

IMPROVING PUBLIC DEFENSE SYSTEMS

Good Practices for Federal Panel
Attorney Programs

Jon Wool
K. Babe Howell
Lisa Yedid

Vera Institute of Justice
June 2003

Executive Summary

More than 40 percent of persons charged with federal crimes who are financially eligible for government-funded lawyers are represented by panel attorneys, private attorneys appointed by the court. While the Constitution and statutes dictate the broad mandates for appointing counsel, the details are left to each of the 94 individual district courts. Thus, a range of systems, diverse both in type and quality, has developed to provide for panel attorneys.

As a step in its strategic planning effort, the Administrative Office of the U.S. Courts asked the Vera Institute to identify and discuss good practices for selecting, managing, appointing, and compensating panel attorneys. Vera researchers reviewed the written panel attorney plans of all 94 judicial districts and conducted interviews with many panel attorney representatives, federal public and community defenders, judges, and court administrators. Three districts that had made significant efforts to improve their panel systems—Maryland, the Western District of Oklahoma, and Oregon—were chosen for closer study. Our goal was to identify practices that advance the quality of defense representation, as well as those which improve monetary and other efficiencies.

The judges and attorneys we spoke with identified many good practices. These include:

- having a federal defender office in the district,
- delegating management responsibility for panel attorney selection, appointment, and compensation to an independent, professional administrator who understands the defense function,
- carefully selecting attorneys who serve on the panel and removing substandard members,
- limiting the size of the panel such that there are enough attorneys to handle the cases but each receives a sufficient number of appointments to maintain proficiency in federal criminal practice,
- requiring regular training on basic and advanced areas of federal law and practice, and
- centralizing and regularizing review of compensation requests.

The actual practices in the 94 districts, which often are not reflected in the written plans, vary widely. In some districts, we were told that panel attorneys were not provided sufficient resources and that there had been few initiatives to improve panel practices. In others, we were encouraged to see judges and attorneys making significant efforts to assure high-quality defense services under difficult circumstances. Further study is needed to learn more about the impact of various practices and to determine which

elements are transferable from one district to another. We suggest the following areas for further study:

- Attorney Quality Assessment: developing and implementing criteria for identifying and attracting high-quality panel attorneys;
- Performance Measurement: developing and implementing criteria for measuring the performance of panel attorneys and entire panel systems;
- Administrator/Supervising Attorney Systems: analyzing the various functions administrators perform to enable districts to make tailored implementation decisions;
- Defender/Panel Shared Resources: building on significant efforts of defender offices to maximize the sharing of resources with panel attorneys;
- Timeliness of Appointment: developing a comprehensive system for assuring the timely appointment of counsel to panel and defender clients; and
- Appellate Panel Systems: identifying good practices for appellate panel systems.

We hope that those interested in improving their systems will find this report useful.

Acknowledgments

We thank the judges, attorneys, and administrators who took the time to share their thoughts about the workings of their panel systems. We are particularly grateful to those in Maryland, the Western District of Oklahoma, and Oregon for their detailed responses, to the panel attorney representatives on the Defender Services Advisory Group for making themselves continually available to answer our questions, and to both groups for their evident commitment to improving the quality of representation for panel clients. Finally, we want to express our appreciation to the staff of the Defender Services Division of the Administrative Office of the U.S. Courts for their guidance throughout this study.

Table of Contents

Introduction	1
Background on Federal Panel Attorney Programs	1
Goals and Methodology of the Study.....	4
The Written CJA Plans	6
Date of Plan.....	6
Panel Size	7
Panel Selection and Review.....	8
The selection process.....	8
Eligibility requirements	10
Training.....	11
Panel Structure	12
Training panels.....	12
The Appointment Process	12
Timeliness of appointments.....	12
Compensation Issues	13
Notice and review of voucher reductions	13
Good Practices	15
Public Defender and Community Defender Offices.....	15
Panel Administration.....	17
Court-based administrators	18
Defender-based administrators	19
Encouraging administrator independence	19
Panel Size	20
Panel Selection and Review.....	21
The selection process.....	21
Eligibility requirements	22
Training.....	23
Panel Structure	24
Tiered panels	24
Training panels.....	26
The Appointment Process	26
Method of appointment	27
Timeliness of appointments.....	28
Compensation Issues	29
State Court Good Practices	33
Panel Selection and Review.....	33
Training.....	33
Compensation Issues	34
Concluding Themes.....	35
Suggestions for Further Study	36

Introduction

Each of the nation's 94 federal judicial districts has a system to appoint publicly financed lawyers for those who are charged with crimes but unable to afford an attorney. The Criminal Justice Act (CJA or Act) provides the statutory framework for these systems.¹ The CJA requires each district to promulgate a plan for the appointment of private attorneys and, if the district chooses, attorneys from a defender office. Most districts have indeed established a federal defender office, either a federal public defender or a community defender organization, to provide the bulk of these defense services. Yet many financially eligible defendants cannot be represented by a federal defender because of a conflict of interest or insufficient resources in the defender office, or because there is no federal defender in that district. To provide lawyers for these defendants, each district has developed a system for appointing members of a panel of private attorneys, panel attorneys, who have been deemed eligible to accept federal criminal assignments. At present, panel attorneys are appointed to represent 40 percent of those who receive CJA counsel.

This report, prepared for the Administrative Office of the U.S. Courts, is based upon an analysis conducted by Vera researchers of the written panel plans of all 94 districts, as well as discussions with judges, defenders, panel attorney representatives, and court administrators. Drawing upon this research, it identifies good practices in areas such as the selection of attorneys to the panel, their appointment in individual cases, panel administration, and compensation. It also identifies a handful of notable state court practices.

The report begins by providing background on the federal panel attorney programs. This is followed by an examination of various elements of the districts' written panel plans, informed by general conversations with interviewees. Finally, drawing upon more in-depth conversations, we provide a detailed discussion of the good practices identified.

Background on Federal Panel Attorney Programs

The Sixth Amendment to the U.S. Constitution guarantees the accused the right to the assistance of counsel in all federal criminal prosecutions. In *Gideon v. Wainwright*, the U.S. Supreme Court stressed the significance of an indigent defendant's right to counsel: "[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."² The right to counsel is now generally understood to mean that any defendant who cannot afford to retain a lawyer is entitled to court-appointed counsel in all but petty cases not punishable by imprisonment. Further, it

¹ The CJA is codified at 18 U.S.C. §3006A.

² 372 U.S. 335, 344 (1963).

is now well established that the government must bear some or all of the cost of representation for those it decides to prosecute if they otherwise cannot afford counsel. More than 80 percent of federal defendants today require court-appointed representation.³ However, putting into practice our constitutional ideals by providing high-quality representation to this large number of eligible defendants is a considerable challenge.

Even after *Gideon*, federal courts continued to rely on the “traditional obligation of the bar,” or the “mandatory pro bono” theory, to compel lawyers to render their services to indigent clients: judges would assign private attorneys on an ad hoc basis to represent poor defendants for free. As the burden of providing defense services for those unable to afford private counsel grew, the quality of representation declined. The Allen Report, the product of a commission study ordered by Attorney General Robert Kennedy in 1963, was the first comprehensive review of federal defense services. Many of its recommendations were codified the following year by the Criminal Justice Act. Under the CJA, federal courts could compensate appointed private attorneys, although at an hourly rate substantially below that paid by defendants to retained counsel. After a 1970 amendment to the Act, they could also establish either a federal public defender or a community defender organization to provide representation.⁴ Taken together, this system of private attorney and institutional defender representation is referred to as the Defender Services program.

Responsibility for seeing that the CJA is successfully implemented and operated is lodged with the Judicial Conference, the statutorily established governing body of the judicial branch. The Judicial Conference is made up of federal judges and chaired by the Chief Justice of the United States. It meets semi-annually to make policy, budgeting, and other decisions based on the reports and recommendations of Judicial Conference committees. The Committee on Defender Services (Committee), which consists of circuit, district, and magistrate judges appointed by the Chief Justice, is responsible for addressing all matters involving the Defender Services program, with support from the Defender Services Division of the Administrative Office of the U.S. Courts. The Defender Services Division plays a primary role in administering the Defender Services program and provides policy, legal, management, and fiscal advice to the Committee, the

³ Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Table K-1: Summary of Representations by District, 2001.

⁴ Federal public defender organizations are offices of federal employees of the judicial branch. Each office is headed by a federal public defender who is appointed by the court of appeals for the circuit in which the office is located and is subject to removal by the court for incompetency, misconduct in office or neglect of duty. 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 a board of directors and is not employed by the federal judiciary. A community defender may be funded by grants from the Judicial Conference or through submission of vouchers on a case-by-case basis. 18 U.S.C. §3006A(g)(2)(B)(i) and (ii).

Director of the Administrative Office, judicial officers and employees, and defenders and private attorneys.

The CJA requires every district court to promulgate a plan for implementing the Defender Services program locally, permitting each district to design a plan that best suits its needs. Approval of the district plan rests with the Judicial Council, the circuit governing body. In addition to providing for the appointment of private attorneys, the district's CJA plan may call for establishing a defender office.⁵ Today, 81 of the 94 federal districts have a full-time defender office, and two additional districts are in the process of establishing defender offices.

If a financially eligible defendant is not represented by a defender office, counsel is appointed from the local CJA panel. In addition to serving defendants in the 13 districts with no defender organization, panel attorneys represent eligible defendants who the defender office cannot represent due to workload or conflicts of interest, or when otherwise appointed by the court; the Act requires that private attorneys be appointed in a substantial proportion of cases, whether or not the district employs a defender office.⁶ In fiscal year 2001, panel attorneys represented 53,265 individuals, 43 percent of the 123,968 persons who received CJA representation that year.⁷ They did so at a cost of \$175,696,000, 40 percent of the \$440,610,000 total cost of CJA representations.⁸ Panel attorneys were compensated at an hourly rate of up to \$55 for out-of-court work and \$75 for in-court work in most judicial districts.⁹ For fiscal year 2002, the Defender Services program was given an operating budget of \$507,473,000.¹⁰ This sum specifically allowed for a rate increase for panel attorneys that brought compensation to \$90 per hour for both in-court and out-of-court work.¹¹

Since 1964, there have been two government-sponsored, comprehensive reviews of the operation and administration of the CJA. The first CJA review was jointly sponsored by the Department of Justice and the Judicial Conference, and conducted by Professor

⁵ Only those districts in which each year at least 200 persons require the appointment of counsel may establish a federal defender organization. However, two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. 18 U.S.C. §3006A(g)(1).

⁶ 18 U.S.C. §3006A(a)(3).

⁷ Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2001*, Table K-1, 29 August 2002. <http://www.uscourts.gov/judbus2001>.

⁸ Administrative Office of the U.S. Courts, *Defender Services: Summary Statement of Account Requirements, FY 2002*, Table: Trends in Cost of Providing Representation.

⁹ *Ibid.* The \$55/\$75 rates applied to work performed on or after April 1, 2001.

¹⁰ Congress appropriates funding to implement the CJA through a separate, "no-year" appropriation within the overall budget of the federal judiciary. A "no-year" appropriation means that funds remaining at the end of the fiscal year are available until they are spent. This allows for a degree of flexibility necessary because of the difficulty in accurately predicting defense costs.

¹¹ P.L. 107-77 (H.R. 2500) (Nov. 28, 2001). The \$90 rate was implemented for work performed on or after May 1, 2002.

Dallin H. Oaks of the University of Chicago Law School in 1967 (Oaks Report).¹² The Oaks Report addressed the feasibility of creating defender organizations to represent defendants under the Act.¹³ In 1990, the Judicial Conference established the Committee to Review the Criminal Justice Act to conduct a comprehensive review of the Defender Services program. Its report, commonly referred to as the Prado Committee Report, after its chairman, Judge Edward C. Prado (Western District of Texas), concentrated on enhancing the independence of defense services.¹⁴

The Committee on Defender Services is currently engaged in a long-range strategic planning process. The primary advisory entity in the process is the Defender Services Advisory Group, made up of eight defender and seven panel attorney representatives.¹⁵ In December 2000, the Committee approved the “Outline of the Defender Services Program Strategic Plan,” which updates the mission and goals of the Defender Services program, strategies for achieving those goals, and performance measures for evaluating success. One of the Committee’s priorities is a review of the districts’ current CJA plans in order to identify weaknesses, strengths, and possible best practices for improving panel attorney programs. This study is one product of that planning effort.

Goals and Methodology of the Study

The specific mandate of this study is to “identify possible best practices in the federal CJA system for selecting, managing, appointing, and compensating CJA panel members.”¹⁶ Our principal criterion for good practices is that they advance the quality of defense representation for defendants. We also consider the degree to which a practice increases monetary or other efficiencies.

To meet these goals the study team:

- reviewed the CJA plans of all 94 districts;

¹² Dallin Oaks, *The Criminal Justice Act in the Federal District Courts* (1967), reprinted in Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1969).

¹³ Following the Oaks Report, Congress amended the CJA in 1970 to provide for the establishment and support of defender offices as optional defense services providers for the district courts’ plans; raised the hourly rate of compensation to \$30 in-court and \$20 out-of-court; raised the maximum case compensation for panel attorneys; and expanded the types of representations for which counsel would be provided.

¹⁴ *Report of the Committee to Review the Criminal Justice Act*, published in *The Criminal Law Reporter* (Bureau of National Affairs) Vol. 52, no. 22, March, 1993. The Prado Committee’s suggestions for a substantial restructuring of the Defender Services program were not adopted by the Judicial Conference. However, many of its recommendations relating to panel attorneys, defenders, and litigation support were adopted. Recommendations relating to the panel attorney component of the program that were adopted included: the need for eligibility standards for membership on a CJA panel, additional training programs, and performance standards and reviews for panel attorneys.

¹⁵ Each district has one panel attorney designated as the CJA panel attorney representative.

¹⁶ Because we believe the term “good practices” more accurately reflects the state of our knowledge than does “possible best practices,” we have substituted the one for the other.

- interviewed each of the seven panel attorney representatives and many of the eight defender representatives on the Defender Services Advisory Group;
- reviewed responses to an e-mail letter inviting input for the study sent to every defender organization and panel attorney district representative nationwide (12 responses were received); and
- interviewed by telephone three panel attorneys, three defenders, six judges, and one supervising attorney in three districts that have recently worked to update and improve their panel systems: Maryland, the Western District of Oklahoma, and Oregon.¹⁷

Our review of the plans began with two instruments provided by the Administrative Office. The first instrument, the “CJA Plan Review Checklist,” was designed to compare the written CJA plan of each district against 15 provisions in the Model Criminal Justice Act Plan (Model Plan).¹⁸ The second instrument, the “Review of District CJA Plans,” covered questions relating to eligibility for appointment to the panel, the existence and composition of a panel selection committee, the size and composition of the panel, the appointment system, removal from the panel, the existence of peer review, and other notable provisions. The study team also applied a third instrument, which it created, with supplemental questions regarding attorney monitoring, training, and compensation.

Next, the team interviewed the seven panel attorney representatives and four of the eight defender representatives on the Defender Services Advisory Group, as well as seven other defenders, four other panel attorney representatives, and five district and two magistrate judges, to collect information about the implementation of the plans (or other actual practices where they differ from the plans) in the districts discussed. We focused our interviews on the three districts listed above. Based on these interviews and the responses to our e-mail letter, we identified a number of good practices. A second review of the plans was then conducted to determine which plans incorporated basic elements of these good practices.¹⁹

¹⁷ Many districts have recently worked to improve their panel systems. These three were not selected as the best of those districts, but rather as a geographically and demographically diverse sample.

¹⁸ The Model Plan was promulgated by the Committee and consists of two parts. The first part, the Model Criminal Justice Act Plan, sets out who is entitled to appointed counsel, who will provide it (a defender office, panel attorneys, or both), the duties of counsel and of law enforcement related to the appointment of 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 collectively referred to as the Model Criminal Justice Act Plan and are published in Appendix G of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures (CJA Guidelines)*.

¹⁹ We did not review the plans for every identified good practice. We did not consider those practices about which there is significant disagreement and practices that are very rare or otherwise not amenable to meaningful statistical analysis. Some of the identified good practices not considered in the plan review are addressed in the section devoted to good practices, which follows the plan review section, below.

The Written CJA Plans

Through our interviews we identified the following elements relevant to good practices:

- date of plan
- panel size
- panel selection mechanisms including:
 - screening of panel attorneys
 - panel selection committee
 - defense attorney on panel selection committee
 - regular review of panel attorneys
- panel eligibility requirements including:
 - federal criminal experience or its equivalent
 - knowledge of federal rules of evidence, sentencing guidelines, and federal criminal procedure
- mandatory training
- training panels
- timeliness of appointments, and
- notice and review of voucher reductions.

This section analyzes which plans contain provisions relating to these elements and notes variations in how the plans handle these elements.

Date of Plan

Before reviewing our findings, it is worth noting that some plans have been entirely updated recently while others have not been substantially changed for decades. Specifically, 36 districts have plans that were adopted in the last five years. An additional 30 plans were adopted between 1993 and 1997. Twenty-eight plans are more than 10 years old and, of these, 18 are between 15 and 32 years old. Moreover, a recent plan date does not necessarily mean that the plan has been revised in a significant way. In some jurisdictions a new plan is adopted when a single change is made, even though the plan as a whole has not been reconsidered for years.

It is also important to note that even in districts with plans that were adopted relatively recently, actual practice often differs substantially from what is prescribed. For example, in Maryland great efforts to improve the quality and administration of the CJA panel have resulted in rigorous screening, regular review of panel members, and a limited panel size. Although efforts are being made to revise its plan, these innovations are not reflected in Maryland's extant 1994 plan, which, in fact, does not require applicants to have relevant experience or even knowledge of federal law, and contains no provision for

regular review of panel attorneys. Other districts have extensive plans which appear to be aspirational, as they detail practices that have not been implemented.

Certainly, the state of practice is more meaningful than what is written in the plan. Nevertheless, having a plan that is accurately updated on a regular basis can serve several useful goals. An up-to-date plan that reflects current practice can provide judges, panel members and applicants, defenders, selection committee members, and defendants with accurate information regarding panel administration.²⁰ Such a plan can also serve as a model for other jurisdictions seeking to revise their CJA plans and facilitate useful national analysis of defense services by the Administrative Office. Finally, the discipline involved in keeping a plan up to date encourages districts to regularly review and improve their practices.

Panel Size

Restricting the size of the CJA panel can promote high-quality representation in two ways. First, to the extent that membership on the panel is viewed as an honor and a badge of ability, it may attract better qualified attorneys. After they took steps to reduce panel size, representatives from districts such as the Eastern District of Louisiana, Maryland, and the Western District of New York reported that competence levels among their panel attorneys improved. Second, the panel attorneys, defenders, and judges we interviewed all agreed that attorneys who receive infrequent appointments do not stay current with federal criminal practice and the quality of their representation suffers. It was generally agreed that to stay abreast of new developments in substantive, sentencing, and procedural areas panel attorneys need at least four significant appointments per year.²¹

The Model Plan sets forth the following provision relating to panel size. “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 the federal criminal defense work, and thereby provide a high quality of representation.”²² Despite the Model Plan and the common perception that limiting the size of the CJA panel contributes to quality, only 44 of the district plans call for a fixed number of attorneys on the CJA panel. A few of these 44 set forth a specific number of attorneys. More commonly, they call for either the court or a panel management committee to “fix, periodically, the size of the CJA Panel.”²³

²⁰ “Publication of the terms of the plan ensures that the bar is aware of the process by which counsel is being provided and promotes public confidence...” *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-1.2.

²¹ This observation was made in reference to panel attorneys who do not otherwise accrue expertise in federal criminal practice as retained counsel.

²² Model Panel Plan, § I.A.2. See also paragraph 2.01D of the CJA Guidelines.

²³ Some of the 50 remaining plans echoed the Model Plan balancing language but did not provide for any process for fixing the number of attorneys on the panel. These plans were deemed not to limit panel size for

Panel Selection and Review

Our interviewees specified two aspects of selecting and reviewing panels as critical to developing and maintaining high-quality CJA representation. First, there must be a formal selection process. Second, districts must adopt and apply meaningful eligibility requirements for panel membership.

The Selection Process.

Screening panel attorneys. We were told that reviewing and comparing the qualifications of aspiring panel candidates and selecting those most qualified can significantly enhance the caliber of practicing panel attorneys. A few district plans detail provisions for screening applicants for worthiness or qualifications by interviewing applicants, contacting references, and speaking to judges before whom the applicant has practiced.²⁴ More often, however, the review process is not specifically described. Sixty-four plans provide for a formal screening process of applications. Thirty do not.²⁵

Panel selection committee. The Model Plan urges districts to utilize a panel selection committee to consider applications and recommend to the district court the best qualified candidates to fill panel vacancies.²⁶ Where they exist, panel selection committees are responsible for reviewing panel applicants and, in some districts, existing panel members on a regular basis.²⁷ The oversight exercised by these committees may be extensive and regular or cursory and irregular.

purposes of our review, though in practice some of these districts may periodically review and adjust the size of their panels.

²⁴ See, for example, the Northern District of Illinois plan, which requires panel applicants to provide a judicial letter of recommendation and be interviewed by a member of the panel attorney selection committee.

²⁵ Where an application is required for panel membership and some person or entity, most often a panel selection committee, is responsible for reviewing applications, we deemed that a screening process was in place.

²⁶ Model Panel Plan, §I.B.2.a. In some districts, such as Massachusetts and New Hampshire, the plans call for the committee to more broadly represent the interests of the CJA program.

²⁷ The plan of the Northern District of Illinois requires the selection committee to meet at least four times per year to review both new applicants and the performance of panel members. In addition, the selection committee must seek judicial comment on the performance of panel members every three years. Oregon's plan requires a periodic review of all panel members that includes "quality of representation provided, availability for assignments, administrative issues regarding assignments and vouchering, and comparison with the qualifications of new applicants." The plans of the Central and Southern Districts of Illinois require that the selection committee conduct an annual review of panel attorneys for worthiness for service on the panel. The plan of the Eastern District of Missouri requires such review for its lead panel (those attorneys who have been selected and appointed by the court upon recommendation of the panel selection committee).

Panel selection committees can promote quality of representation by having the most knowledgeable and qualified persons as members and applying careful and consistent criteria to the selection and review of panel attorneys. The best functioning committees, we were told, also play an advisory role in updating the panel system's functioning.

Sixty-five of the CJA plans establish a panel selection committee. In districts without such a committee, panel attorneys are either selected by judges (sometimes each judge maintains his or her own list of attorneys), or they have simply signed up with a clerk or magistrate judge and had their name added to the list of available attorneys. In the plans of a very few districts, every attorney who is a member of the bar is automatically added to the CJA panel list.²⁸

Defense attorney on panel selection committee. The Model Plan provides for a selection committee composed of one district judge, one magistrate judge, one senior panel attorney, and the defender, if there is one.²⁹ To the extent that they provide details about the composition and function of the selection committee, district plans vary considerably from the Model Plan. Our interviewees generally agree that a panel selection committee should contain at least one, and probably several, defense attorneys.³⁰ Many report that the presence, or a majority, of defense counsel on the selection committee improves the panel quality by ensuring that a defense perspective is primary in the selection and review process. Moreover, it is argued that because defense attorneys are in the best position to evaluate their peers they can provide a more critical perspective on the quality of counsel than others.

In most districts where there is a defender office, the plan provides for the head of that office or a designee to be a member of the committee. Many plans explicitly provide for one or more CJA panel attorneys to be on the committee. Others exclude panel attorneys. Occasionally the state public defender is a member of the committee, providing information on the quality of attorneys from the state defense bar. Of the 65 districts with a panel selection committee, all but six require that one or more defense attorneys serve on the committee.

Regular review of panel attorneys. A regular review of the qualifications and performance of panel attorneys increases panel quality by providing both an incentive for

²⁸ See, for example, Georgia (M), Missouri (E) (for its general panel), North Dakota, Texas (N) except Dallas (in divisions other than Dallas every attorney must complete a CJA application form, which a magistrate judge must review to determine if the attorney is qualified), and Texas (W) (San Antonio Division).

²⁹ Model Panel Plan, §I.B.

³⁰ Some interviewees told us they believed that the committee should be composed solely of defense counsel. The Panel Review Committee in the Southern District of New York employs such a model. The committee is made up exclusively of defense attorneys and reportedly applies stringent quality controls with regular review of all members of the panel. The districts' judges make the panel selections, but act only on recommendations forwarded by the committee.

attorneys to maintain a high-quality practice and an opportunity for panel managers to regularly address substandard practice. One mechanism for regular review is to require attorneys to reapply to remain on a panel after a set term. The Model Plan suggests a term for panel members of three years.³¹ If those charged with screening re-applicants implement serious screening criteria, attorneys who do not meet the district's quality standards will be unable to remain on the panel. In districts where panel size is limited, spots held by marginally qualified attorneys can be given to applicants who are more qualified.

Yet even the plans of districts with relatively stringent eligibility requirements and pre-admission screening often fail to provide for regular post-admission review. Many panel representatives and defenders involved in the selection process indicated that panel attorneys in their districts undergo meaningful review only when there is a complaint from one or more judges. In these instances, an attorney may stop receiving appointments (with or without notice), be deleted from the list, or the CJA committee will formally review the complaint. Where a panel attorney's offense is nothing more than mediocrity, he may continue on the panel indefinitely.

Thirty-one districts have provisions in their plans to review practicing attorneys regularly. Most often this review is accomplished in connection with a regular re-application process for ongoing members. In 27 districts, attorneys are admitted to the panel for set terms (usually three years) and must reapply for additional terms. In a few of these districts reapplication appears to be simply a matter of notifying the court or panel administrator of the desire to remain on the panel and there is no indication in the plans that there is a review process. Some plans require both that panel members reapply for membership after a set term and that they then be reviewed along with new candidates for selection of the best qualified.³²

Eligibility Requirements.

Federal criminal experience or its equivalent. The general consensus among practitioners and judges with whom we spoke was that experience in federal criminal cases should be an essential prerequisite to panel membership. They frequently expressed concerns about attorneys without such experience being eligible and accepted for panel membership. Federal criminal experience or other equivalent experience is specifically required in 29 of the district plans.³³

³¹ Model Panel Plan, §I.A.5.

³² Examples include the plans of the Northern District of Indiana and the Eastern and Southern Districts of New York.

³³ We counted only those districts which require either a specific number of years of experience in practice or specific trial experience or the equivalent.

The Model Plan sets out only the general eligibility requirements of federal bar membership and demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure and of Evidence, and the Sentencing Guidelines. It leaves it to the districts to develop more specific requirements.³⁴ Not surprisingly, the experience requirements in plans vary widely. The Northern District of Ohio requires five years of felony trial practice. The Northern District of California requires five years of felony trial practice and five felony trials. The Eastern District of North Carolina requires two years of criminal defense representation. The Eastern District of Wisconsin and the Northern District of Florida require either trial experience or significant involvement in complex criminal cases. Most jurisdictions with experience requirements do not distinguish between state or federal experience.

It is difficult to determine from some districts' plans whether the requirements are meaningfully applied. In the Middle District of Florida, for example, any judge may waive the one federal trial and two years experience required for an attorney's admission to the panel. Similar plans in the Middle District of Alabama, the Southern District of Alabama, and the Northern District of Georgia require panel members to practice regularly in federal court and have a demonstrated interest and ability in criminal defense, but it would be necessary to look to practice to determine if this actually indicates a requirement of federal criminal experience.³⁵ Fully 65 plans have no specific eligibility requirements related to length of practice or trial experience, whether state or federal, criminal or civil.

Knowledge of Federal Rules of Evidence, Sentencing Guidelines, and Federal Criminal Procedure. The Model Plan's requirement of knowledge of the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Sentencing Guidelines is generally understood as fundamental to effective representation. In particular, we were told, practitioners new to federal criminal defense work cannot represent clients effectively without a solid grounding in the Sentencing Guidelines.

Fifty of the CJA plans require "knowledge and experience" of all three of these relevant areas of law. Fourteen plans require knowledge of two of the three areas, and two require knowledge of one of the three. Twenty-eight plans do not require knowledge of any of these three basic areas of law for admission to the panel.

Training

There was some concern among those with whom we spoke that requiring mandatory training in districts where the panel is already strictly limited, reviewed, and recruited for

³⁴ Model Panel Plan, § I.A.3. (Committee comment).

³⁵ Those plans that require regular federal practice and ability in criminal defense were deemed to require federal criminal experience for purposes of our review.

excellence is not appropriate.³⁶ However, many people we spoke to indicated that mandatory training is not only appropriate but also necessary to maintaining panel quality. In the majority of districts, we were told, panel attorneys are not uniformly excellent, and in some they may lack sufficient current expertise in the necessary body of federal law to provide even competent assistance. The general observation about non-mandatory training is that the same 25 to 40 percent of the panel attorneys attend the trainings from one year to the next. This group of attorneys generally consists of the most dedicated and talented members of their respective panels.

Only 27 districts require mandatory training of CJA panel attorneys. Typical requirements include annual or biennial attendance at defender office or panel selection committee training programs or approved alternatives.³⁷ The remaining 67 districts have no ongoing training requirements.

Panel Structure

Training panels. One way to groom potential candidates who lack sufficient federal experience for panel admission is to provide a formal training panel. The Model Plan provides that the panel selection committee may establish a training panel.³⁸ Such a panel enables inexperienced attorneys to apprentice with experienced panel attorney mentors (or in some cases attorneys from the defender office) in case preparation and second-seating trials. In a number of districts the mentor is required to provide feedback to the panel selection committee. A formal training panel program helps assure that potential members of the panel have relevant experience and are evaluated based on substantial observations. Forty-two district plans provide for training panels.

The Appointment Process

Timeliness of Appointments. In cases where counsel is not appointed for the initial appearance in a federal criminal matter a defendant may be incarcerated for several days before having the assistance of an attorney. In many instances, a defendant will be interviewed by pretrial services and make statements before counsel is appointed. There is a broad consensus that defendants and targets require, and should be given, counsel at the earliest possible moment.³⁹ To this end the Model CJA Plan provides that an attorney

³⁶ As one panel representative pointed out: “Our panel attorneys *give* the trainings.”

³⁷ Districts with these requirements include Alaska, Florida (M) and (N), Louisiana (M) and (W), Maine, New York (W), North Carolina (E), Oklahoma (E) and (N), Puerto Rico, and Utah. In other districts the requirement is expressed in hours per annual or biennial period: Iowa (N) and (S), two three-hour seminars annually; Nebraska, eight hours biennially; New Hampshire, six hours annually; Ohio (S), six hours biennially; and Vermont, five hours annually.

³⁸ Model Panel Plan, §I.C. The Model Plan provides that training panel members are not eligible to receive CJA appointments independently and may not be compensated for their training panel service.

³⁹ The significance of early representation has been recognized by the Judicial Conference. The Conference noted that, “With the advent of sentencing guidelines, information provided by a defendant at a pretrial

be assigned “as soon as feasible after [persons] are taken into custody, when [persons] appear before a magistrate or judge, when [persons] are formally charged or notified of charges if formal charges are sealed, or when a magistrate or judge otherwise considers appointment of counsel appropriate under the CJA, whichever occurs earliest.”⁴⁰

Despite this recommendation there is a wide range of practices for initially appointing panel attorneys (as well as for appointing federal or community defenders). Of 15 districts represented by defenders and panel attorneys at a roundtable discussion of timeliness of appointment, most representatives said that panel attorneys usually are not available at the pretrial services interview or the initial appearance in court. For the initial appearance, some districts appoint the defender as interim counsel while in others the court reschedules the appearance or proceeds without counsel. With the exception of the few, generally highest-volume, districts where panel attorneys are assigned “duty days,” only a small number of districts are reported to have devised a system that assures the appointment of panel attorneys at or before the initial appearance. The timeliness disparity between defendants represented by panel attorneys and those represented by defender offices is a matter of significant concern, because the defender is available to represent one co-defendant from the outset while co-defendants destined to be represented by panel attorneys go unrepresented by their ultimate counsel at these early and sometimes critical stages. Moreover, in some districts, we were told, neither the defender nor the panel attorney is appointed until after the initial appearance.

Thirty-five of the district plans have no provision for appointing counsel at the earliest feasible moment. Of the other 59 plans that follow the language of the Model Plan only 17 have additional language concerning appointing counsel prior to the initial appearance or the pretrial services interview.

Compensation Issues

Notice and review of voucher reductions. Panel attorneys and defenders report that in districts where requests for compensation and expenses (vouchers) are reduced without notice or opportunity for review, panel quality is compromised in two ways. First, highly qualified attorneys may choose to forego panel membership.⁴¹ Second, some panel attorneys may improvidently cut corners if they cannot be confident that all their work will be compensated or reimbursed. According to reports from practitioners, administrators, and defenders who handle voucher review, reductions are rarely based on

services interview (which normally occurs prior to the defendant’s first appearance before a magistrate judge) can have a potentially adverse impact on the sentence the defendant eventually receives,” and the Conference “encourages the courts to appoint counsel prior to a defendant’s interview by a pretrial services officer or probation officer.” *Report of the Judicial Conference of the United States on the Federal Defender Program*, G.1., March 1993.

⁴⁰ Model Plan, CJA Plan, §IV.B.

⁴¹ We were told that in at least one district there was a long history of voucher cutting and that many qualified attorneys simply stopped taking cases because of the practice.

the belief that the work was not done. Rather, the presiding judge may believe that the work was not necessary, that the amount of time spent was unreasonable, or that requests for experts and expenses are excessive. To the extent that these are the reasons, an attorney may be able to explain the necessity of work performed or expenses incurred only if there is a mechanism for doing so.

Only 21 district plans provide for notice and/or an explanation of voucher reductions.⁴² Of these, 11 grant attorneys the explicit right to request review of the reduction.⁴³ Only four districts have a review process in which a committee, rather than the presiding judge, reviews the claim.⁴⁴ In districts with a system for reviewing requests for compensation it was reported that reductions in compensation could often be resolved when the presiding judge's, or the committee's, concerns about voucher claims were raised with the attorney.

⁴² The CJA Guidelines suggest that a judicial officer who approves compensation at an amount less than that requested “may wish to notify appointed counsel” of the reduction and “provide an explanation of the reasons for the reduction.” CJA Guidelines, ¶2.22D. Among plans providing for notice and/or explanation of voucher reductions are those of Alaska, Michigan (E), Mississippi (S), Missouri (W), New York (S), Oklahoma (E, N, and W), Vermont, and West Virginia (N).

⁴³ The following districts (in addition to the four cited immediately below) have plans that grant attorneys the explicit right to review: Colorado, Connecticut, New Jersey, New York (N), Oregon, Pennsylvania (M), and Washington (E).

⁴⁴ Guam, New York (W), Washington (W), and Wisconsin (E).

Good Practices

The previous section, which is predominantly based upon our comparison of the 94 districts' written CJA plans as well as interviews with practitioners, identified the elements of a CJA plan that can contribute to good practices. In this section, which draws upon actual practices as expressed in in-depth interviews with panel attorneys, community and federal public defenders, judges, and administrators, we discuss in greater detail the good practices we have identified. The first two subsections address the roles of defender offices and of panel administrators, both structural elements that affect many areas of panel management and practice. The subsequent subsections address discrete good practices within six areas: panel size, panel selection and review, training, panel structure, the appointment process, and compensation issues.

Public Defender and Community Defender Offices

Without exception, the people we interviewed had high opinions of community defenders and federal public defenders.⁴⁵ All agreed that the presence of these organizations elevates a district's defense practice in two ways. First, institutional defenders concentrate experienced defense attorneys in an office that is devoted exclusively to providing high-quality defense services and benefit from the economies of scale of a specialized law firm. Everyone we spoke with said that attorneys in defender offices provide at least slightly higher quality representation, on average, than do panel attorneys.⁴⁶ Second, dedicated defender offices raise the bar for practice generally by sharing their expertise and resources, such as by conducting training, advocating for the importance of the defense function, and generally providing a model for excellence in defense representation. Defender offices also provide an opportunity for districts to shift some management functions from the court to the defender, bringing experience, consistency, and other efficiencies to panel management.

A defender office provides specific benefits for panel attorneys. Panel attorneys in districts without defender offices reported that the absence of a defender office was the greatest factor in their districts' problems with quality of representation and panel functioning. One senior panel attorney told us, "[Without a federal defender] our district is a virtual wasteland of ineffective assistance of counsel." Defenders can bring a defense perspective to the judges' management of the panel, panel attorneys reported, providing a counterpoint to the fiscal concerns that might otherwise dominate the courts' management approach. Even where the court does not formally share management duties

⁴⁵ Those we spoke with did not distinguish between districts with federal public defender organizations and those with community defender organizations. We refer, therefore, to both as defenders, without distinction.

⁴⁶ It is important to reiterate, as did many respondents, that this is only true on average; many individual panel attorneys are reported to be among the finest practitioners in their districts.

with the defender, the defender's ongoing presence in every courtroom encourages consistency in the court's panel management practices by acting as an informal watchdog for irregularities on the part of judges and panel attorneys. Panel attorneys report that the defender is their main source of assistance through, for example, formal and informal training and case conferencing. Many note that panel attorneys are disadvantaged in relation to defenders and, particularly with respect to advances in technology-based legal resources which they often are not able to afford, the disadvantages may be growing.

Not surprisingly, given the extent to which practitioners and judges express the importance of defender offices, there has been a rapid increase in new institutional providers.⁴⁷ In 1994, there were 45 federal public defender and 10 community defender offices serving a total of 65 districts. In 2002, there are 57 federal public defender and 15 community defender offices serving 81 districts. Thirteen districts do not as yet have a defender, although two of these districts have received the necessary approvals for, and are in the process of establishing, defender offices.⁴⁸ As can be seen from the above figures, 18 districts share institutional defender offices with another district, providing an opportunity, particularly for smaller districts, to gain the benefits of an institutional provider without having to support an independent office.⁴⁹

The number of cases that are assigned to the private bar in districts with defender offices is still quite large. The proportion of assignments made to panel attorneys varies with the nature of local prosecutions and, to a certain extent, the staffing of defender offices. However, it is usually around 25 percent, often as high as 35 percent, and sometimes higher, even when the panel administrator seeks to appoint the defender in all non-conflict cases.⁵⁰

⁴⁷ The Judicial Conference's 1993 report on the federal defender program recommended that the CJA be amended to require that a defender office be established in every district or combination of districts based on certain qualification criteria.

⁴⁸ Eight of the 13 districts without defenders employ a CJA resource counsel, an experienced panel attorney committed to assisting panel attorneys in training and case conferencing. The resource counsel, who is only compensated for a limited number of hours, is reported to be an asset but in no way a replacement for the resources provided by a defender office. The five districts with neither a defender nor a resource counsel are Georgia (M) and (S), Mississippi (N), North Carolina (W), and Virginia (W).

⁴⁹ Many of these shared offices join two small districts, such as Washington (E) and Idaho, or one small district with a larger one, such as New Hampshire and Massachusetts. Other shared offices join two large districts, as with New York (E) and (S).

⁵⁰ The CJA requires that private attorneys be appointed in a "substantial portion" of cases in which attorneys are provided to financially eligible persons. 18 U.S.C. §3006A(a)(3). Section VI.C. of the Model CJA Plan places that "substantial portion" at approximately 25 percent of the CJA appointments made annually throughout the district. The figures we cite derive from reports of defenders and panel administrators. The most recent national compilation, collected by the Administrative Office for 2001, indicates that, nationally, panel attorneys were assigned 43 percent of CJA representations. However, this figure includes those districts with no defender office.

Panel Administration

The CJA panel system has many aspects and managing it successfully requires a substantial commitment of resources. The administrative duties discussed in more detail in the subsections below include long-term planning, attorney selection and review, case appointments, and review of expert and investigator requests and attorney compensation vouchers. The question is, who is best suited to perform these tasks? Specifically, should there be one or more administrators to handle these tasks rather than leaving them to the individual presiding judges? If so, should the administrators work within the court, the defender office, or elsewhere?

To address the first question, the Judicial Conference, in 1997, authorized a two-year (later extended to four-year) “supervising attorney pilot project.” The project funded full-time supervising attorneys in two districts to handle a variety of administrative tasks. A third district later was separately funded by the Administrative Office. The administrators’ activities, and the reactions of judges and practitioners, were monitored and described in a report by the Federal Judicial Center.⁵¹ The report concluded that delegating administrative tasks to the supervising attorney improved many aspects of the CJA panel systems’ operations. Specifically, it noted that the supervising attorneys:

- brought consistency and fairness to attorney expense review by centralizing request processing and case budget management;
- mitigated the dangers of ex parte communications by acting as intermediaries between counsel and the court;
- increased efficiency by freeing judges from work they often did not feel best qualified to handle; and
- assured high-quality representation by coordinating panel monitoring.⁵²

Practitioners and judges in the pilot project districts, as well as those in other districts that employ administrators to handle some of the same functions, report improvement in their panel systems and considerable satisfaction with their supervising attorneys’ administrative efforts.⁵³

Virtually every district we encountered that has addressed its panel management problems in a comprehensive fashion has developed one or more administrative positions to handle these tasks. Yet while the people we spoke to all agree that delegating administrative duties to an expert administrator is beneficial, there is no consensus as to

⁵¹ Federal Judicial Center, *The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration*, April 2001.

⁵² *Ibid.* at 2-3.

⁵³ In 2002, the Judicial Conference endorsed the establishment of a supervising attorney position in all districts that would find it of value but declined to provide central funding for the position. Each of the three pilot project districts now commits local funds to retain their supervising attorneys.

where that administrator should be placed, in the court or in the defender office. Some delegate these duties to administrators in the clerk's office or elsewhere within the court; others place them with persons in the defender office. The delegation may be informal, as a custom that develops to meet local needs, or formal.⁵⁴

Court-based administrators. Those who would have the administrator function as an arm of the court argue, principally, that it is necessary in order to avoid conflicts of interest that might arise were the defender office involved in managing panel attorney matters, particularly in co-defendant cases. They note that even where the defender office takes care to isolate the administrator from all decision-makers involved in the case of the office's client, an appearance of conflict persists.⁵⁵ Others believe that a court-based administrator is more likely to gain the respect and trust of the judges, and that many judges would be uncomfortable delegating statutory duties to an administrator outside their professional control. Those districts that have sought to use an administrator principally to control fiscal management issues are inclined to place the administrator in the court.

The supervising attorney in the District of Maryland, for example, works for the court but was selected because of her experience with, and commitment to, the defense function. Her mandate is not only to bring consistency and fairness to fiscal affairs, but also to raise the quality of defense practice. She, therefore, not only reviews requests for hiring experts, but also might suggest to an attorney that an expert might be useful (and maintains curricula vitae of experts in various fields). She has also negotiated with experts for consistent fee structures to assure that panel attorneys have the same access to experts as defenders. Thus, even as she has contained costs, she has brought consistency and transparency to the compensation system, allowing attorneys to know what to expect and plan their defenses accordingly.

There is yet another benefit of her independence. Because she does not work for the defender, she can review expert or investigator expense requests of co-defendants in conflict cases that otherwise would have to be presented *ex parte* to the presiding judge. This frees panel attorneys of concerns about revealing defense strategy to the defender (whose office may represent a co-defendant), while also providing a degree of relief from the concerns about revealing strategy to the court.⁵⁶

⁵⁴ The District of Oregon, for example, spells out its delegation of authority in broad strokes in its CJA plan: "In accordance with and subject to the provisions of this Plan and further orders of the Court, authority to administer the Criminal Justice Act is assigned and delegated to the Federal Public Defender."

⁵⁵ We had no reports of actual instances of conflict stemming from administrative functions performed in a defender office. Not only did most respondents agree that the danger is solely in the appearance of conflict, they agreed that this is not a particularly serious danger in these instances.

⁵⁶ The supervising attorney submits the request to the presiding judge after her review, with a recommendation, but, generally, she need not forward all of the details of the supporting memorandum or discussion, because the judges have come to rely on her judgment.

Defender-based administrators. The principal argument for placing the administrator with the defender office centers on the belief that panel administration must be ever mindful of the defense function. Panel attorneys, and hence their clients, face administrative obstacles, such as review of compensation requests and delays in CJA appointments. The administrator must have sufficient respect for defense values and independence from the court to successfully mitigate the impact of those obstacles. It is argued that the administrator must, foremost, approach panel management from the vantage point of assuring high-quality defense representation. As this is the function of the defender office, advocates of this approach would have the administrator function as an arm of the defender.

The District of Oregon has placed broad administrative authority in the defender office, which has constructed a system of safeguards to prevent conflicts of interest. In appointing attorneys, for example, only the panel administrator, who is not involved in direct client representation, and the federal defender himself, are involved in the decision to depart from a strict rotational selection, which may happen when cases demand particular expertise.⁵⁷ Oregon's system also allows panel attorneys to bypass the administrator in the defender office and go directly to the presiding judge when the attorney is concerned about possible conflicts.

Encouraging administrator independence. When asked about these competing arguments, many advocates in both camps agreed that the ideal approach would be to create an administrative office staffed by persons knowledgeable about, and sensitive to, the defense function that is independent of both the court and the defender. This would achieve ample respect for the defense function while avoiding even the appearance of conflicts of interests. We found no examples of such an approach in practice. Yet, a number of districts, including Maryland and Oregon, have vested an administrator, whether within the court or the defender office, with a significant degree of independence.

It is important to note, as did even those with strong opinions on this issue, that the focus and character of the person selected as administrator is ultimately more important than the placement of the office. The professional qualities of the administrator, along with the degree of independence provided, are paramount in gaining the respect of both bench and bar. Everyone we spoke with who had worked with a supervising attorney or similar administrator concurred that the position, if staffed with an independent professional with defense experience, is a singular source of improvement to the functioning of a panel system that they would recommend every district, or group of smaller districts, employ.⁵⁸

⁵⁷ When the defender himself is involved in the case, or when he is away, this duty devolves to his deputy.

⁵⁸ Many interviewees stressed the cost-effectiveness of utilizing a full-time professional administrator. They pointed to savings in overall expert, investigator, and attorney costs (discussed more fully in the

Panel Size

“Before we took panel management seriously, there were 300 attorneys on the panel, 75 of whom were dead. Now we have 60, all quite alive.” This sort of comment was typical of those made by interviewees in districts that had made significant efforts to improve panel management. Limiting panel size was widely reported as one of the easier ways to improve representation. The most obvious reason for this is that districts with limited slots can be more selective. Also, the smaller the panel, the greater number of federal criminal cases each lawyer will be assigned in a given year. This gives attorneys incentive to invest in the tools necessary to specialize, such as research resources, training, and contacts with specialized experts, investigators, and paralegals.⁵⁹

Careful attention to panel quality, through limiting size, recruiting top practitioners, and other means, is a self-sustaining phenomenon. As the quality of the panel improves, excellent lawyers are more inclined to associate themselves with the panel, further increasing its quality. Similarly, as the panel’s quality improves, the argument goes, attorneys can trade on the panel’s prestige to improve representation of panel clients: judges may be more inclined to fund a panel lawyer’s request for expenditures, for example, when the lawyer is a member of a well-respected, carefully limited panel.

Limiting the size of a panel is not a simple matter, however. Panel managers must constantly seek to balance the desire to improve panel quality by limiting the number of attorneys with the need for a sufficient supply of lawyers able to take assignments on short notice. Yet many districts have found they could cut the size of their panels by half or more and still maintain adequate availability. The Western District of Michigan reduced its panel from 150 to 80 attorneys; the Western District of New York from 400 to 125; and Maryland from 400 to 100.⁶⁰ In districts with a small defense bar, it may be very difficult to select only the most highly qualified attorneys while still assuring sufficient coverage, but people in a few smaller districts report having been able to assure panel attorneys eight to 10 assignments per year while maintaining high standards for panel quality.⁶¹

section on Compensation Issues), as well as the non-quantifiable savings in judicial resources. Maryland judges estimate that the savings are at least double the \$150,000 total annual cost of the position.

⁵⁹ Practitioners, particularly, cited the need to assure a sizable number of annual assignments to remain current in federal criminal law and practice and to develop a working relationship with judges and prosecutors. Other practitioners, particularly those able to command fees well beyond CJA rates and with an extensive retained federal criminal practice, reported the opposite concern: while they felt a duty to be a part of the panel, they sought to limit their annual assignments because of time and money constraints. We address approaches to this problem in *The Appointment Process*, below.

⁶⁰ We do not have data on the relation between the number of cases in a district and the size of the district’s panel. This might be an interesting area for further study.

⁶¹ Districts with a large qualified defense bar often have the opposite “problem”: too many excellent lawyers willing to serve on the panel. The San Francisco/Oakland division of the Northern District of California, for example, applies a “fallow year” rule by which attorneys may not reapply to the panel for

Panel Selection and Review

Judges and practitioners who have been involved in revamping their districts' panel practices indicate that a successful panel system depends, above all else, on a commitment to excellence in the membership of the panel itself. Beyond controlling the size of the panel, districts use several additional techniques for assuring panel quality. In the following sections, we discuss the processes by which districts select and review their panel members and the quality-based requirements districts impose for admission to the panel and continued membership.

The selection process.

Panel selection and review committees. As recommended by the Model Plan, most districts employ a panel selection committee to review applications for panel membership.⁶² Often, as in Arizona and the Eastern District of Tennessee, there are distinct panels for a district's distinct geographical divisions, with a panel selection committee for each to assure familiarity with the local panel's applicant pool. In the most comprehensive schemes, as in Massachusetts and the Western District of Oklahoma, the same committee that advises the court on changes to the CJA plan and practices is also charged with selecting new panel members and reviewing attorneys during their tenure on the panel. One or more members of this committee may also function as the panel's administrator, as in Maryland. Interviewees praised such comprehensive schemes. They noted that attorney performance review should go hand-in-hand with the district's plans and policies, and that including administrators on the committee is key to the review process because the administrators' duties give them consistent contact with at least some aspects of panel members' performance.

A number of those we interviewed, including some judges, stressed the importance of having the committee composed of defense lawyers, rather than judges, as they are in the best position to evaluate others in the same field. It is not necessary to have court representation on the committee, it was noted, since the court's duty to ratify any panel membership recommendation the committee makes gives it sufficient input. Thus, panel selection and ongoing review in the District of Massachusetts is conducted by the CJA Board, consisting of the federal defender and 10 geographically diverse attorneys from within and outside the panel. In the Southern District of New York, review of applications for the panel is conducted by the Panel Review Committee consisting of the Community Defender and six local attorneys.

one year after serving a three-year term, so as to assure that the panel benefits from fresh talent, while maintaining high standards.

⁶² Model Panel Plan, §I.B (Committee comment).

Including state court practitioners and, on occasion, state court judges on the committee is another reportedly successful strategy, as applicants to the CJA panel often come from the ranks of the state court bar. In Oregon, which draws heavily from a reputedly excellent local defense bar, the Panel Screening Committee is made up of the Federal Defender, whose office fulfills many administrative duties in the district, three senior panel attorneys, a supervisor in a local public defender office, and a state court judge. Similarly, in Arizona, separate panel selection committees in the district's two geographical divisions consist of the federal defender, a local state court judge, and attorneys from various bar associations, which generally include criminal defense attorneys not on the panel.

Recruitment. Recruitment is another tool used to elevate panel quality. In Oregon, for example, the federal defender and some judges have invited respected local practitioners to join the panel. Oregon's panel reportedly includes all but a very few of the best federal criminal practitioners, with the exceptions being white collar crime specialists whose specialty infrequently appears among the assigned cases.

Panel review. Recognizing that some under-qualified attorneys may have been admitted or that previously qualified attorneys may no longer be qualified, many districts conduct periodic reviews of all panel members. Many apply a three-year term, as urged by the Model Plan, to assure that all members are reviewed regularly. Some panel selection committee members explained that the use of terms also facilitates panel improvement because it is politically more feasible to decline to reappoint a panel member than to simply remove him or her. Among the factors cited that may be considered in the review process are an attorney's investigative and litigation skills, rapport with clients, strength in procedural and substantive legal knowledge and analysis, and administrative matters such as billing accuracy.

Maryland's system of review is quite refined: the CJA Committee reviews one-third of the panel members each year in addition to its ongoing quality monitoring. The supervising attorney, who serves on the committee, solicits and collects comments from the presiding judge within one week of the close of every case that involves a panel attorney. If someone brings a quality issue to the committee's attention, it will be addressed by the committee between formal reviews. Similarly, in the Western District of Oklahoma, the Panel Selection Committee annually prepares and submits a panel activity report to the chief judge, setting out any quality concerns about panel members. Annual reviews are seen as an element in many districts of what is described as a proactive, rather than reactive, approach to panel review.

Eligibility requirements. It is generally agreed that formal and explicit eligibility requirements help to assure a high-quality panel while also bringing fairness to the

system by publicly enumerating the selection criteria. It is also often noted, however, that there needs to be some flexibility in the formal requirements to assure the broadest range of qualified applicants.

Everyone we spoke with agreed that any meaningful set of eligibility requirements must assure, at a minimum, the selection of only those candidates with an excellent grounding in federal criminal law and practice, including the Federal Sentencing Guidelines. Most said that criminal trial experience, preferably in federal court, was also critical. The District of Oregon, for example, requires a minimum of four years active criminal trial experience, but it will accept in substitution other relevant experience, such as experience in sophisticated federal civil litigation.⁶³ Many interviewees told us that the eligibility requirements should not be too rigorous lest they act as a bar to non-traditional but highly qualified applicants. Many fine applicants, they said, might not have federal court experience or may be experienced federal civil or appellate litigators with little criminal trial experience. They urged a careful but flexible review regime.

As a supplement to its panel membership requirements, Oregon requires all new members without substantial federal criminal experience to participate in an apprenticeship program. As an orientation to federal practice, new members are required to work with either a senior federal defender or panel attorney. They must continue working closely with the mentor in all aspects of case preparation in the new member's first substantial case. Many districts impose formal requirements for continued panel membership in the form of annual trainings, a subject we discuss in the next section.

Training

Because of the breadth and complexity of federal criminal practice, it is widely recognized that effective representation requires specialized ongoing training for even the most seasoned federal practitioner. Persons in the districts we consulted generally agree that there ought to be two training regimens: basic federal criminal training for newer members and, for all members, advanced topics training covering such areas as electronic evidence presentation and working with forensic experts, and including frequent federal law updates. As most defender offices provide training to panel members, training is one area where the absence of a defender office was cited by panel attorneys as a particular deficit. Panel attorneys in such districts said they must largely rely on available continuing legal education (CLE) courses that rarely provide the necessary detail or focus on federal criminal practice.

There is less agreement about whether such training should be compulsory, however, with a slim majority of those with whom we spoke favoring it. Some contend that the best practitioners stay abreast of current law and practice on their own, and that senior panel members would leave the panel rather than be required to participate in training

⁶³ See the Written Plans section, above, for other examples.

programs. Others described systems that allowed the most experienced practitioners to satisfy training requirements by participating as training instructors or by attending only the most advanced topic sessions.

A number of districts have devised ways to encourage participation in non-mandatory trainings. For example, the District of Oregon, which has no required training beyond its mandatory apprenticeship program for new attorneys, offers, through the federal defender, approximately six to eight lunchtime or half-day programs each year.⁶⁴ The district provides an incentive for attendance at its training programs: non-attendance is noted in the district's periodic reviews of panel members. Other districts encourage participation in optional training by linking attendance to the frequency of case appointments or by having the chief judge sponsor training programs and send out the invitations. The latter was reported in one district to have resulted in a doubling of panel attendance.

A number of panel attorneys noted that they would be happy to fulfill a training requirement were there a greater variety of topic choices, particularly on advanced areas of federal law and practice. The District of Maryland, which requires attendance at one of its two annual half-day training programs, devotes one to advanced practice topics.

Other reported good practices geared to increasing the ease and usefulness of training resources include the following: providing training sessions in locations that are accessible to attorneys who live far from the district's courthouses; recording sessions on video and maintaining a video library that panel members can access at their convenience; maintaining brief banks and disseminating e-mail newsletters of highlights in current law and practice; and maintaining defender office web sites that include training materials and resources.⁶⁵

Panel Structure

We now discuss two methods for structuring CJA panel systems that appear to promote high-quality representation. The first divides panels into tiers to account for the special needs of certain cases or clients or the needs and abilities of some attorneys. The second creates a training panel to assist in developing the qualifications of aspiring panel attorneys.

Tiered panels. The use of tiers to assure that the most highly qualified attorneys are selected for appropriate cases is widely reported to be a good practice. Perhaps the most common use of tiered panels is to match appropriately qualified attorneys to those cases

⁶⁴ Also, the Oregon bar requires 45 hours of CLE every three years. Many districts have arranged to have their training programs accredited to satisfy state CLE requirements, further encouraging attendance.

⁶⁵ The Defender Services Division provides print and on-line resources for training and other areas of assistance to panel attorneys and defenders. See the Division's newsletter, *The Defender's Advocate*, and its website, www.fd.org.

requiring special skills. For example, many districts have tiers of attorneys qualified to furnish representation in federal capital trials or federal capital habeas cases. The Western District of Oklahoma, for example, created a capital habeas panel, which is reported to have improved the quality and availability of attorneys qualified to handle these cases. The panel also has a separate selection committee and the district has delegated to a single magistrate judge the responsibility for attorney appointments, expense budgeting, and case management deadlines for all capital habeas cases assigned to the capital habeas panel.⁶⁶

Tiered panels are also used to match appropriately qualified attorneys to those defendants with special needs. Regardless of the type of case, some defendants, particularly those with mental illnesses, require attorneys with the specialized experience and understanding to appropriately assist them. Some districts also provide an informal tier of attorneys who have been most successful in gaining the trust of those defendants who have sought to have many attorneys dismissed, or otherwise have difficulty working with their attorneys. A number of districts, for example Arizona, maintain lists of bilingual attorneys whom they seek to pair with Spanish-speaking clients.

Some districts have created tiers specifically to try to retain top-quality senior attorneys on the panel. Because of the complexity and size of some federal criminal cases, panel attorneys may be called upon to commit many months, sometimes even years, to a single assignment. In the District of Maryland, for example, appointments are made with consideration for whether a trial of the case would likely last less than or more than two weeks. It is reported that this consideration has allowed Maryland's panel to retain some of its top practitioners, who are often unable to commit the necessary time to lengthy cases.

Oregon, on the other hand, found that it had a number of top-quality senior attorneys who were unable to take the normal complement of assigned cases but were willing—and exceptionally qualified—to take complex and lengthy assignments. In response, it created an emeritus panel through which attorneys who have been on the regular panel for seven years are eligible to be considered emeriti if they wish to limit the number of their assignments but remain available for specialized work. Similarly, the District of Minnesota accommodates those considered premier members of the private criminal defense bar by allowing them to receive a minimal number of assignments in exchange for their agreeing to work on the occasional particularly difficult case.

Another common use of tiers is to divide the panel attorneys according to their level of experience, with the goal of matching experience level to case difficulty. Minnesota, for example, has a tier for less experienced attorneys who are not deemed ready to handle “non-routine” cases. These attorneys are reportedly appointed in the most straightforward sole defendant cases or to a co-defendant when experienced attorneys represent the

⁶⁶ In general, we do not discuss practices associated with the appointment of counsel in capital cases as they involve complex issues beyond the scope of this study.

“lead” co-defendant. The Western District of Michigan also uses tiers to distinguish attorneys by their level of experience.

While experience-level tiers are reported to have helped these two districts improve panel representation on balance by pairing defendants facing the most serious charges with the best qualified attorneys, the practice is criticized by some judges and practitioners elsewhere. They argue that it is inappropriate to sanction a system that allows any but the best available attorneys to represent every defendant. Instead, they would have less experienced attorneys remain on a training panel (see below) prior to admitting them to the regular CJA panel.⁶⁷ They concede, however, that as an interim measure, experience-level tiers may be appropriate in districts in the early stages of trying to improve panel quality.

Training panels. Training panels are distinct from any tier system a district may employ. They are designed for attorneys who are not yet members of the CJA panel and therefore are ineligible to receive panel assignments.⁶⁸ Many districts, particularly those with few attorneys qualified to provide high-quality federal criminal representation, use training panels to help less experienced attorneys gain the skills necessary to begin such practice. Generally, any member of the bar can join a training panel, but doing so is explicitly not a guarantee to future panel membership. Training panel members must attend training sessions and prepare on their own. The core of the regimen, however, is an apprenticeship with a seasoned panel attorney. Districts with high standards for panel membership often require lengthy participation on a training panel. In the Western District of Oklahoma, for example, where there are currently 49 attorneys on the regular CJA panel, there are 20 attorneys on the training panel. Most are experienced state practitioners who lack federal experience. It is understood they may remain on the training panel indefinitely, although some have reportedly advanced to the regular panel in six months. During the training process, they are expected to handle most aspects of case preparation in two substantial cases, preferably trials, under the guidance of an experienced member of the panel.⁶⁹

The Appointment Process

In the course of our interviews, two significant elements of a successful panel appointment process emerged. First, attorneys must be appointed to cases in as fair a

⁶⁷ This debate is reflected in the commentary in the Model Panel Plan at §I.C. (Committee comment).

⁶⁸ CJA compensation is generally not available to training panel members. Some have suggested that reduced compensation should be available to further encourage training panel participation and the recruitment of high-quality candidates for panel membership.

⁶⁹ Some noted the decreasing number of cases that go to trial as a reason they do not have training panels, or underutilize those that exist. Others note that the training panels should be geared to current practice and should not, therefore, be linked principally to trial training.

manner as possible, with due consideration for matching attorneys with clients. Second, systems must be devised to provide for the earliest possible appointment of attorneys.

Method of appointment. Panel attorneys report that a district will be able to attract and maintain better attorneys only if it is scrupulously fair in the appointment process, avoiding the perception or practice of appointing attorneys to individual cases based on friendship or how little case preparation the attorney will do, and thus bill for. Practitioners and judges we spoke with suggested that, but for the occasional case that is unusually lengthy or poses difficult special needs, appointments should be made according to a rotational system.⁷⁰ Other steps that were suggested to ensure and increase fairness include making assignment lists public and accounting for the length, as well as the number, of appointments, in maintaining the rotational list. Panel attorneys report that when judges and the judicial system treat them fairly, they are more likely to reciprocate by, for example, making themselves available for appointments or working with the court or administrator to resolve compensation and other disputes. And a rotational appointment system is not only fair to attorneys, it is fair to defendants as a whole, as all panel attorneys will gain roughly equal experience through an equal number of appointments.

Another approach to bringing fairness and other efficiencies to the appointment process is to shift the appointment duty from presiding judges to a central administrator. Judges and practitioners alike report that even when judges scrupulously use their appointment discretion to match the best available attorney to each case, the process can have a chilling effect on the attorney chosen and a negative impact on the panel's morale as a whole. At least one judge told us that he feels it is inappropriate to appoint the attorney in a case on which the judge sits; practitioners note that they do not want to be in a position in which there is any sense that they owe a "debt" to the presiding judge.

Those most satisfied with their appointment process urge that appointment duties be vested in a professional administrator who also manages other aspects of the panel system. Specifically, the District of Maryland has shifted the administration of felony appointments from judges to the supervising attorney, who maintains an ongoing and detailed list of assignments.⁷¹ Because of her knowledge of the panel membership gained from involvement with panel selection and review, and because of her knowledge of criminal defense practice, this administrator can, when appropriate (and in a limited number of cases), deviate from the strict rotation to better match attorneys and cases. And she can do so without creating the impression of a conflict of interest, which might arise were the presiding judge making the same decisions.

⁷⁰ See the Model Plan's provisions for the method of appointment, Model Panel Plan, §II.B. See also *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-2.3.

⁷¹ As a formal matter, the supervising attorney recommends a particular assignment to the presiding judge, who retains the statutory duty to appoint counsel.

Timeliness of appointments. In districts where the quality of panel attorneys is reportedly on par with that of the defenders, the greatest deficit facing defendants assigned to panel attorneys is reported to be the delay that often occurs in appointing a panel attorney.⁷² One defender candidly noted that clients of panel attorneys are often at a disadvantage compared to clients of defenders, who are usually assigned counsel at an earlier point. Early appointment assures an edge in developing a quick bail package to secure the client's release, or it may give a leg up in the race to cooperate with the prosecutor, assuring the most favorable disposition among co-defendants. It may also avoid the situation where defendants make damaging statements to pre-trial services officers, without the benefit of counsel.⁷³

A number of steps have been taken to ensure the timely appointment of counsel to all defendants. Some districts have successfully encouraged law enforcement and prosecutorial agencies to notify the court or appointment administrator as early as possible when a person is in custody or otherwise in need of counsel. Moreover, the U.S. Attorney's Office, in particular, must make an initial early determination of whether the defender will have a conflict in representing the defendant so that arrangements can begin to assure the availability of a panel attorney.⁷⁴ Thus, in the Northern District of California and several other districts, target letters contain the name and telephone number of the defender office, or appointment administrator, so that the prospective defendant can be assigned counsel before appearing in court.⁷⁵ In Oregon, a panel attorney who has been contacted by a target can arrange to be appointed by the appointment administrator before the person is charged. In a number of districts, prosecutors notify the court or administrator of impending multi-defendant cases so that the availability of counsel can be arranged.

Many of those we interviewed said that law enforcement personnel must be directed to communicate more quickly with the court or appointment administrator when they have a person in custody. In the Western District of Oklahoma, for example, the court

⁷² No one we spoke to was able to specify what constitutes timely appointment, for it differs with context and practice. Many note that, at the least, attorneys must be made available before any appearance in court, before any pretrial services interview, and at no later time than defender clients are appointed counsel.

⁷³ One practice criticized by many, though not all, defenders and panel attorneys is the interim appointment of a defender to represent a conflict co-defendant at the initial appearance until a panel attorney is notified and available to undertake the representation, usually for the detention hearing. To avoid learning information that might be of use to the defender in representing another individual, as interim counsel the defender must strictly limit questioning, thus limiting the effectiveness of the representation. The practice is also seen as an insufficient substitute for meaningful efforts at assuring parity for defendants who are assigned panel attorneys.

⁷⁴ In many, perhaps most, cases this information is or can be known to the U.S. Attorney well in advance of an indictment or arrest, such as when an arrest of multiple defendants who are likely to meet financial eligibility requirements is planned.

⁷⁵ A target letter is a notification by the United States Attorney's Office that it considers the recipient to be a target of a grand jury investigation. It is generally sent in connection with that person's scheduled appearance as a witness before the grand jury.

directs the FBI to produce a detainee for appointment of counsel by noon on the day of a morning arrest, or by 8:00 a.m. the next day if an arrest occurs in the afternoon. This has helped the district assure timely appointment of counsel for both defender and panel attorney clients.

Duty-day system. A few larger-volume districts employ a duty-day system to assure timely appointments. A duty-day system places panel attorneys on call and requires them to be available for a day or a week, just as if they were with the defender office. While this strategy may be the best way to assure timeliness, it has been successful only in the largest districts, such as the Eastern and Southern Districts of New York and the Southern District of Florida. In the Central District of California, where the supervising attorney recently instituted a duty-day system, there is some dissatisfaction among panel members as duty attorneys may either be swamped with cases or devote the day and come away with none.

It was suggested that a modified duty-day system could address some of the complaints by carefully adjusting the rotational list to account for the number and length of assignments given to the duty attorneys. An attorney who received no appointments would go to the top of the list for other appointments, such as representing a grand jury witness or recipient of a target letter, which do not require expending further uncompensated time on duty-day service. In widely dispersed, lower-volume districts a duty-day system may be modified to notify attorneys several weeks in advance of their reaching the top of the rotation and obliging them to be available, but only if called.

Compensation Issues

Judges and lawyers alike report that compensation issues, even more than the appointment process, expose the awkward, conflicting nature of the relationship between panel attorneys and the judges who effectively hire them. Unlike defender office attorneys, who are subject only to the fiscal constraints of their organization, panel attorneys are closely regulated by judges in every aspect of their representation. This arrangement poses potential dangers that districts must address if they are to assure high-quality defense services.⁷⁶

Overcoming compensation disputes is often cited as an important goal of a panel's compensation system. A few districts, such as the Western District of New York and the

⁷⁶ Although we have no data on the extent of "voucher cutting," some practitioners at the trial level report that a small number of judges within their districts deny or reduce funding requests frequently, with negative effects on the quality of defense practice. Frequent and drastic reductions to attorneys' requests for compensation in appellate cases is reported by practitioners to be a more serious problem, causing many qualified attorneys to avoid such work. In some districts, attorneys report not being able to meet their costs, let alone receive salary for the hours of work performed in appellate cases. In others, where the rules require continuity of counsel from district to appellate court, the near certainty of losing money on appeals has caused some to avoid the trial panel.

Western District of Washington, provide for formal review of compensation denials or reductions. Practitioners report the lack of a review procedure as a significant disincentive to panel practice. Practitioners in districts that grant a right of independent review, or at least meaningful notice and opportunity to be heard by the presiding judge, report improved practice because of heightened respect between bench and bar and greater fairness and consistency in panel attorney compensation. A number of respondents have urged the creation of a central, perhaps national, review mechanism for voucher denials or reductions, arguing that to gain consistency within and among districts, national review and oversight is required.

The principal focus of many districts' efforts to better structure their compensation regimes in this and other areas is to relieve the presiding judge of many direct managerial functions. Somewhat more than half of the judges we spoke to stated candidly that they were not fully qualified to make decisions about certain matters such as when an expert should be retained, what is a reasonable fee for their services, or how many hours are reasonable to spend on investigations or plea negotiations. Moreover, even when judges are fully qualified to make these decisions, some judges said they feel it inappropriate to do so as presiding judge in the case because of the *ex parte* nature of these contacts and the dangers inherent in the court intruding into the strategic planning of the defense. Some expressed dissatisfaction with a system that requires panel attorneys to make *ex parte* requests to the court to support funding requests, in the process possibly divulging information about defense strategy. A few interviewees stated that they sought to have a panel of attorneys of such quality that it would generally be inappropriate to second guess their spending decisions and compensation requests.⁷⁷ Some judges also stated that their time is simply better spent on other matters.

One method for addressing these issues is to shift responsibility for compensation decisions to a professional administrator with extensive defense experience.⁷⁸ Those who have experience with this method report that it has yielded great improvements in the speed, fairness, and consistency of panel attorney compensation. By serving as a single, expert intermediary between the individual presiding judge and panel attorneys, the administrator promotes fairness and consistency and mitigates conflicts that may arise with judicial contacts.⁷⁹ The administrator may not have as much specific information

⁷⁷ The plan for the Middle District of Pennsylvania, for example, states: "It is the general policy of the Middle District that vouchers shall not be reduced."

⁷⁸ Those we interviewed in districts employing such administrators stressed the importance of defense experience. This is because the administrator had to be able to discern the reasonableness of defense strategies and concomitant expenditures and because gaining the trust of the panel members is so important. Other districts have employed administrators with other criminal law experience and even non-lawyers such as experts in accounting and management.

⁷⁹ One judge explained that without the benefit of a professional administrator, judges are required to make judgments about fees in total isolation, without the benefit of the adversary process upon which they usually rely. It is not enough, he argued further, for a judge to base fee determinations on only what occurs in court, as that generally provides only a very limited view into the defense attorney's efforts.

about a particular case as the presiding judge does, but has far more information about prevailing rates, the frequency of hiring experts in various types of cases, and the practical aspects of defense representation. And because the administrator's compensation decisions are preliminary and prospective, when the dispute cannot be resolved through discussion with the administrator the attorney has the right of review by the presiding judge before a final decision is reached.⁸⁰

The District of Maryland has built its compensation system around an independent, professional supervising attorney acting as administrator. Maryland panel attorneys seeking to hire experts or investigators present requests to the supervising attorney, rather than to the judge *ex parte*. The supervising attorney reviews the request in the light of the particular case and the practice in the district generally. If she finds the request reasonable, she forwards it to the presiding judge with a recommendation to approve it; if she does not, she will discuss her reservations with the attorney. If they cannot agree on a request to be submitted to the judge, the supervising attorney submits the request with a recommendation to disapprove any part she disagrees with.⁸¹ In all cases, however, the supervising attorney serves as a filter for potentially compromising communications to the judge regarding defense strategy, because she can have an in-depth discussion with the attorney but edit as necessary, with the attorney's concurrence, the requests she forwards to the court. When a recommended request exceeds the statutory maximum the supervising attorney prepares a memorandum in support of the request for the presiding judge's consideration for submission to the chief judge of the court of appeals (or designee).

Another way in which districts can reduce costs and promote the quality of representation is by having an administrator act as a liaison between panel attorneys and experts and investigators. Again, Maryland's supervising attorney maintains a roster of available experts and their qualifications, and also has been able to negotiate lower rates for their services, gaining for panel attorneys some of the economies of scale enjoyed by

⁸⁰ In most districts in which voucher review duties are delegated, the court retains final authority; the administrator reviews the voucher for technical accuracy and reasonableness and submits a recommendation to the presiding judge. Oregon uses such a system. In other districts, however, such as Maryland, full review authority has been delegated to the administrator in cases in which the request does not exceed the case compensation maximum. The administrator makes a recommendation in cases in which the request exceeds the maximum. The CJA requires the chief judge of the court of appeals (or active circuit judge designated by the chief judge) to review claims for voucher payments beyond case compensation maximums, 18 U.S.C. §3006A(d)(3), and claims for expert and investigative services beyond per person maximums, 18 U.S.C. §3006A(e)(3).

⁸¹ A similar procedure is used to review vouchers for attorney fees and expenses, with final approval authority vested in the supervising attorney for vouchers below the case compensation maximums. In capital and other complex cases, the supervising attorney works with panel attorneys at the outset of a case to agree on a budget, providing a degree of financial and case-planning certainty to the court and the attorney.

defender offices. And she assists the court in setting and updating presumptive rates for experts and investigators.⁸²

One further concern raised by many and formally addressed by a number of districts' plans and practices is the timeliness of payment for compensation claims.⁸³ Thirty days for full payment from the date of submission of the voucher was urged as an outside limit by attorneys with whom we spoke.⁸⁴

⁸² The successes in Maryland have come to the attention of judges and practitioners in other Fourth Circuit districts. The supervising attorney has begun to informally assist attorneys in neighboring districts in preparing memoranda explaining the need for excess compensation, where appropriate. These cross-district efforts also point out the viability, particularly for smaller districts or perhaps even a small circuit, of sharing the services of a supervising attorney or other professional administrator.

⁸³ Some attorneys reported having to borrow money to meet office overhead bills while waiting many months for payment. This is another area that seems amenable to national reform.

⁸⁴ Paragraph 2.21B of the CJA Guidelines sets a 30-day limit, absent extraordinary circumstances.

State Court Good Practices

Like their federal counterparts, state courts are bound by the Sixth Amendment to provide counsel for all financially eligible defendants facing non-petty charges. The American Bar Association recommends that each state devise a legal representation plan that involves a public defender organization and active participation of the private bar in a coordinated counsel program.⁸⁵ Although every state makes some use of assigned private counsel to represent indigent defendants, few jurisdictions have a coordinated assigned counsel system resembling those outlined in the federal districts' CJA plans. Here we note a few state models that are worth examining as a source of potential good practices for the federal system.⁸⁶

Panel Selection and Review

Massachusetts has put in place a system of professional administrators who work independently of the court and the defender to manage aspects of the assigned counsel system, principally panel selection and review. The state uses a combination of public defender organizations and assigned private attorneys, known as bar advocates, of which there are approximately 2,400 statewide. Each of the 12 regional bar advocate programs employs full-time or part-time staff attorneys who are charged with supervising the court-appointed bar advocates and evaluating new attorneys for admission to the panels. These staff attorneys conduct performance evaluations, investigate complaints, and provide training for the bar advocates.

Additionally, Massachusetts uses a centralized automated auditing and monitoring system to increase the level of accountability for bar advocates by tracking each attorney's billing history. The state uses this information to ensure that work is equitably distributed among panel members and to detect record-keeping errors and fraud. State officials report that since the inception of this system in 1991 the quality and accountability of the bar advocate system has improved.

Training

A number of jurisdictions have established comprehensive and high-quality training regimes that are cited as having raised the local standard of practice considerably. The Public Defender Service for the District of Columbia (PDS), an independent agency of

⁸⁵ *ABA Standards for Criminal Justice, Providing Defense Services*, Standard 5-1. The ABA suggests that multi-jurisdiction defender organizations be formed in rural areas that do not have a sufficient workload and/or population to support a full-time organization.

⁸⁶ This section discusses state models that are frequently cited in academic literature and identified by CJA attorneys and public policy advocates as promoting a high-quality practice and efficiency. Brief phone interviews were conducted with assigned counsel representatives in each state reviewed in this section. The examples here are not exhaustive; they are intended to provide a glimpse of the variety and innovation of coordinated assigned counsel systems and practices on the state level.

the D.C. government that acts as the primary defender in the D.C. courts, is responsible for administering the assignment procedure for attorneys who receive appointments under the Criminal Justice Act of the District of Columbia (CJA attorneys).⁸⁷ All new CJA attorneys are required to attend an orientation session, held weekly, and to participate in a five-day training session offered every other month by PDS. PDS also provides a year-round Criminal Defender Training Program specifically for CJA attorneys. The 2002 summer series consisted of 12 seminars covering issues in criminal procedure (“Handling Competency Issues Competently” and “Strategies for Requesting Discovery”), criminal practice (“The Ins and Outs of Witness Representation in D.C. Superior Court” and “Cross-Examining Police Officers”), and recent developments (“Understanding and Challenging DNA Evidence,” “Direction and Expectations for the Newly Certified CJA Investigators,” and “Juvenile Dispositions and the New Family Court”). Full-day advanced training courses on specific topics of interest are also offered.

Compensation Issues

Massachusetts has instituted notable practices to ensure that attorneys are compensated promptly and efficiently. For instance, uncomplicated bills for legal services up to \$350 are processed through an automated telephone system, and attorneys representing defendants in cases that require repeat appearances or that take a long time to conclude are permitted to bill quarterly, rather than at the conclusion of the case. Massachusetts also employs an administrative appeals process that allows attorneys disputing a voucher reduction to appear before a state review subcommittee. Absent an appeal, there is a statutory deadline of 30 days for the state to pay after a voucher is submitted.

Some jurisdictions use communication technology to make compensation systems faster and more efficient. Colorado’s state defender agency is responsible for setting hourly compensation rates for assigned counsel services, reviewing vouchers, and compensating assigned counsel.⁸⁸ The agency maintains a secure web site where payment requests may be submitted at any time. All forms for general reimbursement, transcription fees, travel expenses, and expert and investigative services are downloadable and may be submitted via the web site. Prompt payment and accessible services are intended to attract assigned counsel who will provide the highest quality representation.

⁸⁷ Each court day, the CJA office processes the list of attorneys who call in for assignments and posts assignments made for new cases. Assignments are made by alphabetical rotation from a list of CJA attorneys who have volunteered to accept assignments on that day.

⁸⁸ Colorado also uses non-technological efficiencies, such as negotiating reduced rates for lodging and photocopying for assigned counsel. The services are a particularly valuable resource for attorneys who handle large and complex cases, which often require investigator and witness travel and greater support services than small firms or private practitioners are able to otherwise afford.

Concluding Themes

An overarching theme arising in many of our more detailed discussions with attorneys and judges about good practices in panel attorney systems can be paraphrased as follows: one size does not fit all. Many cautioned against importing, wholesale, what works in one district into another. On the other hand, many urged that every district had much to gain from the successes of others, and that they should not be dissuaded from adapting models from disparate districts. We are hopeful, then, that anyone charged with overseeing a panel system will find in this report a helpful menu of good practices to consider in developing the most effective system for a particular district.

The other significant theme, which has not yet been discussed because it defies categorization, was raised in answer to our question: “Why do you think things are working well in your district?” With remarkable consistency, people who felt their panel systems were functioning well told us some version of the following: “It seems to be because all parties to the process here, notably the judges, hold the defense function in high regard. They believe it is their first duty to assure that every defendant in this courthouse is treated fairly and has the resources necessary to hold their own in the struggle for justice. They respect what panel attorneys do and seek to equip them with the tools to do it. And, on the other hand, they expect excellence in return from the attorneys on the panel.” Commitment to the defense function appears to be a necessary, if not sufficient, condition for excellence in a district’s panel system.

We hope not to dishearten by concluding with a theme that defies categorization or easy prescription. Those who alluded to the above also expressed that panel excellence evolved through a process, that small improvements had often encouraged more and bigger improvements, that meaningful change need not come in a single stroke. We hope to have provided some examples to assist in this process.

Suggestions for Further Study

As its title indicates, this report is preliminary rather than conclusive. Each of the good practices that we have identified is amenable to further study. One might look more closely at the breadth of a certain practice: how often it is applied and to what effect. One might also look further at what other good practices have been developed to address the needs identified. Further, one might develop and implement, locally or nationally, practical models based on one or more of the identified good practices. The following are some suggestions of areas for further study and implementation that arise from this report.

Attorney Quality Assessment

There is little dispute that a successful panel system depends to a significant degree on the quality of the attorneys on the panel. But what does it mean to be a federal criminal defense attorney of high quality? What are the appropriate criteria? How do we then employ the criteria to attract and select high-quality attorneys? How do we increase quality among the applicant pool and present membership of a panel? To what extent should judges, panel attorneys, defenders, and other defense attorneys not on the panel develop criteria for, and conduct assessments of, attorney quality? What voice should be given to the users of attorney services—the defendants—for whom attorney quality is most critical? What forms of training, such as training panels, are most effective at bringing new panel members to the highest levels of quality?

This study only scratched the surface of these issues. Developing and implementing criteria for attracting and selecting high-quality panel attorneys is, therefore, an important area for further study. Opportunities for meaningful study in this area include:

- surveying existing federal and state systems, and the judges and attorneys working within them, as well as the legal and social science literature, to identify the most successful quality assessment and implementation tools;
- identifying barriers to attracting high-quality attorneys for panel membership and methods to overcome those barriers;
- developing a means for eliciting the views of defendants regarding attorney quality, both generally—to understand what quality factors are most important to them—and also to implement one form of an ongoing attorney quality assessment tool;
- honing attorney selection and review criteria, and training regimens, as means of assuring consistently high-quality panel membership;
- working directly with a district or districts to implement attorney quality enhancement strategies;

- applying what we have learned about attorney quality assessment in panel systems to defender organizations, to assist defenders in improving their attorney quality.

Performance Measurement

Assessing the quality of attorney representations also involves measuring more broadly the performance of a panel system. Our study focused on reported good practices, generally in districts self-identified as performing well, but we also spoke with defenders and panel representatives in districts that they identified as performing poorly. Yet, it was difficult to tell whether the two groups could be meaningfully compared in any broad sense because of a dearth of objective criteria for performance quality. What does it mean for panel attorneys and panel systems to perform well? Can one simply look at conviction rates and sentencing data or do these, as we suspect, depend too much on case-specific variables? What collateral consequences beyond the disposition of the criminal case need to be included in meaningful performance measurement? What does it mean for the non-attorney aspects of a panel system to perform well? What weight should be given to cost efficiency versus the quality of justice obtained, and how should the latter be measured? What weight should one give to each of the elements of a panel system: the timeliness of appointment, the efficient management of compensation matters, and the degree of resource efficiency in the court, defender office and among the panel? How important is the client's sense of satisfaction with the system's and attorney's performance?

These questions suggest a fertile and constructive area of further study which would seek to develop and implement criteria for measuring the performance of panel attorneys and entire panel systems with the goal of improving that performance. Some aspects of work in this area could also be relevant to measuring defender office performance.

Administrator/Supervising Attorney Systems

While this study focused on districts that employ supervising attorneys or other administrators to improve the functioning of their panel systems, there is ample room for further study in this area. One might look to the efforts in other districts and in state systems to identify further good practices advanced by the use of a professional administrator. One could analyze the efficiencies of the administrator position function by function to enable districts to tailor their uses of the position to local needs and to make them most cost-effective. Models could be developed that explored the shared use of an administrator by more than one district. Or, indeed, one might explore the use of a national administrator to efficiently and consistently carry out some of the management functions now handled locally. In exploring these questions one would have to answer the following: What are the savings in monetary and other costs of utilizing an administrator to manage compensation and other matters? How does one quantify, or otherwise

measure efficiencies such as saving a judge's time? Are the goals of justice advanced, and to what extent, by vesting the administrator with various management functions?

Defender/Panel Shared Resources

Many attorneys with whom we spoke referred to the disparity in resources between panel attorneys and defender offices and the negative implications for panel attorney clients. Most districts with defender offices have developed some form of resource sharing, particularly in the area of attorney training. There are many other ways in which defenders might (and, we suspect, do) share their resources with panel attorneys while not risking conflicts of interest, such as the sharing of legal research tools, information on experts, investigators, and others, and the pooling of resources to advocate for structural changes important to both defender and panel clients. Further study might seek to answer the following questions: How can we develop incentives, such as through shifting funding, for defenders to expand the ways in which they assist panel attorneys? What are the conflict dangers and how can they be avoided while still encouraging broad resource sharing? What have state defender/panel systems done in this area? How can panel attorneys reciprocate by sharing their resources with defenders, such as, for instance, panel attorneys sharing their expertise and contacts in specialties which are on the margins of defenders' normal practice, such as white collar crime? Similarly, one might explore how to gain greater economies of scale within the panel attorney community by creating "firms" of panel attorneys linked in every way except client representation where all or most professional resources are shared but client confidences and other obligations are protected.

Timeliness of Appointment

A distinct area of disparity between panel attorneys and defenders, not related to resources, that has negative effects on panel attorney clients is in the timing of the appointment of counsel. In many districts, panel attorney clients are appointed counsel significantly later than defender clients. Often, moreover, the timing of appointment is left largely to the defender, even when the defender represents a client in the same case as the panel attorney whose appointment he controls. Yet, other districts have eliminated the disparity by insisting through various means on the timeliness of appointment. Our study suggests there is much more to learn and disseminate about the best methods for assuring consistently timely appointment of counsel, to panel attorney and defender clients alike. One might study to what extent law enforcement, pre-trial services, and prosecutorial personnel might be required to expedite and facilitate the appointment of counsel before a person's appearance in court, without compromising appropriate investigative goals. One might seek to develop a range of duty-day systems tailored to best balance the need for timely appointment with the attorneys' efficiency needs in different districts. And one

might explore other innovative methods to ensure timely appointment, by looking at state models and elsewhere.

Appellate Panel Systems

Our study did not investigate, except peripherally, panel systems which serve the appellate courts. We were told by some practitioners, however, of dissatisfaction with aspects of the functioning of appellate panel systems. One might study these systems to determine, much as we did with the trial panel systems, what good practices have been developed to make appellate panel systems function better. More specifically, one might seek to answer the following questions: What are the pros and cons of requiring trial counsel to continue in representation on appeal? Can appellate panel attorneys benefit by sharing resources in law firms without the conflict problems of trial attorneys? What approaches have been developed to assure expertise among appellate panel attorneys? And, how can high-quality attorneys be recruited for, and retained on, appellate panels?