

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 4—Birmingham, Alabama

February 18-19, 2016

Transcript: Panel 5—Views from the Judiciary

Judge Cardone: Good morning, everyone. My name is Kathleen Cardone. I am the chair of this Committee to review the Criminal Justice Act. We're going to get started this morning. Before we do, I'd remind everybody that if you have any cell phones or iPads or anything to please get those silenced so that they're not disruptive.

The session is being broadcast live at cjastudy.fd.org, and for those of you and I think a number of you have already had the opportunity to look at it, but also we have hearings that are archived. If any of you want to go back and look at any of the information, any of the public ones to submit comment, you can do so by going to cjastudy.fd.org.

We're going to get started this morning with our first panel, and I just want to say before we get going, we had a session all day yesterday so I'm not going to say too much other than we are a Committee that was appointed by the Chief Justice. We are on a two-year plan to submit a written report regarding our findings, and so these public hearings are being conducted throughout the United States.

We've already had hearings in Santa Fe, New Mexico; Miami, Florida; Portland, Oregon; and we're today here in Birmingham, Alabama. We have three hearings left in San Francisco, in Philadelphia, and in Minneapolis. Again, the Committee is here, and we will begin this first panel. The panel participants are Ms. Debbie Hunt Hunt, who's the Clerk of Court in the Sixth Circuit, correct? Judge Jane Milazzo, from the Eastern District of Louisiana; Judge John Ott, from the Northern District of Alabama; and Magistrate Judge Clifford Shirley, from the Eastern District of Tennessee.

With that, the way we're going to proceed is we'll let you make a brief opening statement. Please do not read from submissions. Everybody's had an opportunity to look at those, but we'd ask you to make a brief opening statement. Once those statements have concluded, we'll begin questioning by the Committee members. Again, we want to thank all of you for being here. We very much appreciate that. Why don't we start with you, Ms. Hunt?

Debbie Hunt: Thank you, Judge Cardone. I want to thank the Committee for allowing me to participate today in this very important national conversation. Chief Judge Cole had asked me to appear today. I think it's on.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Cardone: Just make sure . . .

Debbie Hunt: Is that better?

Judge Cardone: I will tell all of you, it is being recorded, so speak right into it.

Debbie Hunt: Chief Judge Cole has asked me to come speak to you today on those issues that where the clerk's office and administrative matters intersect with CJA. In the court of appeals, that is primarily in both panel management and voucher processing. It's also in case management since as you know in the court of appeals most cases are managed in the clerk's office before they are submitted to a panel. Panels come into the case fairly late when they are right for decision.

My office deals with appearances, getting attorneys appointed, getting transcripts prepared, briefing done, the minor housekeeping motions are handled exclusively in the clerk's office, of course, with a chance of appeal, to a . . . either a single or three-judge panel, when they don't agree with our initial orders. That's primarily where we're at interacting with appointed counsel, either CJA panel, counsel, FPDs, et cetera.

Our death penalty work is fairly robust. We have a death penalty in three of the four states in the circuit. Michigan does not have a death penalty, Ohio, Kentucky, and Tennessee do. Ohio has a fairly substantial number of individuals who are under sentence of death, are the primary source of our capital case docket is from Ohio. We deal quite a bit with the Capital Habeas Units which I believe we have four Capital Habeas Units in the circuit, two in Ohio, two in Tennessee. In Kentucky, we have mainly appointments from the Public Defender's Office there which is the Department of Public Advocacy in capital cases this is. Then in Michigan, we have only the federal death penalty. We do have one active appeal from a federal death penalty case right now.

The quality of counsel in those cases is from my perspective, I look at a quality in terms of whether they are compliant with the rules, whether they're able to process their cases properly, whether they get their things done on time, and also to an extent, what we can do to facilitate their work. Obviously, when you're working with professionals who do it all the time such as the Capital Habeas Units, and the Department of Public Advocacy, you have people who know what they're doing, and are familiar with the rules, who understand the procedures.

This is true of also non-capital cases. We find that those members of our panels who have deep experience with appeals, in particular, are generally going to process their cases more timely, and more effectively. The Sixth Circuit does . . . have not unique anymore, but was one of the pilot courts

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

for the Case Budgeting Attorney Program. We work with a Case Budgeting Attorney who not only budgets cases throughout the circuit that are either death penalty cases or mega-cases, he also assists with the review of excess vouchers in the circuit, and the judges are very appreciative of his efforts with that.

He is going to be testifying next month in San Francisco, so I won't speak to his functions other than to say that he's been very helpful to both as I understand it from feedback from the attorneys from my office, and from those judges who deal with him, the excess voucher processing judges.

The court of appeals recently adopted eVoucher. We're one of the first courts of appeals to do that. We are hopeful that it will reduce the amount of resources that we have to expend in both panel management, and voucher processing. We are encouraging the rest of the district courts in the circuit to do so, so that we can have access at some point to a fairly robust data system.

We plan to use it for any number of things to provide for our judges, information for our judges, to manage our panel better, to have a better handle on that. I was able to use it yesterday. I listened to the streaming testimony yesterday, and I was able to use it to look to our last seven months or so while we've been on the system, and also to look to some reports that we generated in-house for the past two years to determine how many vouchers had seen a reduction.

I should have written down the actual number, and I didn't. I think there were a little over forty vouchers that had seen a reduction. That constituted about 3.5% of all vouchers that were submitted had some reductions. I did not have time to go look at those, and see what they were, and whether there was a response from counsel and whether the reduction actually held. These were based on reduction letters that were sent out.

I am happy to be here again today, and offer any administrative point of view that you would like to hear from the court of appeals. Thank you.

Judge Cardone: Thank you. Judge Ott.

Judge Ott: Good morning. I also appreciate the opportunity to be here.

Judge Cardone: I'm not sure your microphone is on. There's a green light there?

Judge Ott: Yes.

Judge Cardone: Okay.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Ott: I appreciate the opportunity to be here. It's my understanding, we have submitted and I have read the materials that this court provided the Committee in written form. Also Judges Putnam and Proctor were here I believe yesterday and testified or provided information. I do not have a specific opening statement to make because of that. However, I do welcome any questions at the appropriate time.

Judge Cardone: Thank you.

Judge Shirley: Good morning. My name is Cliff Shirley, Chief Magistrate Judge from the Eastern District of Tennessee. It's a particular honor to be here and be in a building named after Hugo Black who is actually a friend of my family years ago, even though I'm a Tennessean now. I've been on the bench fourteen years, and practiced robust civil litigation for twenty-five years. I have not only read all the reports, seen a lot of the videos, but I've had occasion to review the qualifications, and the resumes and the CVs of those who have spoke in the panel here as well.

I confess to not having a similar pedigree in this area. Just experiential knowledge, but you shouldn't translate it into that end of me not having a lot of opinions which I do. I'm also thankful for this opportunity because that effort caused me to reflect on my own work, and reevaluate, reexamine, take some of the critiques to heart already. Didn't agree with them all, but it did give as I told Judge Cardone cause to pause. That's been very helpful to me.

Let me just say as my opening statement that the biggest problems that I see in a macro sense are the large number of prosecutions, the number of large prosecutions which I mean by multi-defendant cases in our district, that would be several 40-plus, a couple of 60-plus, one 101 defendant prosecutions which obviously takes its toll in a domino effect, not only on panel availability, but panel cost, travel, and the things you've probably heard all about.

The third is the large amount of e-discovery, electronically stored information. We are now up to terabytes in our court. Gigabytes was terrible enough, but when we exceeded that into terabytes, I don't really know what management of a terabyte on information looks like. We're trying to get our hands around it, but it's a little like warm Jello.

The other issue that doesn't get a lot of talk, it may not be an issue in a lot of districts, is remote detention. That really exacerbates the costs. Then there's finally this last issue that maybe the underlying core of all of those which is for me what I call the typical criminal drug defendant. It seems to be a younger person, twenty-five to thirty-five, who shows up with two, three of four prior state felony convictions. Each of which his or her state

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

lawyer was successful in getting reduced sentence-wise to probation, then serious probation, then enhanced probation, then “we really mean it” probation.

Bottom line is this person has never served a minute in prison, and they walk into a system and they hear me or the Assistant United States attorney say, “By the way, because of your record, there’s a minimum mandatory of fifteen, forty or life.” Well, first off, that doesn’t really help with the detention problems we’re having in pretrial because the way the bail reform act is that that person has a pretty hard time being released.

Well, if they’re not released, then they get sent to remote detention where it started out the cost being escalated from day one. If I have a lawyer who’s already out of town from a different direction going to a remote detention, and by the way, we’re in East Tennessee, and two of our remote facilities are in Western Kentucky, and at the Florida-Georgia line in Valdosta. You can appreciate that sometimes the travel cost exceed the substantive cost of bills.

Now, I don’t know if there’s anything we can do with that, but that strikes me as the main issues that I’m seeing today. Let me talk just real quickly about the things that I think have been the hot topics which have been things like the hourly rate judicial review of those bills and things like that. For me, the hard thing getting my hand around is what you do in terms of a comparative analysis for the hourly rate, okay? One hundred twenty-nine dollars an hour seems awfully high if you are a state-appointed lawyer. In fact, it’s three to four times what they get which is abysmal, by the way, but still.

If you’re comparing it to a top civil lawyer in our area, it’s quite low. If you compare it to the average hourly rate of a solo practitioner of which most of our CJA lawyers are, it may be about right. If you are to take an AUSAs salary and reduce it to an hourly rate, even after factoring in overhead, probably is fairly even. It must not be too bad as we have a large number of people seeking to get on the panel every month. There’s more people seeking to get than we’re allowing.

Another pragmatic way to look at it is whether the average person and whatever that is could afford to pay \$130 an hour to a lawyer, pay \$10,000 cash to a lawyer. In the last I guess thought I have on comparative analysis is we only have one fee, one right, whereas virtually, every firm has tiered rates. The question is, is there a certain irony that comes from the fact that the least experience of our CJA lawyers who take the most time to do the same matters that an experienced lawyer who provides better quality, if you will, and the less experienced gets paid more than the “better” lawyer.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

I see less issue with the hourly rate than with the max rate. Given the things I talked about earlier, the travel, remote detention, the ESI, the breaking of the max level has become the rule instead of the exception to the rule. If you think about what the gigabytes of discovery, if you just had 500,000 documents, I just say just, that seems like a lot, but in this day and age that's not. If you reviewed 1000 an hour, that would be 500 hours. You're already at \$64,000.

If you just reviewed 20% of those, say I'm just going to review ones that might relate to my client that would be 100,000. If you did those at 1000 an hour, you'd still exceed the max. You'd already be up at \$13,000 just for reviewing documents, 20%. The other problem I think that I haven't heard anybody talk about is the overall case cost, not on a per defendant basis or per lawyer basis. What are these multi-defendant cases costing?

If you have just 50 which is half of one our multi-defendant cases, if you just have 50 lawyers and they all just billed the max that would be \$500,000. If they all billed \$10,000, I don't know what one does with that, but I just think that's something that ought to be considered as well.

You'll hear me talk if we get to question and answer about judges, then I'm the contrarian. I believe judges reviewing bills is quite fine. I did time sheets for twenty-five years. Not every judge did though, and I think that some of the suggestions about training for best practices on billing and billing review would be good, but I even reviewed bills of other lawyers around the country.

It's not that it's the greatest thing. I understand the criticisms and critics and I've taken some of them to heart, but it's a little bit, I guess like Winston Churchill said about democracy. It may not be that great, but it beats all the other alternatives. With that, I mean it sounds like the only two alternatives I've heard or having the federal defenders do it in-house which would mean credibly burdensome it seems to me both time-wise and cost-wise in a time when they're already strapped time-wise and cost-wise or it would be setting up a third-party billing examiner.

Before one went to that extreme, one might want to talk with civil lawyers who over the last decade have been involved with third-party billing reviewers, and I think you would hear that not only has that been an abysmal experience but they are quite despised.

One of the questions that I haven't heard answered if you were to set up such other program would be who would monitor them, who would supervise them, who would they answer to, who would pay their salary, their staff for their offices. The real issue I think arises with anybody else is, where's the incentive? Would the incentive be for a third-party biller to

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

cut, to justify the fact they've been hired and they're being paid this money or would their incentive be not to cut because they're replacing judges who the complaint was they were cutting too much? If they're not cutting any bills and they're just rubber stamping them or approving them, why do we need them? I mean, why do we need that additional cost?

I'll be glad to answer and expound on any of those. Thank you again for the opportunity to be here this morning.

Judge Cardone: Thank you. Judge Milazzo?

Judge Milazzo: Good morning. Thank you for having me. I actually had no prepared statement, but I do just have to respond to something Judge Shirley had because I have to tell you, we are unique in New Orleans, and that the federal defender does provide coordinate the review of vouchers for the judges and presents us . . . we work very carefully with them, and while it is indeed a strain on the Federal Defender's Office, we find that there is more uniformity among the divisions of the court, and that we had the same person acting as mediator, and very frankly, I think it functions well.

We have I believe excellent representation provided by the CJA panel, and the panel positions are very competitive. People want to be a part of the panel because I think the billing has not become problematic as a result of our use of the Federal Defender's Office. With that, I have no further comment, and welcome your questions. Thank you.

Judge Cardone: All right. Our original Committee members included Mr. Chip Frensley. He was unavailable, so Mr. Neil MacBride is acting in his place. We have on the Committee members Judge Mitchell Goldberg, Professor Orin Kerr and Katherian Roe. We'll start with you, Mr. MacBride.

Neil MacBride: Great. Thanks, Judge Cardone. I wanted to [get] started with some questions about voucher cutting which several of you mentioned. Ms. Hunt, I'll start with you. You had said that I believe last year, your data showed that there were about forty vouchers that were cut, and if I understood you correctly, that was about 3.5% of voucher submitted. Just a couple of questions about that. I'm curious if you have any historical data and can compare that to prior years whether that's more or less a median or mean average or whether last year was more or less than what has been seen in recent years.

Debbie Hunt: That was for two-year period of time.

Neil MacBride: Two years? Yeah.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Debbie Hunt: It was 2014-2015. I could probably get some historical data, but as I said, I did not have time yesterday. It wasn't one of the issues that I had been looking to discuss so I just did it off the cuff, and that was I have wrong numbers, but I didn't have anything further back than that, but I can get it if the Committee would like that. I'd be happy to supplement.

Neil MacBride: In terms of, I don't know if you have this insight or granularity, but any sense either from analysis or I guess, anecdote as to the reason for those cuts, in other words, we've heard from witnesses over the course of our hearings that in some districts, a percentage, a material percentage of voucher cuts may be ministerials, some mistake in transposing numbers or something like that. In other districts we've heard it's much more a substantive disagreement by the reviewing magistrate or the judge where they just think the cost of the case is significantly less than what the lawyer put down. Any sense as to what in your district has been recently a small number of reductions, which buckets of reasons for cut those fall into?

Debbie Hunt: I don't really have any insight into that since I did not look at these personally. I didn't see them. We do technical reviews of all the vouchers. We do catch errors, so that could account for a good portion of those. I think eVoucher is going to be much better catching those before they get to a judge. I do know that when the judges have questions about the substance in a voucher, the case budgeting attorney is frequently asked to weigh in and review the voucher.

Neil MacBride: You know Ms. Hunt how just using the last years as an example, in any sense of how your circuit compares and contrast to the other circuits?

Debbie Hunt: No.

Neil MacBride: Are you aware whether the AO keeps data by circuit?

Debbie Hunt: I don't know if they do or not. I would have to find out. I mean, these were reports that we kept in our ECF system. This is data we keep there so we were able to generate it. Until last July, we were on 6X, the old system. Anything we had was either the paper notebooks that we kept, and we would generate information manually or through CM/ECF. I doubt that there is a comparative database for that, although there might be. I don't know. I don't quite understand what the data possibilities are in 6X.

Neil MacBride: Just last question, the numbers we've been discussing for the last two years, is that data that the circuit in turn has reported in any fashion to the AO? Do you know if they have that information?

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Debbie Hunt: This was literally off the cuff. I went at 11:00 a.m. yesterday morning when I was hearing the discussion, and asked my staff to look at it and try to pull that information for me for two years. I can say is I don't hear it, and I do hear attorney complaints somewhat about things. I don't hear a lot of complaints about voucher cutting from our attorneys. Again, it may be that I'm just not the person they're turning to, and I guess Chip and Mike Mazzoli might have more insight into that, but that isn't a complaint that is registered with me when I go out to speak to the bar or when they call in with an issue.

Neil MacBride: Right. Okay. Judge Shirley, a couple of questions for you since you've talked about voucher cutting in your prepared remarks and this morning. It sounds like you personally over your fourteen years of service to the district, from your perception at least in terms of the vouchers, you're reviewing, you have not been in a situation where you've had to do much voucher cutting. I wonder if you could speak a little bit about the instances where you have had to do it again trying to break it out in buckets or by rough percentages as to what things in your view required the cuts in the cases you've seen over the lifespan.

Judge Shirley: I would say that they come in two batches. One would be the ministerial mathematical transposing areas that you've mentioned, and I think I've mentioned on my prepared reports. There's just errors. The other is the acknowledgment that not all CJA attorneys love them as I might, as important as they are...are saints when it comes to billing. That can be either through lack of experience or it can just be the fact that excessive billing does exist. One has to acknowledge that. Sometimes there are patterns of unreasonable billing.

Now, in my case I've put some of those in my remarks I think in a footnote, and they're few in far between, but when you look at someone who has filed a sentencing memorandum, and they have billed the average whatever eight to twelve hours for preparation, research, and what not, and then you go back and look at their past six sentencing memorandums, and they're the same with the exception of some looks like a macro fill in the blank.

Well, my experience, I called the lawyer on that. I'd tell him I'm cutting it, I don't want to see it again, and they don't have a problem with that. I had a problem with them doing that. If you see somebody that regularly for whatever reason seems to double the in-court time. They're in-court for half an hour or three quarters an hour, and their bill shows an hour. They roundup or whatever every time. That's something we can check.

Sometimes it's what I think is looking at certain things. Realize the reason there aren't a lot of voucher cuts, and I don't think there's a lot of

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

questions. We can't even begin to cut most of the entries. How would I know how long it took them to meet with their client? How would I know how long it took them to do certain substantive work or to review the discovery when it says review a gigabyte of discovery? I can't second guess that.

When I have ten lawyers in a case and they're all coming to Knoxville from Chattanooga and they're all billing within five miles let's say or ten minutes of time the same, and one's billing an extra hour for travel time, for every trip. That's hard to explain other than that's just systemic problem with that lawyer. They come in two kinds. One I think is little intentional, one is unintentional.

I will say this, I make it a practice try to pick up the phone and call those lawyers or next time they're in court actually have them come back and I talk with them. I have had all but one ever just basically saying, "Sorry, I'll not do that again."

Neil MacBride:

Thank you, Judge Shirley. If I could follow up just with one further question for you from something in your written testimony that caught my eye where this is under I think issue three, and it's the last paragraph before you get to issue five, but just that last short paragraph. You write, "The biggest problem I've seen with the issue of experts and investigators has not been the over-cutting of requests—our division has only reduced two in each of the past two years—but the under-utilization of requests by CJA attorneys."

That struck me. I want to make sure I'm understanding you correctly is are you saying that from where you sit, you and your colleagues, you believe there are instances when CJA lawyers might be raising their hands to ask for an expert or an investigator and they're just not doing it for whatever reason?

Judge Shirley:

No. What I meant by that was as I read through the reports and listened to testimonies, there seem to be a lot of complaints about the judges reviewing CJA 21 vouchers for experts and things like that, and whether they were imposing their will on how a case was tried and things like that. There just aren't that many requests the gross number in our district for those. What I meant was from my standpoint and my watching and knowing how I tried cases, it just seems like the use of experts, the request for experts, the request even for investigators, the request for any assistance paralegals in complex cases is under-utilized. They don't ask for them.

That has surprised me, and I hadn't thought a lot about it until I was going through all of this, and realizing that in our district at least, say I have a

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

fifty defendant case, I would think I would have fifty requests for certain things, and I have five.

Neil MacBride: I know it costs you to speculate but any guess as to why CJA attorneys in your district are not making those requests?

Judge Shirley: No, and it certainly isn't because they've been turned down because I handle those first. It's not because they have to disclose much. They're pretty cryptic requests, and I rarely think it's appropriate for me to second guess somebody on those issues. No. I don't really know. Again, mine is anecdotal, much like my criticism as some of the others is anecdotal.

Neil MacBride: Judge Cardone, if I have time for one last question?

Judge Cardone: Sure. Go ahead.

Neil MacBride: Judge Milazzo, we heard just straight from your FPD, Mr. Kelly, who came and shared about the model you just summarized. Some of us, certainly I was very intrigued by that. We've heard a number of different structures and models across the district circuits that we've talked to so far. Mr. Kelly made an interesting observation. I asked him whether he thought the model in the Eastern District might be a good model that other districts might look to.

His question was, "It depends a little bit on how the Committee and the judiciary ultimately sees the federal defender if my job is to help manage the CJA panel in an efficient way. I think we do it very well. The downside would be it tends to distract from my ability to fully focus on and execute the mission of the FPD. It drains some resources away. It would be nice if I could be held harmless by giving a couple of resources just to manage that."

Then and these are my words, not his, it might be the best of all worlds. The question for you, Judge, is to the extent that you at conferences like this and your circuit conferences, the all judge conferences, to the extent that you compare notes with your colleagues around the country about these issues, do you have any view, do the judges in your district have any view even informal and off-the-record as to whether the way the panel and the defender are integrated in your district is a best practice or any practice that might work well in other districts?

Judge Milazzo: I have to be frank with you, Mr. MacBride. I am four years on the bench, and it never occurred to me that it operated any the other way. This was very new to me, and when I was asked to fill in at this hearing, I met with Mr. Kelly, members of the CJA panel, and called in some other colleagues to discuss these issues. That's when I learned that this is not how it

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

happened anywhere else. I can tell you that our Chief Judge has taken the position that this . . . I can't imagine very frankly having to deal with every voucher in reviewing the billing very specifically on every case that I have a CJA panel attorney represented. It works very well for us.

I have no experience any other way. I can tell you that our judges would have no desire to move from the model that we have in place. I can just anecdotally tell you, there's one habeas capital case in the Eastern District, and I drew the short straw, so it's mine. It was very comforting for me that as soon as that case was allotted to be able to call Barbara Daigle who is a paralegal in the Federal Defender's Office, and to meet with Barbara at that time to speak to how we were going to manage the budget to be submitted to the circuit.

Then after when the lawyers that were actually appointed visited with me, I had already reviewed it all with Barbara. She really works as an effective mediator to avoid I think the inherent conflicts that arise in any other way of handling it. All I can tell you is my experience has only been this, but I can assure you that in our district, there is no desire to move from the model that we have in place.

Neil MacBride: Thanks, Judge.

Judge Cardone: Right. Judge Goldberg?

Judge Goldberg: Ms. Hunt, good morning.

Debbie Hunt: Good morning.

Judge Goldberg: Do you have your prepared remarks?

Debbie Hunt: I do.

Judge Goldberg: Okay. I wanted to make sure I understood some statistics that you've provided us, and thank you for doing that. The table number two CJA vouchers processed by the court of appeals, that table, and I'm interested in the CJA 21 expert services. For 2014, the number six, in 2015, it's six. I want to make sure I understand what that means first. Does this mean that these are the numbers of the circuit vouchers that have been approved that are over the statutory limit of \$2400. Is that what that means?

Debbie Hunt: No. What that represents, the CJA 21 expert services, is vouchers in the court of appeals, not from the circuit, not excess vouchers.

Judge Goldberg: Not excess vouchers?

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Debbie Hunt: Not excess vouchers from the district courts. This is strictly vouchers concerning appellate cases in the court of appeals.

Judge Goldberg: Just appellate cases? Okay.

Debbie Hunt: Those are mainly translation providers.

Judge Goldberg: Okay.

Debbie Hunt: There's not a lot of need for expert service at . . .

Judge Goldberg: Is there a number here that would tell us how many for those two years 2014 and 2015 were excess vouchers approved by your court?

Debbie Hunt: Actually . . .

Judge Goldberg: The circuit.

Debbie Hunt: The expert vouchers approved by the circuit is in chart number three. Chart number three, we approved, but this isn't expert services. This is just the number. We lump together all of the excess vouchers, so that is not broken down. I did not break that down by CJA-21s, 24s or 20s.

Judge Goldberg: Okay. Thank you. Judge Shirley, I thought I heard you say that the state rate, the CJA state rate was half of what the federal rate is.

Judge Shirley: Yes.

Judge Goldberg: What is it? What is it?

Judge Shirley: I can't remember, but I think it's \$50. It may be more than that now, but it's terrible.

Judge Goldberg: Understanding you're a federal judge, I'm stunned by that number.

Judge Shirley: Yeah.

Judge Goldberg: How do . . .

Judge Shirley: I just hear that, okay? I mean, I'm not over there practicing, but that's what I've heard and I've read some stuff, so I couldn't speak to it, but I can pretty well be assured it's not remotely approaching even \$100. You can appreciate the state defenders who want to come over to federal court.

Judge Goldberg: Right. In your prepared remarks, you talked about I think and I want to make I understand it's your view that the CJA lawyers' understanding

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

everyone would like to have a higher number, but that they're satisfied with the federal number of \$129. Is that your view?

Judge Shirley: I've never had a conversation with them regarding their satisfaction with that number. All I can say is those who are on the panel, I don't recall anybody having even commented about leaving over the rate. There's a line waiting to get into the system to get that rate.

Judge Goldberg: I think you commented that it could be just general numbers, but when you crunch in the hourly amount of time for these cases and overhead, it sort of commensurate with what a private attorney would charge.

Judge Shirley: Again, it would depend on what you're comparative analysis is. We review civil billings all the time.

Judge Goldberg: Right. Just take a felon in possession, a simple felon in possession case.

Judge Shirley: For example, \$300 an hour is pretty much our max in our area, much higher in other areas, I'm sure, but \$300 an hour.

Judge Goldberg: Civil or criminal?

Judge Shirley: Civil, top flight civil lawyers in a complex case, fee shifting type of a case. I think that particularly with the situation law practices and firms have been in in the last four years, I would say those who get \$200 an hour regularly in our area aren't hurting too bad, so \$130 is probably on the low side of reasonable. That's what I'd say.

Judge Goldberg: That's what I was trying to understand. There's so many interesting parts of this assignment, and one of them is just to understand the differences between the different districts and circuits. Can you give me a sense or let's just pick a felon in possession case for a private attorney. What would be the hourly rate?

Judge Shirley: I don't know.

Judge Goldberg: Yeah.

Judge Shirley: I don't know. I've never been privy to that. I've always wondered. I didn't do retained criminal practice. I always wonder what they do charge. You might hear things on the street, but you have no way to know, but I have no idea.

Judge Goldberg: You think it's a little higher than \$129 or . . . ?

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

- Judge Shirley: I don't think it's an hourly rate. What I hear is I think they get what they get the first day. In a lump sum, they get paid a flat fee. If I were guessing, I would guess it would be between \$10,000 and \$20,000 for a retained lawyer. I don't know.
- Judge Cardone: Can I ask you to speak into your microphone?
- Judge Shirley: Oh, I'm so sorry. Again, I leaned back, pardon.
- Judge Cardone: That's okay.
- Judge Goldberg: My eyes are so bad I can't read your . . . how do you pronounce your name, Judge?
- Judge Milazzo: Milazzo.
- Judge Goldberg: Milazzo. Could you elaborate a little bit on your use of the public defenders with the vouchers and tell us a little more detail how that works?
- Judge Milazzo: Our Public Defender's Office as I appreciate it, there is one paralegal that is virtually assigned to the CJA panel. I don't think it's a formal assignment, but because of the significance of the time that it requires, she does this almost full time, and she reviews all of the vouchers. When there's a suspected voucher, she will call the attorney and meet with him, and basically, serves as a mediator between the attorneys and the judges. When we are presented vouchers . . .
- Judge Goldberg: I'm sorry. This is a paralegal?
- Judge Milazzo: Yes, and it's an administrative position, and she reviews it. By the time a voucher is received by me, it has been reviewed by Barbara in the Federal Public Defender's Office. She reviews the math, sometimes calls them in and requests, will question certain items on the voucher, and it's usually completed by the time it's received by the judge if there's further question and we can call the attorneys in, but I think she cleans up any excess billing by the time it's received by the judge. Someone else has looked at it. She served as that third-party review.
- Judge Goldberg: Do you see situations and understanding Judge Shirley described them as infrequent? Do you see situations where . . . does the paralegal address situations where there's been three hours of court time in reality, but the bill says five hours?
- Judge Milazzo: That's what she does.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Goldberg: Okay.

Judge Milazzo: I'm not having to review all of the vouchers to make any comparison. By the time frankly I get it, I'm very comfortable, I can look at it and not have any problems after her review.

Judge Goldberg: Do you have any sense as to whether the attorneys have any resistance to, I'm not integrating the type of paralegal but a paralegal question they're billing? Has that ever been a problem?

Judge Milazzo: Not really. I think what you have to look is the experience that Ms. Daigle brings to the table. She's been in the Federal Defender's Office longer than anyone else. She has done this for years. She's very experienced, and I think it's a model as I appreciate that they enjoy because they've worked with her for years, and then there's a uniformity in the divisions of the court.

Judge Goldberg: and consistency.

Judge Milazzo: That's it. They know exactly what's going to be accepted and what's not accepted, and they're not dealing with one judge who has an attitude that no case should cost more than \$5000, and another judge that won't look at any of the billing. I think frankly, that becomes more problematic in this situation. They can go to the Federal Defender's Office, they work with her, and she mediates so that there is consistency across the board.

I can tell you in some of our more complex cases, it was easier for me to contact the Federal Defender's Office to say, "I know there's going to be a budget that's submitted by the attorney, so are you going to review it ahead of time and then to work with her in the attorneys." I think it just becomes a better model. That's my own experience, so it's really hard for me to complain about or to critique any other model that I have not had experience with.

Judge Goldberg: Yeah. Well, this is very helpful because we're going to try to decide if we recommend change, and the next question is what's the change, what's the model?

Judge Milazzo: The problem is and I think it's already been articulated I'm sure Mr. Kelly has informed you that it has created a tremendous strain on his office, but I think the judges in our district do not want to move on from the model that we have in place.

Judge Goldberg: Well, if and underscore if our recommendations would be maybe more funding for that type of model, and if the judicial conference agrees, and then if Congress agrees, maybe we could . . .

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Milazzo: That would be great.

Judge Cardone: That's a lot of ifs...

Judge Goldberg: That's why I underscored all these.

Judge Milazzo: That would be a great. A lot of ifs. That's a lot of ifs, but we would be delighted.

Judge Goldberg: Yes. One more question for you. I just want to make sure I'm clear from your testimony and Mr. Kelly's testimony. The instances where the negotiation so to speak between the paralegal and the lawyer, are there any instances or some instances where that breaks down and you have to be the judge and decide or is that very infrequent?

Judge Milazzo: I've never had that, but that's of course always an option where there's a complete disagreement, but that has not . . . I've never had that experience for me. Now, what has happened is when budgets have to be submitted to the circuit even after they've reviewed it. There's still a requirement that lawyers meet with me to advise that this is a budget that has to be submitted because it exceeds . . . for example, the habeas capital case that I currently have, even after they have reviewed it with the Federal Defender's Office before it could be submitted, they would . . .

Judge Goldberg: That's a great example, that type of case. A bigger case, do you have any information or advice for us as to the paralegal-CJA lawyer interaction when they have to go to the circuit and get approval for excess funds?

Judge Milazzo: What I've done in my situation is call the Federal Defender and very frankly, it was Mr. Kelly and Ms. Daigle that came and visited with me, and we spoke about what budget and how . . . because I very frankly, this was new, and they had the experience. We went over what the process would be, and then they asked the attorneys appointed to represent, to submit to them a budget, and then they worked through it. Then it was submitted to me at that time. They were able to work through it. While I had to approve it, by the time it was presented to me, it appeared to be reasonable. I was satisfied, and then as the vouchers, it has worked.

Judge Goldberg: Thank you.

Judge Cardone: Right. Professor Kerr?

Prof. Kerr: Thank you very much for your testimony. One of the complaints . . .

Debbie Hunt: Wait.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Prof. Kerr: Sorry. Back here.

Debbie Hunt: Where are you?

Prof. Kerr: The voice, I can hide under the desk if it makes it even more mysterious where the voice is coming from. I wanted to ask a question related to voucher cutting questions. One of the concerns we've heard about voucher cutting has been based not so much on line-by-line review of whether there was an error or some reasons objectively to think that something was entered in wrongly, but rather a sense that there's an inherent value almost in a particular case. Drug case is likely to be X dollars or gun case is likely to be Y dollars, and that somebody who's billing beyond that really shouldn't be.

I'm wondering if you have any reaction to that judgment, if you think that's proper, improper, and more broadly if you think it would be helpful for there to be standards written into the law or guidance as to exactly what kind of voucher cutting is appropriate or inappropriate and under particular standards or if it's okay to leave it something more general and something maybe applied a little bit differently in different districts or by different judges.

Judge Shirley: I don't share that there's any value assigned to a particular type of case, and I think one has to be very careful with that. Sometimes you will have a multi-defendant case, and the billings will seem to be in reverse order, say the Kingpin or the leader's bills will be the least, but they may have adhered to the federal rule, unwritten rule first to plead wins. Whereas the lowest delivery person may not have had a chance to cooperate, and they had to go to trial. That bill ends up being the highest which would seem not to make a lot of sense if you just assign values based on either culpability or senates, things like that.

I'm very reticent to say that a certain case or a certain type of thing is worth a certain value. I would say this, I wouldn't mind if they had two different maximums, one for single defendant or two-defendant type cases or whatever we might call it, a general case. The ones for these multi-defendant or complex electronic discovery cases because they bump up against the maximum within weeks sometimes. With the motion practice they need to keep up with what the other defendants are doing, particularly what are they doing to my defendant, and the cost that are involved maybe with the remote detention.

I wouldn't mind if there was a second tier of maximums, so we didn't have to always bump up against them because . . . and I am curious about one thing. I don't know if I'm allowed to ask questions, but I like the idea of the federal defender being involved in the process. There are probably

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

no judge here or that's testified before you who wouldn't mind giving up voucher review in a heartbeat.

I'm curious, with all the multi-defendant cases that we have and one of them being the federal defender, how do they review the bills of the other defendants? Is that not a conflict problem greater than the concern about the conflict of a judge, particularly if it's upfront? Do you know what your codefendants' expert is going to be? That was my concern with them doing it from a legal standpoint besides just the cost value.

Judge Goldberg: I think Ms. Roe does something similar with that, so maybe when she gets her turn at the mic, she can engage you on that.

Judge Shirley: That's fine. We don't have to do it on air, so to speak. I'm just curious about that. I don't know if that answered you, Judge Kerr, I mean, Professor Kerr.

Prof. Kerr: Yeah. If anybody else on the panel has thoughts, I'd love to hear them.

Judge Ott: I would say this professor that I have probably reviewed in 18 years close to 2000 vouchers because the magistrate judges of this court are the reviewers of the substantive billing. The percentage where there's inappropriate billing for technical other reasons way less than 3%. The CJA lawyers do an absolutely great job with that. Where there is a question, however, usually it is technical or just an error by the lawyer. If it is truly as substantive issue by way of example, a lawyer recently was billing 0.2 for every email he was sending out, and he was sending out tons of emails in this case, and it was a big case.

I called them out and said, "Is every email taking you ten or twelve to fifteen minutes?" He said, "No, I just chose that. I figured that was the appropriate thing I'm doing." I said, "Well, if it's five minutes, then bill accordingly." He was like, "Okay. Thanks. I'm glad someone told me." I want to be sure that everybody understands, we review a lot here. They do a great job with it. Having done that many, I would say this, every case is absolutely different. Having reviewed that many, do I have a gut visceral on what an average 922 defendant should be or probation revocation should be as far as cost goes? Absolutely. Do I look at everyone independently? Yes.

I have the same concern that Judge Shirley does about the federal defender does not do them in our district. I'm concerned about a conflict there. Number two, knowing the lawyers in my district as I do because I've been practicing here either as a law clerk, prosecutor, as a magistrate judge for thirty-five years. I would be very surprised if the CJA lawyers that we

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

have, the quality be in caliber they are would like their work reviewed by a paralegal first.

A judge is very different. If I call them up and ask them a question, they don't mind answering. We'll have good discussion, and it's over with. I would also say we have the same problem Judge Shirley does about remoteness of defendants. It's hard to come up with a plan when the defendants are all over the district. I hope that answers your question.

Judge Goldberg: Just to follow up on that, on the conflict issue that you raised and Judge Shirley raised. I know if it would go from a paralegal the review to a defender, a lawyer, some of the closest friendships I've observed in our district are between the defenders and the CJA lawyers query whether that's a good model having friends reviewing each other's bills and affecting each other's livelihood. I think you both raised excellent points on that regard.

Judge Ott: When I bring that up as Judge Shirley does, I in no way am impugning Mr. Butler. He is absolutely incredible. We're very pleased with him. I enjoy working with him on a regular basis, but I am concerned about perceptions there.

Judge Shirley: Mine is the same. Ms. Beth Ford who you'll hear at the next group has no peers, but she is the biggest supporter of our CJA lawyers, and she should be. I'm trying to protect her actually, and keep her from having to take on even more when she needs to not have more.

Prof. Kerr: This has been helpful, and I wanted to ask what I think is the standards question which is one approach is to leave the question of voucher review. It's just an open-ended issue. Each judge can review that judge's sense of what is reasonable or not reasonable. One consequence of that may be that particularly an excellent judge will be particularly excellent in reviewing voucher and a judge who may not that day be so excellent may not be so excellent in reviewing the voucher. Would it be helpful in your view if there's more guidance in what the standard should be?

For example, I think Judge Shirley you were saying there's some things of course you wouldn't cut for that. You can't make a judgment call about certain things. Other things you can make a judgment call about. I think your sense of what you could do and not do seemed absolutely sound to me, but I wonder would it be helpful if something like that were codified to the extend there may be some judges that are not following that guidance.

Judge Shirley: That's addressed to me. I think my only thoughts if I'm understanding what you're saying is I would encourage training both ways. I suspect

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

there's a lot of CJA lawyers who aren't used to regular billing, keeping a time sheet, that type of thing. This may be the only types of cases they do them in. They could use some training. Judges who don't come from a civil background and regularly live with a time sheet permanently attached to them may not understand incremental billings and things of that nature, and how that works.

The other thing that would be nice and I'm going to probably recommend this when I go back, I made a note to myself, maybe have a brown bag lunch with the judges and the lawyers or the defenders have them set up something and talk about the various issues. I mean, I think we're pretty open and I don't mind hearing from them about their concerns are and expressing to them what our concerns are, and what we look at, and what troubles us, and what troubles them. I always believe that more communication is better than less. I would hate to ever go on record as recommending codifying one more thing, but I would agree that relationally, things can probably be improved.

Judge Ott: I agree with Judge Shirley on that. It's hard to codify. By way of example, if you are to codify, you should go see the defendant once a month or once a week. Some defendants do not require that. Other defendants may require more than that. I'm afraid of codifying or standardizing any of it. I think it's working as far as I can see.

Judge Cardone: Ms. Roe?

Katherian Roe: Ms. Hunt, I'm going to begin with you. Ms. Hunt, the information that you gave us about the voucher reduction for the last two years you said was 3.5%.

Debbie Hunt: Yes.

Katherian Roe: Can you tell me if that includes the excess compensation vouchers?

Debbie Hunt: No. Those were strictly our court of appeals vouchers.

Katherian Roe: All right, good to know. That would be essentially looks like the excess compensation vouchers for 2014 were 1027 according to your chart . . .

Debbie Hunt: That right.

Katherian Roe: chart number two or table number two, and 1137 in 2015. That does not include those?

Debbie Hunt: No.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

- Katherian Roe: As far as the excess compensation vouchers, the ones that come off from the district court, do you know the percentage of cuts on those vouchers?
- Debbie Hunt: I do not.
- Katherian Roe: Thanks. Is that the type of information that your staff could also gather if they were asked?
- Debbie Hunt: I've made a note to see if we can do that. The difference here is that the excess vouchers that come up from the district courts have historically been paper. I mean, right now, we're still taking paper vouchers from the district courts. The only way I know of would be to go back to the notebooks that we keep on those. I'm not sure. It would require a hand calling if we have the data to call. I'm not holding a lot of hope, but I'm happy to. I've got a note to see if we can do that.
- Katherian Roe: Imagine it was a substantial amount of work just to get the 500-600 plus information from the vouchers that were court of appeals only.
- Debbie Hunt: That was easier because that was in our system. We could look to that. We have our own system, our filing system actually had some data points that we could do for that, but we don't have access to the district court's filing systems.
- Katherian Roe: You indicated I believe that the way that you determine this was to look at the letters that went out to the attorneys saying, "We've cut your vouchers."
- Debbie Hunt: That's right.
- Katherian Roe: Do you have the same type of letters for folks that you send out for excess compensation vouchers that were cut.
- Debbie Hunt: Those I believe are going to come from the district court because the district court has already made a decision on those incentives. I could find out for you if the district court sends a letter or I don't believe we send the letter. I think the district court does.
- Katherian Roe: What if the voucher, let's say the excess compensation rate just went up to \$10,000 on January 1st? Let's say that, but it really did happen, but let's say that the number was \$15,000, and there was no cut at the district court, and it went up to the court of appeals, so no letter would have gone out at the district court because there's no cut. Went up to the court of appeals, then the court cut it to let's say \$12,000. Who would notify the lawyer of that?

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Debbie Hunt: Again, I think that would be from the district court because that's being processed at the district court level.

Katherian Roe: The court of appeals would cut the voucher, and then it would return to the district court, and then the district court, it would be their responsibility to notify the attorney?

Debbie Hunt: Correct.

Katherian Roe: Do you know if that's done in your circuit in the district court?

Debbie Hunt: I think it has to be done. I think the attorney has to have an opportunity to respond to the cut.

Katherian Roe: When you say you think it has to be done, is that because that's the circuit's rule?

Debbie Hunt: It's because that's how we do it. To tell you the truth, I'm not sure if . . . I thought it was in the guide. The guide required that there be an opportunity for the counsel whose voucher was being reduced to get notice of that, and to respond to it. Now, I could be wrong, but that's my understanding.

Katherian Roe: Well, my understanding is the guide does suggest that it should be done, but it's done in some places around the country which is why I asked whether or not you know if it's done in your circuit.

Debbie Hunt: I have not polled the district courts . . . No.

Katherian Roe: All right. Thank you. One more question I wanted to ask you is that you indicated that the case budgeting attorney assists the judges when there is some question about a voucher, whether or not to approve it, whether or not to cut it. Do you have any thoughts and do they do that on the Court of Appeal vouchers also?

Debbie Hunt: Yes.

Katherian Roe: Do you have any thought as to whether the addition of that person in the last, it's been eight years in your circuit, I believe, whether the addition of that person has lowered the number of vouchers that were cut or is it higher or kept the same? Any idea about that?

Debbie Hunt: I don't. I'm sure Bob can respond to that.

Katherian Roe: You said Bob. Who's . . . ?

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

- Debbie Hunt: Bob Ranz is the case budgeting attorney in our circuit. I think he'd probably have a much better handle on that than I would.
- Katherian Roe: Do you think he keeps that kind of data?
- Debbie Hunt: If not, he certainly has the anecdotal information. I suspect that he does keep at least rough figures on that.
- Katherian Roe: Thank you. Judge Ott, I wanted to ask you a question about something you had said earlier. In your district, the magistrate judges do the final review on the vouchers?
- Judge Ott: Not final, the intermediate. The clerk's office, my courtroom deputy does the review for technical and mathematical challenges, then I review it for substance and it's finally approved by the district judge handling the case.
- Katherian Roe: All right. Is it your experience that your review is really the significant one that you do? You look at all the substantive issues, you compare to see whether if you look at position papers or sensing memos or whatever. Is that something you do versus the district court judge in your district?
- Judge Ott: I do it, then it is sent up to the district judge. He or she I am sure does it as well, but I really do a very detailed as do the other magistrate judges review of it. If I have questions, I'd challenge the lawyers.
- Katherian Roe: All right. Does the district court judge ever come back and ask you why you send something through if that person actually thinks that it should have been cut?
- Judge Ott: In probably 18 years I would say less than 10 vouchers total out of \$2000 maybe I've done or say \$1500. It's rare, but occasionally, a district judge will ask me a question. Sometimes I'll pick up the phone and ask them the question because I think Judge Shirley mentioned, sometimes you'll look at the docket sheet and it will say, "We're in court an hour. There's a billing for two hours." It doesn't seem to make sense. I may talk to the district judge, I may talk to the lawyer, the courtroom deputy. Sometimes they have merged the time they were with the client and lock up. There's that communication that I have with all the players, including the district judge.
- Katherian Roe: I assume in your district, it works that the compensable time for time in court doesn't begin until the judge actually takes the bench, correct?
- Judge Ott: Yes, in-court time.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

- Katherian Roe: Sometimes lawyers will write down, let's say the hearing was at 10:00, and then their particular hearing doesn't really start until 10:30 goes to 11:00, they'll right down one hour, correct?
- Judge Ott: Right.
- Katherian Roe: It's compensable time. It's just not compensable time in that category.
- Judge Ott: That's why oftentimes I'll talk to the courtroom deputy who's really the eyes on it or honestly, typically, I'll call the defense attorney and say, "I've got this variation," and he goes, "Well, we had to wait. Judge was late. Judge was in another hearing," whatever it might be. We're talking a very small percentage where I challenge them, especially with the new electronic system. That has helped immensely in the work. I can review them much more quickly.
- Katherian Roe: Judge Shirley, would you also agree that time doesn't start that's compensable for being in court until the judge actually takes the bench?
- Judge Shirley: Right. We have the exact same procedure. We have the same I would say of this of the same anecdotal experience as Judge Ott. We actually or at least I encourage the lawyers to get there early and meet with their client, particularly if it's somebody that's been brought in from some distance. This is a great savings opportunity for you to meet with your client. Just bill it as such. Bill it as time spent before court, and then break down the time in court because it should match the time in court. That's all, in court time and out of court time.
- It's not a question of compensability, it's a question of getting it right on the voucher. I agree that eVoucher, as much as I questioned it, starting out has been terrific so far at least in terms of speed. I treat it when I first started a fax that seem to have an imprimatur that came with it that required immediate response. It pops up on my screen, it's like, "Oh, I have to do it now," as supposed to a paper voucher that we come and maybe sit in a stack.
- Katherian Roe: One of the reasons I raised this is because when you were talking about different ways in which you've noticed that attorneys were claiming time that perhaps they shouldn't have been claiming, that came to my mind immediately when you said the time in court because that's something that's quantifiable, right?
- Judge Shirley: Right.
- Katherian Roe: You check the minutes, but I review vouchers every day, unfortunately also, and I have discourse of vouchers over ten years, over a ten-year

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

period that I've reviewed them where folks have just put it in the wrong category. We have to say, "Okay. You were there. You do get paid for this. It's just in the wrong box." Fair to say?

Judge Shirley: Correct, and the times I've had problems where it says, "One hour meeting with client before court, one hour in court," and it was only a fifteen-minute hearing.

Katherian Roe: You also have to check as to whether or not or when their hearing actually began and it was . . . ?

Judge Shirley: I will actually look at the minutes themselves, and I look at the calendar, and I'll say, "Oh, that was supposed to start at 10:00, and we actually started at 10:30, so give them the benefit of the doubt. Plus, I give them the benefit of the doubt anyway if it's half an hour and it billed 0.7. What's the difference?"

Katherian Roe: I want to ask you another question about when you were talking about final vouchers that you review. I take it that your district is just like Judge Ott's and that in your district, the magistrate judges review vouchers for reasonableness and do substantive reviews.

Judge Shirley: Right. Correct.

Katherian Roe: All right. Then it goes on to the district court for . . .

Judge Shirley: Final review.

Katherian Roe: Final review, that's what we'd call it.

Judge Shirley: For affirmation.

Katherian Roe: I was going to say affirmation, but I didn't want to presume. All right. It goes on for final review. One of the things you were also talking about was when you got back and let's say look at a sentencing memo, and it looks like the same sentencing memo that that lawyer has filed in another case, just fill in the blanks and make it different. Is there any effort at that part to take that person off the panel because it seems to me that first of all, I mean, the issue may be a funding issue. We're not going to fund things that you didn't actually take six hours to do, but the second is why are you preparing the same memo for a client that you're supposed to be representing? My question is, have those folks been removed from the panel?

Judge Shirley: Let me see how to answer that. My approach is educational. With that conversation comes the clear understanding that I don't approve of it

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

either substantively or billing-wise, and that I will give them the benefit of the doubt that this was something that hadn't been brought to their attention and will be corrected immediately. Once I can think of probably it was not, and they are not on the panel.

Katherian Roe: Give me an idea. I mean, so one person is out on the panel then this happened with more than one lawyer?

Judge Shirley: Yes, because it correct it.

Katherian Roe: It was another person, but they corrected it.

Judge Shirley: Yes.

Katherian Roe: They didn't do it again?

Judge Shirley: Correct, and these are aberrant cases. I hope you understand that the vast majority of our panel lawyers are fantastic. As you bring up new people, and as more people are in line trying to get there, sometimes you let someone in that doesn't understand quite as well.

Judge Goldberg: Before we leave this topic, excuse me, just one . . .

Judge Shirley: and I'm not opposed, by the way, to cut and paste or appropriate. I'm not talking about that because if you're going cite book or something like that, a lot of times you have some standard language. That's fine. I get that. I'm talking about that rare case where you see two or three that are exact same page lengths, and that same language, and sometimes mistake his for her.

Katherian Roe: That's ineffective assistance as counsel as far as I'm concerned.

Judge Shirley: That's the big concern . . .

Katherian Roe: That's why I'm asking.

Judge Shirley: as much as bill. It comes up in a billing format, but as I mentioned in the conversation, there's an undercurrent of discussion there.

Judge Goldberg: I'm not disagreeing with the magistrate review model, just seeking to get your thoughts. How do you and Judge Ott feel comfortable that you can do this when you haven't presided over the trial and the actual sentencing to use the last example?

Judge Shirley: That we have or have not presided over the trial, what was your question?

Judge Goldberg: My question was, you don't hear criminal trials, right?

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Shirley: Right.

Judge Goldberg: You don't hear criminal sentencings, but yet you're reviewing bills for that, and how do you do that? Isn't the person in the room, the disrespected district court judge in a better position to assess what happened?

Judge Shirley: Yes, and I would say where Judge Ott may call them and discuss with the district judge, my usual practice is to make a note and say, "The lawyer has billed for this much time for preparation for this sentencing hearing, let's say eight hours, and the sentencing hearing only took thirty minutes." You might want to look back at your notes. It just seems unusual to me.

In other words, if I see something, but I'm not going to cut it at my level because I have no idea. I wasn't there, but I'd certainly not cut any trial time or preparation for trial time because I wouldn't have been involved in that. I will make notes if I see something to point out to the district judge that I think might be worthy of them looking at.

Katherian Roe: Let me just follow up on that.

Judge Ott: Can I make a comment first for the record?

Katherian Roe: Sure.

Judge Ott: I believe particularly in my case, and with my fellow judges, we are more qualified not in the district judge, but the paralegal at the Federal Defender's Office. Additionally, I have tried eighty-five felony cases in this courthouse as a prosecutor, so I do understand that. I also as a judge do try criminal misdemeanor cases including civil rights violations which I haven't done both felony and criminal misdemeanor before I got here, I'm very attuned to that. I think I get it.

Katherian Roe: Sorry. Let me say this. I certainly know that Judge Goldberg isn't questioning whether or not your experience or Judge Shirley, whether or not your experience been able to do it. Here is the thing. Throughout this country when we have talked to folks, one of the things that judges say is that the reason that the voucher should be with them is because they're the ones who are familiar with the cases. The people came before them, the trial was held before them, they sentence the folks, they read the memos, they did all of those things.

They have the familiarity with the cases, and that's why it should not be placed somewhere else, whether they say in an administrative place, whether it be, I can't remember what they refer to it, basically a third-party or whether it be with the Federal Defender's Office. The reason they

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

say is because they're the ones who are familiar. I think Judge Goldberg's question is more towards the issue of if that is true, then . . .

Judge Shirley: Let me see if I can to get to what I think your concern is.

Katherian Roe: how would it be that in these two districts, and I'm sure other districts that the magistrate judge is at a better position to be reviewing these vouchers when they're not the ones who are most familiar?

Judge Shirley: We are not usurping the district judges' review. We are assisting their review. Just like we have not seen what goes on after it leaves our court, they have not seen what goes on in our court, so that if I've had six to eight motion hearings, how would they know what those look like, whether they were standard preform or motions, whether they were very heavy-lifting type suppression hearings or things like that? We just provide a recommendation. We don't usurp. They can do all the review they want, and there's not one thing we've done that takes that authority away from them.

Katherian Roe: My understanding and this could be a misunderstanding, but the understanding I had based on our earlier conversations was that essentially, what goes up gets from the magistrate level to the district court judge gets affirmed.

Judge Shirley: I would like to think that every report and recommendation I send out gets affirmed.

Katherian Roe: Well, I know that may be true, but I'm talking about . . .

Judge Shirley: It's not, but . . .

Katherian Roe: a conversation we just had a few minutes ago was that essentially, and Judge Ott, you said maybe ten times in the last I can't remember how many years, but it was a decade did it come back to you or questioned, and Judge Shirley, you indicated that usually, it just goes up and gets affirmed.

Judge Shirley: I didn't say that. I just said it goes up hopefully for affirmance.

Katherian Roe: For affirmation?

Judge Shirley: Right, but I will agree that my historical experience is that there's a pretty good deference given to the two reviews that have preceded it, and I'm going to guess if the district judge signs off and it goes to the Sixth Circuit, there's a similar deference, but I don't know the extent to which they spend time reviewing our review.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Katherian Roe: This is a question for both of you. Do the district court judges advise you if they cut a voucher?

Judge Shirley: It's come down to me, but it's been rare. I'm not sure I could call it up right now. I just remember that being done. There was a cut made that I didn't recommend or didn't cut. I can't think of one case, but it would be very anecdotal and . . .

Katherian Roe: There's no formal process? They don't send you a letter or an e-mail saying, "This is a voucher that you reviewed and I cut this."

Judge Shirley: No.

Katherian Roe: Right. Judge Ott, that's true for you?

Judge Ott: No. It's not a formal process. We communicate very well about that. I would also say this, the way I see my role is to complement the ultimate decision of the district judge. As far as familiarity with the case, oftentimes, I've actually spent more time with the defendant and the lawyer than the district judge does. For instance, I'm going to handle motions to dismiss on an R&R, motions to suppress.

The person then after that decides to plead guilty even before the district judge has had to rule or review my work. They plead guilty and have a relatively short sentencing, so I'm actually spending more time and have a very good feel for the case. Additionally, I cannot remember any time in my career as a judge that the Eleventh Circuit has reduced a voucher we have approved ever.

Katherian Roe: Do they notify you when they do?

Judge Ott: My courtroom deputy would know it. She would tell me. They do not personally give me notice. You also have to remember, I have a relationship with the lawyers here who have practiced this long, I would know it.

Katherian Roe: Well, that brings me to the next topic, and that is the issue of voucher reduction and how is it that we know it. One of the criticisms has been and Judge Shirley, you mentioned this earlier is that the information is anecdotal. The problem is if there is no solid data, if folks don't keep data, how do we know? That brings me back to my questions again about voucher reductions. I'm going to begin with you Judge Shirley. In your statement, you stated that you thought that or that your opinion was that voucher reduction was rare. The question I have is again, I assume that's anecdotal.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Shirley: Oh, yes. Well . . . one.

Katherian Roe: The question I have is, is there any data in your district that you're aware of that actually indicates what a voucher request is the amount request, and the amount actually paid, the difference in them and how many times that occurs.

Judge Shirley: Yes.

Katherian Roe: What is that data and who keeps it?

Judge Shirley: I got a printout before I left, and I haven't really had time to decipher it, and I'm not sure it's in the best format because we have three different divisions.

Katherian Roe: All right. You said you got a printout, so I'm assuming that you haven't seen that data before.

Judge Shirley: I hadn't, and it seemed to comport with what I understood, and I didn't bring it. It's in my expando file in the car.

Katherian Roe: All right. Where did you get that data, sir?

Judge Shirley: I had my clerk run it. I said, "Can you . . . ?" Not my clerk, clerk of court, I said, "Can you possibly find me vouchers and voucher requests and voucher actual payments and then we can go through and highlight the ones that are different?"

Katherian Roe: All right. Did they compile the numbers? I mean, does it actually say, "Hearing 2015, there were 200 vouchers submitted in this district . . . ?"

Judge Shirley: No. It's more of a spreadsheet, Defendant Smith, and then across voucher submitted date, amount submitted, amount recommended or paid. I think there might have been eight if I remember right.

Katherian Roe: Over what time period was this?

Judge Shirley: That was over one of the years. I just looked it quickly at the yellow marks.

Katherian Roe: Can you provide that information to the Committee?

Judge Shirley: I think so.

Katherian Roe: When you say . . .

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

- Judge Shirley: I'll try to put it in a better format so you might be able to understand what you're looking at. If you see something that says "Greenville" or "Chattanooga" or "Knoxville" but you see different magistrate judges, some of the way cases get assigned. I think I can get you the information you want. It might seem to me just in the format that I got it or try to get it down and have a recapitulation sheet maybe. Total number submitted, total number cut, percentage cut, things like that.
- Katherian Roe: Does it also indicate, do you have any indicators on those documents that say why the voucher was cut?
- Judge Shirley: No, but there's one on there for \$9. You can probably assume that was something or \$11, one \$25.29, something like that. It's probably not a . . .
- Katherian Roe: Judge Ott had said that when a voucher goes up from his district and excess compensation voucher goes up the court of appeals that those vouchers do not get cut. Do you know if your district keeps any statistics as to whether or not their vouchers get cut at the Sixth Circuit?
- Judge Shirley: Sixth Circuit, right.
- Katherian Roe: Sixth Circuit.
- Judge Shirley: I don't know if we do, and I again anecdotally don't know of any coming back. Technically, I think they come back for our payment, so there might be somewhere you could look at the amounts submitted against got over to the payment side of the courthouse and find out what the actual check cut was, and then do some analysis. Again, that might take a little time and heavy lifting, but . . .
- Katherian Roe: We have folks for that.
- Judge Shirley: You might be making promises others can't keep.
- Katherian Roe: I have confidence in them. They're young and energetic.
- Judge Shirley: Oh, to be such.
- Katherian Roe: Judge Ott, I have the same question for you. Does your district have any information as to the voucher cuts for any period of time?
- Judge Shirley: I don't know that. I made a note to myself also to check with the Clerk of the Court about that because you piqued my curiosity now.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Katherian Roe: The second part of that question is about the court of appeals, the Eleventh Circuit in your situation. Do you know if the vouchers from the Eleventh Circuit come back to the district for payment?

Judge Ott: Yes.

Katherian Roe: It's possible that you also may keep statistics on cuts from the Eleventh Circuit?

Judge Ott: Could be. I just do not know that.

Katherian Roe: Are you willing to check and see, sir?

Judge Ott: We can check and see.

Katherian Roe: Thank you.

Judge Cardone: Anything else? I have a couple of questions, and I'm going to pass it to you. Let me ask Judge Milazzo. You mentioned that you had sent one up to the circuit on I think it was, the one on the capital case, has that gone up yet to the circuit on the case budgeting?

Judge Milazzo: I believe it has. Yes.

Judge Cardone: Okay. Do you know when you submitted it approximately?

Judge Milazzo: Gosh! We just ran into another problem with this case, and it seems like it's been on hold for a time, unrelated to anything with budgeting. It has gone up and it's been approved. I just want to back up because perhaps there was a misunderstanding as to the district judge is not reviewing the vouchers that come to us in terms of how our coordination with the Federal Defender's Office works.

I am still provided the voucher. It is still my obligation to review it. They handle all technical deficiencies. It works through them. They're submitted to us through that office, but that does not mean that my obligation at that point that anyone just signs off particularly that in those more complex cases where you're meeting with the attorneys. It's just as far as I'm concerned, it just provides for us, it seems to, and easier flow of information.

I'm not having Ms. Daigle approve the vouchers, so if there were some misunderstanding, I apologize. I believe that that budget has been approved and it was done some time ago. I don't remember. We just had a FOIA request that seemed to stop.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Cardone: Okay. I guess my question is how long did the process take from the time that you submitted the case budget to the circuit for it to get back to you indicating that it had been approved. Do you recall?

Judge Milazzo: I do not recall.

Judge Cardone: You've been there four months. Do you know approximately how many you've had to submit to the circuit?

Judge Milazzo: Four years.

Judge Cardone: Four years, I'm sorry.

Judge Milazzo: I think there were three.

Judge Cardone: Were all three approved as you budgeted them?

Judge Milazzo: Yes.

Judge Cardone: Okay. On the issue of travel cost, Judge Shirley, you mentioned that it's a big issue, and we've heard that around the country. How do you handle travel cost? In other words, we've heard different ways of handling it. Do you have a specific way of handling travel cost on your voucher?

Judge Shirley: Handling it, you mean in terms of trying to reduce it?

Judge Cardone: No, no. I am talking about reviewing it. In other words, our remote detention site is a certain distance away, do you guys look at it and say, "This is how long it takes to get there." Is there a particular way you look at it when you review it?"

Judge Shirley: I guess yes. I mean, I know generally how long it probably takes, but I don't know if they got stuck in traffic. When we have interstates that seem to be in a perpetual state of construction. There are wrecks. There's all kinds of things. If they said it took longer, I don't question it. I trust them.

Two things I do to try to reduce that cost, and I try to encourage them to meet with their defendants when they're in town. Even if they're in for a hearing, and they have a non-remote defendant, I'll say they're coming a couple of hundred miles or 100 miles per hearing, they could go see their defendant while they're in town rather than make another 100-mile trip.

Second would be to allow them often to appear by telephone. We allow them to come in that way. Now, certain hearings require them to be there with their client. If I require that, then I ask them to get there early. If a client is coming in from 200 miles, they're coming in from 100 miles,

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

what a great opportunity to have one of those meetings you need to have with your client, but those are two main costs saving measures.

The other is it's hard for me to say. Now in one case, I did compare where all the lawyers were coming from the same downtown area, and one's bill was completely different than the other by a substantial margin.

Judge Cardone: Along those same lines, and I think . . .

Judge Shirley: What I got, by the way, as an answer, and I apologize for interrupting . . .

Judge Cardone: That's all right.

Judge Shirley: my secretary Googled it, and it said that's how far it was.

Judge Cardone: Okay. Along those same lines, and I think you might have indicated this, but do you know of any kind of training that your CJA attorneys receive about filling out vouchers? In other words, looking at this form and saying, "Oh, my God! Don't bill it 0.5. Bill it 0.10 because it's just ridiculous," or the opposite, "I want to see everything." Do they receive any training about how to bill for travel, how to bill for in-court time, out of court time or they're just given the vouchers and told to figure it out?

Judge Shirley: I would presume that they are offered the training. Again, our Federal Community Defender, Beth Ford will be here and she can answer that specifically. One of the issues that we've discussed on the panel administration is certain lawyers not taking advantage of the training opportunities.

I would guess they're already in place. I just can't remember. I mean, we actually go over which of the training sessions are occurring, and I'm almost sure all of them have gone through eVoucher training. I feel pretty comfortable saying yes. The extent to which it's stuck, I don't know or whether they attended the ones that were offered, I can't say.

Judge Cardone: Do you have any requirements for attending a certain amount of training per year?

Judge Shirley: We do.

Judge Cardone: You do? Okay. Same questions to you, Judge Ott. How do you handle travel cost?

Judge Ott: Similar to Judge Shirley. The only other thing we do because we have the marshals transporting prisoners to the extent we can, the marshals also are very accommodating about bringing someone in, for instance if a lawyer

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

can't make a four-hour trip, and we've got a trip already going. We'll put the defendant on the bus or the van. Other than that, we do it similarly.

With regard to training, our federal defender has a very active training program where they get CLE for free. It includes voucher training. We also do the electronic voucher training by the clerk's office. All our lawyers, I believe, are very well-trained that's probably why we have very few issues.

Judge Cardone: Okay. Thank you. All right. Judge Fischer.

Judge Fischer: Thank you. Ms. Hunt. Have you heard anything from your judges? First of all, I should ask, is it the Chief Judge of your circuit who reviews excess vouchers or does he or she delegate?

Debbie Hunt: Delegate.

Judge Fischer: Okay. Have you heard anything from those judges or the chief the nature of why are we doing this? We're not at the district level. We don't know what happened down there or the opposite, so good thing we're reviewing what those district judges do with these vouchers. Any thoughts?

Debbie Hunt: My discussions right now with Judge Jane Stranch is the delegate review, the vouchers. I think she thinks it's an obligation that she has to do. I don't know that I've heard her comment on the value of that. I think that there is a fairly strong sentiment amongst those judges that I have spoken to though who have waited on this with me, that they feel that they do add value to the process of reviewing the cases in the court of appeals.

Again, I'm not sure how much value she feels that she adds. Although because of our process, we route every excess voucher that comes to the court of appeals to the case budgeting attorney. The case budgeting attorney does have an objective review of what has happened in the district court.

Judge Fischer: Is that every excess voucher or . . . ?

Debbie Hunt: The excess vouchers.

Judge Fischer: Okay. Not just the \$30,000 suggested amount that's budgeted?

Debbie Hunt: No. For any excess voucher that comes to the court of appeals, our case budgeting attorney reviews that for the delegated excess review voucher judge.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Fischer: Thank you. Have the other judges heard anything anecdotally or directly perhaps from any of the circuit judges who review vouchers about whether they think their positions or their review adds any value to the process? Judge Milazzo?

Judge Milazzo: I really have no comment about that.

Judge Fischer: Okay. Any of . . . ? Okay.

Judge Shirley: I see them so rarely, and when I do, I don't think we're usually talking about vouchers.

Judge Fischer: Okay. Thank you. I don't have anything else, Judge Cardone.

Judge Walton: Could I ask, the case budgeting attorney, what's that person's background?

Debbie Hunt: He was a practicing attorney for many years. He practiced criminal law. He became the case budgeting attorney on a pilot program in 2007. He's been doing this for eight years now, and his background was strictly as a criminal practitioner.

Judge Walton: Do you know if he accepted CJA appointments or was he . . . ?

Debbie Hunt: I'm not really clear on his background.

Judge Goldberg: Judge, could you . . . this may be a little off topic, but as I said, one of the many things I love about this assignment is you get to learn things about other districts. As I understand it, you hear motions to suppress in criminal cases prepare R&Rs. That's something we don't do on our district. Could you walk me through that a little bit? How often do you do that and I think it's a great idea, and I'd like to hear a little bit more about it.

Judge Ott: Having been on the court now for a number of years, we used to do it more than we do now. It's a very individualistic thing. If the district judge wants me to hear it, it's referred to me, I hear it. With the number of district judges we have vacancies on, two vacancies right now, one judge may send it now because he or she is in trial, and another criminal case needs it done.

What happens is it's referred to me. I conduct a full-blown hearing. The lawyers present testimony, evidence, whatever. I would do a report and recommendation, goes to the district judge. They have the opportunity to object. Oftentimes honestly, there are no objections and very quickly thereafter, the case pleads. Sometimes it's helpful; other times it creates

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

another layer because there are a lot of objections that have to be reviewed by the district judge, depending on the nature of the case.

We now have full civil authority. We're in the full draw of the course, so I do a lot more civil cases. I try probably four or five, three or four or five civil jury cases a year. The district judges have been very good to us, and a lot of times, they will keep those now to themselves realizing that we have a lot of duties which we do appreciate. When necessary, they send it down, and that takes priority over everything else.

Judge Goldberg: How many hours on motions to suppress to you do in a year, just ballpark it?

Judge Ott: Now? Probably, it depends. For instance, I'm working with federal death penalty case, so I'll do more work in that than I would in a typical criminal case. I would say on average in the last three years because it's really changed in the last three years. Probably a dozen on motions to suppress, motions to dismiss probably less, definitely less.

Judge Cardone: I believe Dr. Rucker has a question real quick.

Dr. Rucker: Thank you, Judge Cardone. I want to address this question to all three of the judges, but initially to Judge Shirley. You indicated that you thought there should be perhaps maybe two statutory maximums. Would you care to share with us what you think the second maximum should be, and then I'd be very interested to hear what the other judges have to say about that as well.

Judge Shirley: In my notes to myself, I just put \$15,000. Now, that's just a number out of the air. I have some thought in my mind that there are a number of these multi-defendant vouchers that come in that exceed \$10k, but don't really exceed \$15k. It would be nice if you could capture a large number those that didn't go up to that level. I don't remember a whole lot over \$15k and the \$20k. I mean, there's occasional ones, but I don't have a feeling, hard feeling on that number.

Dr. Rucker: Okay. I just wondered because you talked about sometimes the big data cases, the e-discovery that can be terabytes now.

Judge Shirley: I'm surprised that they aren't higher.

Dr. Rucker: Judge Ott, do you have a feeling?

Judge Ott: I agree. That little bump to \$15k, I think would take care of a lot of additional cases where I find the excess comes in is in experts that you can spend \$2400 I believe it is now on an expert in no time. Those always

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

have to be for that number I would recommend be higher. I would recommend something up to \$5000 for instance with regard to psychological experts. It is very difficult to find someone that's going to do it for \$2500-\$2700 or less and give you what you need. I think \$5000 on expenses minimum would be reasonable.

Dr. Rucker: Okay. Judge Milazzo, do you have a thought on that?

Judge Milazzo: I'll be honest with you, I hadn't thought of that until Judge Shirley discussed it. It sounds reasonable anecdotally, but I haven't looked at any data from my district. I'd probably be a little more comfortable having at least queried our judges to see what their view is, but it sounds reasonable anecdotally, and that's what . . . I don't know.

Dr. Rucker: Okay. Thank you. Let me, Judge Milazzo, stay with you for just one more question, if I may. With your public defender doing a lot of the work on the voucher review, are you aware of them making cuts or suggesting cuts or working with the attorneys to cut their vouchers before they come up to you?

Judge Milazzo: I have and it has been things like travel. I've seen cuts where there's been a move because the travel was inconsistent. That's where . . . I'm trying to think of where I've looked at a voucher and there's been a cut, and it's been primarily in those sorts of things where it's not a . . . I wish I have done. That's where I specifically recall having seen problems or having seen changes to the voucher is in travel and things of that nature, not in preparation for a motion. I haven't seen that cut.

I know that when there is a preparation for budget that's submitted, they do work through the Defender's Officer, and I think there are conversations with the Defender's Office, and that's been my experience. When the voucher comes to me, where I see cuts or in things that I would consider more technical.

Dr. Rucker: Do the panel attorneys ever appeal to you about a cut that was made?

Judge Milazzo: I've never had an appeal . . .

Dr. Rucker: Okay.

Judge Milazzo: about a cut. That's what's been interesting is when I have talked to panel members, I think they've been satisfied with the process.

Dr. Rucker: All right. Thank you very much. Thank you, Judge Cardone.

Judge Cardone: Judge Prado.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

Judge Prado: We've heard testimony around the country. The judges seem to say, "It's working fine. There's no problem," and then we hear from some of the CJA lawyers who tell us their vouchers are being cut without explanation, that there's this fear that if they're not super reasonable in their voucher, they might be kicked off the CJA panel. There seems to be inconsistent stories there between the judiciary and the lawyers, and I'm just wondering, it's difficult for us to find out where is the problem. Is there a problem? Each district has its own different way of doing things. We hear from each district, and it seems to be working in their district.

I don't know if the problem is inconsistency within the judiciary that one judge is different from the others, and he or she says, "Heck! I got to worry about the national debt, so I'm going to cut them across the board." You have one judge in a district that is the problem, not the district or is it that every time there's a new Chief Judge who has a different outlook on things that influences the district or the circuit? I'm just wondering where is the problem? Is it the individual judges that have problems and just a few of us or is it the way the system is done and how do we remedy this?

I know Professor Kerr had questions about regulations, and I don't think the last thing judges want is another ton of regulations telling us exactly how to do the voucher. I think we need some ability to do these on a discretionary way, but if there is an abuse by some of us, what are we going to do? I'm just wondering if you would respond to those concerns.

Judge Shirley: I'll speak first. I don't know how to answer your question empirically at all. I think that's part of your charge, and I don't know how you'll do it. Part of my concern is anytime we talk about one-size-fits-all with judges, it just never works. You have panels of judges who hear the same case, read the same things, and you have concurrences and dissents. They don't even agree on those types of things. If twenty district judges heard the same motion, I'm guessing they wouldn't all twenty rule the same way. If they see the same voucher, they may not see it the same way.

As I read the reports, and this would be my commentary though. As I read the reports of some or some of the actual anecdotal problems that some lawyers had experienced, as supposed to the hypothetical problem that might happen, I was pretty taken aback by some of those accounts. I would say if there are judge problems, then they should be addressed as judge problems, and not to be what is currently en vogue in the country; if I might make a commentary that if you find a problem that's affecting 1%, we change the 99%.

That's why I wrote what I wrote to say I don't think this is as big a problem as it is, but you're the ones touring and asking. My suggestion would be to, I don't know how you do this, but go to the CJA panels in the

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

various districts and say, “How’s it going for you? Do you think the judges are fair? Is it a judge you have a problem with it? Is it systemic in the division? Is it systemic in the district? Is it systemic in the nation or is this anecdotally a problem?” I mean, you have some judges that tend to, magistrate judges, I know Judge Ott would know from our conferences that are more inclined to detain people, and others that are more inclined to release them. There are those who do fourth amendment matters one way, and some that view on the others.

I don’t know how to answer your question other than that, except from my experience in talking with a large number of magistrate judges, many of whom operate the way we do that there’s no overarching sense that we need to cut these vouchers. To the contrary, it’s an obligation that we have been given, and we take it seriously, and I think that would be the general rule.

Just as I said earlier on, not all CJA lawyers are saints nor are all judges. I suspect some have a mindset that let’s say that yeah, were shocking to me. I thought they were when I was a lawyer. I include myself in it. I suspect that I’ve made mistakes along the way. I don’t think again it’s been systemic, but that would be the only way I can answer that question.

Judge Ott: My suggestion if I might very briefly would be I know some of our CJA panel attorneys at least one maybe two have testified here or come before the Committee. They probably would not publicly tell you whether we’re cutting vouchers unreasonably or having difficulties there. I would suggest talking to Mr. Butler, our federal defender, and also talking to the Resource Counsel for each of the respective districts, so to speak, off the record, off the public record maybe where they would be more inclined to tell you what they’re really thinking. I would love to know if that’s an issue in my district because I would be astonished because they do good work, and we encourage that.

Judge Cardone: I believe Professor, you have a question, Professor Gould?

Prof. Gould: Thank you, Judge. One quick question. Question for the three of you who are in the bench. Have either of you or any of you practiced elsewhere or have you sat by designation elsewhere so that you have an idea of whether the experience in your districts is similar or different from those and other areas?

Judge Shirley: I have not.

Judge Ott: Nor have I.

Judge Milazzo: Neither have I.

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

- Prof. Gould: Okay. Thank you. That's all I wanted to clarify.
- Judge Cardone: All right. We're right . . . did you have a question. Okay.
- Katherian Roe: I just want to ask one question, and that is to follow up on what we've just been talking about the voucher cuts. Judge Shirley, one of the things that I read in your statement was that when you were looking at vouchers, you were obviously looking to see whether or not a voucher was an honest and forthright presentation of the services that were rendered.
- Am I to understand you correctly that if the voucher is honest, if everything in that voucher is something that the person did and the attorney did an effort to represent the client fully and effectively, that you believe that that voucher should be paid in full?
- Judge Shirley: As a general rule, I would say yes.
- Katherian Roe: When you're thinking about an exception, tell me what you're thinking about.
- Judge Shirley: I'm thinking about one case.
- Katherian Roe: Okay. All right. Then that truly is an exception, all right. As a general rule, if the work is done, the voucher should be paid.
- Judge Shirley: Right.
- Katherian Roe: Judge Ott, would you agree with that?
- Judge Ott: Yes.
- Katherian Roe: Judge Milazzo?
- Judge Milazzo: Yes.
- Katherian Roe: Thank you.
- Judge Walton: I just have one quick question. In those e-discovery cases, and I would agree those are generating a lot of fees. Do you ever get requests that paralegals do that rather than the lawyer him or herself which can reduce significantly the cost?
- Judge Shirley: Again, we have had several of those requests. I've been surprised there haven't been more. There haven't been as many requests for some a common coordinator of discovery for fifty defendants where we could just pay one and attribute it to them. We've had paralegals, we've had IT

Transcript (Birmingham, AL): Panel 5 –Views from the Judiciary

support, we've had things like that. I'm quick to approve those because I think that is a very good use of money, and it's usually well-below the hourly rate for the lawyers doing the same thing. I think it's a good idea, would encourage it. I just wish it was asked for more.

Judge Walton: Would you take the initiative to call the parties in and tell them that that's what you're going to approve?

Judge Shirley: I stick my nose in far more probably the most judges more than I should, but I'm not sure I'd be comfortable telling them how to try their case, but if asked, I wouldn't . . . if they said, "Do you think we could do this?" I'd be encouraging and say yes.

Dr. Rucker: One more, if I just follow up. I'm sorry, Judge Cardone.

Judge Cardone: It's okay.

Dr. Rucker: Do you know if the panel attorneys are being given CLE on this or providing any education to help them handle these big discovery cases?

Judge Shirley: Again, I can't recall specifically. I would guess yes. If not, that's a good thing to do.

Judge Cardone: All right. All right. Thank you all for being here. Again, you can't imagine how helpful it is. We really, really are trying to gather information and your information is invaluable. Thank you all for being here, for taking time out of your busy schedules, and we will go ahead and adjourn for fifteen minutes. Our next panel begins at 9:45 a.m.

Judge Shirley: Thank you.