

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 4—Birmingham, Alabama

February 18-19, 2016

Transcript: Panel 4—Views from a Mixed Panel

Judge Prado: It's happy hour somewhere. I'm not insinuating that we should rush this and get to happy hour, because this is a very important thing we're doing and we have several panelists this afternoon, several CJA panel attorneys, someone from the ABA on death penalty and we have a death penalty law clerk with us today. I will let you all make a brief statement and then we'll start with questions from the Committee.

Ken Gomany: Brief. First of all, thank you for being here, making your trip to Birmingham and I'm honored to be here part of your panel to speak before you and we do appreciate the work that you are doing and the interest you have in the Criminal Justice Act and panel attorneys. Of course, I'm speaking as a private lawyer here in Birmingham; myself and Ms. Luker, of course, are kind of on the same team, different offices.

I think the main thing I would like to address to the panel—I submitted a short testimony—of course is money. We would like to be paid faster. I tried a case in here in this courtroom in November, finished it December 1st or sent the bill in then; still have not been paid.

Judge Prado: You want me to go talk to them?

Ken Gomany: It's been approved and all this and that and the other, but there's got to be a faster method. I don't know what the other CJA attorneys would mention. I think the rate we are paid I think is \$126 an hour. I would like to see that increased somewhat. I think we got a dollar raise last year.

One thing about payment of CJA vouchers, from what I understand, there's no computer prompt. When we submit our voucher to be paid by the court, there's no prompt by the computer. It's not like a motion's been filed. It could take a long, two, three, four months for those things to be approved. I think there's got to be a better method. I know we're very familiar with the state system here. When a voucher's been filed, there's a prompt to the court. They see it. They approve a voucher, not going through the voucher itself about the amount of money or what's been billed or things of that nature, but the judge approves it that the attorney did the work and the case is completed, and then that voucher goes to a central accounting office in Montgomery that makes the payment. Although, that process is a lot longer than the federal system, it probably is streamlined somewhat.

Another point on that, too, I think we have not had any experience, or I have not or seen much where vouchers have been cut. I think that was

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

mentioned in some questioning by earlier committee members. I haven't seen that here except years ago when there was pro-ration. As far as caps and things of that nature, I'll go ahead and answer questions, but I wanted to use my time to mention those things.

I think, too, on billing, at one time I was a Jefferson County Treasurer, so kind of familiar with how things work and if it was a direct payment, I think that was talked about years ago where when a voucher was submitted and the federal government issued a check, it was a direct deposit into a bank account. That would probably save thousands and thousands of dollars and speed things up. Thank you.

Kathy Luker:

Good afternoon. My name is Kathy Luker. I am also a CJA panel member here in the Northern District of Alabama. I am also very honored to have been asked to come and give testimony about a subject that is very important, very near and dear to our hearts.

As everyone else, I put together a short outline testimony of what I felt were important things that I wanted the Committee to hear from me about. One thing, and I know all of you were here for all of this all day long. I came early this morning to be able to hear some of the judges and U.S. attorney and some of the other public defender, federal defenders so that I could see where they were coming from and how that meshed up with my experience on the CJA panel.

Here in the northern district, I believe that we are a little different than other places. Birmingham may seem like a big city because it's the largest city in Alabama, but it is still very small compared to a lot of other areas.

I know there's been some concern about how we, as CJA panel members, use our resources, whether or not we use experts on a regular basis, so forth. I can speak from my own experience. We have a fabulous Federal Defender's Office here. Kevin Butler's done a wonderful job. He has a great staff, and of course, they get the biggest majority of the cases that come from the Grand Jury. They have lots of resources. They are also willing to share their resources with us. The idea of experts, per se, is not something that I really worry about very much because the majority of the cases I get don't require an expert.

Our discovery process here is also very different in that we receive our discovery on the day of arraignment. We're not sitting around, waiting and digging and trying to figure out what's going on and having to do a lot of extra investigation on our own. Joyce Vance does a fabulous job, she and her staff. If we need other things, we tell them, they get it to us. Sometimes, if it's a very complex case where we're dealing with banking issues and so forth, you may need experts for that, but on the § 922(g)

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

where we're talking about just a felon in possession, why should I waste resources when I can get all the information I need on my own without having to spend that money?

The other resources in training, we, here in the northern district, have a great panel. We have the judges we work with, the magistrate judges, the people on the panel, the training we get. I think Judge Putnam mentioned this morning that we are just now in the process of getting ready to appoint the next series of members for the panel. We reapply every three years. This particular year, I was asked to help two of the other members develop a new application that was fairly streamlined but gave us more information about what we needed to know about people who want to be on our CJA panel. Why do they want to be here? Certainly not for the money. I think we can all agree on that. It's not for the money.

I was also asked to help develop a mentorship program. We've been talking about this for a long time and have never done anything about it. Now, we're ready and I think that is incumbent upon us on the panel to help train the people who are going to come behind us and the people we are going to be working with in these next years.

We have a fairly small panel compared to other areas of the country. We have thirty-five members and I'm not sure what Mr. Gomany has to say, but I think thirty-five along with our Federal Defender's Office is a gracious plenty to handle the cases we have. Sometimes, and just recently, I think you had one of the cases in Huntsville, we had thirty-three defendants. When they hang onto those indictments that long and we have that many defendants, we had to end up calling in other private attorneys who may have been on the panel previously, but we always have enough good people to handle the cases. All of our CJA panel are private attorneys. Most of them have been doing this for a long time. They have trial experience. They have experience working with the program. They have experience getting things done efficiently and effectively and in the best interests of these indigent defendants that we are here to serve and help protect.

Again, one of the things I will mention briefly and hopefully there'll be questions about this is of course the payment. Us having the eVoucher filing has made it tremendously better for us in not only getting paid but also in letting the court know what it is we've done on the case. Used to, when you had to type it out on a piece of paper, it was hard to want to put in a lot of information. With the eVoucher program now, you can give as much explanation as you want to. Sometimes you'll have a .4 for email. Well, if I'm looking at that, I'm thinking, "How in the world could you spend twenty minutes doing emails?" You can type in as much as you

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

need. It was not just an email. It was to the U.S. attorney and to the probation officer and answers back and to this person and that person.

I think those type things and that information helps the judges know and justify the time that we spend. I don't believe we have a problem here with vouchers being cut. That is because our judges know us. They know how hard we work. They know that we are cautious with our time and if we do go over the \$9,700 we automatically send a letter of explanation with the voucher explaining why we went over the cap. Because we work together like that, I think it makes it so much easier and makes our program maybe a little different than others.

Thank you.

Emily Olson-Gault: Hi, my name is Emily Olson-Gault. I am the Director of the American Bar Association's Death Penalty Representation Project. Like the others, I thank the Committee for this opportunity to testify before you today.

The ABA's Death Penalty Representation Project was created thirty years ago as of this year and our sole mission for all of these thirty years has been to improve access to qualified, adequately resourced counsel in death penalty cases at every stage of a death penalty case.

To achieve this mission, we take a lot of different approaches. We do training, education reform. We serve as experts on the ABA guidelines for the appointment and performance of defense counsel in death penalty cases, and we're perhaps best known for recruiting pro bono law firms to work on death penalty cases, usually in the post-conviction context.

I'd like to take this opportunity to just address a couple of points that came up during the last session. One about pro bono counsel and another for the standards for appointment of counsel.

We have, to date, recruited well over 300 law firms to represent well over 300 individuals and their death penalty cases. Like I said, most of those are post-conviction. The majority of those are in the state post-conviction phase, but we do recruit a fair number of firms to provide representation in §§ 2254 and 2255 proceedings.

The reality is that recruitment has slowed over the years. You heard that from the previous panel and that's absolutely true. We find that with every increasing year, we have more difficulty recruiting people to take these cases. There's a few reasons for that. It is not for lack of interest from the bar, but there are a finite number of firms that can do this work. They almost all have cases and not just one case. They all have multiple pro bono death penalty cases pending right now.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Since 2008, there has been an increase in the use of firm committees that review these cases. Any large scale pro bono case and they are uninterested in cases that have no definite timeline and that require a lot of out-of-pocket expenses. That is pretty much the definition of a post-conviction case. There are still firms out there that are taking these cases. We applaud them. We think they are doing wonderful work, but there simply are not enough to meet the need.

When we say we've recruited law firms for 300 cases, what that doesn't say is that there are hundreds of others that we have not been able to help and that's more and more every year that we simply cannot find pro bono counsel to represent them. There are not enough pro bono lawyers out there.

I thought it was a very interesting proposal in the last session to only appoint attorneys who pledge compliance with the ABA guidelines. The ABA certainly would applaud that as a standard for appointment. I'm sure that's shocking but the ABA would certainly applaud that. I think that it's also important to know that that's not enough, from our perspective, because there are several jurisdictions across the country that have adopted the ABA guidelines in substance, that require their lawyers to comply with the ABA guidelines and some of those jurisdictions are where we see the worst lawyering problems in post-conviction. The reason is that there is not monitoring. There is not sufficient monitoring, there's not sufficient removal and there's not sufficient action taken in the next case if we know that a lawyer did a bad job in the previous case.

I want to share, if you'll allow me, just a few things that we've heard from prisoners over the years, writing to us about their lawyers, their court-appointed lawyers in federal habeas in § 2254, and these are from jurisdictions where the compliance with the ABA guidelines is considered mandatory.

One person wrote to us and said, "I, myself, have had to write the federal court and say, 'Hey, Judge, my attorney missed this deadline.' I've gotten so fed up with my attorney that I've even asked the courts to let me waive my appeals and just give me an execution date."

Another told us, "My hopes of writing to you is to secure a sufficient lawyer in the federal phase of my appeals. I've written motions for appointment of new counsel, I've written the state bar, the Judge, everything I knew to do I've done it. This year is the first time in four years I've heard from my attorney."

One other said, "My court-paid lawyer would not do any research or investigation into my case. He came down to see me, but only to tell me

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

he didn't have time to talk to me. He said he was not getting enough money to investigate my case. Just got up and walked out. He only filed one issue of argument in my appeal in the circuit court. My federal appeal was denied because it was not filed on time."

These are not unique letters that receive. I have a filing cabinet full of them. We get more every day. These are not letters from twenty years ago, when things were bad. These are recent letters. This sort of thing keeps happening and it keeps happening in jurisdictions that require high quality representation, but that has to mean something. Requiring high quality representation can't just be a mere pledge. That means that the defense system has to be dedicated to actually enforcing those standards and making sure that all lawyers meet them for their clients.

Thank you.

Terryl Rushing: I'm Terryl Rushing, the death penalty law clerk, Southern District of Mississippi. I'm very honored to be here to represent my district. I'm also a little overwhelmed at the fire power that's been assembled in this room.

Judge Prado: Closer to the mic. Is it turned on? The main light will go on.

Terryl Rushing: There. Is that better?

I'm honored to be here. I'm a little intimidated. I see that my Federal Public Defender has apparently decided happy hour starts earlier for him than for the rest of us, but I will soldier on and do my best.

Without repeating my written testimony, I would like to point out to the group that I believe I was one of the first attorneys who volunteered through the Representation Project of the ABA. I did represent an inmate on death row for ten years when I was in private practice. I do approach my job with a great deal of empathy for the people who are representing these inmates.

Also, when I took the job, I was the first death penalty law clerk for our district, so I got in touch with people around the country to see how they worked their jobs. I got invited to a Ninth Circuit Conference for Death Penalty Law Clerks. I've seen case management from the Fifth Circuit perspective and the Ninth Circuit perspective, and I think it's safe to say that I've seen both ends of the spectrum.

I think having listened to the testimony today, three areas of concern keep coming up that I wanted to briefly address and then of course will answer questions later. Appointment of counsel to capital habeas cases, voucher

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

review of attorney's fees and expenses in these cases, and the decisions on request for expert funding.

One of the advantages, I guess, to being from a fairly impoverished state is that the hourly rate for these cases appears to be attractive to many attorneys in Mississippi. We have not had a problem. We do maintain a separate capital habeas panel. I have a lot of input into it. Our Public Defender has a lot of input into it. It's a good group of people.

We have started to see a little bit of a change in the composition of the panel. Initially, it was that same handful of lawyers that had been doing these cases for years and kept getting more and more cases and became overburdened. We, also, got letters from inmates who had been represented by someone for three or four years and had never heard from them. We began to address those issues and to actively recruit other lawyers to get on the panel. We have now found that there are a substantial number of young lawyers in big firms who want to do this work. We've appointed several of them as second chair lawyers. We've let them work their way through the system. Some of them have now become, in our opinion, first chair lawyers. They seem to zealously represent their clients and do quality work. We've been happy with that.

As far as voucher review, I think you know that the Fifth Circuit has a \$35,000 cap on attorney's fees in capital habeas cases. We all understand that that's unrealistic. We kind of look at it as more of a starting point than an ending point. What it becomes for us is a tool to encourage these lawyers to submit a budget for their cases. If they budget over \$35,000, we can get that to Judge Stewart in advance. He can approve it, then they know they're going to get those attorney's fees. It also speeds up the voucher review process. That's been very helpful to us, and particularly these young lawyers who are used to representing large corporate clients are not unfamiliar with the concept of budgeting and they seem to be very receptive to doing it.

The issue of request for expert funding's is problematic for us, in light of Pinholster and the directive that the record should be the same as the record that was before the state court, in light of the exhaustion requirement, and now in light of the Mississippi Supreme Court's change in its position to . . . they have declared a state court right to effective post-conviction counsel. Right now, half of my docket is stayed and they have all gone back to state court to exhaust that issue and the court is considering that in successive post-conviction petitions before it, and in fact has sent a couple cases back to the trial court for an evidentiary hearing. They're taking that seriously. We're going to get those cases back with a finding that post-conviction counsel was effective. There will have been a record made on that.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

In light of all that, it's problematic to justify a request to develop expert testimony at our stage. The way we're set up, because we do consider them ex parte, the judge is then put in the uncomfortable position of being in almost an adversarial position to the defense lawyer, which is not a good place for him to be, but there's no one else there. Our judges are a little concerned that they're going to authorize a large expense for expert funding to develop an issue that, it turns out, we can't consider, or to develop evidence that we cannot consider because it supplements the state court record.

I think our judges would be receptive to some other method of handling that. I've heard some suggestions here today and I will certainly go back and discuss it with our judges, because I don't think they like that situation any more than anyone else does.

Thank you.

Judge Prado: Let me start off by asking the two CJA panel attorneys here, could you give me an idea the type of cases that you've been appointed to hear within the last year or so? Are they mostly gun cases? What type of docket or what type of cases are you handling?

Ken Gomany: Most of the cases, and I think Ms. Luker will agree with me, probably 75% are drug conspiracy cases. We'll have a big drug bust and bust twenty-five people in one group, or thirty-five in another we had recently. Most of them are not § 922(g) cases. A lot of guns.

We do have some immigration cases, the prior conviction of a felony, those types.

Judge Prado: Agree?

Kathy Luker: I would say the same. Sometimes we get a lot of conspiracy, drug conspiracy, where you have a lot of wire taps and so forth, but then also, as the time of year now has come along with income tax filing, a lot of fraudulent filing and that, we find kind of runs in a cycle.

Judge Prado: Have either of you had the opportunity to ask for experts to help you in your cases?

Ken Gomany: Probably not that often in those type cases because in a drug conspiracy case, you've got wire taps. "Look, I'm passing. I need two," or here's 500 or this, that and the other language. It's probably not really a need for an expert in that case. In gun cases, sometimes there are experts needed to evaluate the firearm, but as far as experts, most of my experts have been in

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

the mental health evaluation, but that's where the magistrate judge, they go ahead and pay them directly.

I was in here this morning. There was some discussion with Judge Putnam and Judge Procter about that being questioned, about the low percentage in the northern district. Our experts, the ones that we use probably most would be the ones that mental health evaluations, and those people are appointed by the court and the court pays them directly. I don't think we have anything to do with the money part on that.

As far as other expert things, I know I've had good use with Kevin Butler's office when I've had things, computer problems or where we're given a lot of computer things from the U.S. government discovery-wise. I've even had his IT guy come to my office one day and spent all afternoon helping me out on that. We've had, I think, a good relationship with the Public Defender and their experts.

One expert, I did mention this in my thing and I'll give up to Ms. Luker, but interpreters. That's one thing and I remember I talked to Judge Cardone about this a couple weeks ago when I first got the letter about being in this Committee. Our interpreters, from what I understand, when we have illegal immigration cases with firearms or get caught busted with drugs, our interpreters all live in either Georgia or Tennessee. It costs them \$750 for them to come visit us at the county jail in Cullman County or Anniston, Calhoun County Jail. We don't have a jail here. That costs, for one trip, is \$600-\$700, because they are certified interpreters. I understand certified interpreters, they have like a 3% pass rate. I guess we're required to use them because they have to go over a plea agreement, advice of rights, the pre-sentence report, discovery and all that, so we have a cut-off, here, of I think \$2400 and then we have to file a motion for more funds. That is probably four trips.

I think there could be ways to streamline that up a little bit. For example, when the person comes in on initial appearance or detention hearing and they're found to be needing an interpreter that the court could take care of that expense and save the lawyers a lot of trouble and legal mumbo jumbo trying to get more money if we need to have another visit by an interpreter, and find how much it is. We could spend three hours just trying to figure out, "We need another \$50 for another trip." It seems to me it's kind of a lot of bureaucracy and getting things done, but I think there could be ways to streamline that type thing.

Other points about experts. I think our cap is \$800. I saw somebody filed a motion the other day, here, they needed \$863 to pay their expert. \$863. Well, the cap is \$800. They probably had to spend an hour, figuring up the bill, talking to the expert, filing a motion. A law clerk gets it and the judge

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

gets it and approves it, this, that and the other. You've probably got a couple of hours of government work and labor, two or three hours, to prove \$60 that went over the \$800. It's a lot of little things I think you could raise that amount to say \$1500 or \$2000 to start off with.

Kathy Luker: I've had no issue getting experts when I felt like I needed them. I think one of the keys is when you file the motion asking for the expert, you give the judge as much information as you can to justify why you think you need that expert. Several child porn cases that I've had, I've had to get experts to be able to deal with my defendant and his issues dealing with the pornography, his background, so forth. Never had an issue with that.

Had a case year before last that dealt with cell towers, trying to pinpoint, so forth. Asked for the money. Got the money. Got the expert, and by having the expert, we ended up being able to settle our case as opposed to going to trial because that gave us the information we needed to deal with the U.S. Attorney's Office and with our client. I think the experts we need we can get, it's just that, like in the Federal Defender's Office, I heard Mr. Butler say that when they get cases in, they assign an investigator to that case and then they have people who decide whether or not experts are going to be needed. That's great. We don't always need investigators, but when we do, if there is an issue that hasn't been answered by the discovery we get, then we can get those. It's just that a lot of the investigation, it's, to me, it's not worth having to spend the money to get if it's something that I can do in-house.

Judge Prado: Have either of you ever been turned down for a request for an expert?

Kathy Luker: I never have.

Ken Gomany: I never have.

Kathy Luker: Never.

Ken Gomany: [CROSSTALK] Oh, excuse me.

Kathy Luker: Never even been questioned.

Ken Gomany: We call up Judge Ott, Judge Putnam or any of those people and say, "Judge, I need more money," or talk to their assistant. Just file a motion. I've never been turned down.

I did, and I think Kathy did the same thing to let you know, we did put a feeler out to the other forty panel members. We put emails out. We talked. We had lunches and this, that and the other, and asked for input to help with our input to the Committee here.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

- Judge Prado: Did you request an expert for that? Go ahead, I'm sorry.
- Ken Gomany: No, that was all. We did put our feelers out and nobody emailed me back or called me saying, "I had a problem getting an expert." I don't know of any time we've been turned down.
- Judge Prado: You've heard from the rest of the panel and there was no one that was complaining that they had been turned down.
- Ken Gomany: Nobody noticed a complaint to me either orally, through email and for weeks and weeks of talking to people. We have a small bar here, so we see each other all the time.
- Judge Prado: Any sense that either of you or anyone else had second thoughts about requesting it, thinking it was going to be a hassle or "The judge is going to question me so much, so I'm not even going to bother requesting it." Anything like that?
- Ken Gomany: I don't think so. Of course, that would be something a lawyer should never, never consider whatsoever in their representation of a client. I don't know of any. At least they're not going to admit to anyway.
- Kathy Luker: If the expert is needed and you're not willing to step up and be able to justify to the court why you need it, then you probably shouldn't be doing the job to start with.
- Judge Prado: Ms. Rushing, let me ask you. In reviewing all these death penalty habeas work that you do, what's your impression on the quality of the work? Do those lawyers seem to be pretty good or does it look like they could do better? What kind of grade would you give them if you had to grade these lawyers in general? Do you see all types? Can you give me an idea of the quality of the work that's being done?
- Terryl Rushing: Unfortunately, our Attorney General's Office is very understaffed. Their briefing is pretty subpar, I hate to say but there it is. In comparison, the petitioner's counsel usually comes out looking pretty smart. There are going to be differences and after you've read them for a while, you pick up a 250 page brief and you know, this is the guy that never says something once if he can contrive to say it 15 times, but you plow through it anyway.
- I have had at least one situation where an attorney was not disingenuous, he was dishonest in a brief, not only about the facts of the case, but about the law. That was very disappointing because this attorney was very highly qualified, just for some reason did not do a good job on his brief. The rest of them, I think they're fine. I feel like it's incumbent on me to

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

read both sides and then push them aside and kind of start over in my mind and do the research over again. I'm going to do that whether it's a wonderful brief or a terrible brief.

I'd say B, B+ would be the grade.

Judge Prado: Of both sides?

Terryl Rushing: No.

Judge Prado: Well, they're state employees.

Terryl Rushing: They're all my friends. I hate to say this.

Judge Prado: How do these attorneys get appointed to these cases?

Terryl Rushing: Many of our cases, the initiating documents are a motion to proceed IFP and a motion for appointment of counsel where counsel has already been identified. That probably happens most of the time.

I'm feeling very progressive, being from Mississippi, I've got to tell you all. We do have a state office of capital appellate counsel, and we have a state office of capital post-conviction counsel. They, if no one steps forward to take the case, bring it to us and I'm monitoring. I'm looking at the cases that are on post-conviction in state court and when I see that relief has been denied, I'm immediately on the phone to our clerk's office, saying this case will probably come soon. You all need to engage the byzantine calculus formula that they use to assign it to the next judge in rotation. We have all that set. The intake clerks are looking for the case. I'm looking for the case, so as soon as it comes in, if there's not counsel or if there's a motion for appointment of counsel, we're getting an order in front of the judge right away because we're very conscious of the limitations issue.

If there's not an attorney willing to take it and the state post-conviction lawyers will not bring it to federal court. Now, that's probably a good idea because now we're going to have some conflict issues with their effective assistance, but they will go ahead and file it. They'll file the motion to proceed IFP, so we're open in a file and they will say, "This guy needs lawyers." We get on the phone and we usually have them identified pretty quickly.

Judge Prado: Ms. Olson-Gault, there is training by the ABA? Did you say there was some training by the ABA of lawyers involved in death penalty cases?

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Emily Olson-Gault: The ABA has done a number of trainings, primarily related to the ABA guidelines since that's our area of expertise and what those require for effective representation, and then we, of course, work with many other non-profit organizations and Capital Habeas Units that do trainings all over the country, every year, to help train lawyers.

Judge Prado: Is there a registration fee or are lawyers allowed to come do it for no charge? What kind of expense is there involved for a lawyer to receive this training?

Emily Olson-Gault: From the ABA's perspective, our trainings, I don't believe we've ever charged for a training. Since our mission is to improve the quality of counsel, we want anyone who is interested to come and learn. Certainly, other groups, just to cover their overhead, things like that, have had to charge for training conferences, although there are usually scholarship opportunities available, things like that, for people whose offices can't afford it.

Judge Prado: Thank you. Anyone else on the Committee? Yes, sure.

Neil MacBride: First, a question to Mr. Gomany and Ms. Luker. Thank you for letting us come to your hometown here. It's your district.

Just going back to something I think Mr. Gomany mentioned, I think you both said you were here earlier in the day and heard some of the earlier panels and there was discussion about statistics from individual districts about percentage of cases where experts were approved, and the average price per expert, so forth. You both, I think, have testified that in your experience in this district, you've not had issues personally nor have you heard from your colleagues of any issues involving judges being reluctant to approve experts. When you heard the discussion this morning, I don't know if that data was new to you or not, but I think to a lay person, they would hear 3% and they might think, "Wow, that sounds really low." I'm just curious whether you had any particular reaction. Whether that surprised you, or given the nature of the work that you all are seeing, you mentioned a lot of the § 924(c), (g), Hobbs Act type cases. How does that strike you?

I guess the main question, going back to what our reporter, Mr. Gould, asked in the last panel is, can any conclusions or inferences be drawn from data like that in terms of it being a proxy for the commitment of the judges, for example, to the CJA panel, or is it so fact determinant and district specific that you can't read into that sort of data? I'm just curious. We've heard different folks express different opinions on it. We'd love to hear you-all's views.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Ken Gomany: Number one, it sounds like we need to ask for more money more often then. The truth of the matter is, we have a small bar here. We're all very close. The U.S. Attorney's Office in our district, when we have a case, we're given all our discovery 99% of the time at arraignment. We don't have to beg, borrow and steal and hire experts to go over a lot of discovery issues. I think Kathy mentioned sometimes you need one in a child case or a porn case where you have computer experts.

The statistics, it does sound low .3%. I think Judge Procter and Judge Putnam made an excellent comeback on that, the type of cases we have. We have mostly drug conspiracy cases, mostly firearm cases. There's not really a need for an expert in those cases, I don't believe.

We have a pretty good bunch of experienced lawyers on the panel. Kathy Luker's husband was a former police officer. I was a former prosecutor for ten years. I mean, I hate to toot our own horn, but the panel lawyers we have, the ones that I know and work with, we have a lot of experience and we're not out to waste government money on hiring some expert and ask for money to waste taxpayer's money. We're kind of a conservative town. When we think we need one, we're going to ask for it and I've never seen any of us get turned down. The emails I put out and the conferences I had, I have not had any lawyers ever complain to me in feedback.

Prof. Kerr: Could I just interject a follow-up question? To the extent the Federal Public Defender is bringing on experts and hiring investigators and having investigators much more often, first, is that the case? That's my understanding at least. To the extent that's the case, is the FPD just having too many experts?

Ken Gomany: I need to know what kind of experts. I guess I haven't talked to Kevin about it or know what experts they're getting that we're not to get. What experts are they having that we don't have access to, what I would ask in response to that.

Reuben Cahn: Maybe I can, because I'm trying to figure out this issue myself as well. I think the sort of first expert type and only in the world of the Criminal Justice Act do we refer to this as an expert is an investigator. I guess, maybe it'd be helpful if you could walk me through, you mentioned § 922(g)'s a couple times. A § 922(g) case and the factual circumstances in which you wouldn't want an investigator to aid you in testing the government's case?

Ken Gomany: Here's the common case. I think I could speak.

Kathy Luker: Please.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Ken Gomany: I don't want to take over everything, but typical § 922(g) cases, a guy or girl gets busted in city court. They plead guilty to having a firearm. Six months, a year later, there is a liaison detective in the Birmingham Police Department that contacts with liaison U.S. Attorney and they say, "This guy's got a felony conviction. He plead guilty in city court to possession of a firearm, or some city court, and we found out he's got a felony conviction or three felony convictions." That's your typical § 922(g) case in our district.

Now, expert. Hopefully, we can read the police reports. We can read the docket sheet that the person entered a plea of guilty to. Did they waive a lawyer? Did they have a Public Defender in city court? Is it certified, the paperwork, correctly? Is the prior felony conviction a felony conviction? Hopefully, we're experienced enough to be able to look at the code section or look at the case.

Another thing, too, about panel lawyers. We have experience in city courts and we see a prior conviction, if it says whether it's a felony or misdemeanor, if we've been around the block a few times over the years, we can tell that court, what county it's in. Is that judge a real judge? Is that lawyer a real lawyer? Is that paperwork correct? By having experienced private panel lawyers, there is some advantage, no offense Kevin, but we can see a lot of things. We may have been to that courthouse before, but I hope I answered that question.

In those cases, if the firearm is not workable or if it needs to be examined, we can file a motion to have Lawden Yates, somebody who is a retired forensic specialist, and ask for money to look at the gun, and I don't have any question or doubt that Judge England, Judge Cornelius, Judge Putnam, Judge Ott or any of the magistrate judges would deny our request. I really don't. I hope that answers or helps out somewhat.

Reuben Cahn: Just partially. Let me probe a little bit further.

You say you could get an expert to look at these, in what percentage of your § 922(g) cases do you think you get this firearms expert to look at the firearm? In what percentage do you think you get an investigator to go out and get the underlying conviction documents for you to review them?

Ken Gomany: The U.S. Attorney gives us those documents. We have a computer system called 'Alacourt' here. We can get into them ourselves. The attorney subscribes to that system. I personally don't see a need for an expert to get documents.

Reuben Cahn: You can get directly to the underlying conviction documents, not just the docket records?

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Ken Gomany: Correct. The U.S. Attorney supplies us with the convictions. Now, we hopefully, if we're a competent lawyer on the panel, which we hope we are or think we are, we can interpret those documents without having some expert look at it and read it. Is this a prior felony conviction? Hopefully, we're competent enough to review that ourself and make that determination without an expert.

I would think 99% of these cases, they're either caught with the gun or they plead guilty to the underlying offense of having possession of a pistol. Most of those cases, it's probably not need for an expert. You may disagree, Kathy. There could be 1% somewhere, I don't know.

Kathy Luker: You spoke specifically talking about experts to include investigators.

Reuben Cahn: Because in the strange world we live in, we include investigators in the field of experts for our CJA-20s.

Kathy Luker: I think that I would tend to agree with Mr. Gomany in that because we're in private practice, we both do primarily criminal defense. This sounds terrible. I don't always trust what somebody else gives me as being the gospel about what I'm supposed to look at, so I tend to be the person who goes back behind to check and make sure, was it really a conviction? Was it really a robbery one, or did it get knocked down to a robbery three? Those are things that I need to know, and I've been doing this long enough that I'm pretty dang good at getting that information probably quicker than an investigator would.

See, it's different for an investigator that Mr. Butler may have in his office, because that investigator is there all the time. They work together all the time. When I call an investigator, it's a person I know who does investigation and they're doing my investigation along with twenty-five or thirty others. By the time he gets the information back to me, I could've already gotten it myself. I trust myself on that.

Are there times that we ask for investigators? Yes, absolutely. Tracking down witnesses, serving subpoenas, taking statements, those kinds of things because I think me taking a statement from a witness is not appropriate. It needs to be an investigator, a separate third party that does that. There are not that many times that that happens on the cases that we deal with. One reason is because we have so much discovery, we have an open file discovery policy, and that makes my job so much easier. The more information I can give my client to let him know what the charges are against him, what the evidence is against him, the easier it is for us to work through this case to make sure that the government's doing what they're supposed to do, that they can prove it, and if they can't then I have an avenue that I can use to try to deal with that.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Reuben Cahn: I appreciate that. Let me ask one more question about that, and then I'd like to ask about another part of the key work that we do as defense attorneys. I think we all appreciate when U.S. attorneys are forthcoming with discovery. Discovery has always been a major problem in federal courts because of our antiquated criminal justice rules, but when you've got full discovery and you've got things like 302s or DEA-7s or whatever, you've got the reports including the witness statements, how do you confirm those? Are you going out, are you calling up the witnesses yourselves and doing all that work, or are you getting investigators to go do that?

Kathy Luker: If we feel like it's necessary. Most of those we deal with, if they can give us the information, they do. We try to verify that, but a lot of those things are things that I do myself. I don't know how other attorneys do. I can only speak for me. The information is generally complete and I don't have a problem picking up the phone and calling an investigator and asking questions, meeting with those investigators to answer my questions. Don't have a problem with that at all.

Reuben Cahn: Do you find the agents are generally receptive to your calls here?

Kathy Luker: Absolutely.

Reuben Cahn: The other question I have that follows up on this, of course we're now in a post *Booker* world and one of the main jobs we do is sentencing mitigation, something we really didn't do much of a few years ago. Do you use investigators to search out mitigation in your clients' cases?

Kathy Luker: Sometimes. It's more often that if we're going to have an expert it will be in the form of mental health expert. I find, especially in dealing with child porn cases, having experts who deal with my client and can give me information that I can use for mitigation. I personally have a lot of open contact with my clients' family and friends because I think that's important, and again, that's information that I like to get myself, not send somebody else out to do it for me. If I think it's necessary and we have had a lot of good success having mitigation experts for sentencing, and the judges have been very receptive to that, but I try not to overuse that because a lot of that information I think I can find myself.

I have a secretary who works with me. She's very good about helping me gather the information. She can call and get information sometimes it's harder for me to get. She gets it, gives it to me, I can go through it. That works better for me.

Reuben Cahn: Sorry, Neil, I interrupted your line of questioning.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Neil MacBride: Thanks. I just had one more. After that question kind of took on a life of its own, but Ms. Olson-Gault, my question for you, in the last panel, one of the witnesses said, if I understood the testimony correctly, that essentially there's a systemic problem or significant problem with the way the death penalty is handled on the federal side by the Justice Department. It was a little unclear exactly what the person meant, but in any event, that was a little surprising to me. I came from a district that did death penalty cases and our Federal Defender and our CJA panel were extremely experienced in that area. Of course, it's just one district and there's ninety-two others. My question for you is has the ABA done benchmarking or studies to look at the adequacy of counsel on the federal side? Whether you have or not, does the ABA take a view as to whether current rates for death penalty defense is sufficient, or is it something this Committee should look at?

Emily Olson-Gault: Sure.

The ABA has done a number of studies at the state level. A number of state studies in state counsel systems. To my knowledge, we have not specifically studied federal death penalty cases. That is something that is probably, especially if we're talking about the § 2255 context, that's probably something that we interact with the least because it's a smaller number of cases and Ruth's project, we collaborate with her frequently when she has need. It's probably our least common area that we work in, so I don't have a lot of expertise in that particular area.

In terms of the rates, however, the ABA guidelines are very clear about needing to pay commensurate with what is necessary to provide high quality representation, which is a little bit vague, but it talks about paying people enough to attract high qualified attorneys to do this work and, from hearing the previous panel and from my own experience doing this, it simply isn't enough. It simply is not enough. If you compare that to what lawyers are making in the private sector, what they could be making doing other work, it's simply not enough paying them what they are paid and it becomes that problem gets compounded in certain phases of capital representation where they are having their vouchers cut so they are unsure if they are actually going to get paid, and where experts and other auxiliary services that they need to do their job may not be available.

We see this. We have just constant stream of people contacting us at both the state and the federal level in post-conviction saying, "My judge isn't giving me what I need. I don't know if I can pay my rent next month. I don't know if I can stay on this case."

It's a huge ethical conflict. It's a huge problem in terms of recruitment of lawyers and it's pervasive throughout the system.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Prof. Kerr: One of the questions that's been raised as we've looked in different jurisdictions has been the possibility of having different rates for CJA lawyers in different districts. Recognizing the different cost of living in different districts. Mostly, we hear the concerns that this is necessary from districts that have very high costs of living, where the rate seems sort of obscenely low for the attorneys who may have rents that are quite high. That's a national matter. If something like that were to go into effect in most of your districts, that would operate the other way. It would probably lower the rate. Maybe this is a question that is unanswerable, but to the extent the rate were lowered, and currently you think that now the CJA attorneys do quite well on the whole. It's a pretty desirable position to have. Can you give us any guidance as to how that might effect the quality of counsel in your district if that rate were to drop in an effort to try to equalize rates based on cost of living?

Kathy Luker: I can only speak for me and the people on my panel. We all believe the rates are too low. We are all in private practice also. What we get paid to handle a federal case doesn't come close to what that case would be if you were handling it for a private client. I think that if the rates were lowered for our district, it would be very difficult for the quality of people we have on the panel to remain. It certainly is not something that is going to attract younger lawyers who want to come in and learn the system and be ready to be on the panel and be productive, as we've tried to be for the last however many years it's been.

I understand the rate for areas of the country where the standard of living is much higher, but you take \$127 an hour and, as cautious as we in this district try to be with our vouchers, and we really do. It's a concerted effort among the panel. We charge bare bones as it is. If the rate went down, I think it would be catastrophic.

Ken Gomany: I think, too. There was something that came out in the Birmingham news about two weeks ago. The average rate for divorce lawyers was \$296 an hour. The \$126 we're paid now, you've got to remember, of course a third of that goes to taxes. Half of it goes to overhead. There ain't much left. We're paying our overhead. We don't have full time staff. We're paying our staff, our computers, our telephones, our rent and everything else out of that money. It's probably a pretty good bargain, I would think.

If somebody wanted to ask me how to cut money, I can spend all day here, all tomorrow telling different ways to cut money to have more money available for CJA panel lawyers. I guess this isn't the time and place for that, but if they cut it . . . are they talking about cutting the \$126 lower?

Prof. Kerr: This is just a proposal to have some variation and that could be only variation up, but it could also be . . .

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Ken Gomany: I thought the whole thing, this whole Committee, not you guys and girls, I meant the whole thing about the system is to pay have better lawyers, better representation whether it's a capital murder case or a possession of marijuana case in a federal system was to have good legal representation. That would help things with the appellate judges, too.

Judge Prado: I think what he's talking about is if we were base the fee on cost of living, where it might be super expensive in New York, but down in Birmingham, it might be cheaper. If you went by cost of living, while it could have the effect of increasing it in expensive cities, it could have the opposite effect in more rural areas and decrease the amount of pay that you would get paid down here in Birmingham. You might have to advise your clients that they also need a divorce so you could charge them the extra money.

Ken Gomany: Let's call Julia Tutweiler at the hotel and tell them to raise the rates. See what it costs here.

Judge Fischer: I don't think that we've heard that the rate is too high anywhere. In some places, we've heard that it's not so low as to dissuade well qualified counsel from being on the panel, so I think we were really only looking, from my perspective, we were really only looking at what should be the base rate and then to accommodate, I'm from Los Angeles, places where the cost of living might be much higher. Don't go back and tell your panel lawyers they're thinking of reducing the rate.

Let me ask Ms. Luker, as long as we're on rates, you suggested that the expert cap is low and you can't assure experts a reasonable rate. Can you not go to the judges and let them know that you can't find an expert for an amount within the cap, and are they willing to . . . ?

Kathy Luker: Yes, ma'am. In looking around and shopping for experts, and you hate to say shopping but that's sometimes what we have to do, what's available here locally as opposed to what's in Atlanta or Nashville, or some place like that. If we find somebody that we know can do a good job and it's going to cost more than what we've been allotted to this point, I don't ever see that it's been a problem to go to the judge and say, "This is what I have. This is what it's going to take to really get what I need." As long as you can show that, they have always been willing to give the money.

The very first time I had to deal with that had to do with an expert in a really, really, really bad child porn case and she was absolutely the person that I wanted. It was going to cost significantly more than what I knew that our general fee was going to be. I went and talked to the magistrate judge, took her CV, took all of the information, explained why, why my client was different, so forth. He said, "Whatever you need to do."

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

- Judge Prado: I didn't know. Professor Kerr, did you have more questions? Dr. Rucker?
- Dr. Rucker: If I could follow up on the hourly rates for just a little bit more. I thought I heard both of the panel attorneys say that they'd like to see the rates higher even here in Birmingham. What would you like to see the rates? What do you think is a fair rate?
- Ken Gomany: In the lawyer business, you always ask for the highest you can get and then work down. I saw a schedule. I was looking through somebody's hand out or something, and it had the psychologist rate was up to \$250 in the federal system. I've seen psychologists bills come in where they were paid more than the lawyer was on cases.
- I don't know. If you're asking me to set an amount, I'm going to say the most, \$250. We're not going to get it, but I'm saying we have \$125 and it went up a dollar last year. It's got to be something more than that. I'd like to see it, we're not going to quit and not do it, but I think it would be fair to have a higher rate, \$175, \$200, something in that area, I would think. I think a lot of lawyers here charge somewhere \$350, \$450 an hour on stuff and then some are \$150 hour, \$150 out of court, \$250 in court. That's kind of how a lot of contracts in Jefferson County read.
- If that would give you some kind of a basis. Kathy, I don't know . . .
- Kathy Luker: This is kind of a loaded question and you know that.
- Dr. Rucker: I do.
- Kathy Luker: We were all very happy to see it go up a dollar last year. Every little bit helps.
- Judge Goldberg: Seriously?
- Kathy Luker: Seriously.
- Judge Fischer: It's better than not.
- Kathy Luker: Every little bit helps. We've been at the bottom end of that scale, too, where it was much lower. Somewhere in the neighborhood of \$150, \$175, I think would make people in our district a lot happier.
- Dr. Rucker: But, even at the rate you're getting right now, you're getting quality counsel representation, is what I'm hearing you say, though.
- Kathy Luker: Yes, Sir. Absolutely. We have very qualified people on our panel and if you look at the makeup of our panel, and I think Ken would agree, the

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

majority of our panel members now are older. I say older, that's really bad. I shouldn't say that. More seasoned attorneys who have been doing this for a long time, as well as some younger ones that we're trying to bring up. I say 'we' because I'm one of the older ones, but I don't have as much experience as Mr. Gomany does, or my husband does who has been practicing for more than thirty-five years.

I think we have really good quality people and they're people who practice this kind of law every day, not just in federal court, but in state court. I think that's really important. You have to be able to do this. Who wants to go to a dermatologist who only does dermatology one day a week and the rest of the week he's a painter? We don't. We want to have people who do this kind of work all the time, who are willing to go to seminars, who are willing to go to training, who are willing to put in the time to do the kind of job that we signed on to do.

Dr. Rucker: Let me follow up with that. One of the things we've heard in our hearings is that sort of a point that you just raised, that CJA panels around the country are graying, they're aging. And that we are not getting a lot of young people in. You said you're trying to recruit some young people. Are you having success with that at these hourly rates?

Kathy Luker: We are. One of the things that we feel like is really going to help us is we've spent the last year and a half putting together a mentorship program that we think is really going to be important because when I started practicing in federal court, I had the advantage because my husband was an attorney, I had worked with him for many years before I went to law school. I had the advantage of being in court and seeing how things were done.

I also went to law school with a girl who worked for Judge Coogler, who is now one of our federal judges, so she had some court room experience just seeing things. So many of the younger attorneys who are coming out, and we know that's the reason they call it practicing law, because you have to practice at it, and if they don't know how to do these things, if they don't know how to deal in federal court as opposed to state court, if they don't know how to deal with clients or U.S. attorneys or judges, then they can't be good representatives on the CJA panel. They just can't.

We want to be able to offer this to them and it's a year-long program. They have to sign up for a year. They don't get paid. They're assigned to be with panel members and members of the Federal Defender's Office, and work all the way through cases, from the very beginning to the very end. If a case finishes up, then they're put with somebody else so they know how to do it from the start.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

I think that's just invaluable and that's the only way, I think, to encourage younger lawyers to want to be a part of this because people ask me all the time, do you really like going to federal court? I love going to federal court. I love it. I love state court, too, but in state court, you're always jockeying for position. Who gets in there at 8:00 and signs their name so you're not 10:00 getting your name called. When you go to federal court, you're supposed to be there at 9:30; 9:30, it's your time to go. I love that and it's very formal and I love that kind of system. Most young lawyers who are coming in don't know how to deal with that. They've not been taught to deal on that kind of level and that's something they have to learn and we on the panel and the Federal Defender's Office want to be a part of helping them develop that so that when I'm not practicing and Mr. Gomany's not practicing, there's somebody standing right there in our place to work just as hard as we did at that time.

Dr. Rucker: I thank you. Ms. Rushing, I'd like to turn to you and ask sort of similar kinds of questions and also rely upon your experience both in the Ninth Circuit and here. On the death penalty cases, in California, \$183 an hour is not a very high rate, and yet I thought I heard from your testimony that you do have really good quality people here and you have a lot of people who want to do these cases. Is that correct?

Terryl Rushing: We do and I was thinking about it, when we were talking about cutting the rates, it would have an impact and, of course depending on how much they were cut, I don't think it would have the same impact for capital habeas lawyers because a lot of them are motivated by other than the payment. Some of them are motivated by their opposition to the death penalty. Some of them are motivated by . . . they're getting paid, they're part of a big law firm, they're getting a salary. They see this as a way to bring money into the firm that's their billing. It's not brought in by a senior partner. It's their money that they're bringing in so they feel like they're making a contribution. Then, also, it's kind of a quasi pro bono effort, for the public good.

I think the money in and of itself is not that big a motivator for roughly half of the people on our panel. Maybe more.

Dr. Rucker: Is there any issue with the graying of the panel for the death penalty people?

Terryl Rushing: I'm sorry?

Dr. Rucker: Are you getting young people to come in as well who are doing this work?

Terryl Rushing: We are. When we started realizing that we had this small group that was overburdened with cases, our judges started speaking at different Bar

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Associations, different gatherings and saying this is important work, it's good work, it's intellectually challenging work and I've talked to people. I say young people, I'm not talking about just starting out. Generally, senior associates, junior partner level. I know a lot of them. I've talked to them and really stressed to them, not only the public good that they can do in this field but also, these are very complicated cases. They're very intellectually challenging cases. If that's what you like, if you like being involved in that and having to go through that intricate process, you would like doing capital habeas cases and so we're starting to see more and more of them who will apply to the panel and, like I say, second chair for a while and then move up. They seem to stay. They seem to really get into and like it and want to keep doing it.

Dr. Rucker: Do you have time for another question, or if I may? On your death penalty cases, you talked about, if I understood you correctly, that you're using this sort of circuit policy of that \$35,000 cap to help motivate people to budget their cases. Could you talk a little bit more about how the budgeting works? Are you doing it in phases or how are you doing the budgeting process? Are you budgeting the cases all at once?

Terryl Rushing: We don't have the formal system that I know they have in the Ninth Circuit, where there's the pre-petition budget and the post-petition, the briefing budget and so on. We don't really have a standard form for them. What we try to tell them is put enough detail in it so the chief judge knows you're planning to spend this many hours drafting the petition. You think it's going to be this many hours briefing.

One of my jobs, the way I see it, is to be kind of a liaison between the court and these lawyers. They're going to be more receptive or less intimidated by a call from me where I say, "Look, you budgeted x amount for briefing and you're only halfway through the process and you seem to be really using up your budget. Do you need to amend it? You might need to come back in." That gives me a way to help them. They do come in and amend and it gets approved, as long as there's a cogent, detailed explanation for what they're doing.

Dr. Rucker: All right. Thank you very much.

Reuben Cahn: I had a few questions, actually. Can I start with you Ms. Olson-Gault? I think you were here this morning when one of the magistrates was testifying and he said that in almost all the cases that come in for capital habeas that there's already a volunteer lawyer willing to take the case pro bono, and that surprised me. I didn't get a chance to ask about it, but it wasn't what I would've guessed. I wonder if you could sort of tell me of what you know about the availability and quality of counsel for capital habeas cases in Alabama?

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Emily Olson-Gault: Sure.

Reuben Cahn: Federal capital habeas.

Emily Olson-Gault: That was very surprising statement to me as well. This is at least half of the work of our project is recruiting law firms to take post-conviction cases, state and federal. It is enormously time consuming and difficult and getting law firms to sign onto these cases is incredibly hard and we are often unsuccessful.

I actually had just happened to speak with the person who manages the pro bono program at one of the larger firms in Birmingham today and mentioned that to him, and he said that in the past, in past years, the chief of the Alabama Supreme Court had to call his firm and beg them to take death penalty cases pro bono. That it had come to that. That these were not widely available things, that there was not a readily available pool of volunteer lawyers to do this. His particular firm has something I think close to fifteen cases right now that they are handling pro bono, which is a ridiculous number. I mean, I applaud them. I greatly applaud them and their dedication, but that is far more than we should be asking of any law firm to give.

In terms of the quality of counsel, volunteer firms can be wonderful. We have found that they have wonderful results when they have adequate support. Sometimes that support comes from resource counsel. Sometimes that support can come from a CHU, but we never put a law firm on a capital case without a partner who is going to provide strategic guidance to them, who is an experienced capital defender. We have seen the results, if people remember the *Maples* case, that things can go terribly, terribly wrong without that sort of support and oversight.

This is true for law firms that have done ten of these cases before. We still make sure that they have that training and support because these are not people who do these capital defenses for their career. They do commercial litigation and they simply don't have the training or background to know how to handle these cases on their own. With the proper support, with proper resources, volunteer law firms can provide very high quality representation, but with those caveats.

Reuben Cahn: Can you explain a little bit the sorts of failures you've seen when high quality, private law firms are not getting that support? What are they missing?

Emily Olson-Gault: The example that I mentioned, the *Maples* case, was one which we like to forget about when we're doing law firm recruitment, but then we always give that caveat that that would not happen with the firms we place

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

because they have strategic support and someone helping them. In that case, the two lawyers from a very large, national law firm took on a death penalty case. It was never made clear to me whether the firm itself was signed on or if it was just those individual lawyers from the firm, but the lawyers left the firm and relief was denied in the state court. The notice was sent to the lawyers at the firm. The law firm mail room wrote, “These lawyers no longer work here,” sent it back to the clerk and the clerk put it in a desk drawer and no one knew that the state relief had been denied. The federal deadline passed. All deadlines were blown.

The U.S. Supreme Court did grant relief in that case, which was a fairly extraordinary step, but that is the sort of thing that could happen certainly in any case where there is not proper oversight and support.

Reuben Cahn: I, of course, remember the *Maples* case, or I remember reading it, being somewhat horrified but gratified that the Supreme Court granted relief. I was thinking of what are the more typical problems that arise in terms of the ability of firms to do this work without support?

Emily Olson-Gault: Fortunately, I don’t have, from our own firms . . . our firms aren’t put in that situation. I can tell you that the types of things that our strategic counsel, our experienced advisors provide, the things that they are trying to head off are failure to investigate certain types of claims that might not be obvious to someone who hasn’t done this work before.

There are several very, very tricky parts to capital representation, but one of the tougher parts is that the law is so constantly changing, which was brought up in the last panel, and if you don’t preserve a claim right now, even if that claim isn’t a viable claim under current law, the law may well change long before your client’s case reaches the end. If you didn’t bring it up now, it’s now waived. Law firms have a very hard time seeing that they need to investigate every aspect of their client’s case, whether or not it seems like they’re going to win on that issue at any given stage.

I think another big thing that they need help with is interacting with the client. The ABA guidelines require that you establish a relationship of trust with your client, and that is so important because most of the people, by the time they reach the habeas stage of a capital case, have been let down over and over again by their lawyers. They are often very mistrustful. They won’t provide information, and so much of capital habeas representation is going out and finding that mitigating evidence. Without your client’s cooperation, without developing that relationship of trust, you’re simply not going to be successful in that. Law firms often just don’t know how to do that. They’re used to working with sophisticated corporate clients. This is a totally different endeavor.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Along the same lines, one place that law firms can really go off track if they don't have the right support is their client saying something like, "I want to waive all my appeals." If you have a corporate client that tells you, "I don't want to pursue this claim," generally, you listen. That's a sophisticated client, you listen to what they say. Big law firms aren't used to dealing with a client that may very likely have severe mental illness, may be severely depressed, and is likely going to change their mind about waiving their appeals or waiving their investigation later down the road when it's too late. That's why the ABA guidelines, that's why the U.S. Supreme Court requires that you conduct that investigation regardless of your client's instructions. That's something that law firms have a very hard time wrapping their heads around, and that's something that a strategic advisor can really help them understand, make sure that they do conduct that investigation.

Judge Cardone: Can I ask a question, Ms. Olsen-Gault? I have a question about these firms that do this kind of work. You've heard us talking about the cost and circuit approval and doing these budgets. Do you have any sense of what it costs, and you mentioned that there is a huge problem with firms now saying, "This just is too costly." Do you have any sense of what it costs these firms to put on these kinds of defenses, get these experts? What they're spending or contributing in doing this work? Essentially, are they getting paid at all? Is it totally pro bono work? I don't know how this all works.

Emily Olson-Gault: The first question is easier to answer than the second. The time is almost always pro bono, although I think sometimes in the federal habeas stage, they can get appointed as a panel attorney if they are qualified. The expectation though is that the time itself will be pro bono. In different jurisdictions, there's sometimes financial assistance available for experts and investigators, and we certainly encourage our volunteer firms to make those requests of the court. It is the ABA's position that the court should be providing funding for that.

In terms of the cost to do a case, that's the sort of question if I ever want to recruit a law firm again that I don't particularly want to answer, but the reality is that we did try a few years ago . . .

Reuben Cahn: You have the right to remain silent.

Emily Olson-Gault: Yes. I take the Fifth on that.

A few years ago, we did actually try to nail that down and we did a survey of our law firms that had done this work before, and the results were so widely varying that we just couldn't get an accurate number. It's different jurisdictions, it was different types of cases. We always warn firms that

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

innocence cases are sometimes the most expensive because of the experts they require, things like that.

I would say in the average, if there was one, was in the \$50,000 to \$100,000 range, and that is not including attorney time. Law firms will like to throw out that their case cost them millions of dollars and that's including attorney time at their usual billing rates. In terms of out of pocket costs for investigators, and I should say that those numbers were in the first two years. We only asked them about the first two years of their work. That's where the primary, out-of-pocket expenses come from. It really varies so widely, about whether they get an evidentiary hearing, about whether they're paying for expert testimony, things like that.

It's very expensive. Law firms know that it's very expensive. This is not a secret. We can't pretend otherwise and it does keep them from taking these cases.

Judge Cardone: You're saying, it's \$50,000 to \$100,000 only for the experts. None of this is attorney's fees.

Emily Olson-Gault: Oh, correct. Correct. This is just experts and investigators. That number, like I said, we had in the just a few thousand from some firms, we had significantly more than \$100,000 from others. It really was all over the map, but if I had to kind of put it in a central range, I would put it somewhere in there.

Judge Cardone: Do you have any statistics about the number of work hours? Did you ever gather statistics about what it took them in the number of work hours to do this work?

Emily Olson-Gault: We haven't gathered that systematically, but we present awards every year to law firms that have done outstanding work on pro bono death penalty cases and we very often see 10,000 hours, 20,000 hours, things like that. That's sort of the life of a case. Sometimes these are cases that have gone on for twenty years. I know that you have a lot of times a large team of lawyers at a law firm doing this, because that's what's needed. That is what is honestly needed in these cases. They're billing hundreds of hours a year each. It's a huge time investment over the lifespan of a case.

Judge Cardone: Thank you.

Terryl Rushing: Judge, if I could add, my client . . . I got through the project, I represented him for ten years. Eight of those years were pro bono until his death sentence was reversed and remanded and I got appointed by the trial court to retry it. My firm won an award a year or two later from the ABA for the

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

amount of pro bono work that we had done in total, not just on a death penalty case. About two years later, the firm dissolved.

Apparently, a lot of our pro bono work was unintentional.

Judge Cardone: All right. Thank you.

Reuben Cahn: Can I follow up on something Ms. Rushing said and maybe both Ms. Olson-Gault and Ms. Rushing can address this. It's a question about how do we evaluate funding for additional investigation in § 2255s, additional experts after *Pinholster*? I'd ask you if you can kind of address this in the context of what Sean Kennedy was talking about earlier, about the strategic decisions of counsel to go back into state court to exhaust what may not have been exhausted? How do we fit these pieces together?

Emily Olson-Gault: I can start out with that.

First of all, I'm sure Ms. Rushing can talk about the uniqueness, in a sense, of Mississippi with their court's declaration that there is a constitutional right under their state Constitution to effect a post-conviction counsel, and I don't know exactly how, because that is a fairly recent decision, that will play out and effect potential *Martinez* claims.

Setting that aside for the moment, even post-*Pinholster*, you have a great need for lawyers to conduct a re-investigation of the entire case, even in § 2254 proceedings, because until you do that, you don't know what the *Martinez* claims are. You don't know what the potential issues are until you go back and do that investigation. I think that this also, kind of going back to what I was saying before, you also don't know what claims will become viable in the future. You don't know what claims that are losers now may be winners in two years, but if you didn't investigate it and you didn't raise it now, you've lost it. That's why the ABA guidelines call for a full re-investigation at every stage of the case.

In terms of investigators and the need for them, absolutely, the ABA's position, the ABA guidelines say that you must have investigators, you must have experts at every stage, and there is no exception at all for § 2254 proceedings.

Terryl Rushing: The way our judges have handled it generally is when a very early motion for the appointment of experts comes in, if we haven't gotten the record from the state court, the judge will generally defer ruling on the motion, or he may deny the motion but without prejudice to re-urge it, because we want to look at it as well. So that the judge can make a reasoned judgement about whether he thinks that it's reasonable to hire these

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

experts, so we do wait. We wait until we get the record in and go through it.

Now saying that, I'm not aware of a request post our getting the record that has been denied. I could be wrong, but we don't have many requests.

Judge Prado: You said 'we.' I'm just wondering, do you play a role in the vouchers? Does the judge ask you for your recommendation, suggestion, or to look it over and see if you think it's okay? What role do you play in that process?

Terryl Rushing: After the Public Defender's Office has looked at it, the Panel Administrator reviews it for clerical and real obvious errors, then it comes through me and I prepare a memo for the judge which 85% of the time is, "This looks reasonable to me. I'd recommend that you pay it." I'm certainly not going to second guess how much time somebody spent writing a brief.

Where I've questioned things . . . we did have one, and this is the disadvantage of getting a large law firm involved in one of these cases, they billed the case like we were Exxon. They had a paralegal who spent .2 hours every day getting on Westlaw, just checking to see if there were any cases that were relevant. They used it as a make-work project for every summer associate that ever came through the firm. On that one, I did say, "Judge, there's a problem here," and he ended up writing a letter to counsel explaining the concerns and they worked it out.

In another case, the Panel Administrator who no longer has that job decided that she was qualified to critique and make judgement on the bills and stopped sending them to me, and I got one back from a judge that said, "Well, Angela says that we shouldn't pay for this lawyer to be talking to the prisoner's family, because this case had already been tried and she's just never seen that happen before." I said, "Well, what Angela doesn't know because she's not a lawyer is that they are going to pursue an ineffective assistance of post-conviction counsel claim, and this is entirely proper and it should be paid."

I think that points out that having people who are familiar with the law in the case reviewing the vouchers is important. Having a third party that doesn't really understand these cases can be problematic.

Judge Prado: Let me ask the two . . .

Oh, I'm sorry.

Katherian Roe: [INAUDIBLE]...reasonably that'll be true, that we would actually go up for geographic location, if that was going to be possible. When he

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

mentioned that, you said, I think with some surprise, you greeted it with some surprise and you said, “We charge bare bones as it is.” That reminded me of something that you had also said in your statement when you said that panel members bill minimally to avoid any sense of impropriety. Is there some concern among the panel that if their bills were higher, or if you charged for the work that you actually did, that that would look like you were over-billing in some way?

Kathy Luker: No, not at all. Here is my reasoning behind that.

We have been through periods of time in years past, before we had the CJA panel where there was an issue that occurred I believe on a fairly regular basis with some attorneys who were appointed to handle cases, that I think all of us felt like they charged too much. They used it as a way because there wasn't a lot of really big oversight then.

On the panel now, I truly believe that we charge for the work that we do but we also know that there are some things, the way the structure is . . . for example, my husband and I practice together. We have a secretary who happens to have been out undergoing cancer treatment since the end of September, so needless to say a lot of the work that she usually does for us that we don't think anything about has fallen to me to do. In billing for the time that I have to spend doing that, I try to be very careful to make sure that it's reasonable. Sometimes, I may not as be as quick to pick up on something as my husband may be. It may only take him an hour to do it, it may take me an hour and a half. I have to always feel like if a judge called me in and asked me about it, can I justify that time? That's my main thing.

I don't think we have anybody on our panel now who charges more than is reasonable. I think there are instances where maybe I wish I could charge more, but I just don't feel comfortable with that. I think that's where the situation with us and our judges comes in that they know us, they know the work we do. They know that when we send a voucher in, that they can feel comfortable approving that voucher because we've truly done that work.

Ken Gomany: Could I add a little bit?

Katherian Roe: I'm sorry, just one second. I hear what you're saying, but when you say the difference between you charge reasonably, and the difference between that and when you say you charge minimally. Do you see a difference between those two?

Kathy Luker: I don't see that. I don't see a difference in that.

Katherian Roe: All right.

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Kathy Luker: When we first started . . . well, it's been a couple of years ago now. I had a conversation with one of our judges who was trying to get a sense of how the CJA panel did their billing. She just randomly picked a case that I had. She had me come in and she had written all these little notes all over it and she had actually taken the time to say, "Well, it only took me .2 to do this, but it took you .4." I understand that, but I also have a lot of other cases going on and charging .4 to do something, like for example to have a telephone conversation with my client's mother when I'm trying to get information about my client's background in an effort to work on the mitigation thing, she didn't understand why making phone calls like that to family members was important, but yet she gave me an opportunity to explain that so that the next time she looked at it, she didn't just automatically dismiss it as something that was not necessary. That's the reason, I think, with the new eVoucher thing that we're doing, it gives you a better opportunity to explain how you spent the time.

Katherian Roe: Okay.

Kathy Luker: We try not to waste our time, because I have other cases I'm working on, too. Sometimes I may have three or four federal cases that I'm working on, but I have forty or fifty state cases that I'm working on. I have to be efficient with my time all the way through. I hope that answers . . .

Katherian Roe: Yes, thank you. Mr. Gomany, did you want to add something?

Ken Gomany: Please. I think initially there was some chilling effect in our district and the judge is no longer here, retired many years ago. I'm not going to mention his name. Told us one time we had three trips we could make to see a client. I know there's been some discussion that's happened before where an attorney's been called on the carpet about billing out for conversations with family members. Those are some things that might effect us in that, but I know Kathy and I have been on committees with the state judges to oversee vouchers so we try to be very honest and ethical in our billing. That's just kind of our nature to be. I just wanted to make those points. One judge did instruct our panel years ago, we had three trips we were allowed because our clients are not housed here in this court house. They're all over the place. That's not here nor there anymore, but there could be some residue feelings about that.

I mentioned about the experts. About the Spanish-speaking experts. \$2,400, that's what, four trips because they charge \$700 a trip. Those are kind of concerns that I have.

Katherian Roe: Let me ask you. Do you use experts in many of your cases? I'm sorry, interpreters in many of your cases?

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Ken Gomany: Any time we have a Spanish-speaking, which we get periodically, yes, we have to.

Katherian Roe: If you have ten cases . . . I'm just trying to get an idea. I don't know how many Spanish-speaking folks there are in Alabama.

Ken Gomany: Right. The interpreters, there's three in Georgia and I think two in Tennessee. There's none in Alabama that are federally certified interpreters that we're required to use.

The system could change by having instead of a 3% pass rate for interpreters, maybe a little bit higher pass rate. Then we might get an interpreter here in Birmingham.

Katherian Roe: Understood.

Ken Gomany: Yeah.

Katherian Roe: I'm trying to get a feel for how many cases you have in the district that involve Spanish interpreters. Does it come up often in your practice?

Ken Gomany: We probably have, I don't know for the whole district. Kevin's gone. I don't see Ms. Vance here, but there could be 100 a year. Wouldn't you say, Kathy?

Kathy Luker: It could be between all of us. It kind of goes in cycles sometimes, too. You may have a conspiracy that comes through and you have several Spanish-speaking defendants. I have had times where I've had as many as two or three that I was dealing with all at one time, but what we try to do because the interpreters do have to come from out of state, we try to get in touch with them, say, "This is what I would like to do." The Marshal's service is fabulous about having us have our people together so we can effectively use the interpreter to come.

For example, I had all three of mine in the same county jail, but that county jail was Morgan County, which is in north Alabama, which is about an hour and forty-five minute drive one way. Rather than having that interpreter to make three separate trips, I tried to make one trip, see all of my people, have them come, make one trip, to help me with all three of my people. That's how we try to use that service and still be reasonable with the money.

Katherian Roe: Understood. I want to ask you to go back a little bit about the experts that we were talking about earlier, and of course interpreters, at least in these categories, are also considered experts. Interpreters and investigators. In response to Mr. Cahn's questions, you were indicating that you would

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

contact the agents or investigators on your own. Are you concerned at all about making yourself a witness in your own case?

Kathy Luker: I try to be very careful about that, and there are only certain things that I will talk to them about. If it's a situation where I think that it needs to be where we're taking a statement or we're getting information that's not contained some place else, then I would have an investigator go and talk with them, but that doesn't generally come up. We're very careful about that so that I don't end up being a witness.

Katherian Roe: All right.

Mr. Gomany, I wanted to ask you just one more question. One of the things we were talking about earlier was the panel nationally, and Dr. Rucker was talking about the fact that we've heard from many folks throughout the country that the panel is aging. You and Ms. Luker had talked a little bit about that was the case in your panel. I'm wondering what your panel looks like. Obviously, we know that your panel is aging, and I think the two of you indicated that it's approximately forty people. Could you tell me how many, estimate I guess, women are on that panel, and how many people of color?

Ken Gomany: Let's see. The panel is about forty. Women . . .

Kathy Luker: There's about thirty-five. Women, there are three. There were more. We've had a couple who have left because of different things. Moved, so forth. I think now there are three. There are three or four people of color. I think that's about it.

Ken Gomany: Yes.

Katherian Roe: Thank you.

Ken Gomany: You know, in response to that, in all fairness, you have to apply to be on it and fill out a twenty page form and some people don't want to fool with it. Federal courts could be very intimidating to a lot of people, especially new lawyers. You've got to be kind of geared up to it.

Judge Prado: Is there any way to evaluate the lawyers that are on the panel?

Ken Gomany: There are . . .

Judge Prado: Is there a system set up to see that they're doing a good job, or is it just a judge says, "He didn't show up in time to my court a couple of times. He's out of here." I know it's a difficult, challenging thing, and I don't know if it's possible. How do you evaluate the quality of the representation, once

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

someone is on the panel, and if they're not doing an adequate job, is there any way to check up on people?

Ken Gomany: I think the judges here know. Our bar is small enough, our panel is small enough that everybody knows everybody. If somebody comes in here, to this court room, intoxicated or on drugs or didn't prepare their case, they're out of here. They're out of here. They're not going to get called again.

I think the people that get selected on the panel have to be voted on by all our magistrates and our judges to get on the panel. You've got to make a big effort to get on it. Some people don't want to get on it.

Judge Prado: Have you heard of an occasion where someone was taken off the panel?

Ken Gomany: Oh, sure. There's been medical reasons.

Kathy Luker: Over the last several years, our panel started . . . when we first developed the CJA panel, it was opened up to everybody. They had 150 applications. They chose seventy-five people and then they realized from the number of cases, especially after we started talking about having a Federal Defender's Office, seventy-five people was too many. Some of those people left on their own, it just wasn't for them. Then it got cut down further. Now it's down to thirty-five, and thirty-five is a really good, working number, especially having a really good Federal Defender's Office like we do.

We also have an Executive committee made up of one district judge, one magistrate judge and six or seven panel attorneys. If there are problems and things are made known, they are brought to the committee to be discussed. Suggestions are made, either that someone talk to them or we have them come in, or how we deal with the problem. I'm not on that committee except in the sense that I was asked to help put together the mentorship program, so I have been to some of those meetings and making presentations.

I do know that there are times when situations have been brought to the committee and it has been dealt with appropriately. One of the times when the panel was cut, that was certainly a time that was used to not ask people to be on the panel that may have had problems.

Katherian Roe: Ms. Luker, can I ask you a question about the mentorship program?

Kathy Luker: Yes, ma'am.

Katherian Roe: Can you tell me when that program began?

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

Kathy Luker: It is just now in its infancy. We've spent the last year and a half getting lots of information from different areas around the country who have mentorship programs to see what we think is going to work best for us. Then, the Executive committee asked me and two other attorneys to get together and come up with what we thought was a good plan for us, which is what we've done. We've incorporated the mentorship application as a part of our new application that we've just used to re-apply to be on the panel. You have a choice at the very beginning, you're re-applying or you're a new applicant or you're applying for the mentorship.

The basic part of the application applies to everybody and then there are specific areas at the end, questions twenty-eight through thirty-six I think, that are just for people who are applying to be on the mentorship program.

That's also a segue to see how this person is going to work in our system, as to whether or not to consider them to be on the panel when they finish that. Hopefully that will and there'll be an evaluation through the year to make sure that these people are fitting in and they're the kind of people we want to have on the panel.

Katherian Roe: I believe I heard you say earlier that the mentorship program would be an unpaid mentorship, is that correct?

Kathy Luker: That is correct.

Katherian Roe: Why was the decision made to have it be unpaid?

Kathy Luker: Because we felt that it was important if a person really wants to be a part of this, if they really want to learn, they should be willing to invest the time. I don't think the time they're going to be investing in this is going to be detrimental to them financially.

Katherian Roe: Why do you say that?

Kathy Luker: Ma'am?

Katherian Roe: Why do you say that?

Kathy Luker: Because I think that they will be willing to spend the time, just like if you had some of the summer intern programs, for example. People go because they want to learn and they are willing to do and not be paid for it because they want the experience.

I think that we can all see from this mentorship thing that if the mentee got involved in the case that was going to be very complex, that were going to spend two weeks in trial, there is an avenue for them to go to the judge

Transcript (Birmingham, AL): Panel 4 –Views from a Mixed Panel

and request for them to be compensated for the time that they spend in trial and for trial prep. What we're doing for most of these, because the majority of the cases we handle, because of the way they are presented to us, we don't do that many trials. We're working out good pleas for people. Somebody comes in and it comes by way of information that they've already made confessions ahead of time. As a mentee, they still need to know how to deal with those from the time a person is arraigned all the way through sentencing.

That's after much discussion that we felt like that is the best way to handle it. That's not to say that once we get into it we may have to make a change in that.

Katherian Roe: Was there any consideration given to the possibility that if you made it an unpaid mentorship that you might not get some of the folks into the system that you might want to bring in? People who could not afford to come in and work for free?

Kathy Luker: No, ma'am. Not at all. There have probably been at least a half dozen over the last five years that we've been talking about doing the mentor program. Every time I see them they say, "When are we going to do the mentorship program? When are we going to do the mentorship program?" Then we start talking about it and it's probably going to be an unpaid position. "I don't care. I want the experience. I want the experience. I want to have a chance to work with lawyers like Ken Gomany, who has been doing this forever." They're willing to spend the time. Like I said, once we get into it that may change. We may ask for compensation at a lower rate. I don't know but we've not seen, the applications we just got, we've had fifteen people to sign up to be considered for the mentorship program and we're talking about taking maybe five or seven to start with.

Katherian Roe: Thank you.

Kathy Luker: Yes, ma'am.

Judge Prado: Anyone else? Mr. Gomany, what time should the Committee show up to your home for dinner tonight?

Ken Gomany: Right now. I'd love to have you. You've been a great Committee.

Judge Prado: Thank you for your information. This was very valuable and informative and we'll be in recess until 7:30 in the morning. Thank you very much.

Ken Gomany: Have a good evening.