal could compromise the defendant’s interests and possibly violate the attorney’s duty to protect client confidences. These concerns are frequently cited in the rationale for a permissive continuity policy.

The Court of Appeals for the District of Columbia Circuit restricts continued CJA representation on appeal to those attorneys who are members of its appellate panel. The District of Columbia Circuit is coextensive with the single district within its jurisdiction; most district CJA panel members are also members of the appellate panel, even though membership on each panel involves a separate (and rigorous) screening. The circuit’s notice of appeal form asks CJA trial counsel who are members of the appellate panel to indicate whether they would like to continue on the case as appellate counsel. Those who are not members of the appellate panel may submit a motion to continue their appointment on appeal,

²² Criminal Justice Act Plan, United States Court of Appeals for the Tenth Circuit, §I.

²³ *Id.*

²⁴ *Id.*

²⁵ Criminal Justice Act Plan, Court of Appeals for the Seventh Circuit, January 1, 1996, §IV(3).

but these requests are granted only after a review by the chief circuit judge's designee with input from the federal public defender.

In the Seventh, Tenth and District of Columbia Circuits, the consensus among the judges and attorneys we interviewed is that these practices, particularly the reliance on the defense counsel's preference with respect to continued representation in each case, have improved—or, in the case of the Tenth Circuit, which recently revised its plan, are expected to improve—quality and efficiency.

The Court of Appeals for the First Circuit takes the additional step of including defendants directly in the continuity decision. Although other courts of appeals may consider a defendant's wishes, particularly when there is an evident breakdown in the attorney/client relationship, they have no formal mechanism for soliciting the client's views. Deference is given to counsel's request to withdraw, but it is done in conjunction with eliciting the defendant's preferences. Pursuant to its CJA plan,²⁶ a "Form for the Selection of Counsel on Appeal" is sent to all defendants represented by CJA counsel in the district court. This form gives the defendant the option to request that trial counsel continue or that new counsel be appointed. According to the language of the plan—and, we were told, actual practice—when the defendant requests new counsel, the request is usually granted.²⁷ Other appellate practitioners expressed the concern that such a practice, while good in theory, may unduly interfere with the attorney-client relationship.

In the course of our interviews we also noted that courts with flexible continuity rules could nonetheless take steps to encourage continuity. One way might be to accommodate the various court obligations facing panel attorneys, who are typically solo practitioners with a mixed practice. It was suggested, for example, that the court might offer more leeway by extending filing requirements when an attorney cites trial obligations. Also, greater efforts could be made to provide specialized training in appellate practice and procedure, particularly for new panel members. It was also suggested that allowing panel attorneys more flexibility in deciding whether they should continue on appeal facilitates panel attorneys' own efforts to improve their practice; those who choose to continue on appeal are likely to be more motivated to excel.

The timing of any change in representation is another important concern, but practices vary widely. With some courts of appeals, particularly those that strictly enforce continuity presumptions, CJA attorneys often seek to withdraw in the district court, at or after sentencing but before the notice of appeal is filed. This is reportedly because they believe that district judges—who presumably can identify attorney-client relationships that are foundering and

²⁶ Plan of the Court of Appeals for the First Circuit in Implementation of the Criminal Justice Act, December 16, 2002, Local Rule 46.5(b), ("The [defendant] may ask for appointment of counsel who represented the defendant in the district court or for the non-appointment of such counsel, but shall not otherwise request any specific individual.").

²⁷ *Id.*, Local Rule 46.6(b), Procedure for Withdrawal in Criminal Cases ("If the defendant returns the form and elects to proceed with new counsel to be appointed on appeal, then the court will ordinarily appoint new counsel and allow trial counsel to withdraw.").

who are perceived to be sensitive to the preferences of district panel members—are more inclined than appeals court judges to grant such requests. However, this practice raises the possibility that, if the request is approved before the notice of appeal is filed, the defendant could be unrepresented at a critical time, that is, when the decision must be made as to whether to file an appeal or request other post-trial relief. Judges we spoke with expressed particular concern that the absence of counsel would lead to notices of appeal not being filed in a timely manner. For this reason, district judges often simultaneously appoint new counsel when granting a trial counsel’s motion to withdraw. Yet, some interviewees—principally, but not exclusively, practitioners—expressed the view that district judges may not be in the best position to make the appointments for appellate cases because they cannot evaluate the quality of the attorneys’ appellate work. An innovative approach to managing these concerns has been developed in the Third Circuit: when counsel moves to withdraw in the district court, the district court instructs its clerk to file the notice of appeal and, upon receipt of the notice, the court of appeals assigns appellate counsel.

Continuity good practices.

- The circuit rules that govern the appointment, withdrawal, and/or substitution of counsel for criminal appeals should provide for a flexible approach, rather than mandating that the CJA counsel appointed at the district level continue to represent the defendant on and through the appeal.
- Although it is important to recognize the possible benefits of continuity, there should be significant deference to the position of trial counsel regarding whether, in each matter, continuity is (1) in the best interests of the client and (2) consistent with counsel’s professional skills and obligations.
- Courts of appeals should develop mechanisms for addressing motions to withdraw by CJA trial counsel that are made in the district court at the conclusion of the case. Such mechanisms must assure that the defendant is continuously represented.

Administration of the Appellate Panel

Even where there is a strong presumption of continuity of CJA representation on appeal, a certain number of appellate cases require assignment of new counsel. Discussed in the section below are the advantages and drawbacks of various methods of assigning representation in “cold-record appeals”—those that follow the withdrawal of trial counsel or are required when the defendant first becomes eligible, upon appeal, for CJA representation. Subsequent sections address the appropriate size of an appellate panel, methods for selecting counsel, the appointment process, and issues surrounding compensation review.

Utilizing an Appellate Panel

The first issue that arises with regard to panel administration for a court of appeals is whether to establish a panel of appellate CJA practitioners. Given the inevitable need for qualified attorneys to handle cold-record appeals, where will the court find the attorneys? And what are the consequences of its systemic choice? In six of the 12 circuits, there are formal CJA panels utilizing quality-based selection and review processes.²⁸ The other courts of appeals select private attorneys through a variety of means: some appoint attorneys from large private firms; some appoint district court CJA panel members; and some use lists, often informally compiled, of local attorneys known to be willing to accept appellate assignments.

A number of courts of appeals rely extensively (but not exclusively) on federal defender offices—especially those with specialized appellate units—to take cold-record appeals. Typically, the court calls upon a particular defender organization—sometimes the organization from the district where the case originated, sometimes the organization from the district where the appeal is being heard, and sometimes the defender office with the largest appellate unit in the circuit. For example, over the past few years, of the estimated 250 cold-record assignments made annually in the Fourth Circuit, approximately one-third were handled by federal defender offices. A few courts of appeals judges and administrators said they would assign more cold-record cases to federal defender offices—and even relieve trial counsel more often—if those offices had the capacity to undertake additional appellate work. In some circuits, federal defenders stated that they were receptive to taking cold-record appeals and have the resources to do so, but have not been asked to undertake such representations.

Judges, court administrators, and panel attorneys commented that the defender offices within their circuits provide excellent appellate representation and that this representation, on

²⁸ The six are the Courts of Appeals for the First, Second, Seventh, Ninth, Tenth, and District of Columbia Circuits. These panels are generally circuit-wide, but need not be. In the vast Ninth Circuit, appellate panel selection and management are left to the individual districts from which the appeals originate.

average, is of a slightly higher quality than that provided by panel attorneys and often considerably better than the representation provided by retained counsel.²⁹

In the Courts of Appeals for four circuits—the Third, Fourth, Fifth, and Seventh—large private law firms are actively encouraged to accept appellate CJA representations. Generally, these courts have a strong presumption of continuity (and therefore have relatively fewer cold-record cases) and no organized appellate CJA panel. Appellate judges in those circuits consistently report that these firms file high-quality briefs. It is believed that, although large firms often assign these cases to junior associates as a training opportunity, they generally provide extensive supervision. Judges point out another benefit: many large firms do not seek compensation that exceeds the statutory case compensation maximum, even in extended or complex cases, and occasionally a firm will claim no compensation.³⁰ Judges and administrators also appreciate that larger firms rarely decline when the court calls with an assignment.³¹

Most practitioners, on the other hand, emphasized the drawbacks of turning to such law firms for representation in cold-record appeals. In their view, providing defendants with attorneys who may have little or no federal appellate criminal experience is inappropriate and not in the best interests of CJA clients. A number of panel attorneys and defenders pointed out that large-firm attorneys with primarily civil practices may fail to identify subtle issues in appellate criminal cases. Court administrators noted that although these firms may submit lower compensation requests, sometimes their claims are considerably higher than those submitted by other private attorneys for comparable work because large firms often require multiple layers of staffing. Finally, some panel attorneys and administrators questioned an appointment process that either delegates quality assurance to the law firms or leaves it to chance.

When asked about methods of assigning counsel in cold-record appeal cases, most of those with whom we spoke—judges, administrators, and practitioners alike—recommended making appointments from a circuit panel of CJA practitioners. They also endorsed the reliance on federal defender offices, especially those with specialized appellate units, for assigning cold-record appeals.³² Indeed, the vast majority of judges, administrators, and

²⁹ We stress, as did many of those with whom we spoke, that this is a general observation; many individual panel attorneys are reported to be among the finest appellate practitioners in their jurisdictions.

³⁰ In the Court of Appeals for the District of Columbia Circuit, appointments are occasionally made to firms that have agreed to accept appellate CJA appointments on a *pro bono* basis.

³¹ In part of the Fifth Circuit, several large firms are organized into the Texas Appointment Plan, which is similar to an appellate panel. Texas circuit judges previously assigned attorneys to cold-record cases on the basis of letters from attorneys expressing availability for appointment. Over the years, the plan has expanded and has been formalized through the organizing efforts of a former Fifth Circuit law clerk. Currently, about 150 firms of 20 or more lawyers participate; several individual attorneys were recently added. Although larger firms that wish to participate in the plan are not required to undergo a review process (the firms are relied on to monitor and assure quality), individual practitioners are vetted through a review of references and writing samples.

³² These specialized appellate units sometimes consist of no more than one or two attorneys—in one or more district federal defender offices in the circuit. Among the circuits with appellate units that we identified are: the First Circuit (Districts of Massachusetts and Puerto Rico); the Second Circuit (Eastern and Southern Districts of

attorneys expressed the view that there is no substitute for a panel of qualified and willing appellate practitioners.³³ At the same time, those in circuits that rely predominantly on federal defender offices are especially pleased with the quality of representation.

The distribution of cases among CJA panel attorneys and federal defender offices varies from circuit to circuit. Generally, this distribution depends on the staff resources of the defender office, the volume of cold-record cases, and the size of the appellate CJA panel. The Court of Appeals for the Tenth Circuit, which has relied extensively on a highly regarded appellate unit in the federal defender office serving the District of Colorado, recently moved to institute an appellate panel by including one in its revised CJA plan; however, it will continue to stress the primary role of the federal defender in accepting cold-record appeals. (This change comes as the circuit begins to relax its continuity rule and thus expects to make more cold-record appellate assignments. It also is said to reflect a renewed commitment to improving the overall quality of appellate practice in the circuit.) The Court of Appeals for the Seventh Circuit also maximizes its use of federal defender office appellate attorneys. Administrators there report that the large and well-respected appellate unit in the defender office serving the Central District of Illinois is often the court's choice for assigning law-intensive appeals, such as cases with suppression or post-*Apprendi* (and, more recently, post-*Booker*) sentencing issues.³⁴ Lengthier, more fact-based appeals are generally referred to members of the appellate CJA panel. The Court of Appeals for the First Circuit recently requested and received approval to increase by four the number of federal defender office appellate specialists in the circuit in order to handle appeals that do not originate in the defender office.

Many judges and practitioners noted the importance of courts offering training opportunities for new CJA appellate panel members, and perhaps mandating panel attorney attendance. The purpose of such training is to assure that reliance on an appellate CJA panel will advance the quality of representation and that the available pool of possible applicants is as broad as possible. In the First Circuit, any attorney who wishes to be included on the list of CJA appellate counsel is required to attend a court-sponsored training. The training is open to any attorney, whether civil or criminal, prosecution or defense, who wishes to attend.³⁵ The program consists of a series of day-long training sessions, offered in three locations so as to

New York); the Fifth Circuit (Southern District of Texas); the Seventh Circuit (Central District of Illinois); and the Tenth Circuit (District of Colorado).

³³ The exceptions, not surprisingly, are judges in circuits without formal appellate panels, most of whom expressed satisfaction with their methods of assigning counsel. However, it is worth noting that such judges generally expressed less satisfaction with the quality of practice of non-defender CJA counsel. "We have some excellent CJA arguments and some that are barely adequate," noted one judge in a representative observation.

³⁴ *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), provided the legal bases for raising a wealth of sentencing issues in a great number of federal criminal appeals.

³⁵ One criminal defense practitioner involved in developing the training said that it has proved to be very valuable to involve prosecutors (as well as experienced appellate defense attorneys) in designing and presenting the program, as prosecutors point out issues that the defense attorneys might overlook, such as procedural defaults, issue preservation, and court rules.

be accessible to practitioners throughout the circuit, and covers the procedural aspects of First Circuit practice as well as a number of substantive “hot topics.” The sessions are well-received by administrators and practitioners alike, and there are plans to offer additional programs.³⁶

Appellate panel good practices.

- Appointments should be made from a circuit panel, or multiple panels in very large circuits, of well-qualified CJA practitioners.
- In conjunction with the circuit CJA panels, courts of appeals should encourage the establishment of, and reliance on, appellate specialist positions within one or more defender organization within the circuit.
- Courts of appeals should encourage training opportunities for new members of CJA appellate panels and consider whether to mandate training as a qualification for membership on the panel.

Panel Size

Assuming that a court of appeals relies on a CJA panel of appellate attorneys, the next question that must be addressed is the panel’s size.³⁷ Those who work in circuits that have reduced the size of panels that had grown too large over time report that such “pruning” is a critical step in promoting effective representation.³⁸ One reason for this is that limiting size can afford greater selectivity. A smaller pool of attorneys also helps assure that each panel member receives a sufficient number of assignments to remain current on appellate law and procedure. However, a court of appeals must also ensure that it has enough qualified attorneys to meet caseload needs.³⁹ Finding this balance includes some determination of the optimum number of assignments that each appellate panel member should receive in a given year. Many attorneys we interviewed consider one or two assignments every year to be the bare

³⁶ In the study of district court CJA panel attorney programs, *District Court Good Practices*, “requiring regular training on basic and advanced areas of federal law and practice” is identified as a good practice. Similarly, Principle 2 of the *Core Principles* states: “Provide panel attorneys with necessary resources, including local training.”

³⁷ The Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the Criminal Justice Act (CJA Model Plan), § I.A.2, developed for use in district courts, states, “The Court shall fix, periodically, the size of the CJA Panel. The panel shall be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide a high quality of representation.”

³⁸ The American Bar Association suggests that “the roster of lawyers should be periodically revised to remove those who have not provided quality representation or who have refused to accept appointments on enough occasions to evidence lack of interest.” The ABA also suggests that circuit plans contain “specific criteria for removal” from the panel. *ABA Standards for Criminal Justice: Providing Defense Services* (3rd Ed.), 1992, Standard 5-2.3(b). Available on-line at: <http://www.abanet.org/crimjust/standards/defsvcs_toc.html> (accessed October 19, 2005).

³⁹ See CJA Guidelines, 2.01(D); Model Panel Plan, §I(A)(2).

minimum necessary to ensure that panel members remain current on appellate practice (assuming they handle few retained federal criminal appeals).

The architects of the recent project to pare the size of the appellate CJA panel in the First Circuit were reluctant to reduce the number too much; they did not want to exclude well-qualified attorneys and they expected that many would apply. They worried, moreover, that limiting the size to the point that each attorney would receive four to six appointments each year would discourage those with thriving practices who did occasional panel work as a public service from continuing to do so. If the number of assignments per attorney were lower, it would also help ensure that members would accept those they are offered, thus reducing the administrative work associated with appointment of counsel. Because an unexpectedly large number of highly qualified attorneys applied, panel size was reduced only slightly; each panel member receives one or two assignments annually.⁴⁰

The appellate panel in the Second Circuit was also reconstituted recently; its size was reduced from 137 to 80 members, which resulted in an annual average of two or three assignments each. The CJA Attorney Advisory Group—the committee of attorneys responsible for panel selection and review—created a new selection process for the appellate panel, designed an application emphasizing appellate experience, and instituted three-year terms for all panel members. As one member of the committee stated, “It was more important that we got the right attorneys than that we got the right number.”

There are too many competing factors to achieve a consensus on the optimum number of members of the panel or to set a target number of annual assignments for each member. What is clear, however, is that attention to panel size is important.⁴¹ Therefore, good practices necessitate addressing the factors that influence the appropriate size of the panel. Some factors relate to the circuit’s needs and policies, such as the number of cold-record appeals and whether that number may increase if the policy on continuity of counsel on appeal is relaxed. Other factors focus on resources, such as the number of well-qualified attorneys who can be attracted and the limits of their motivation and capacity to take CJA assignments. Courts of appeals must strike and re-strike the balance between these factors as quality and efficiency concerns require.

Good practices for determining panel size.

- Courts of appeals should periodically adjust appellate panel size by finding the appropriate balance between attorney skills and appeals court appointment needs (including the number of cold-record appeals), thereby maximizing quality and promoting efficiency.

⁴⁰ The panel was reduced to approximately 170 from 209 attorneys, and a fair number of the 39 removed had not been accepting assignments.

⁴¹ The need to address panel size was also cited in the examination of practices among CJA panel attorney programs in the district courts. See *District Court Good Practices*, p. 20; Core Principle 3(E).

Panel Selection and Review

“We don’t have a real feel for the counsel. We see them only periodically, so there needs to be a stronger mechanism for making sure that panel members are up to the task.” “It used to be that nobody knew how people ended up on the panel and everyone had an appointment for life, or longer.”

These comments by judges come from two different circuits where panel attorneys get mixed reviews and where few judges said they are satisfied that an adequate effort is being made to ensure panel quality. Where circuit judges, administrators, and practitioners are most pleased with the quality of their appellate panel members, the key elements appear to be a rigorous selection procedure and an ongoing review of the attorneys’ performance and commitment to providing quality representation.

Although no one took the position that attention to attorney selection and review is unimportant, not all courts of appeals employ such procedures. Some judges expressed satisfaction with the quality of the attorneys selected by informal “ad hoc” approaches, such as maintaining lists of former circuit law clerks and private attorneys who have previously represented criminal defendants. In at least one circuit, different judges on the court of appeals use varying methods to select counsel and maintain separate lists. One of the problems most often cited is that it is difficult to evaluate the relative merits of these less formal, unpublished approaches. Further, non-transparent processes often result in an unavailable list rather than a formally established panel. “Not only do we not know how people get on the list,” one federal defender told us, “we do not know who they are so we cannot reach out to them for trainings and the like.”

Three conditions were regularly associated with rigorous panel selection and review procedures: (1) established but flexible criteria for panel membership; (2) a committee (predominantly composed of criminal defense attorneys) responsible for evaluating attorney applicant qualifications; and (3) regular review of existing panel members’ qualifications and performance.⁴² Most, if not all, of the circuits with formal appellate panels have established criteria for membership and some form of selection committee; some also limit the terms of panel members and review members periodically for renewed appointment.

Practitioners (and some judges) told us that well-defined and published eligibility criteria make the selection process fairer and more transparent and also set expectations for attorneys who take CJA assignments. Common complaints where there are no such criteria are that appointments are based on “cronyism” and that too little attention is paid to the choice. Yet, it is difficult to identify a discrete set of objective qualities that demonstrate the requisite knowledge, skills, or dedication of prospective panel members. Few applicants are said to possess the most revealing criterion—substantial federal criminal appellate experience.

⁴² Also mentioned as an important consideration was adequate training of new members to assure that promising candidates with limited federal criminal appellate experience are given an opportunity to serve.

Most courts of appeals with a panel selection process that uses eligibility criteria rely heavily on reading writing samples and speaking with references, in addition to considering general information relating to practical experience. This combination gives reviewers the flexibility to assess the quality and not simply the quantity of that experience and facilitates the selection of attorneys who have less experience but who have demonstrated strong potential.

There is no consensus on the best way to identify a practitioner who is well qualified to handle appeals (or who has the strong potential to do so); most panel selection committee members rely on “knowing one when they see one.” There is, nonetheless, considerable agreement about who is in the best position to make the identification. In the circuits from which we heard—from judges and attorneys alike—selection and review processes that rely on a selection committee comprised primarily, or exclusively, of respected appellate practitioners are held in high regard. The important features of such a committee were described as (1) size (enough members to do the laborious work of thorough review); (2) geographic diversity (members drawn from various regions within the circuit so that they can more effectively evaluate the experience of applicants); and (3) judicial support (regardless of whether court of appeals judges serve on the committee).

To ensure that CJA appellate panel members remain both active and qualified in criminal appellate practice, a few courts of appeals have instituted term limits for panel membership, as well as periodic review of members’ qualifications. As one judge observed, “Term limits ensure that the panel doesn’t become entrenched; a renewal keeps it energetic and of high quality.” Periodic review also facilitates removal of substandard members by a method that is less objectionable than an “ad hoc” process. An important component of periodic review is the routine collection of evaluations about the performance of panel members from judges and co-counsel. In three circuits—the Third, the Sixth, and the District of Columbia Circuits—appellate judges have a formal opportunity to comment on panel attorneys’ performance. These reviews typically include a simple ranking sheet filled out by one or more of the judges who heard the appeal. In the District of Columbia Circuit, for example, a certain number of “inadequate” scores triggers a review of the attorney’s tenure on the panel.

There is broad support among judges and defense attorneys with whom we spoke for the practice of regularizing the CJA appellate panel selection process by delegating authority to select and monitor membership to a committee composed of practitioners well respected in the field of appellate criminal defense and supported by the court. The committee should apply published but flexible criteria that allow for carefully exercised discretion and should also conduct periodic, informed reviews of the attorneys’ continued qualification for panel membership.⁴³ There are a number of models for such a process. For instance, in the Second

⁴³ These concerns are mirrored in both *District Court Good Practices* and the *Core Principles*. The former (at p. 21), identifies as a good practice for district court CJA panel attorney programs the careful selection of attorneys who serve on the panel and the removal of substandard members. Likewise, Core Principles 3-A, C, and F advise

Circuit, a 13-member CJA Attorney Advisory Group is chaired by the head of the appeals unit of the federal defender office serving the Eastern and Southern Districts of New York.⁴⁴ All 13 members are criminal defense attorneys who practice in the circuit; although they may be on a district court panel, none may be a member of the appellate panel—to assure that they are “above the fray,” as one judge described it.⁴⁵ There is an effort to include representatives from all of the circuit’s districts in order to encourage the broadest participation on the panel and to provide the widest range of knowledge and views. Advisory Group members, other than the head of the federal defender appeals unit, serve for no longer than two three-year terms to encourage independence and diversity. The terms are staggered to promote continuity.⁴⁶

According to one member of the Advisory Group in the Second Circuit, appellate panel membership is limited to attorneys with “superior experience and proven competence” in federal appellate criminal defense work. To determine whether an applicant meets those requirements, the Advisory Group relies heavily on the applicant’s written submissions—preferably federal appellate briefs—and assessments from co-counsel and opposing counsel, whom an applicant must list, and references.⁴⁷ The Advisory Group’s relatively large size allows for a thorough review of written submissions. According to an attorney who reviews applications for the Second Circuit panel, the process of reading briefs and calling references can be “rigorous and time consuming,” but the result is a panel of the “highest quality.”⁴⁸

The panel members they select also serve for staggered three-year terms but may re-apply for additional terms. The Advisory Group reviews applications for reappointment as well, using a similar process supplemented with comments from circuit judges. The Advisory

districts to use selection and review committees, conduct a regular review of the CJA plan, establish qualifications for panel membership, and conduct periodic post-admission review of panel members.

⁴⁴ The current members of the CJA Attorney Advisory Group were selected by the court of appeals’ CJA and Pro Bono Committee, made up of three judges and charged with formulating panel selection processes.

⁴⁵ Amended Plan to Implement the Criminal Justice Act of 1964, United States Court of Appeals for the Second Circuit, January 29, 2002, §V, p. 3.

⁴⁶ Under the new CJA Plan for the Court of Appeals for the Tenth Circuit, an eight-member Standing Committee on the Criminal Justice Act will play a similar role and will be comprised of federal defenders and private attorneys representing all of the districts in the circuit. The chief judge may also designate a liaison from the court’s legal staff. CJA Plan, Tenth Circuit, §III. The Attorney Selection Committee for the Court of Appeals for the District of Columbia Circuit, on the other hand, is comprised of two active court of appeals judges, the federal defender, one experienced CJA appellate panel member, and one criminal law practitioner who is not a member of the CJA appellate panel; it meets every two to three months. The CJA Model Plan for the district courts suggests a Panel Selection Committee consisting of one district judge, a United States magistrate judge, one attorney who is entering the third year of his or her term as a member of the CJA Panel, and the chief federal defender, if there is one. CJA Model Plan, § I.B.

⁴⁷ In contrast, the Court of Appeals for the First Circuit, recognizing that there are many promising candidates whose practices have been limited to state court, expressly credits state appellate experience. A requirement that applicants submit a federal appellate brief was dropped.

⁴⁸ The only complaint we heard is that the process is not used broadly enough; that is, it is not used to evaluate the attorneys who continue in representation from the trial court, many of whom are not on the appellate panel. One architect of the selection process said of the continuity rule: “It is in conflict with our creation of an excellent cadre of appellate specialists. Trial counsel are not vetted for appellate ability.”

Group makes selection and reappointment recommendations to the three-judge CJA and Pro Bono Committee, which generally follows its advice. Attorneys who are denied reappointment are provided with an explanation of the process but generally not with the specific reasons for the denial.⁴⁹

Good practices for panel selection and review.

- The selection of appellate CJA panel members should be overseen by a committee primarily or entirely composed of criminal defense attorneys, including experienced appellate practitioners.
- The CJA panel committee should apply a rigorous selection process based on established but flexible criteria.
- The committee should conduct periodic review of panel members to assure their continued qualification for, and commitment to, appellate practice. In circuits in which a rigorous selection process has not been the norm, existing panel members should be required to reapply or otherwise undergo a quality review.

The Appointment Process

Courts of appeals confront two sets of issues when deciding how to appoint attorneys to cold-record appeals. These involve (1) balancing the need to apportion cases fairly among appellate panel members against appointing an appropriately qualified attorney in each case; and (2) deciding who is in the best position to make appointment decisions.

There is broad consensus among everyone we interviewed that, generally, appointments should be made on a rotating basis among panel members, but that considerable efforts should be made to assign cases to appropriately qualified attorneys.⁵⁰ Three forms of attorney-to-case matching were identified: (1) type of case and attorney specialization; (2) case complexity and attorney skill level; and (3) geographic considerations.

⁴⁹ The new CJA plan for the Court of Appeals for the Tenth Circuit provides for counsel to be given notice of the proposed basis for removal and an opportunity to respond in writing. Such responses will be further reviewed by the Standing Committee. §II.G.

⁵⁰ The Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the Criminal Justice Act, Appendix G to the CJA Guidelines, Section II.B, developed for use in the district courts, provides: “Appointments from the list of private attorneys should be made on a rotational basis, subject to the Court’s discretion to make exceptions due to the nature and complexity of the case, an attorney’s experience, and geographic considerations. This procedure should result in a balanced distribution of appointments and compensation among the members of the CJA Panel, and quality representation for each CJA defendant.” Practitioners we spoke to previously (see *District Court Good Practices*) about the district court appointment process generally placed greater emphasis than appellate practitioners interviewed for this study on the need to assign cases to CJA panel members on a strictly rotating basis. There are several factors that may contribute to this view. First, there are many more CJA appointments made at the district court level than at the court of appeals level. Second, at the point when district court appointments are made, less is known about the case. And finally, district court panel members may tend to rely more on a regular stream of CJA assignments than attorneys who are appointed at the appellate court level.

Every court of appeals selects appropriately qualified attorneys for capital appellate cases, as required by statute,⁵¹ and at least one maintains a separate list of attorneys who have requested to be assigned only to capital habeas corpus appeals. Beyond these approaches, administrators who maintain appellate CJA panel lists commonly make note of the case types preferred by individual panel attorneys. Although some administrators told us they do not simply take attorneys at their word regarding their qualifications, most courts do not have any systematic way of identifying attorneys' specialized qualifications.

When it was reconfiguring its panel, the Court of Appeals for the First Circuit considered grouping panel attorneys into tiers, organized by skills and preferences. However, administrators decided that such a system would not only be difficult to implement and maintain, it might also alienate many panel members.⁵² The Court of Appeals for the Sixth Circuit uses judicial feedback to guide certain appointments. Members of the panel of judges hearing argument are asked to rate the attorney's written and oral skills and to include additional comments. The clerk's office tracks attorneys' ratings; attorneys with poor ratings may receive a letter informing them of the need for improvement or alerting them that they will no longer receive appointments. Those attorneys who receive consistently high performance ratings from the judges are appointed to the more complex cases; those whose ratings are lower than average are assigned to more routine cases.

Many panel administrators also keep a list (or make a mental note) of those attorneys who excel at, or are less likely to object to, working with difficult clients. A substantial number of CJA cold-record appeals involve clients who have had difficult relationships with their attorneys, particularly in circuits with strong presumptions of continuity, where the complete breakdown of the attorney-client relationship is one of the few bases on which the court of appeals grants motions to withdraw.

Finally, when assigning attorneys to cold-record cases, a number of courts of appeals take geographic considerations into account, assigning attorneys based on their proximity to (1) the court of appeals; (2) the district court where the case originated; or (3) the location of the defendant. Each approach has the potential to improve efficiency. For example, appointing an attorney from the original district may facilitate access to the record.

Generally, the administrative duties associated with appointing appellate CJA counsel are assigned to the clerk of court or another staff person in the circuit's central office. In a few instances, however, court personnel make appointments from locations throughout the circuit. For example, in the Eleventh Circuit a judge from the court of appeals is assigned to each district (generally the district in which the judge has his or her chambers) and maintains a list of available attorneys from which CJA appointments are made for appeals from cases from

⁵¹ 18 U.S.C. §3005; 21 U.S.C. §848(q).

⁵² In contrast, some state court appellate panel systems—including those of California, Massachusetts, and Wisconsin—evaluate and certify, or otherwise rank, appellate attorneys according to skill and experience when admitting them to the panel and periodically thereafter. The purposes are to assure the necessary competency of appellate attorneys and to aid in the development of less-experienced attorneys.

the district. In the Ninth Circuit, where some districts have their own separate, rigorously vetted appellate panels, appointments are similarly decentralized.

In some Ninth Circuit districts, as well as in the District of Columbia Circuit, the federal defender receives cases that require new counsel from the clerk's office, accepts a certain number of appointments for the federal defender organization, and identifies panel attorneys for the remaining appointments.⁵³ Similarly, courts of appeals could delegate the management of the appointment function to an experienced administrator, such as a supervising attorney.⁵⁴

The appointment systems preferred by all with whom we spoke rely principally on a system of rotation, with some effort to match the case or defendant with an appropriately-skilled attorney.⁵⁵ One approach is to have the federal defender office administer appointments. Through their specialized defense expertise, federal defenders are able to identify difficult cases or clients quickly and match them with appropriately-skilled attorneys. In the District of Columbia Circuit, and in the Ninth Circuit districts where the federal defender administers the circuit panel, the defenders also participate on the CJA panel selection committees. Thus, they are in the best position to identify and evaluate the available attorneys when deviation from the rotation is warranted.⁵⁶ In a few state court systems, similar benefits flow from delegating multiple administrative functions to a defender office or similar entity. The Wisconsin Public Defender's Appellate Division, for example, selects and monitors private attorneys, makes the appointments, provides training and litigation assistance, and reviews compensation requests. In Colorado, the statewide Office of Alternate Defense Counsel performs many of the same functions, as do the regional Appellate Projects in California.

No consensus regarding the use of geographic considerations emerged from our interviews. One CJA panel attorney commented that it is important to "share the wealth, or the burden" by assuring that attorneys throughout the circuit are well-represented on the panel, a view expressed by other interviewees. Broad geographic representation has been made a priority for the appellate panel in the Second Circuit, and, although members of the

⁵³ Although the CJA vests appointment authority with the court, 18 U.S.C. §3006A(b), other court personnel facilitate such appointments and manage the administrative component.

⁵⁴ In *District Court Good Practices*, p. 27, delegating management responsibility for panel attorney selection, appointment, and compensation to an independent, professional administrator who understands the defense function is identified as a good practice on the district court level. Core Principle 3-H urges CJA panel administrators to "consider use of [an] administrative/supervisory attorney."

⁵⁵ The Court of Appeals for the Second Circuit is to some extent an exception. It assigns cases almost exclusively on a rotating basis. Most administrators and practitioners interviewed in the Second Circuit prefer this approach, citing reasons of fairness and proportionality. They also expressed the view that, because attorneys on the panel are almost all very highly qualified, case-matching is unnecessary. See also, Core Principle 3-G ("Use an appointment process that is fair to attorneys and gives due consideration to matching attorneys with clients").

⁵⁶ There is a contrary view, however, that defender involvement with the administration of the panel presents at least the appearance of a conflict of interest. This concern led one district to turn to the use of a CJA supervisory attorney. See *District Court Good Practices*, p. 18.

Advisory Group say they are not entirely satisfied with results to date, the group has encouraged attorneys in districts far from where the court of appeals sits to apply for panel membership.

Appointment good practices.

- Appellate CJA panel attorneys should be assigned to cases on a rotating basis. However, the appointment system also should be flexible to allow for appointments that pair complex cases or challenging defendants with qualified attorneys with the appropriate skills.
- Courts of appeals should develop a process—such as through appointments administered by a CJA supervising attorney or a federal defender office that also oversees selection and review—for evaluating the special skills of attorneys and the needs of the case and the defendant.

Compensation Processes

There is unanimity about one aspect of panel attorney administration: compensation review is trying. The courts of appeals expend significant resources reviewing and processing compensation requests.⁵⁷ Although the statutorily authorized maximum hourly attorney compensation rate,⁵⁸ case compensation maximums,⁵⁹ and Judicial Conference policies with respect to voucher review and compensable expenses⁶⁰ are applicable nationwide, compensation practices among the courts of appeals are strikingly inconsistent. Among the 10 circuits for which we have data for fiscal year 2004, the average amount paid per attorney appellate representation varied by nearly 100 percent; the percentage of the total number of appellate vouchers that were reduced ranged from 5.5 percent to 58.2 percent (a variation of more than 1,000 percent); the average reduction ranged from \$1,117 to \$5,500 (a variation of nearly 500 percent); and the reductions measured as a percentage of the amount claimed ranged from 1.6 percent to 30.9 percent (a variation of more than 1,900 percent).⁶¹

A large number of those we interviewed—primarily attorneys but also judges and administrators—expressed concerns about the efficiency, consistency, and fairness of the attorney compensation review in the courts of appeals. The efficiency concerns are

⁵⁷ Included among the compensation-related matters that courts of appeals routinely handle are the review by the chief judge (or that judge's delegate) of all appellate court CJA vouchers submitted by attorneys or other service providers and district court vouchers claiming amounts that exceed the statutory case compensation maximums. This study examines circuit practices for the review of CJA panel attorney compensation claims (vouchers) filed for payment for services provided and reimbursement for expenses incurred. It does not include an examination of the review procedures for compensation claims submitted by experts or other service providers.

⁵⁸ 18 U.S.C. §3006A(d)(1); CJA Guidelines, 2.22(A)(1).

⁵⁹ 18 U.S.C. §3006A(d)(2); CJA Guidelines, 2.22(B).

⁶⁰ CJA Guidelines, 2.23 to 2.32.

⁶¹ Data compiled and provided by the Office of Defender Services, Administrative Office of the U.S. Courts, October 2004.

straightforward: it takes numerous staff—as many as five or six in some average-sized circuits—and a significant expenditure of judicial time to process compensation requests. Concerns about consistency focus on the variation in compensation determinations from circuit to circuit and from judge to judge within a circuit. Concerns about fairness address whether an attorney has notice of, and an opportunity to respond to, proposed voucher reductions, the clarity of the local rules guiding compensation decisions, and the timeliness with which vouchers are processed. Both consistency and fairness concerns affect the inclination of panel attorneys to accept appellate assignments and, ultimately, on the quality of panel attorney representation. Underlying these concerns is a common question: Who is in the best position to evaluate panel attorneys' compensation requests?

Efficiency. The voucher review process puts significant demands on a court of appeals' human resources. Generally, the process starts in the clerk's office with a mathematical and technical review of all appellate vouchers.⁶² A staff member checks the numbers and identifies non-compensable claims and those lacking proper documentation, such as an insufficient explanation of the basis for the compensation sought. In some offices, this individual's work is reviewed by other staff members. In addition, the CJA requires that attorney compensation requests that exceed the statutory case maximum be "certified" by the court in which the representation was rendered and then "approved" (for payment) by either the chief judge of the court of appeals or the chief judge's delegate, who must be an active circuit judge.⁶³ This process, too, requires significant time and resources. Within this framework, the role judges play in attorney compensation review varies considerably from circuit to circuit.

In the First Circuit, the deputy circuit executive has been given authority to authorize payment for vouchers up to the statutory case maximum. For those above that maximum, the deputy circuit executive reviews the vouchers and the chief judge's delegate conducts a final review and payment authorization. The Courts of Appeals for the Fourth and Eleventh Circuits have delegated appellate voucher certification functions to members of the clerk's and circuit executive's offices, respectively. In the Fourth Circuit, appellate vouchers that do

⁶² This practice is endorsed for use by the district courts in the CJA Model Plan, §III.

⁶³ The CJA provides case compensation maximums of \$7,000 for most district court representations and \$5,000 for most court of appeals representations. 18 U.S.C. §3006A(d)(2). The Act further provides that payment in excess of the maximum may be made for "extended or complex representation" when the court in which the representation was rendered "certifies that the amount of the excess payment is necessary to provide fair compensation." Approval of the chief judge of the circuit or the chief judge's delegate (who must be an active circuit judge) is also required. 18 U.S.C. §3006A(d)(3). The Judicial Conference supports expanding the category of persons who may be delegated authority to approve such excess compensation requests to include "an appropriate non-judicial officer qualified by training and legal experience," and allowing the claimant to seek review by the chief judge of any reduction by a delegate judge or non-judicial officer. JCUS-SEP 03, pp. 20-21.

<<http://www.uscourts.gov/judconf/sept03proc.pdf>> (accessed October 19, 2005). The judiciary's position is contained in its proposed Federal Courts Improvement Act of 2005, forwarded to Congress on June 2, 2005.

not exceed the statutory case maximum (currently \$5,000 for appeals) are approved for payment by a senior deputy clerk. In the Eleventh Circuit, the chief judge has delegated to the circuit executive approval authority for appellate vouchers that do not exceed the statutory maximum. Where compensation above the statutory maximum has been requested, the circuit executive conducts a review and prepares a memorandum with recommendations to the chief judge, or to the active circuit judge designated by the chief judge, for approval.

Most judges and administrators stressed that the judicial role in reviewing compensation requests should be limited in scope, especially the court of appeals' "second-level" review of excess compensation requests (from either trial or appeals court representations). Several pointed out that the CJA requires court certification and judicial approval of excess compensation claims—not a second in-depth or a *de novo* judicial review. The Third Circuit provides one example of how to streamline the court of appeals' review of district court (but not court of appeals) excess compensation vouchers. The chief court of appeals judge's delegate, who has instructed district judges to forego including memoranda explaining their certifications with the vouchers they send to the circuit, limits the scope of his review to assessing whether the district judge has made a "reasoned determination." Similarly, in the Seventh Circuit, the court of appeals applies a "presumption of appropriateness" to its review of district court excess compensation certifications. In the case of claims that do not exceed case compensation maximums—that is, requests that are submitted directly to the court of appeals for appellate representations—judges with whom we spoke agreed that greater scrutiny at the court of appeals level is appropriate.

Some we spoke with stressed that in the interest of fairness, the reviewing judge should inquire about certifications that do not seem appropriate, especially those that seem too low. This is important because reviewing judges can reduce compensation requests that have been certified, but they generally cannot increase them.⁶⁴

Some courts of appeals delegate a significant portion of the review of vouchers for the reasonableness of the claim to non-judicial staff. Most, however, expend considerable judicial resources in compensation review; judges from these courts reported that they find their involvement in the voucher review process to be very burdensome. As one judge recounted, "I get a voucher a couple of months after I issued the opinion and have no recollection of the case. I have to go back to the beginning to take a look. It takes a lot of time; this is the bane of my existence." Another explained, "One of the big problems I have is that I have a lot to do and I let a couple of boxes [of excess compensation vouchers] accrue and then I spend five to six hours at home wading through them. This is what you have to do unless you rubber-stamp them."

⁶⁴ See *In re Lawrence J. Gross, Esq.*, 704 F.2d 670 (2d Cir. 1983).

Consistency. Judges and administrators who review attorney compensation requests describe their mandate as a search for reasonableness. For non-capital representations where payment in excess of the case compensation maximums is sought, the Criminal Justice Act requires two specific determinations: (1) whether the representation was “extended or complex” and (2) whether the amount of the excess payment requested was necessary to provide fair compensation.⁶⁵ Judges have considerable latitude to make these determinations in the exercise of their judicial discretion. As one judge remarked, “The bottom line is I have to figure out ‘Is this reasonable?’ Reasonable, like beauty, is in the eye of the beholder.” Judges said that factors they consider in evaluating the reasonableness of the amount claimed include the complexity and number of issues in a particular case; the length of the record or trial transcript; the length of the government’s brief; the length of the opinion; and a comparison with vouchers submitted by co-counsel. Most judges and practitioners recognize that these factors may be misapplied. For instance, many attorneys interviewed warned that using co-counsel’s fee requests as a benchmark can be misleading, explaining that it is not unusual for co-counsel to borrow liberally from the brief of one attorney who has done the great bulk of the research and thus has expended vastly more time.

A number of lawyers in several circuits said that they believe that attorney compensation decisions made by their courts of appeals are inconsistent. One former chief judge explained: “Different judges see the process of compensation differently: some are parsimonious, others generous, some overly critical, some of us have been out of the practice a long time and we don’t have an understanding of current market value. I spoke with the lawyers and they could never count on what they would get.” Panel attorneys also reported that reductions often appeared to be arbitrary; one used the description “round sums taken off the top without explanation.”

A perceived lack of consistency in compensation can have a significant negative effect on the quality of a circuit’s CJA panel. “There is no underestimating the importance of payment and how it attracts or deters quality attorneys,” explained one CJA panel attorney. “If the work has been done, there is nothing worse than having the voucher cut. It is insulting. It says, ‘I do not have respect for your judgment in your area of expertise.’” A number of judges made a similar point. “Panel quality depends on attorneys feeling they will be treated fairly,” remarked one, “and compensation issues are part of that.” A memorandum was issued by the chief judge of one court of appeals cautioning that frequent reductions in compensation could cause attorneys to leave the CJA panel.

The impact of these reductions is exacerbated by the fact that the hourly compensation rates for appointed counsel historically have been, and continue to be, low, particularly when

⁶⁵ 18 U.S.C. §3006A(d)(3). See also CJA Guideline 2.22B(3), which provides some refinement of these standards: “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 the average case, including pre-trial and post-trial hearings, the case is ‘extended.’” See also CJA Forms 27 and 27A, CJA Guidelines, Appendix A.

compared to the hourly fee the federal government pays other private attorneys and to the average hourly fee for retained criminal cases. For non-capital CJA representations (based on the maximum hourly attorney compensation rate of \$90, effective May 1, 2002⁶⁶), it has been shown that panel attorneys are netting an average pre-tax rate of \$26 per billable hour, compared to \$148 netted by attorneys when retained in non-CJA, non-capital criminal cases.⁶⁷ A further comparison can be made to the \$200 per hour rate paid by the U.S. Department of Justice to retain private attorneys with five years of experience to represent current or former federal employees in civil, congressional, or criminal proceedings.⁶⁸

Many courts of appeals have taken steps to improve the internal consistency of their compensation decisions. Those that have delegated review duties to a single decision-maker—whether a judge or administrator—reported gains in both the efficiency and consistency of their review processes.⁶⁹ “We were surprised by the nature and extent of cuts,” explained an administrator in the Court of Appeals for the First Circuit. “So we made a big change both in procedure and result.” That change included delegating the authority to review compensation requests in all appellate cases to the deputy circuit executive. (An active court of appeals judge, pursuant to a delegation from the chief judge of the court of appeals, reviews the deputy circuit executive’s recommendations in excess compensation matters.) The result has been greater consistency and fewer complaints. In both the Fourth and the Eleventh Circuits, the circuit executive is a former practitioner who, by serving as the initial decision-maker on all appellate vouchers, has become very knowledgeable about standard attorney compensation requests.

Fairness. Although the CJA Guidelines provide that the reviewing judicial officer “may wish to notify appointed counsel that his or her claim for compensation and/or reimbursement has been reduced, and to provide an explanation of the reasons for the reduction,”⁷⁰ this is done by very few courts of appeals.

⁶⁶ A cost-of-living-adjustment raising the non-capital panel attorney hourly rate from \$90 to \$92 subsequently was authorized by Congress, effective January 1, 2006.

⁶⁷ A nationwide survey of CJA panel attorneys in February 2005 revealed that the average hourly overhead cost per billable hour for the attorneys surveyed was \$64. The average hourly rate they charged in retained criminal cases was \$212. Defender Services Program Surveys: Surveys of Criminal Justice Act Panel Attorney District Representatives and Panel Attorneys, 4.6 (WESTAT, May 25, 2005). The average hourly overhead expenses and average hourly fees charged in retained, non-capital criminal cases, as reported by the CJA attorneys surveyed, are less than the comparable hourly overhead expenses of \$74 and average hourly fees of \$218, effective January 1, 2004, derived from *The 2004 Survey of Small Law Firm Economics* (Altman Weil, Inc.).

⁶⁸ As of May 1, 2002, pursuant to 28 C.F.R. §50.16, the rates paid by the Department of Justice increased from \$125 to \$200 per hour for an attorney with five years of practice experience; from \$100 to \$160 for a lawyer with three to five years of experience; and from \$83 to \$133 for a lawyer with up to three years of experience.

⁶⁹ Voucher review duties have been delegated to one individual by several courts of appeals, including those for the First, Seventh, Ninth, and Eleventh Circuits.

⁷⁰ CJA Guidelines, 2.22D. Results of recent surveys of magistrate, district, and appeals courts judges and of CJA panel attorneys showed a marked disparity on the issue of voucher reductions and notice. Of the judges responding, 82.9 percent said vouchers are reduced in their district or circuit for reasons other than administrative and mathematical inaccuracies, 70.6 percent said that panel attorneys are notified of the reasons

Notably, some courts of appeals, such as those for the Ninth and Tenth Circuits, have committed to a formal or informal process of notifying attorneys of impending reductions and providing them with the opportunity to justify full compensation or a lesser reduction.⁷¹ For example, in the Ninth Circuit, when the appellate commissioner⁷² determines that reduction of a given compensation claim is warranted, he sends counsel a letter detailing the amount and the reasons. Counsel is given 14 days to respond. Attorneys often provide additional information leading to full payment; in other cases, counsel accede to the proposed adjustment. Panel attorneys interviewed said they are generally satisfied with the transparency and opportunity for comment that this system provides. The Tenth Circuit's revised CJA plan includes the following requirement: "If the court determines a claim must be cut it will provide the attorney notice and an opportunity to cure the defect."⁷³

The reason commonly articulated by judges and administrators for not providing notice and an explanation or soliciting feedback from the panel attorneys is that it would delay the compensation process. They also cite concerns about "litigating" compensation matters. Several attorneys we spoke with said that the lack of transparency in compensation review contributes to the impression that the court does not respect them or their work. "There should be a system for letting us know a cut is coming down the pike," remarked one attorney, "give us a chance to respond, show us some consideration. Just an informal call would do."

To achieve greater fairness—and perhaps consistency—some courts of appeals have sought to provide detailed and explicit information about the services and expenses compensable under the Act. This guidance, which should comport with the national policies prescribed by the Judicial Conference (and published in the CJA Guidelines), is either included in the court's rules or, more commonly, in advice-to-counsel letters sent with each appointment. As one administrator explained, "It is unfair to say a claim is unreasonably excessive if the rules are not clear in the first place."⁷⁴

"always" or "often," and 59.3 percent said that panel attorneys are provided with an opportunity for reconsideration "always" or "often." In contrast, 33.7 percent of CJA panel attorneys said they had had a voucher reduced for other than administrative or mathematical inaccuracies within the previous two years. In contrast to the reports of the judges, more than half of the individual panel attorneys responding reported they were "rarely or never" informed of the reasons for voucher reductions at the district level (63.3 percent) and at the circuit level (66 percent). Further, 75 percent of the panel attorney district representatives responding said they are "rarely or never" given an opportunity for reconsideration of a voucher reduction at the district level, and 86.3 percent reported the same at the circuit level. Defender Services Program Surveys: Survey of Judges (WESTAT, November 17, 2004), § 4.5; Defender Services Program Surveys: Survey of Criminal Justice Act Panel Attorney District Representatives and Panel Attorneys (WESTAT, May 24, 2005), §§4.7.1B, 4.7.2A, and 4.7A.

⁷¹ See Core Principle 5 ("Establish a procedure for reconsideration of compensation denials or reductions by the judge who made the denial or reduction").

⁷² See "*Delegating review responsibilities to an experienced administrator*," supra, p. 32, for a description of the role of the appellate commissioner.

⁷³ CJA Plan, Tenth Circuit, §VIII(A).

⁷⁴ The Court of Appeals for the Tenth Circuit's Advice to Counsel Letter, sent to CJA counsel at the time of each appellate appointment, provides detailed guidance on what time and expenses are compensable and the documentation required. The letter also invites inquiries regarding compensation matters not set out within. <<http://www.ck10.uscourts.gov/circuit/forms/cja/adv20-mod.pdf>> (accessed October 19, 2005).

Another way in which courts of appeals can bring greater fairness to CJA attorneys is to make it a priority to process vouchers as expeditiously as possible. The Court of Appeals for the Eleventh Circuit has a policy of reviewing every voucher submission within 24 hours of receipt (except when a request is returned for further documentation or explanation). This practice especially benefits solo practitioners and those from small firms, upon whom the burden of “fronting” the costs of representation is greatest.⁷⁵

Compensation decision-making. Who is best situated to make efficient and accurate decisions about compensation? Some judges and administrators with whom we spoke believe they are well qualified to do so, while others said they feel wholly unprepared. Many practitioners—and some judges and administrators—suggested that judges and court staff may not be in the best position to determine compensation for defense work because they lack defense experience or sufficient familiarity with the intricacies and economics of defense practice. “I don’t feel comfortable passing judgment on when a voucher should be cut,” said one court administrator, “and given that some of the members of our bench haven’t been in practice for decades, I don’t see how they can make the assessment.”

Many attorneys expressed the view that those who review compensation requests do not appreciate the range of challenges faced by panel attorneys—such as client management, particularly with difficult clients, some of whom have had more than one lawyer already. “The most common complaint is failure to communicate. Often judges don’t understand the needs and importance of client management—not just on a personal level, to keep clients from once again seeking new counsel, but in order to constructively develop issues,” said one attorney. (This same attorney reported that he had stopped submitting compensation claims for more than a single client conference after repeatedly having such items struck from his vouchers.) Several practitioners also expressed concern that judges sometimes use their compensation review authority in ways that directly affect the level and quality of representation provided to CJA clients. For example, two attorneys in separate circuits recounted being told in open court that the arguments they were pursuing should not be included on their vouchers. Such practices can create conflicts between the lawyer’s advocacy duty and financial needs.

Delegating review responsibilities to an experienced administrator. There is considerable agreement among judges and administrators that a single, appropriately qualified

⁷⁵ CJA counsel report varying turnaround times by their courts of appeals, e.g., 30 days; 30 days up to one year; and six to nine months. The CJA Guidelines urge a 30-day limit, absent extraordinary circumstances, for judges to act on compensation requests. CJA Guidelines, 2.21.B. In addition, the Judicial Conference of the United States has urged judicial councils of the circuits to compile a report listing CJA vouchers that have been under review by judicial officers for more than 90 days. JCUS MAR-93, pp. 14, 27 (the report of the March 1993 Judicial Conference proceedings is on file with the Office of Defender Services). The Defender Services Committee had recommended this procedure, in part, to assist in minimizing voucher approval delays by alerting the circuit chief judges and judicial councils of instances in their circuits where such delays are occurring. Copies of the quarterly reports are to be provided to the Office of Defender Services.

administrator should be given significant responsibility for the compensation review process.⁷⁶ Consensus is lacking, however, as to how much responsibility should be delegated and to whom.

Practitioners expressed the greatest satisfaction with voucher review processes where significant review responsibility has been delegated to a single, experienced administrator (rather than to a judge on the panel that heard the case). In the Ninth Circuit, for example, the appellate commissioner is responsible for certain quasi-judicial functions, including appellate case budgeting and appellate voucher review.⁷⁷ The appellate commissioner reviews and certifies all appellate court vouchers; certifications for excess compensation are subsequently sent to the chief judge's delegate for approval. The review is similar to that conducted by judges or other court administrators in most circuits: it involves an examination of the briefs, the opinion, and an "information summary sheet" provided by appellate counsel addressing the number and complexity of the issues and other information about the representation. The appellate commissioner is an experienced former appellate practitioner who has established a rapport with the panel members.

The CJA panel attorneys, defenders, administrators, and judges in the Ninth Circuit with whom we spoke all look favorably on the use of the appellate commissioner position. As one judge said, "With the appellate commissioner we're treating the lawyers fairly and allowing the judges to do what they should be doing—judging. If anything we have more of a cap than we did before because we always had errant judges who would give any fee a lawyer asked for and now we have consistency in what we will compensate."⁷⁸ And one administrator noted that, among other virtues, such an approach avoided the difficulty judges may face in carrying out two disparate functions in CJA appeals, ruling on the merits of the appeal and ruling on compensation requests. "By the time a judge gets to the payment issue, he may have come to see the legal issues as quite simple because he has resolved them. It can be difficult to separate that from the question of how time-consuming it might have been to brief even the losing side of those issues."

In many respects, the appellate commissioner's role in voucher review is akin to that of the CJA supervising attorneys employed in several districts (including two in the Ninth

⁷⁶ In *District Court Good Practices*, p. 30, centralizing and regularizing the compensation process is identified as a good practice.

⁷⁷ The Ninth Circuit is the only circuit that had regularly employed appellate case budgeting. A provision was recently added to the CJA Guidelines (paragraph 2.22B.4) encouraging courts to use case budgeting techniques in CJA representations that appear likely to become or have become extraordinary in terms of potential cost (ordinarily, where attorney hours are expected to exceed 300 hours or total expenditures are expected to exceed \$30,000 for appointed counsel and services other than counsel). See also CJA Guideline 6.02F, providing for case budgeting in capital cases.

⁷⁸ Several courts of appeals—including those for the First, the Fourth, and the Eleventh Circuits—have taken a similar approach by delegating to the circuit executive or other senior staff member both the responsibility for reviewing all attorney compensation vouchers and the authority to give final approval to those that do not seek excess compensation.

Circuit).⁷⁹ The commissioner and the supervising attorneys participate in voucher review and case budgeting and help secure services other than counsel, such as expert services. While they know less about the details of specific cases than presiding judges, they generally possess far more knowledge and information about the time required to perform certain tasks, whether they are reasonably necessary, the propriety of various claimed expenses, and other practical aspects of appellate defense representation. They also are far more likely to communicate with the attorney making the claim. At least one court of appeals—for the Second Circuit—is considering the use of a supervising attorney (or similar administrative position) to improve efficiency and consistency and to control costs, particularly those related to case budgeting and compensation of expenses other than for services of counsel.⁸⁰

Good practices for compensation processes.

- In court rules or in advice-to-counsel letters sent with each appointment, courts of appeals should provide information reflecting pertinent Judicial Conference Guidelines and the court's procedure for voucher review.
- A single individual or coordinated team—well-grounded in the practical and legal challenges of appellate defense practice—should administer the attorney compensation process. Consideration should be given to the use of a CJA supervising attorney or a federal defender office in the circuit.

⁷⁹ In 1997, the Judicial Conference authorized a two-year (later extended to four-year) “supervising attorney pilot project.” The evaluation of the project found that supervising attorneys (1) brought consistency and fairness to attorney expense review by centralizing request processing and case budget management; (2) mitigated the dangers of *ex parte* communications by acting as intermediaries between counsel and the court; (3) increased efficiency by freeing judges from work they often did not believe they were best qualified to handle; and (4) assured high-quality representation by coordinating panel monitoring. See Federal Judicial Center, *The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration*, April 2001. See also *District Court Good Practices*, p. 17.

⁸⁰ Given that a relatively small percentage of CJA panel attorney representations consume a disproportionately high percentage of expenditures in panel attorney cases, the judiciary is giving increased attention to case budgeting in high-cost cases at the district court level. Thus, the CJA Guidelines now encourage case budgeting for non-capital representations expected to cost in excess of \$30,000 and all federal capital prosecutions and capital post-conviction representations (CJA Guidelines 2.22B(4) and 6.02F). At its September 2005 proceedings, the Judicial Conference endorsed a recommendation of its Defender Services Committee to approve a three-year pilot project for up to three circuit positions to be funded from the Defender Services appropriation to support the case-budgeting process. The pilot is intended to provide additional management and accountability for the cases most significantly affecting the Defender Services Program. Another promising approach involves delegating compensation review to a defender office, especially one already involved in case appointment and attorney selection and review. This is the practice in the District of Columbia Circuit, where the federal defender office reviews excess compensation district court vouchers and makes recommendations to the chief judge. It should be noted that some judges and federal defender offices regard defender involvement in appointment and compensation review as creating at least the appearance of a conflict of interest, particularly in multiple defendant cases. Those federal defender offices that undertake such roles do not agree and address such risks by isolating administrative duties from those involving representation of clients.

- Courts of appeals should explore limiting the nature and extent of the judicial role in reviewing compensation requests and streamlining the second-level review of excess compensation claims for both trial and appeals court representations.
- Attorneys should be notified of proposed voucher reductions and the reasons for them and should be provided with an opportunity to explain why reconsideration is appropriate.
- Courts of appeals should make it a priority to process compensation requests as expeditiously as possible.

Conclusion

Our interviews with judges, administrators, and attorneys in the circuit courts of appeals revealed a mutual commitment to high-quality defense representation and to providing it efficiently. Indeed, most of the good practices identified in this report are rooted in cooperation among panel attorneys, judges, court administrators, and federal defenders. There are certainly different approaches across the country to attaining the twin goals of effective and efficient defense services, the focus of this study initiated by the Administrative Office of the Courts. Virtually everyone we spoke with, however, expressed the sense that their minds are not made up and that they would benefit from hearing about approaches taken in other circuits and the arguments that support them. It is our hope that through their dissemination and ensuing discussion, the good practices identified in this report will be expanded and improved upon by those who work within appellate CJA systems so that defense representation is consistently of the highest quality practically possible.

Suggestions for Implementing Improvement

The CJA allows each court of appeals to craft its appellate representation processes according to its specific needs and circumstances. Not surprisingly, practices for selecting, appointing, and compensating CJA appellate panel attorneys vary widely. This report documents some notable practices in each of these areas and provides the basis for three specific initiatives to improve CJA appellate panel attorney programs.

The first is the dissemination of “Core Principles for Criminal Justice Act (CJA) Appellate Panel Management and Administration,” similar to those endorsed for district courts by the Committee on Defender Services of the Judicial Conference of the United States and distributed by the Director of the Administrative Office in May 2004 to the courts, federal defenders, and CJA panel attorneys. The good practices identified in this report may provide a basis for establishing these appellate Core Principles.

The second is the recommended development of a Model CJA Plan for the Courts of Appeals. Judges and administrators in the courts of appeals expressed great interest in making improvements to the administration and management of their CJA appointment and voucher review processes at the appellate level. A model CJA plan specifically tailored for appeals courts could provide a framework for doing so. There is such a plan applicable to the district courts (see *Guidelines for the Administration of the Criminal Justice Act and Related Statutes*, Volume 7, *Guide to Judiciary Policies and Procedures*, Appendix G). Based on this study, we recommend development of a Model CJA Plan for the Courts of Appeals, incorporating “good practices” identified in this report but permitting individual plans to reflect local needs and practices.

The third is the creation of a repository for reference materials to facilitate improvements in CJA plans and practices at the appellate level. Housed on web sites available to the judiciary and to CJA panel attorneys and the public, it would include items such as newly revised CJA plans and related orders, appellate training curricula, application forms for panel membership, forms for judicial assessment of CJA panel attorney performance, and pertinent legal references.