

## **Ad Hoc Committee to Review the Criminal Justice Act**

Public Hearing #4 – Birmingham, AL

February 18-19, 2016

### **Transcript: Panel 7 –Views from CJA District Representatives**

Judge Cardone: Ready? We're going to get started with our very last panel. For all of you on this very last panel, thank you so much for hanging in here with us. This is panel seven and I'm going to go through the panel participants. We have ... You're never in the order that I call you out. We have Mr. Gordon Armstrong, the CJA District rep from the Southern District of Alabama. Ms. Lisa Costner, CJA District rep from the Middle District of North Carolina. We have Mike Mazzoli, CJA District rep from the Western District of Kentucky. We have LeRoy Percy, CJA District rep from the Northern District of Mississippi. Oh, there you are. Okay. Andrew Skier, CJA District rep from the Middle District of Alabama. Finally, Tom Stingley, CJA District rep from the Southern District of Mississippi.

Again, we're going to start with a brief opening statement. You don't need to read your submissions because the committee has had them and had the chance to review them. If you would make just a brief opening statement and then the committee will begin questioning. The committee for today will include Judge Dale Fischer. Chip Frensley was on the committee but he had an unexpected situation. Ms. Katherian Roe will be taking his position. Professor Orin Kerr. Neil McBride is not here but the rest of the committee will ask questions. Whenever you're ready, we'll start with you Mr. Stingley.

Tom Stingley: Thank you, Judge. I want to thank the committee for inviting me to participate in the hearing. I think the work we are doing is very much needed and very important. It's an honor for me to be here even though I've only been the CJA rep since this past December. I don't have a specific opening statement. However, I've listened to testimony from yesterday afternoon, one panel, and I've listened this morning. Some of the concerns I brought with me from Mississippi is, a lot of the concerns you have heard already about hourly fees and maximum pay. That sort of thing.

I put in my comments which I found is a lot higher than what I've heard the last couple days. I felt like a reasonable hourly fee for a panel of attorney would be \$175.00 an hour which is substantially higher than what I've heard. The reason I said that is I'm reminded of what a retired State Supreme Court Justice in Mississippi told me once and I won't call his name. When I started to practice law he said, "You understand that you're not practicing law for your health." I look at it as a business. I love what I do.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

I've spent a lot of time with my clients because I find out it's going to take several interviews before I get the whole story. If a client pleads, and we appeal before the judge for a plea hearing, the judge can tell if there's a connection between you and that client. The jury can tell at trial if there's a connection between you and that client. I try to establish a strong connection with my clients. I spend a lot of time with them.

It cost time to do it and I expect to be paid. I expect to be paid a reasonable amount because I'm going to do the best that I can to represent that client. That was my basis for recommending \$175.00 an hour.

I also heard testimony about experts and the under-utilization of experts. I would suggest drawing upon my 20 something years of private practice. Particularly, I used to do a lot of tort litigation. I've also defended church cases as it relates to sexual harassment and misconduct by clergy.

I would suggest that ... I don't know if the panel of attorney organization should do it or if it should come out of the Public Defenders Office. One thing that could be done is just like you have panel of attorneys you could have a panel of experts. You could have a panel of investigators who have a proven record of doing a good job in your district. I think that sort of information should be compiled and made available to lawyers. It would encourage lawyers to use them because they know they're there.

I know the other side of the coin is that you're going to need to be able to pay for them. An average cost for an investigator in Mississippi is going to run about \$70.00 an hour plus expenses. Expenses, depending on where they have to travel to, could get kind of high. That's an issue that would have to be addressed.

I've had one lawyer tell me in Mississippi that we have 54 members of the panel and he feels that that's a little high. I mention this in my public comments. His argument is if you have a smaller panel of attorney's they will spend more time with a lot more cases and they would be better trained.

There's two ways to look at that argument. As an entrepreneur I'm going to be against anything that's going to foreclose an opportunity for someone to make money. I look at that kinda differently but I understand the rationale. You need to do more cases to get good at it. I did it in private practice when I handled tort cases. I don't do as many tort. Tort reform, to kind of shorten that up a little bit, that business. I used to sue, when I did medical malpractice, I used to sue podiatrists. Tort reform even affected that but I always need experts. There was always a disagreement between the experts. Most of the time if you got a good expert on the front-end you could settle the case before you went to trial.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

The use of experts is very important and I know how to use them. I don't like having to jump through the hoops to get one. I'd rather be able to reach out and get an expert at reasonable fee and be able to pay that expert when it's time to pay them. Why don't I stop there. I'll stop there. Thank you Judge.

Judge Cardone: Thank you. Mr. Skier.

Andrew Skier: Thank you Your Honor. Good morning everyone. I'm sorry. Good afternoon now. I'm coming to you from a district that is about 90 miles south of here. I'm happy to report that I think that the consensus in our district is that everything is running pretty smoothly for a district our size. I want to share with you some reasons that I think that's the case.

The first reason, probably the most important reason, is because we have a judiciary that takes criminal defense very seriously. Particularly the CJA panel and the Federal Defenders Office. Our judges encourage us to do our best. I've never had a judge in our district turn down, I'm not aware of, anyone ever being turned down for extraordinary expenses for experts or for other things like that. Our judges are very active in letting us know, as panel members and as the leadership of the panel, when and if a problem occurs with a panel member. It's important to them that everyone in the court gets proper representation and I think that trickles down throughout the community of lawyers.

The second reason that I think that we have a very effective panel in our community is because we have a Federal Defender that sets a very high standard for the level of representation that they provide and they make themselves available at all times for help with things that the panel attorneys need as they go through and learn and figure out these cases that sometimes get quite complex.

The third thing I think of something that is really sort of more nebulous. It's the culture in our community. The lawyers that are members of the panel are widely seen in our community to be the top 25% of the criminal defense community in our small area. I think that's important. I put in my written comments we have recently instituted term limits and come up with a CJA plan which didn't exist before. We're feeling our way through it.

We had our first round of applications this past month. We did remove eight members. We had a 38 member panel. We decided that each panel attorney should be getting between three and five appointments per year in order to maintain proficiency in that area. We wanted to get the panel down between 25 and 30 members. We did reduce it to 30 members. Two of which were removed for insufficient performance. The rest of which

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

were removed for other reasons like moving out of the district or becoming emeritus members of the panel.

The culture in our community I think is important. I'm not sure as a committee how you should go about litigating that or making requirements of that. I think it's something that will grow as it has in our community throughout the legal community at large. I know that your focus here today, one of your focuses, is on habeas representation and capital representation. I'll just say, very quickly, Christine our federal defender testified at the last session about the challenges that her habeas unit faces. I'll just say basically it's ...

To use a term from literature. They're depending on the kindness of strangers basically because their obligation is they have to exhaust the state remedies before they can go into federal litigation. They are depending on volunteer lawyers like myself. I've currently taken on a death penalty case pro bono. The court house that that case is being heard at is 100 miles from my office. Every time we have a hearing I drive 100 miles there and a 100 miles back to get there. I'm doing that pro bono because I think it's important.

That's not a way to run a habeas unit and that's not a way that we in our society should be satisfied with. I think that's improper. One final comment before I turn it over to my colleagues and await your questions. When we talk about the size of the panel. I just said we reduced our panel from 38 to 30 members. I think there's a balancing test that you have to do and you have to consider what is the purpose of the panel.

Is the purpose of the panel to be a jobs program for lawyers that want the billable hours or is the purpose of the panel to provide the most effective representation for our clients and those that depend on us? I think that squarely I come down in the second camp. I think it's much more important that we provide good representation for the people that we represent. I think that's much more important than serving the lawyers on the panel themselves. I think, by serving the lawyers, I think that we do provide and eventually get to the point where we provide the best possible representation for our clients. Thank you for this opportunity. I'll await your questions.

Judge Cardone: Thank you, Mr. Percy.

Roy Percy: Roy Percy. Northern district of Mississippi. Panel representative. I live in Oxford. As I said in my written comment we have a very small panel. Just based on my experience meeting other panel representatives I suspect ours is one of the smallest panels in the country. 14 lawyers. I think it serves our district well. It serves our indigent defendants well. The lawyers have

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

a steady flow of cases. They're in the courtroom a lot. They don't have to reinvent the wheel every time they get a new case. The judges know the lawyers well. The lawyers know the judges well.

We don't have many vouchers cuts and other requests, I suspect, were probably on the low end as far as requesting experts. I don't know of any expert funds requests that have been denied. I think the judges know our lawyers well enough that if we request something they take those requests seriously. I think that's definitely a benefit to our panel.

We did have, I discussed in my comment, a \$3,500.00 case maximum and it fell in the guilty plea cases. Up until less than two years ago. I have no doubt this committee has heard over the course of these hearings a lot of tales of trying conditions under which panel attorneys have been asked to represent indigent defendants but I would put that condition up against any of them. We don't have that anymore. It wasn't anything that our district did purposefully. Nobody in our district knew that that maximum was unique to our district. They quickly did away with that. That has made a huge impact.

Prior to that our panel of attorneys didn't really care what the hourly rate was. Every time it would go up all that meant was that it was just that much quicker that we would get to that \$3,500.00 maximum and that much more that we would just have to eat ourselves. Now we can worry about the hourly rate a little more.

Another improvement in our district is that the court has implemented a secured jail video teleconferencing system that is available only to Federal Defender staff and panel attorneys. It helps. Of course no one wants to substitute video link conference with a face-to-face conversation with a client. It does help when time is of the essence and you've got a client in a detention facility two hours away or you just need to present a waiver or something like that to a client that will take 10 minutes and he's in a detention facility two hours away.

It's a convenience. I'm sure it's a cost savings. We've just begun using it. Probably most of our detainees are kept at the detention facility in Oxford. Where I live so I have only used it a couple times because usually, being in Oxford, I can just go to the detention center and meet with my clients. It will definitely be a big help to some of our representatives that live in other parts of the district.

One other improvement that I neglected to mention in my comment and it doesn't really apply strictly to indigent criminal defense as it does to just criminal defense in our district in general. We have just, within the last month, our court has adopted a new standard scheduling order in criminal

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

cases. The previous order just had a discovery deadline, a motions deadline, a plea agreement deadline.

Previously, defense attorneys had no way to get Jencks material, witness statements, until after a witness had testified. Despite whatever encouragement the court could do to encourage prosecutors to provide that information, because it makes everybody's job a lot easier, it wasn't necessarily happening. Now we have a scheduling order that requires witness statements to be provided at least seven days prior to trial. Impeachment materials to be provided at least seven days prior to trial. We didn't have that before. That's just occurred in the last month. Just in the last couple of years we've had some vast improvement in our CJA and indigent criminal defense in the northern district.

Judge Cardone: Mr. Mazzoli..

Mike Mazzoli: Thank you Your Honor. Let me thank you all. Not just for the pleasure of being able to come and address you but for the immense hard work that you all are putting into this. I was here yesterday and it was just very evident that you all have made an immense commitment of your time, your effort, your talents, and I think I'm echoing something that was said yesterday. It's a thrill to be able to be here and talk to a group of people who are really passionately interested in the CJA panel and the CJA program. Who are really dedicated in putting their shoulders to the wheel, really. Who ultimately will have some influence and has the weight and potential influence to make things better. I just want to thank you all. I figure something good is bound to come of all this work. Let me thank you in advance for the improvements.

Just by way of very quick introduction. I have been in private criminal defense practice for about 15 years. I have been the CJA rep in the western district of Kentucky, Louisville for about the last 10 years. Prior to becoming a private lawyer I was a federal prosecutor for five years. Before that I was the law clerk for Judge John Heyburn or unfortunately the late Judge John Heyburn.

I saw, both as a law clerk and a prosecutor, how very important the appointed attorneys were to the functioning of the entire system. I saw that the appointed attorneys in the cases that I was involved in we're just of uniformly high quality it was something that I aspire to do as soon as I got into private practice. I got an appointment to the panel very soon after I entered private practice and then Judge Heyburn, who was the Chief Judge at the time, asked me to be the panel rep.

I would say that the arrangement of our CJA panel and the management of it is very similar to what you've heard from the Northern District of

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

Alabama. In Louisville, for the Western District of Kentucky, the court is of central importance. It essentially makes every important decision. The court, or the clerk's office, makes every appointment to cases and handles all the vouchers.

That has had, I think for the most part, it has been to the very great benefit to the CJA program because our judges, as I sensed from the judges from Alabama yesterday, are committed to fairness and transparency in the way that they go about doing their work. Not just lip service but really and truly live up to that aspiration that they have.

Are legal culture is similar to that of the Northern District of Alabama too. Probably we are about the same in terms of experts usage by CJA lawyers and probably in terms of fee structure and things like that. We're similar to what you've heard from them. As far as I know our court has never made it difficult to get authority to have an expert and has not made it difficult to get the payment for the experts. The vouchers for district court are turned around very quickly. If you are under the ceiling you can expect to get your pay in four weeks or less which I think is a very good turnaround time.

For the Sixth Circuit, when you have an excess voucher, it has improved greatly. Those used to be a real problem but in the last four or five years it has gotten very good. It still takes about three or four months. It's what you would kind of expect if you are submitting an excess voucher. Of all of the things that I have heard over the last day and a half the thing that I would encourage the most is increasing the ceiling so that excess vouchers don't become excess vouchers until you reach a higher threshold.

I think the thresholds are too low. Every time you go over that threshold you're adding several months to the processing. You have a private lawyer sometimes they ask you, "Do I really want to wait an extra four months for this maybe couple hundred dollars that I'm over the voucher?" You have a lot of self cutting. I just think that the whole process could move much more quickly but without any loss of integrity if we increase the ceilings. Thank you

Judge Cardone: Mr. Armstrong.

Gordon Armstrong: Thank you Judge. I'm Gordon Armstrong. I'm from Mobile. I've been going panel work since 1990. I've been the panel rep since 2000. After hearing all the lawyers today and then reading some of the submissions from prior conferences, or prior hearings across the country that have been held, I've really kind of grappled with what can I say that you hadn't heard? What am I going to say that might make a difference or what not?

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

The last two days I was in DC, Judge. I was up there for some meetings. I'm on the Practitioners Advisory Group to the US Sentencing Commission. I've been gone for two days and then I came here today. Of course, I have three kids at home and my wife is handling everything. I told her I have to get up early and drive to Birmingham because I flew in last night from DC on work that I don't get paid for. It's volunteer. I'm going up here today. She says, "Well, what is your benefit from it? What is your benefit?"

Then I start thinking. I had this stuff prepared that I was going to say and I started thinking, what is my benefit? Why am I here? I mean I've been invited to be here and I know that what we're doing is important but what is going to be the benefit to the CJA or to my panel which is who I represent? At the end of the day what is going to be the end result?

If there is one thing I can ask this committee to try to work on because there's lot of issues but they're far ranging depending on where you are. Some circuits have different problems from us. In the southern district of Alabama it's much like Andy said in his district. I think our panel works well. The administration of the CJA works very well.

I know y'all heard from Judge Bivens yesterday. She's the magistrate from Mobile that handles ... She's in charge of the panel committee. We meet twice a year and we talk about issues and vote on new members. It works well. It works well in Mobile because of how it was originally set up by Judge Butler back in the late 80s or whatever. He really had a selfish motive for creating our panel which was he wanted competent effective lawyers arguing cases in front of him.

He didn't want people that didn't know what the guy. Of course it was mandatory then. He didn't want incompetent lawyers. He didn't want lawyers that came over from state court that had never been in a federal case before and didn't know what it was to argue the guidelines. Didn't know how the Federal Rules Of Evidence worked.

Our bench has been supportive of competent lawyers. We've never really ... That culture has followed through. We've never really had a problem from our bench with either voucher cutting or if we need experts. I don't know where we rank on that list in the southern district. I see some eyebrows being raised over there. We may be near the bottom. I don't know.

I use experts when I need them. I know that and I'm never denied. If there's one thing that I can ask this committee to try to do is to work on compensation of the lawyers. Our hourly rate is embarrassing. It's embarrassingly low. Who was it? Mr. Eddy, in the last session talked

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

about his panel. He'd put them up against anybody. Well, I'll put my panel up against anybody too.

Some of the top lawyers in our community for retained federal work are also on the panel and do panel work. We have a small ... Mobile is a big small town or a small big town depending on how you look at it. We are the intersection of I-65 and I-10 so there's a big drug corridor of drugs coming from Texas. No offense Judge but coming from Texas and then going to Atlanta, or Miami, or wherever they're going. They come through Mobile and they like to indict in Mobile when they come through here because we have a conservative jury pool. We're in a conservative circuit. They like to bring the indictments in Mobile.

There's been a transition of cases from the drug cases to now they're bringing more fraud cases. The fraud cases are more labor intensive because they're more document intensive. We'll get a call. You've got an appointment. Can you show up in court. We'll go over there and they'll give me a small package with a disc in it. They'll say, "Bring me three hard drives so that we can copy the hard drives from the computers we've seized."

I have to pay for that. I have to front that cost. I've got an hourly rate of now \$129.00 an hour and I have to pay for my office. I've got a mortgage. I've got two kids in college. I've got one a sophomore in high school. He's 15 about to turn 16 and he wants a car. You know?

Every time I've ever gone to an oral argument at the 11th circuit when I'm done I'm thanked. "Thank you so much for being here." They're sincere because they realize, and I think the judges in our circuit and the judges in our bench, realize that what we do is very difficult to do. Then we get paid less than anybody. \$129.00 an hour. That's really low. That's very low. That's lower than most of the experts that we hire to testify. Why are we getting less than the experts? Aren't we supposed to be the expert for our clients?

If there's anything I can tell this committee is we've got to work on compensation. We've got to. It just can't be lip service. We've been talking about this. The best resource for you is Chip Frensley who unfortunately is not here. I understand the reason for that but Chip's been part of the district representative conference longer than I have. I think we both started about the same time.

We've been working on compensation from the beginning. From the very beginning. Tom mentioned \$175.00 an hour. Boy, that would be nice but it's still not what our peers get in the civil sector or in the private sector that do criminal defense work but it would be a start. That's a very good

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

suggestion. That's what I would hope. If anything can be taken away that we could work on that but not just say it. We've had supporters on the bench in the judiciary that have gone to bat for us working on that.

I know it's Congress that controls that. Not this committee and not the Chief Justice or anybody. It is Congress ultimately. I wish I had the magic wand that said okay, let's get these budgets increased because I know there's a problem with that. If there's anything we can work on that would be it. Thank you.

Judge Cardone: All right. Ms Costner.

Lisa Costner: Lisa Costner from the middle district of North Carolina.

Judge Cardone: I need you to speak into that mic.

Lisa Costner: Oh, I'm sorry. Is that better? Okay. I have been the panel rep for a very long time. I've been on the CJA panel. Look, I think it was in 1989 that I got accepted to the panel. When I was first on the panel I think the rates were, I want to say, \$45.00 an hour. I dreamed of \$129.00 but of course many, many years later, being a solo practitioner now, knowing what it takes to make overhead, to pay employees taxes, rent, all the things that you have to pay. \$129.00 is not enough. I echo what Mr. Armstrong said.

Our panel has gone through some changes over the last few years. We have a new, in the end of 2013, we had a new CJA plan instituted that then went into effect in 2014. Before that our panel was over, I think, it was over 90 people. Anybody that applied. It was a rolling application. Pretty much anybody that applied got on it. The only decision was whether they were on a training or regular panel.

When we decided to redo the CJA plan we reduced the panel. We set out standards for becoming a member of the panel. Certain amount of practice, criminal experience, things of that nature. We then instituted a certain period of time to apply for the panel instead of some rolling application period that just went on all year we opened it up and then we close it. Then we consider the applications. Then we let people know whether or not they've been accepted. Then they begin that next January.

We have a CJA advisory panel now. Myself, as a CJA panel rep, another CJA panel attorney, someone from the public defender's office, an magistrate judge, and district judge. We meet. We discuss the applications and then as issues come up throughout the year with panel attorneys, if they're brought to our attention, we might have a conference about that. Ultimately it is the judges that makes the decisions about who's on the

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

panel and maybe what happens when there's a problem with the panel. I do believe that they listen to us.

Under this new plan I believe we have always had really great qualified attorney's but to me it has taken our panel up to the next level. The CJA panel is something attorney's want to be on. I get calls about it. Somebody goes into private practice they want to know how to get on that panel. We have no problem attracting good attorneys.

I think we have some diversity. On our panel right now we have 58 on the regular panel. We have a training panel. We have 8 people on the training panel. We have some younger attorney's who are wanting to be on the panel. There's some mentoring though the training panel matched with regular panel attorney's. We are trying to bring up younger attorney's so that, as our panel ages, we do have new attorney's ready to go.

We have 12 women on our panel. We have nine minorities. All African American on the panel. We, as a part of our meetings, think about diversity and attracting diverse attorney's. Qualified attorney's. I'm real proud of that work.

I submitted my testimony and I'm sure y'all will have some questions about the expert issue that I brought forward. I did want to give you guys an update just before we turn to questions. We just went to e-voucher. I just had my training in e-voucher about four days ago. It looks to me, from the e-voucher training, that our requests for experts are going to be done differently and they're going to be done through e-voucher. Still these ...\$800, \$2,400, all of that is still in existence but the way the requests go through are different. I don't know what impact that's going to have on requests and approvals. I'll be real interested in seeing that.

That is going to be a change. I'm waiting to see how that impacts. I have put in a couple of requests for some expert assistance since my training four days ago but I have not received responses. I can't really report on how that's going to effect the Middle District. With that I'm going to stop and answer questions.

Judge Cardone: Can I clarify something Ms. Costner because, I may ask Dr. Rucker to clarify it even further but just so the committee is aware, e-voucher has a portion of it where when you submit for a expert it is a specific form. Then it goes through e-voucher. It's not a part of the record because in the past you had to file an ex-parte motion. Is that what you're talking about?

Lisa Costner: That's my understanding. For CJA-21 there's a request portion. You put in a request and then you attach. It seems to me if it's going to be over \$800, less than \$2,400, anything over \$800 you're going to attach a motion.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

That's going to go through e-voucher. Then you get noticed as to whether or not it's approved. Then you go back into e-voucher, back into this CJA-21 form, and you complete the rest of it. So far I haven't gotten to step two yet though. I've just done step one.

Judge Cardone: All right. The second part would be so that the expert can get paid. My question to you is, so that's all done in e-voucher now in your district. Are you required also to put something on file as part of the record or is it only through e-voucher?

Lisa Costner: It's only through e-voucher from what I can tell. Now, I guess the order is that the CJA-21, I, guessing again. Don't know because I haven't received any response to what I put out a few days ago. There may be some others that are further into e-voucher than I am. That's my understanding that there's not going to be a docket entry. I could be wrong.

Judge Cardone: Okay. It is my understanding, just for the committee, that that function and that ability, how that's going to be managed, is completely dependent on how they set it up in each district. Some judges are going to be doing it the way you're talking about. Some judges are still going to require private motions, ex-parte motions, in their court. Separate and apart from what's in e-voucher. That's a phenomena that's happening now as e-voucher's rolling in.

Lisa Costner: One thing I liked was the fact that there is a comment box. When I submitted a request earlier this week I could actually put in the comment box 'Here's why I needed it'. It was actually more funding for an expert who had run at the end of their limit. I'm hoping that will provide some further information to the court that we couldn't provide otherwise.

Judge Cardone: All right. So we'll start with Judge Fischer.

Judge Fischer: Thank you all for being here. As you know, this is the fourth in a series of seven and we're starting to hear the same issues which is telling us a lot. There is value in hearing the same issues consistently because that's one of the things we have to decide is how consistent are these problems around the country, which ones can we do something about, and which ones should we work the most on? I'm going to ask you to take out the hourly rate because we all know that's a hot-button issue and take out, although none of you has mentioned it, the re-elevation of the Defender's Services Organization and focus on the issue that we've heard a lot about which is independence from the judiciary or with varying degrees of emphasis put on that.

I'll ask each of you to tell me from the perspective of your district. You seem pretty happy for the most part. How could we improve it if at all

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

with regard to that particular topic? Do you feel the need to remove all or part of what's presently done by the judiciary? Take it out of the hands of the judiciary. Are you happy with things the way they are? Mr. Stingley could you start?

Tom Stingley: Based on my experience I feel that the judges should stay involved to some degree. I do have some problems with the issue raised about you being a little over the maximum when it goes to the circuit and you have to wait three months. I think that's a problem. I think the authority ought to stay at the district level.

I haven't experienced a lot of reductions but I have experienced some and the district judge would, I would, get the message from the public defender's office that he or she reduced the amount because to alleviate the problem of going to the circuit. That reduction would be done before I had a chance, in some cases, to respond to it.

Judge Fischer: So the judge reduced it so it wouldn't have to go to the circuit?

Tom Stingley: That's the way it was explained to me. The reduction wasn't earth shaking so I moved on so I can get paid and that sort of thing. I think the judges ought to be involved to some extent. Mississippi is still a relatively small state. We generally know each other. We know the judges. We know the personnel. Part of practicing law is public relations to some extent. They know you're competent. In my case, I never put down all of my time that I spent. I also realize that this tax payers money and I'm also submitting a report to the federal government. I'm not submitting it to a private client. I'm very concerned about what I submit and it's accurate. That sort of thing.

I think the judges should stay involved. Particularly since they preside over the case. They know what happened in that particular case. I think they should be involved. I understand the benefit of having a professional, an attorney, somebody with the experience, criminal defense experience and being separated from it but to me in Mississippi it's working okay.

Except for when those reductions occur that I mentioned earlier. I think the judges should be involved to some extent. I know the judges have a lot to do. I don't want them to be over-burdened with administrative duties but I think it's just part of their job of the judges job dealing with those cases.

Judge Fischer: Thank you. Mr. Skier.

Tom Stingley: Thank you Your Honor. Your observation is correct that this is sort of a happy panel. We obviously have good judges that take CJA representation seriously but I have learned. I'm in the second term, second three year

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

term, as CJA panel representative from the Middle District of Alabama. When I go to the national conference once a year I hear horror stories. I hear people tell me about judges that, at best, are indifferent and, at worst, are hostile towards CJA lawyers. I think that our experience is not necessarily representative of what goes on around the country.

That being said I do think the judges are probably in the best position to advise panel leadership about performance of lawyers, about competence of lawyers, and about issues that judges are in a unique position to observe. We can't be everywhere at once obviously. We sought their input when we went through our first round of reapplications. We got some very candid and very valuable input that we used in making those decisions.

I know that that's not the national standards. I would caution the committee to be aware that there are folks in this country and in districts that have hostile benches. That would be a concern to me. Thankfully it's not a problem for us.

Tom Stingley: Judge, can I add just 30 seconds.

Judge Fischer: Sure.

Tom Stingley: We have a real good Federal Public Defenders Office too. The staff looks at all those vouchers very closely. I have a tendency to make errors.

Judge Fischer: You said that in your letter.

Tom Stingley: They correct those errors. They call me and tell me what they've corrected. They make sure everything's sound before I submit it to the courts. That's been a great help to the relationship we have with the Public Defenders Office.

Judge Fischer: Is there any concern about conflict that you panel has with the services the public defender performs with regard to vouchers or anything else.

Tom Stingley: Dennis Joiner makes a strong effort to make sure that there's no conflict between the panel of attorney's and his office.

Judge Fischer: Okay thank you.

Tom Stingley: He brings that matter up quite frequently.

Judge Fischer: Mr. Percy.

Roy Percy: Personally I don't have a big problem with the judges reviewing if we're talking about reviewing vouchers. I know the judges would love nothing

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

more than to not have to do that. I know that the judges no doubt were thrilled when we removed the \$3,500.00 compensation limit so they could quit reading all these memos about why every case, every single case, was extended and unusually complex.

The fact is there has to be some kind of review system. I know that that means that there's going to be people reviewing vouchers whether it's a judge or an independent office. That means that there's bound to be cuts no matter who's reviewing them. As an attorney I don't know who I would be more comfortable cutting my voucher. A judge who knew me, knew the case, or somebody in an office somewhere that doesn't necessarily know anything about the case.

I'm sure there's, in other parts of the country, we've all heard complaints about horror stories about vouchers being cut. I'm sure there's resentment there but I think the resentment is more just the voucher being cut not so much as to who's cutting them. I'm sure the same resentment would be there if they were being cut by somebody else.

Judge Fischer: Mr. Mazzoli.

Mike Mazzoli: When I was in high school I had a teacher who asked the class, "What's the best political system you can come up in." People were saying democracy and so on and so forth. He said, "No. Enlightened despotism." Enlightened despotism is the best sort of system you can have as long as you've got a good enlightened despot. At my experience in the western district of Kentucky has been that the judges do a good job. They care about what they're doing. They are certainly ... That system works.

Whether a different system would work any better I certainly can't say for sure that there is some model out there that's bound to be better. At least I wouldn't say that the judicial centrality is necessarily a problem. It has not been for us.

Judge Fischer: Thank you. Mr. Armstrong.

Gordon Armstrong: I sure hope we're not going to ruin it for everybody else by being called the happy panel and that all is going to be viewed as well. I can speak for my district. I've never had a voucher cut in the years that I've submitted vouchers. We've been doing e-voucher since 2013. Our clerk has taken the leadership role, Chuck Diard, and has implemented the voucher. The lawyers are accustomed to it, familiar with it.

As Tom said, I think most lawyers in my district probably under-charge for their services or under-document their services. They don't add it in. If you're in the car and you make a phone call when you're talking about a

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

case or whatever and you don't have the mechanism to document it you probably just don't do it. Most lawyers probably under-charge for the actual services they've done.

I do not hear about voucher cuts as far as having to go to the bench to get an expert. It makes you double think. Do I need the expert because I might have to justify it? It forces you to think about the merits of whether you actually need and then how are you going to use that expert? I think there's certainly the other side of that coin which also says if I have to justify it and I need it and I'm doing that ex-parte, don't want to ruin this trick but, I'm actually laying my defense in front of the court and justifying my defense. If it's not working towards the guilt phase then I'm certainly working towards mitigation and how that might benefit my client in the long-run.

So I really don't have a problem because, like I said, it works in our district. I don't have the problem with the judge kind of being the gatekeeper on the vouchers or on the use of my experts. I do see in some cases that are the big ones. We don't get the big huge cases that sometimes they try for months. At least I've not been involved in one. I know budgets are not as big of a issue. In fact, since I've been doing it I've only had to use the budgeting process one time, in one case, and that was a large multi-defendant case where half the lawyers were retained and the other half were CJA. We participated in having to be on a budget.

Other than that it's really not a problem. Despite not wanting to be the happy panel I guess we're happy.

Judge Fischer: Ms. Costner.

Lisa Costner: I would echo on the happiness in many ways. In my district we don't have a problem with voucher cutting. There sometimes is a problem with voucher delay. I think I said in my comments e-voucher may well take care of some of those issues. As a panel rep, and going to these national conferences, and hearing the testimonies in these hearings I'm well aware that nation-wide it is not necessarily the case.

Then the question becomes, how do you do it in a way where there are abuses and there are problems. You can't see your client more than twice or meet with the family. Just all the things we've heard about. It seems like there needs to be a solution where those folks can get what they need. Get paid for the work that they're doing. If that means taking all of it out of the hands of the judges and putting it into the hands of somebody in the Federal Defenders Office that reviews vouchers and pays then that may be what has to be done.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

In my district it's not a problem but I don't know that that necessarily means that there doesn't need to be a change for the folks that really do have a problem.

Judge Fischer: Thank you.

Lisa Costner: Okay, thank you.

Judge Cardone: Ms. Roe.

Katherian Roe: You're all panel representatives for you district. So I wanted to ask you in some districts the Federal Defender or someone else, even the clerk's office maybe, send out letters to the attorneys when their vouchers are cut. The letter basically says, "Sorry to tell you that your vouchers been cut by this much money. If you have any questions or you want to discuss this please contact your panel rep." Then it gives the panel reps name, number. Do any of you have a similar procedure in your districts?

Andrew Skier: Our letter doesn't say contact the panel rep. It's says 14 days passes and we don't hear back from you we're assuming that you consent to this cut. That comes from the clerk. It's not from the judge.

Katherian Roe: Okay. Does anyone have a letter that goes like that and you are actually the ones who are notified?

Gordon Armstrong: Just a little different twist on that. Actually Judge Bivens will call me. This has happened one time. It was a rather new lawyer to the panel and had been submitting vouchers that were getting some eyebrows raised about the time he was claiming. She called me and asked me to get in touch with the lawyer and discuss his vouchers with him and how they were being viewed. To try to assist him and maybe being a little bit more reasonable. That's kind of the closest that we've come to a formal process.

Katherian Roe: Okay. Basically there's no formal process in any of your districts that you would get notified in there was a voucher cut? Okay. When all of you have said that voucher cuts are not really an issue in your district that is based on the fact that you're not hearing about them? Not that you're not in the loop and you just don't see any? Fair to say?

Gordon Armstrong: I send out emails to all the panel members. I've asked them, "Is anybody having problems with voucher cuts?" I've done that routinely just based on the fact that when we go to the national conference the CJA panel attorney district conference, which is in two weeks by the way, in San Francisco.

Katherian Roe: We'll be there.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

Gordon Armstrong: You'll be there? Good.

Katherian Roe: We're very much aware.

Gordon Armstrong: I try to take an informal poll of everybody on the panel to talk about issues that I can then discuss when we get there. That's one of the things I always ask. Is anybody having a problem with voucher cuts? Does anybody have? I do try to find out other than some kind of direct contact from them or from the bench.

Katherian Roe: The bench doesn't tell you? You're not notified from the bench?

Gordon Armstrong: No.

Katherian Roe: Are any of you notified that members of your panel are receiving cuts from the bench? Mr. Percy, I wanted to ask you a question. You also indicated that things are good in the northern district of Mississippi. Some of the things you said in your statement talked about the very high quality of the lawyers in your district and they are very committed and dedicated folks. I'm wondering if they thought things were really good in 2013, 2012, 2011, 2010, or 2009. Would they have also said the things were really good at that point?

Roy Percy: We had our \$3,500 compensation limit at that time.

Katherian Roe: I'm aware.

Roy Percy: Sequestration and rate cuts didn't really affect us because we were hitting that maximum regardless of the hourly rate.

Katherian Roe: I guess my question is more that the fact that you had that \$3,500.00 cap. Your bench had decided that no matter how complex a felony case is that the amount that they thought was reasonable was for you to put 28 hours into that case. That's why I'm wondering. Would you have said then ... It sounds like everyone comes in and says they're happy but then you hear things like ... That's, to me, staggering that the bench would say, the rule is, across the board that you can put 28 hours into a felony case if you just plead it out. I can imagine putting 1,000 hours into a case that I just plead out. I don't know how that is reasonable but that's obviously the decision of your court. My question is, do lawyers really think that everything was good in northern Mississippi when the reasonable amount, the statutory maximum, or the court-ordered maximum was \$3,500.00 or you had to file a memorandum, or as you put it, eat it?

Roy Percy: Sure. That was a burden. There were gripes about it but we didn't know that we were the only district in the country.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

- Katherian Roe: You were happy?
- Roy Percy: We just thought that was the way it was.
- Katherian Roe: Okay, so ignorance is bliss?
- Roy Percy: Correct.
- Katherian Roe: All right.
- Judge Cardone: Can I just ask you a quick follow-up? Why do you guys do it? Why do you take on this work, eat these expenses, pay it out of your pocket, and put up with the \$3,500? Why do you do it? Anybody want to answer?
- Roy Percy: I think everybody on these panels has a commitment to indigent criminal defense. It's a lot of courtroom work. You're in the courtroom a lot. You get a lot of face time with the judges. With the small size of our panel it lends a prestige to the panel work but it's helping the clients. I think everybody really has a dedication to that. On our panel, we have attorneys who are very successful in their private practices and would definitely make more money on an annual bases if they were not on the panel. They enjoy the work and you're helping. We see it as a service to the court.
- Katherian Roe: I think you said there were only 14 members of your panel?
- Roy Percy: Correct.
- Katherian Roe: As a result you get a significant number of cases. Could you estimate how many cases a year your panel receive?
- Roy Percy: Last year it dropped off a fair amount. I would say on average each panel member gets five to ten cases a year.
- Katherian Roe: Folks on your panel obviously have a private practice other than just their panel practice?
- Roy Percy: Correct.
- Katherian Roe: When you say last year it dropped off, do you know why that? Were the filings down? Was it because the Federal Defenders Office had to take more cases? Do you know?
- Roy Percy: That probably was part of it. Another part of it was the US Attorney's Office in our district was indicting a lot of cases related to white supremacists gang with multiple indictments, multiple defendants, and the panel attorneys were conflicted out early in that case. That's the one

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

instance that I can think of where the small size of the panel had an effect. Where they had to go outside the panel. Outside the district even. I attribute some of that to that. The panel attorneys were conflicted out of a lot of those cases.

Katherian Roe: Okay. Thank you. Mr. Mazzoli I wanted to ask you a question about the self-cutting that you were talking about. Again, a strange term. People reducing their own vouchers maybe is a better way to put it. When these vouchers, these excess compensation vouchers, go to the circuit do you have success? Does the circuit cut more than the district court? What would you say about that? I know some of it is a time issue. If it's just slightly above the statutory max it may not be worth waiting on it but do you also have issues with cuts at the circuit?

Mike Mazzoli: No. I have not and I haven't heard of any from people on the panel. That's not necessarily the best reading. As far as I know my situation is very fairly common for everybody. If you go to the trouble of putting down a good memorandum explaining why your particular case is going over the ceiling typically your judge, or whoever is the district judge who is signing off, will write a memo of some sort that supports your request. That goes up to the sixth circuit. I have never had a situation where it was cut after that.

Personally speaking, I don't do these self-reductions anymore. I found it convincing at one of our CJA panel representative meetings when someone said, "Look, if you've done the work. Claim it. Get paid for it. If you are reducing yourself then you're, if nothing else, you're giving the court a somewhat inaccurate view of what it takes to get these cases done. Who can blame judges if they never see an excess voucher. Thinking it must not be that expensive to do these cases." If it were only \$100.00 I might just let that go. I certainly don't reduce like I used to. I'll ask for the excess and then wait.

Katherian Roe: Again, just so I'm clear on this. It's a matter of how long it takes to process the voucher when it goes up?

Mike Mazzoli: Yes.

Katherian Roe: Not that you're concern that it will be cut?

Mike Mazzoli: Right. I have to say there is some burden in doing that extra request.

Katherian Roe: Memorandum. Right. Especially if you do a detailed one.

Mike Mazzoli: Yes.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

Katherian Roe: Mr. Stingley I wanted to ask you a question about the vouchers that you talked about where the court would cut them so they wouldn't go up to the next level. To the circuit court level. Do you know what the rationale was for that? Why would the court care about the voucher going up?

Tom Stingley: The court didn't call me directly. I guess you might say the CJA person in the Public Defenders Office called me to let me know and that was somewhat the explanation. I accepted it because I'd rather get paid. I'd give up a couple hundred dollars or whatever to go ahead and get the money within three weeks versus two or three months.

Katherian Roe: Okay. It wasn't a significant enough amount that you would wait? That it would matter to you? Is that what you're saying basically?

Tom Stingley: Sometimes things are relative. If I settled a pretty decent public personal injury a month earlier the way I look at that \$500.00 or \$1,000.00 is going to be different then if I had settled one in six months. Everything is relative when it comes to looking at money. I'd rather not cause a problem for the court system in the work that I do on the panel so I just ... It was fine.

Katherian Roe: Understood. Mr. Skier I wanted to ask you a question about the mentor program in your district. I believe in your statement you indicated that you've reduced your panel to 30 individuals. Is that correct? You have 11 on the mentor panel?

Andrew Skier: Yes.

Katherian Roe: Do those folks receive training? How are they mentored?

Andrew Skier: It's a two-tiered system. The people on the mentoring program are encouraged to contact a CJA lawyer and sort of follow that person around. Follow a few cases. The lawyer and the mentoree are supposed to communicate about when hearings take place, proffer sessions, change of plea hearings, anything that happens in the case so that they can follow a case along and get some real world experience in dealing with the issues that we deal with on a day-to-day basis. Also to make some personal connections with people in the US Attorney's Office, people in the court system, and things like that.

In addition, the people on the mentoring program are also subject to the same CLE requirements that we put on our CJA panel members which is, I believe, six hours of CLE related to federal practice with two hours required for sentencing. I might be wrong about that but I think that's what we came up with as a CLE requirement and just for your information all that is easily obtained through the Federal Defender's Office. They provide

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

more than enough CLE per year at no cost to easily fulfill that requirement. That's basically how the mentoring program has worked.

Katherian Roe: Thank you. I have some questions for Ms. Costner but I'll come back. I'll let some of my colleagues come to you. Unless they don't then I'll be back. Mr. Armstrong you wanted to say something?

Gordon Armstrong: I just wanted to add something. When you were asking the question about how would your panel ... What would they say about five years ago as opposed to now? I know you were talking about the northern district of Mississippi but things have improved dramatically over the years as far as training and access to funds. They are better. A lot of time the people in my panel know how bad it was because there was a time where you didn't have any training. There was no training at all.

If there were any seminars you had to find it on your own and you had to go out and try to do it. Try to educate you on the guidelines but now, in our district, there is required federal CLE that you have to get to stay on the panel. In addition to that our federal defender sponsors a free seminar every year that brings in wonderful speakers from across the country about a broad range of topics.

A lot of our lawyers appreciate where we were and then where we are now. I don't want to say happy in general but better than we were. That's why I wanted to focus on now let's work on compensation because to me that is ... Both aspects of compensation. Both the hourly rate and the limits that are in place.

Katherian Roe: Thank you.

Tom Stingley: Can I add something? I don't want my comments to be misinterpreted regarding the Public Defenders Office because they do a very good job. Listening to Mr. Armstrong I was reminded that the Public Defenders Office gives a free CLE once a year. At each of those CLEs the public defender would give us an update on what's happening with vouchers. How they're being viewed by the court. What to look out for when you are preparing the vouchers. We get an update on that every year. Communication flows. It's just that I receive one or two reductions. Most of the time I don't receive them but I did receive one or two. One I spent a lot of time on so that's the reason why it stuck in my mind a little bit.

Katherian Roe: Thank you.

Judge Cardone: Professor.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

Prof. Kerr: Thank you for all of your testimony. I wanted to begin with a clarifying question for Mr. Armstrong. Wanted to make sure I understood a comment that you had made about being comfortable with the idea of the judges as gatekeepers. In particular the question of whether you could ask for experts or investigators and potentially disclose your strategy. Understandably that's not something you'd want to do. I just want to make sure I understand how then do you approach that conflict if asking for a particular expert might disclose that strategy. Is that a reason why you might not ask for the expert?

Gordon Armstrong: If I needed an expert but I didn't want to tell a judge why I needed the expert then I would ... We have a relationship with our bench that I would call the judge and tell the judge, "Judge I can't tell you why." I don't think I would be denied. I've never been denied when I've asked but more of the times that I've asked for one ...

I'm thinking back not to specific instances, there was one time where the judge called me into chambers and said, "Why do you need this?" This was on the record. Of course if my motion that I filed was ex parte because it was quite expensive. Actually I was trying to get an expert in drug addiction to testify that my client, who was accused of being a prohibited person in possession of a firearm, to evaluate my client and to determine that he was not addicted to the medicine that the government was alleging that he was addicted to so he was not prohibited.

The cost was going to be pretty steep. It was well above the limit. I filed the motion. The judge called me personally. We had a phone conference about it. Then we had an in-chambers conference about it. I was able to convince the judge that I needed it. Of course then I got my evaluation. It came back that, "Well, we think he's addicted." It didn't really help me any but I was not denied that opportunity.

If it was a little different, and I didn't want the judge to know, I've never really kind of had that fact scenario come up yet. I would just try to apply for the funds within what the guidelines are for me to get. Just try to make it work under that amount.

Prof. Kerr: Okay. Helpful. My broader question, this is for everyone on the panel, is how you deal with electronic discovery which we've heard a lot of testimony about how the number of cases that have a lot of electronic discovery has dramatically increased over recent years. Which really puts a strain on a CJA attorney who may not have the resources and certainly doesn't have the time to go through all the documents. I think it would be very helpful for us just to get an idea of how do you respond to that? How has that changed your practices, your interactions, with the US Attorney's Office? How you go about your roles as a defense attorney when you're

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

just deluged with so many documents and so much material? Maybe if we can start with you that would be great.

Lisa Costner:

I have not had any of the two terabyte cases. In the middle district of North Carolina we just don't have cases that are quite that document heavy. In the western district of North Carolina where I also practice I have one where it's a multi-defendant RICO case, gang case, where we got approval for a technology person to just put it all ... These were interviews from different law enforcement agencies all on different. Everybody's got their own player and medium for these interviews. They made it all on one platform. They made everything searchable. They made everything indexed. They've made it very easy for all of us to be able to look, search, and utilize that great amount of discovery.

When I haven't had an expert like that ... Again, not a two terabyte case or anything. Just maybe 16,000 pages. I just sit down. I make it searchable and I go through it to the best of my ability. It is time consuming and it can be difficult. That's what I do. I'm enough proficient that I can make it searchable. I can try to get it to where I can review the discovery. Index it. I try not to print much. My iPad is sort of my trusty friend for those things. It has been nice to have somebody that has taken all of the documents and put them in a format we can all use in the case that I have in the western district.

Gordon Armstrong:

Without being flippant, American express helps me because I have to finance it. If they said give me a disc that has all kinds of documents on it I'll try to go though the disc to identify what I need. Then I'll take what I've identified as what I need and I'll take it down to pro-legal copies. I say, "Print this out." Then they'll send me a bill later. I try to float that bill as long as they'll let me. Then I'll put it on American Express. I'll have to pay it when I pay it. When I can get funded for it.

It's certainly a burden which goes right back to what Judge Cardone said. "Why do you do it? Why in the world would you do this work?" I don't want to act like it's all we're a bunch of ideal hogs. We'd fight for the constitution even if we didn't get paid. Like Tom said. It's a business. You have to get paid. You have to have money to do it. That's why I want our rates increased. We just got to because it's hard. It's hard and there are lawyers who will not get on the panel because they don't want to take appointed work. It doesn't pay enough.

I put in my position statement that most of the lawyers are solo-practitioners or very small firms that handled criminal defense cases. You don't get lawyers straight out of law school who are applying to get on the panel. They're applying in the big firms because they want to generate an income for themselves. It's very hard to stay on the panel. It's very hard to

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

do any kind of appointed work. I don't know how people do capital murder cases in state court like Christine was talking about.

To me that's crazy. I used to do them. It was when I was brand new and I didn't have anything else to do. I was trying to learn. Who's going to hire a lawyer who's never tried a case before? Nobody so you get an appointed case. It's difficult to do. It does put a burden on the back of the lawyer. He carries it or she carries it. You do the best you can under the circumstances.

Mike Mazzoli:

I have not yet had a CJA case with mass discovery. Probably have not yet in private practice until very recently had a case that involved a mass amount of discovery. The strategy that I would try to use as a CJA lawyer is there's an awful lot of good support that you can get from the defender services in Washington. They've got their own electronic discovery specialist who can give you advice about software. They have some discounts for software. It could be that if you understand what your problem is and can describe it to them they can give you an answer.

Sometimes the government will cooperate. They really oughta cooperate all the time. They should give you discovery in searchable format and a few basic, decent things that they can do with the evidence to at least make it a little easier to use. If I didn't get cooperation from the government I'd complain to the judge. I would say, "They're refusing to spend a few hours, and they're going to force me to spend a hundred hours, maybe you can get them to make that."

The one other thing, and I've just learned this as a strategy is, to approach it in a staggered sense. To get an expert just to look at what the problem is and come up with a plan that would sort of itemize. This is what you would do. This is what it would cost. Then maybe with that because, that's probably going to blow the top off of the ceiling for experts, but maybe with that you can go to the court and say, "The government won't cooperate. This is what the expert said." The expert, if they've only done a consultation that should be reimbursable by CJA I think, regardless if it's below the proper amount.

You can use that little bit of money that you've got for an expert to at least get an estimate as to what you really need. That would be what I would try. I'd have a good feeling. If I could make a good case to the judge that we've tried with the government. They won't help. I called Washington. They can't really do anything because whatever the reason is. Then I think I'd have a decent shot. It's not easy.

I have not even brought up the idea with the case with 100 hours of audio. I mean I don't know that there's anything you can do but listen to 100

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

hours of audio even if the government says, "Really, there's only about two or three important tapes here." I think you have to listen to all 100. I don't know that there's any software that will do it for you.

Roy Percy: I have heard some complaints from a panel member or two about getting discovery in a large data-dump. I'm not suggesting that the US Attorney's Office is deliberately giving a data-dump to hide the relevant evidence amid.

Mike Mazzoli: I would say that. I've experienced that.

Roy Percy: In my own experience I have, and I think most of our panel attorneys, have good relationship with the AUSAs. I don't hesitate to call them up and they don't hesitate to speak to me and tell me exactly what and where. These are the numbered calls that you need to listen to. Of course you rely on that solely at your own peril. You have to look for, like you say, you just have to listen to 100 hours of audio but it's a good starting place that you can go to your client with.

I'm struggling right now with a case with a large volume of discovery that was provided in electronic format. It's an encrypted format. I was given the code to open it and view it but the encryption prevents me from making a copy. Defense attorney's differ. Some panel attorneys and federal defender attorney's don't like to give their clients a complete copy of all the discovery. I do like to do that.

In this case my client lives an hour and a half away. I can't copy this discovery even onto an electronic.... I'm not talking about making a hard copy for him. I just want to copy it onto another flash drive. I'm having trouble doing that. I'm trying to resolve that without a motion to compel but the court, in other cases recently, has entered protective orders up on the motion of the US Attorney's Office preventing defense council from making copies of discovery because they've had some issues with confidential informants. A couple have been killed so they've got some security concerns. That's an issue I'm struggling with now is how I can make it available to my client. I'm not necessarily expecting my client to go through it all but I want them to have had the opportunity to view all the discovery.

Andrew Skier: I want to thank you for that question professor because I think it brings up an even more important point than our individual experiences. This is a world of limited resources and I think we would all agree that we need to use the resources that we have the most effective way possible. I'm involved in a case right now where, someone just mentioned, of a multi-defendant case with hours and hours of wiretap audio. I have a case like that right now. I remember thinking to myself every time I fire up this

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

player I'm billing the government \$12.90 to listen to it and so are nine other lawyers because there are 10 co-defendants in this case.

I remember thinking that's not a good use of our time. I don't know the answer to it but I think one thing that might be helpful ... I watched some of the other testimony from some other hearings and I think at the Miami hearing there was some discussion about some changes to the rules to require the government to indicate which documents they intended to use their case in chief. I think that would be very helpful.

Putting requirements on electronic discovery that it be searchable. That we be able to make copies. That we be able to share with our clients. I think I would be very helpful. There's no reason for this duplication of effort and frankly its a waste of the limited resources that we have and we're not doing the most effective job that we can for our clients when we have to do the same job 10 times because there's 10 co-defendants in the case.

It's a problem that's going to get worse. It's a problem that's gotten worse since I've been practicing in federal court. It's a problem that's not going to get any better because of least in our district wiretaps are the new vogue and that's what's coming down the pike. I'm glad that the committee recognizes that that is an issue. Other than what I just said I don't know what the answer is but I do hope that it's addressed when y'all make your report.

Tom Stingley:

That's a very important question. I've received anywhere from 2,100 - 3,000 hours of tapes, wiretap, that the government submitted me. My approach is that I listen to some of it to see who the target is and take a look at if its a multi-defendant case. Who the target is. How does my client fit into the scheme of things?

If I hear enough concern and my particular client I'm going to meet with my client and go over the discovery with that client. I'm not just going to give it to them. We're going to sit down and go over it. If my client is opposed to it that way I go back to the government and I'll send an email or a letter indicating the problems I'm having with the discovery. I can't find any culpability in this discovery.

Most of the time if you've established a relationship with the government attorney and they respect you in terms of being serious about what you're doing and that you're not going to push anything that doesn't make sense. They know how you practice. They will come back and point out what's important.

I'm not saying that they're going to give you their case strategy but they will point out to you. Then I'll do that. You have to do due diligence. I

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

might have only listened to 500 hours of tape. I've got that other 22,000 hours out there I need to listen to. The best use of time would be to hire an investigator, a skilled investigator, or skilled paralegal to listen to it once you've given them instructions on what to look for. Let them be billing at a lower hourly rate than the attorney. That's what I would rather do. Sometimes I'm forced to listen to all of that myself.

Judge Cardone: Microphone.

Judge Walton: You've indicated that there's some recent changes in the discovery process in your district. You indicated when you receive certain information but you didn't say now when you're receiving "Brady."

Roy Percy: The new scheduling order. That's actually what precipitated the new scheduling order is an instance where some "Brady Material" was not disclosed in a timely manner. The new scheduling order there was discussion about when the "Brady" would have to be disclosed. The scheduling order says promptly after the United States learned or obtained exculpatory information. We take to mean immediately but they're concerned and the US Attorney's Office was at the table along with the Federal Defenders Office and the panel in crafting this order. Their concern was obviously they don't always learn of "Brady material" until after maybe even the mid-trial sometimes. We settled on promptly. We were so thrilled to get the witness statements now seven days prior to trial impeachment material regarding to witness seven days prior to trial. That's just a huge leap forward for us. I have no doubt will ultimately results in a big cost of savings for this CJA program because it will obviate the need for some trials if you can confront your client with witness statements before the witness has actually testified. There is no drop dead deadline for "Brady materials."

Judge Cardone: Mr. Rucker do you have any questions?

Dr. Rucker: Maybe a couple of quick questions or I hope are quick questions anyway. I want to continue on with the idea of the discovery and the difficulties you're having with the e-discovery. Have any of you ever used a discovery coordinating attorney to help you with this? Or you Sean Broderick's office and national litigation to help you with any of these issues?

Mike Mazzoli: Not yet.

Roy Percy: I have not.

Lisa Costner: In the western district case I have. It's Russell Aoki I think who's out in west. He's helping and he put it all together for that case.

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

Dr. Rucker: Okay, and as a follow-up to that have you had training on managing these large e-discovery cases?

Lisa Costner: In our case, yes. They actually had training sessions for everyone and individualized training sessions. It was very helpful.

Dr. Rucker: Any of the rest of you?

Roy Percy: Yeah, training.

Mike Mazzoli: Training.

Gordon Armstrong: The training that we've had is, for me personally, is through the CJA panel attorney conference. Sean and his team usually attend all our national conferences. It's constantly at the forefront of the conversation is what they offer and what they do. Locally, on the local level, the seminars usually touch on that type of case management system and how you can try to get a handle on the electronic discovery. Especially in the very large cases.

Dr. Rucker: Judge Cardone. I have one more question if I may.

Judge Cardone: Sure.

Dr. Rucker: The other question that I wanted to ask you about it is a number of you have talked about self-cutting your vouchers. I think Mr. Mazzoli said you're no longer doing that. Did any of you keep track of how much time or how much money you are not billing for voluntarily?

Gordon Armstrong: I have never cut my own vouchers. In fact I have other lawyers tell me that they did that to get under the cap and I said, "Don't do that. Your devaluing your own service. Your own time and efforts." I have always tried to keep very good track of every time I've ever had. There are times I know that I've probably under billed, but I didn't do it because I chose to. I did it because I probably couldn't documents properly that time. I didn't want to guess and get into a situation where I'm guessing as to what my time was even though I knew I have expended more time.

I encourage the lawyers on our panel that if you put the time in bill for it. Do not cut your own vouchers. I have had lawyers in cases that I've been involved in with excess that would end up in excess vouchers saying, "Well maybe we ought to get together and compare our notes. Make sure that we're about the same level so that it all looks like we've ..." I said, "Look just put your time down for what you've done and bill for it. Then if your called to question to justify it then justify it." I don't like somebody else telling me my time is not what I put into. I don't think that's right that

## Transcript (Birmingham, AL): Panel 7 –Views from CJA District Representatives

anybody should do this. I would defend my voucher but I've never had one cut. I've been fortunate in that sense.

Roy Percy:

I've had one voucher cut. The only voucher I've ever had cut. It was when we had the \$3,500 maximum. The judge called me personally, which is the ordinary of practice when the rare occasions when voucher are cut, and the reason was not that I had billed them too much for the work that has been done on the case. It was that the other attorneys on the panel were submitting \$3,500 vouchers and it was just not fair for me to submit excess vouchers if they were cutting their vouchers.

After that I did cut my vouchers. I kept my vouchers. I was pretty strict. There's nothing worse, no worse feeling, than getting a voucher cut. I did cut my vouchers. I did not keep up with how much I cut. It was thousands upon thousands of dollars. The one benefit was that when you renew your bar membership every year in Mississippi you have to report that you've done at least 20 hours of pro bono work or paid \$200.00 to the bar. You could always put that you had done 100+ hours of pro bono work.

Judge Cardone:

Anybody else? I want to thank all of you for being here. We very much appreciate you guys. You're the last panel and you've been here, I assume some of you, for a while. I know that Mr. Mazzoli's been here for a couple of days. Again, that you very much for being here. Thank you very much for your appearance and we stand adjourned. The committee has a meeting. Short meeting.