Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing # 2–Miami, Florida
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Transcript: Panel 3—Views from Judges

Reuben Cahn: Second in a series of public hearings of the Committee to review the Criminal Justice Act. My name is Reuben Cahn. I am the defender in the Southern District of California in San Diego. By way of introduction I'd like to begin with a brief personal story because what trial lawyer can resist the opportunity to talk about themselves in front of a captive audience of judges. Twenty-three years ago I was a young lawyer and I had just had the honor of being offered a job in the Federal Defender's Office in this district, the Southern District of Florida. I arrived in February of 1993 and began to hear immediately of the work of the Prado Committee, the first committee to review the Criminal Justice Act chaired by our Emeritus Chair, Judge Edward Prado. I learned very quickly of the significant work it had done and the many recommendations it had made to improve the functioning of the Criminal Justice Act.

The vast majority of those recommendations were accepted by the Judicial Conference, were implemented and have gone on to make for a more effective system of representation of indigents in the federal courts, but the most consequential of those for a fully independent defender system with a defender general heading it was rejected by the judiciary, by the Judicial Conference. In the wake of the report and in the wake of that recommendation I think a new understanding was born and developed within the judiciary and with the defenders, that Defender Services was not a service to the court nor was it some mere annoyance. It was a special trust managed by the judiciary for the protection of all of our constitutional rights. That understanding protected both defenders and the judiciary and led to a much better system.

The judiciary and the defender system have changed massively over the last twenty-three years. Many of the members of the judiciary who were here then are no longer with us today and the young Turks like Judge Prado are now the old lions of the bench, and I am no longer a young lawyer, either. Unfortunately that understanding has frayed and sequestration shined I think a very harsh light on the tattered fabric of that understanding. That was the impetus for this new study, this ad hoc Committee to Review the Criminal Justice Act chaired by our own Judge Cardone, who's also a member of the Defender's Services Committee.

The same fourteen questions that were posed to Judge Prado's committee are posed again to this Committee and they're all relevant today, including the central question of independence and they all bear study. This Committee is examining those both through private research, but most

importantly in a series of public hearings where we hope to get the views of as broad and diverse a group of individuals as possible about what's needed to improve the functioning of the Criminal Justice Act. As I said, this is the second of those hearings. In addition there is a website at cjastudy.fd.org where members of the public can offer comments. I urge as well as look at the public testimony that's been offered both in streaming form and the written testimony that's offered, and I urge anyone who's interested to take a look.

I'd like to briefly introduce the Committee beginning with the panel members for today's panel. First we have Judge Mitchell Goldberg from the Eastern District of Pennsylvania; Chip Frensley, citizen from Nashville and the National Representative of the Criminal Justice Act panel attorneys; as I said, I'm Reuben Cahn, the defender in San Diego; Judge Reggie Walton, Honorable Reggie Walton of the District of the District of Columbia; as I said, our Chair Emeritus and member of the Committee, Judge Edward Prado of the Fifth Circuit Court of Appeals. That's the panel for this morning.

The other members here are Judge Kathleen Cardone, our Chair; Katherian Roe, defender, Federal Public Defender of the District of Minnesota; Judge Dale Fisher of the Central District of California; Doctor Robert Rucker, Assistant Circuit Executive of the Ninth Circuit Court of Appeals, the best court of appeals in the nation. I can say that now that I've left the Eleventh Circuit. Neil MacBride, formerly the U.S. Attorney for the Eastern District of Virginia and now a partner at Davis Pope; Professor Orin Kerr of George Washington University. Not with us is Judge John Gerrard of the District of Nebraska; and our reporter, Judge, sorry, not Judge, our reporter Professor John Gould of American University; our staff, Autumn Dickman; Arin Brenner; and somewhere is Mark Gable, though I don't know where he is.

With that we'd like to begin to welcome our panel. Judges John Gleeson and Kathleen Williams are intimately familiar with the defender system. I welcome Chief Judge Aida Delgado, and I've heard a lot of things about the District of Puerto Rico, looking forward to hearing more from you, and then Magistrate Judge Bill Matthewman, my old trial partner from twenty some years ago. So with that we'd like to begin with brief opening statements from each of you and then we'll move on to the Committee for questions. I'd like to begin with Judge Gleeson.

Judge Gleeson: Thank you. Good morning. Thanks to this Committee for two things, one inviting me to speak and to be questioned and second, for doing what you're doing. It's very important work. Couldn't be more important work as far as I'm concerned within the judiciary. When I first became a judge, like happens to all of us, I got a memo asking whether I wanted to be a

member of a judicial conference committee and if so which committee or committees I'd like to be considered for. There was a list of the jurisdictions of the various committees and I had been a federal prosecutor for ten years, was into that work.

So I put down a Criminal Law committee on the first line. Then on the second line for reasons I can't even remember because I still up to this day I have no idea what the Federal-State Jurisdiction committee does, but I put that committee down. Then on the third line I said if I can't be appointed to one of those two committees, I don't want to be appointed to a committee. So naturally, Chief Justice Rehnquist put me on the Defender Services committee.

At the time I was a hard-nosed organized crime prosecutor and if you made two lists, one list the defense attorneys I liked and respected, and then the second list, the defense attorneys I had successful moved to disqualify from the trials I tried for their unethical conduct, that second list would have been a longer one than the first one. When I came on the committee I was ready to ride herd over the defenders and the panel attorneys. It took me about a minute and a half to figure out that the defenders and panel attorneys had been ridden herd over for a long time before I arrived. What they needed more than anything else is protection. Stewardship yes, but mostly protection from hostile forces within and without the judiciary.

I don't believe in making policy by anecdote, but I do think there's anecdotes that can be illustrative of systemic problems and I want to share three briefly with you in my opening remarks. One is when I was chair of Defender Services, a district judge to whom a recently filed capital habeas petition had been assigned didn't have an attorney who could handle it. That judge reached out to our defender program and inquired as to whether we could find one for him and we did. There was a defender in a capital habeas unit in another circuit who had just had a case resolved and had the capacity to handle this capital habeas petition.

Through the death penalty folks in the program we notified the judge. The judge was happy. That defender was appointed and about three weeks later I got a call from the chief judge of the circuit in which that case was pending. Not even asking, basically directing me to unappoint that capital habeas unit lawyer. I told that chief judge I couldn't do that. I hadn't appointed the lawyer and couldn't unappoint him, but asked why. The answer to the question why was there were plenty of law school clinics within this circuit that would represent death row inmates for free including in the capital habeas setting.

I pushed back a little bit. I care about Defender Services. I pushed back and explained that the prosecution function is a national program. When Joe Hartzler got appointed by Janet Reno to investigate and prosecute the Oklahoma City bombing, He called me, I was a prosecutor at the time, asked me for some good people and three of the people who worked for me doing organized crime work in Brooklyn ended up on those trial teams out in Denver before Judge Mage. I explained to this chief judge that the Judiciary is a national program too. As the need surfaces we have lending and borrowing districts. District judges and circuit judges go around to help one another out because it's a national program, and I tried to explain that the defender program is the same thing, it's a national program and it's not only not a bad thing to have, to use the resources from one circuit to fill the needs in another, but it's actually a good thing. The answer I got to that from the chief judge of a United States Court of Appeals was that it violates the principles of federalism for a federal defender to go from one circuit to another to help prosecute a federal habeas petition.

The second anecdote I want to share with you is the effort that went into section 230.36 of the Guide to Judiciary Policy when I was on Defender Services Committee. That's the provision of our guide that says the judge should give notice and an opportunity to be heard to a Criminal Justice Act lawyer before cutting a voucher. I was here yesterday, I heard some discussion about this as a possible idea. We already have this guideline. When we got it I thought at the beginning, I thought this was a no brainer. We're judges. Notice and opportunity to be heard is our middle name. We don't adjourn a trial without giving somebody an opportunity to be heard. It seemed to me at the time that you take a 20,000 dollar voucher and you cut it to 10,000. That's somebody's livelihood. Where do we get off not giving notice and opportunity to be heard?

But I was shocked that the pushback, at how ingrained it was . . . and it wasn't really the judges on the committee as much as it was the judges reporting back the reaction of their colleagues where they came from, each judge from each circuit. The resistance to having even just a phone call that says, "This seems excessive." Anyway, we prevailed. We had to water it down, had to make sure that it could be informal notice and an opportunity to be heard didn't mean you got a hearing. God forbid you get your voucher cut and you can't pay your bills and you get a hearing. We watered it down, but the point is it got promulgated.

My main point in raising it is it's of a piece with the first and now the third anecdote I'm going to give you. The third one is very simple. You go to a lot of national meetings of defenders and panel attorneys when you're involved in Defender Services. I certainly did. After *Booker* was decided in January of 2005 there was a panel attorney who wanted to . . . sorry, a defender who wanted to provide training to the panel in that defender's

district about the post-*Booker* world. Those of you who were on the bench then and even if you weren't will remember there was a good deal of confusion as to what was coming next, what weight would be accorded the guideline range and the like

This defender went to the chief judge in his district and asked for a list of the panel attorneys and contact information so the panel attorneys could be invited in for training. The chief judge's response was I'm not giving it to you, that's proprietary information. These are just three anecdotes that to my mind place in very stark relief a systemic problem, and the systemic problem is there is insufficient respect in our own ranks, in the judiciary's ranks, for the defender program and for panel attorneys generally.

One thought that occurred to me yesterday, and it wasn't the first time it occurred to me, is like many of you I do a lot of CLE trainings. People ask me to show up, I show up. Unless they're mandatory and they're, only some of them are mandatory, I get the same impression each time. The lawyers show up for training and the problem is the people who need the training the most aren't the ones that come to the trainings. The ones you really need to be talking to never show up.

The parallel is you . . . good for this Committee, and you're having these seven public hearings and it's great. I know you're hearing things that are revelatory to you and will help you, but I think one problem is the judges who really need to hear what you're going to hear aren't here, and they wouldn't have signed up, and they're not going to care very much about what you're doing. We need to be ever mindful of how many of those judges there are and how important it is to create policies with them in mind.

The last thing I want to mention and I'll end is a process point. I think this is so important and it's a consequence of the demotion of the program and its director within the AO. Before the wood got laid to the defenders during the sequestration I was asked to be part of a conference call with the chair of the Executive Committee of the Judicial Conference. The other participants of the call were the chief judges in New York, southern, eastern and the chief judges of circuit. They asked me to participate because I had some familiarity with the issues by virtue of having been involved in Defender Services.

A main topic in the conversation was whether the short-fall in the defender budget ought to be dealt with by requiring layoffs, by having the defenders "share the pain"—that's a buzz phrase that we'd heard for years that meant requiring the defenders to have layoffs and fire people. It wasn't the first time the issue had arisen. It arose every time we had a shortfall and the logical answer to that is it doesn't make any sense to do that because

everybody knows, the chief judges know, the defenders had been well scrubbed for years. If you make them lay off people they're going to go to the chief judge and tell the chief judge, "I can't do these representations." Those representations go to the panel, which is more expensive. Less quality, more expensive, so it doesn't really save any money.

That argument won the day for a decade. Those of us who were involved in Defender Services saw what was happening, what was going to happen, coming around the bend a mile away. On this conference call there was us in New York and then on the other end of the call was the chair of the Executive Committee and then a staffer from the Budget Committee. When you do this stuff long enough, all of you, I'm sure you do, you recognize talking points when you hear them. The talking points that we heard were the talking points that we had been getting from the Budget Committee for a decade.

The most remarkable thing about the call to me was there was no one on that call from the staff from the Office of Defender Services, no one there from Defender Services Committee. A decision that went right to the heart of the function of Defender Services was being made with no input whatsoever from anybody who knew what was going on. The process, I think process means so much, not just for appearances, but for the quality of decision making, and this demotion, this degradation of the Defender Services staff and the committee, by stripping key parts of its jurisdiction, is a bad thing. Really needs to be corrected, just so the people who make the information . . . I don't fault the chair of the Executive Committee. He's trying to make the best call he could on behalf of his committee at the moment, but the information flow is defective when you carve people out and you cut people out of the process. I've taken more time than I should. I look forward to answering any of the questions you have. Thank you again.

Reuben Cahn: Thank you Judge. Why don't we go to the opposite end of the table and we'll go to Judge Mathewman's opening statement.

Judge Matthewman: Thank you. I'll be very brief. I've been involved with the CJA program since the 1980s, first as a CJA attorney. I was a representative, district CJA rep, Eleventh Circuit CJA rep and I was the national CJA rep for two years, and have handled everything from federal capital cases in the federal system to all types of other cases. Now as a magistrate judge I deal with defenders and court appointed lawyers on a daily basis.

First of all I think that Congress got it right when they passed the Criminal Justice Act. I think it's a model for indigent representation. I think it particularly runs well in our district, in the Southern District of Florida. We had, in the last fiscal year, we had 2324 criminal defendant filings. I'm

not exactly sure how many of those were represented by the public defender. I'm sure that information can be obtained, but I know last year approximately 989 were represented by CJA attorneys. Nine hundred eighty-nine out of the 2324 and the public defender had an awful large number. So the great majority of cases are represented by CJA council or federal public defenders or assistant public defenders which I don't think was something that was anticipated when the Criminal Justice Act was passed many, many years ago. It's a reality that our system could not work without the Criminal Justice Act, with the CJA lawyers and the federal defenders who do an excellent job.

However, I think the program can always be improved. I believe that, for example in our district we have a list of attorneys who are up for appointment each week in each division. The lawyers know that they're ready to be called for appointment. They have to be available to immediately meet with the client and we get a fairly prompt representation that way. I think that's a good system to have. I think mandatory training and more training for CJA attorneys in conjunction with the federal defender's office is very important.

I think that the panel qualifications should be high. I think there should mandatory training. If the attorneys are not willing to go to the training then I think that their membership on the CJA panel should be reconsidered. I think that because the law changes so often and as Judge Gleeson said, oftentimes at these seminars the lawyers who show up are not the lawyers that need to be there. It's the lawyers who don't show up, which is why I think the mandatory requirement would be helpful. That can be done in conjunction with the federal defender.

I believe that there are caps that are too low. For example private investigator hourly rates and caps are too low. In order to get a qualified private investigator to handle a very serious case sometimes it's difficult, especially in a district like this, to find an investigator who will work for the lower hourly rates and the low cap. I think that needs to be addressed along with other hourly rates and caps of experts.

Overall in this district I think we really are a model for a lot of the other country. I think we have a very, very good CJA panel, a great federal defender's office. I now I sit on the CJA committee for this district. We have more attorneys applying to be on the panel than we do have spots. We have to go through a winnowing process and we require a detailed application. There is a vetting process that we go through in order to have attorneys appointed to the panel. I think all of that helps raise the quality of representation.

I'm willing and happy to answer any questions that anybody on the Committee may have. I think a lot of problems that used to exist back when I was the national representative and the circuit representative with low attorney hourly rates and low caps and things of those natures have been ameliorated somewhat, they have been helped somewhat in recent years. I do think we need to get onto other issues as well such as I have said training and things of that nature. Thank you.

Reuben Cahn: Thank you Bill. Chief Judge Delgado, can I turn to you next?

Judge Delgado: Good morning. I want to begin by thanking the Committee for the opportunity of sharing with you some of the experiences and measures we have adopted in the District of Puerto Rico to address some issues related to the panel. My statements here today certainly are based . . .

Reuben Cahn: Judge Delgado, I'm sorry to interrupt. Can you pull the microphone in front of you? We're streaming this and it's not picking up apparently.

Judge Delgado: Okay. Let me backtrack then. Of course that I welcome the opportunity and having been here yesterday I saw the work that was being done during the afternoon hours and certainly the work being done needs to be commended in the sense that those are hard working hours in a very tight schedule. I think that the purpose and what is the agenda deserves of that effort as well. For that I thank you.

As I was saying, my statements here are based on the data that we have gathered for the district. I'll try to refrain from anecdotal comments. Certainly based as well on my background and experience and direct involvement with the CJA panel attorneys and the federal defenders. By way of background I should mention that I began in 1982 as an Assistant Federal Public Defender. That's how I began to work for the federal court and the District of Puerto Rico. There I held several positions including the one of acting federal public defender. Those were the years and times in which the federal public defender used to manage the panel of attorneys. As to that I'll have some comments as well later on.

Later on I was appointed as a magistrate judge, served the court as a magistrate judge for twelve years as well as being a member of the CJA panel committee. Back then I participated with the chief judge and other members of the panel in drafting the CJA plan for our district. That's 1994, 1995, 2004. Then appointed to the bench in 2006, also directly involved with the CJA panel committee. As a chief judge since 2011 as well, I chair the committee of the CJA panel committee for the past nine years.

Defense work I must say is very close to my heart. I recognize the importance of the job that is being done by Defender Services, the importance of the CJA which I think is a well-structured statute that with fine tuning and collaboration and direct communication, it may be the national guidelines that were being mentioned and discussed yesterday, a great deal can be achieved. As to the District in Puerto Rico in particular, except in taking away the numbers of Puerto Ricans who have decided to move to the district of Florida right now the population is 3.4 million. It's served by one district court with seven active judges, three senior judges and four magistrate judges and office of the federal public defender with twenty attorneys and of course the staff that was mentioned here yesterday and a CJA panel of attorneys that has eighty-seven members to the present day.

They represent a wide variety of cases. Among those drug gang, conspiracy cases, RICO, weapons fraud, child pornography, immigration which is among the lowest percentages now, different than what it was in the '80s, and a large number of death penalty cases. The panel attorneys are receiving between an average of nine to eleven cases per year, which I think is a good number that will ensure the sufficient proficiency of the panel participants. Many of those cases in which they participate are multi-defendant cases that at least may take a year to complete to the trial stage.

In terms of the caseload I think that the district of Puerto Rico is among the first in multi-defendant cases and is seventh in the nation in the movement of prisoners. I'll give the reason why I highlight this because we are among the border states, but actually that movement of prisoners that we have is related to violent offenders as well as you will see because our caseload is 45% of drug gang cases, 25% of weapon cases. Since 2011 there's an MOU with the state authorities through which in order to curtail the murder rate and violence incidence in Puerto Rico an average of 450 cases are being brought from the state courts into federal court. Those are weapon cases because of the interstate commerce.

These people do have a recidivism rate between 50% to 62%. Many of these cases are going into the hands of panel attorneys. We also have 10% of fraud cases. Of course, this is complicated the scenario for panel attorneys in terms of time-consuming cases and a large number of death penalty-eligible cases. Between 2012 and 2014 the district tried to penalty phase four cases. It took five million dollars from the CJA budget. At the same time we had on pretrial stage thirty-five eligible death penalty individuals.

What I would like to point and ask to the extent that is possible that this be considered as well in recommendations to Congress and the Department of

Justice is that there was a huge delay in terms of the time that it took the Department of Justice to make the final determination as to certification. Our numbers indicate that it has taken between one to three years. Those cases may consume four to five million dollars of the CJA budget before a final determination was made.

As to September of this last year we had four cases with seventeen defendants death penalty-eligible and by January of this year it has turned down to one case, but with six defendants already certified. I think that the recommendation for Congress and the point to be made is that fairness and due process, aside the need of efficient management of scarce resources should lead to a revision of the statutory framework for this type of cases and for a more streamlined process in which to handle those.

Sometimes when we informally talk about this we discuss that if DOJ would have to pay for the pretrial cost, stages of this they would certainly have an increased interest in streamlining the process, but that is taking a big chunk of CJA funds. Aside from the fact that I think everyone should be more sensible to the fact that these cases put a lot of emotional burden not only on the defendants and the relatives, but also on the victims and the victim's family and the community in general. More so in a district like Puerto Rico where the state by the Constitution prohibits the death penalty as well. Of course having those cases for so long in pretrial stages affects the case management that is handled by the court and the performance of the attorneys and imposes an undue burden on CJA funds.

In terms of workload we have a massive number of cases . . . defendants being charged. We had for example between 2014 and 2015 consistently over 700 cases filed. In those 700 cases we had over 1,400 defendants being charged. In 2014 for example we had 26 multi-defendant cases involving 594 defendants. The multi-defendants produced 40% of our defendant's workload. The same thing happened in 2015 in which in 16 multi-defendant cases we had 465 defendants charged. Of course, the panel has 85 members. Right now it's been sufficient to handle this workload, but there was a time in 2012, 2013 in which we had to look outside the CJA panel to get attorneys appointed to this type of multi-defendant cases.

When I mentioned that we are seventh in the nation in prisoner movement I would like to mention that the detention center that we have has a maximum capacity of 1,200 defendants. Since 2012 we have exceeded that. That has produced the need to house pretrial defendants in Atlanta, which means out of the district, out of the direct reach of defense counsel. That is not the optimal scenario in which the court would like to see cases being handled. Because of that the court has had to manage and work a system with the U.S. Marshal's in having video conference systems

available for the attorneys, of course, at no cost and having some of the internal policies and probation work done in advance of these defendants being transported out of the jurisdiction.

Still we recognize that there is a need under such scenario to pay for travel, for waiting time at the detention center. We have tried to work with the CJA panel committee and on the district judges methods that will try to alleviate the burden imposed on CJA panel of attorneys like allowing them, through the courtroom deputies to know a listing that prevails where the defendant is at a given time; access on a given basis when they ask for appointments for the video conference system to be available; given frequent notice through massive emails for them to know what is happening and every single circumstance that may affect their daily work.

I agree with Judge Matthewman in the sense that the CJA structure and the Defender Services certainly is a well-developed and implemented structure that provides for quality services. Any issues as to funding I rest assured this Committee will be addressing in as much I have seen a consistent statement being made as to the need for increased funding giving the increased cost of litigation and services. I'd like to emphasize and I think that the judges in my district, we remain cognizant of our duty to ensure effective legal representation, to develop the defender's program and to promote professional growth of the attorneys and members of the bar. We remain committed to that.

We are aware of the need to strengthen the quality of the legal representation being presented. If anyone is going to say that the court exercises control over the defense bar is to demand quality services and good performance in court. Actually something that I don't know it has been made in any other district, but in September of 2014 was the 50th anniversary of the CJA. We held a public recognition of the CJA panel attorneys, the public defenders and CJA representatives. Actually one of the things that we took care of was to make sure that every attorney received a pin to wear so that they will feel pride on the type of work that they do and will carry it as a distinction of the quality of services and group to which they belong. I think it's an important component of our legal system.

In terms of expert services and representations being made I don't think that any judge will second guess requests for services. I'm a firm believer that having a good defense attorney as well as having a good prosecutor makes the trial Judge's work easier and better. We don't have to be so much concerned about being gatekeepers because everyone is doing what they are supposed to be doing. We know what our work as to that is.

In terms of panel attorneys I would like to mention that in the '80s when I was a member of the public defender's office the panel had 100 members. Those were the times in which the public defender controlled the appointment and designation of attorneys. There was a case the magistrate judge called and a name was given from a three tier system that we had. Attorneys from one to five years of experience, tier one. Tier two was from five to ten. Tier three from ten and above.

The recommendation for appointment was directly made by the public defender's office or the designee. That system was later objected by panel members because it was very subjective and resulted to be unfair in its application with same attorneys getting more frequent appointments than others, was not balanced. Currently the panel attorney's designation or appointment is done by a random computerized system. This system has been largely favored by panel members. Of course, the judges do remain with the authority to make a direct appointment, but there is a need to make written findings under such circumstances just to ensure that the transparency of the appointment process.

I think that reverting the control of the CJA panel to the federal defenders in my opinion is not advisable. Not for the selection or designation of attorneys and certainly not for the vouchers' review. I think that even if an independent structure is created then that will be the way in which it will work, but still I think that it's important that the person reviewing or the entity reviewing the vouchers needs to have knowledge of what has transpired in the case and not to have a conflicting opinion. I think that while funding remains within the judiciary, judges should be the ones reviewing and are the ones in the best posture to understand the complexities of the case and the quality of work rendered by the attorneys.

I agree in terms of what Judge Matthewman said in terms of the qualification of panel members. There should be strict requirements. I think that our district plan sets the bar high. Five years of experience and showing an interest in the criminal defense. Those applications for membership are closely scrutinized by the CJA panel committee which by the way is composed of four fixed members, the public defender, the clerk of court, a magistrate judge and the chief judge or the designee and five attorneys of which at least three must be CJA panel members.

Now there is a revision in place that we expect the district judges will approve and finally the circuit that recommends that once this application process is favorably considered the attorney be appointed for a year. What we want is to have a cushion of a year to see and be able to evaluate the attorney's performance and see if he should be reappointed for extra three years. This reappointment process now is structured in a way in which it involves an application for reappointment, peer review by CJA panel

committee members in which we take from each of the attorneys, we review and try to review from the electronic docket motions practice, quality of the motions, performance in court. We get the input in general for the attorneys being evaluated by session from the district judges. That input is transmitted to the panel committee who takes that into account at the time of deciding whether to recommend reappointment or not.

Generally recommendations for reappointment or not to reappoint are favorably considered by the court. The court gives deference to the work being done by the panel committee. Of course, those that are more closely evaluated are those that involved removal which we haven't had except one many, many years ago. We have a mentoring program that has undergone review in a couple of occasions and now it's being restructured. We have mentors identified by the court. We have from ten to twelve attorneys plus the attorneys at the public defender's office who act as mentors. When we say that the court appoints them we do not look for people that will just please the judges or the court. We have experienced litigators that do challenge the judges, are respected practitioners and actually that's what we would like to see in the bar.

As to training and so forth I know there will be questions and I'll leave that for afterwards. What I would like to mention is that certainly . . . that we have a large number of vouchers that are being reviewed on an annual basis. Most of those of course are attorney vouchers. For example in 2014 we reviewed 1434 vouchers, 76% of this were attorney's fees vouchers. In 2015 same percentage. 85% of the vouchers we reviewed we just took a sample and actually when the work of this Committee began and we knew there was anecdotes in terms of members failing or talking about excessive cuts or averaging, I asked the clerk of court to take the given period, and they took from March 15th to November of 2015. 641 vouchers were reviewed.

Of those 85% were vouchers over the maximum amount and that's generally what happens given the large number of multi-defendant cases what happens in our district. The average number of vouchers being filed per month is from 109 to 120. We only have 2.5 positions of CJA clerks. We don't have CJA administrators. A lot of work is being done with extra support from the finance department. I think that the shortage of personnel is something that needs to be looked at if we are to ensure prompt payment of vouchers. Given the number of vouchers in the district of Puerto Rico we are in need of additional personnel.

The First Circuit court has taken measures to ensure timely payment of vouchers. For example in March of 2015 they have required quarterly reports on any voucher that has been pending from filing to payment for more than ninety days. Actually, in order to make sure that we were in

compliance I took the precautionary measure of demanding that the clerk's office will give me thirty days reports. That means every district judge that has a voucher pending for close to thirty days, I receive that report in advance of the thirty days so that I can make sure that compliance is achieved and that serves as a follow up. That measure is also being implemented. The policy of the circuit requires at least thirty days for every stage of the evaluation process for vouchers over the maximum amount.

Yesterday there was a question concerning whether the circuit had taken measures, in times of sequestration. The First Circuit did. There was a series of recommendations that were made and were implemented and remain in place in the district. It's submitted within the materials that I gave, the grouping and the way in which to bill for electronic notices. Once again, we have to keep in mind that we may have cases with 4000 electronic notices or more, or entries in a given case. Also presumptive rates for certain type of experts, like paralegal investigators, mitigation experts and health experts and strict application of administrative guidelines pertaining guideline review.

I'll say that in terms of voucher review and voucher cuts within our district those remain at a minimum. If we take the same example that I described at the beginning of those 671 vouchers reviewed 84.5% were over the maximum, 104 vouchers or 15.5% were under. The time in which those under the maximum vouchers were reviewed ranged between thirteen to sixteen days and that's from clerk's office to getting out of chambers. For those over the max were from twenty-four to twenty-eight days.

I think that most of the adjustments being made relate and are based on applicable guidelines. There might be a few that may produce controversies. For example there's a guideline that says that collateral matters like handling bill documents and things are not to be reimbursed, but actually defense attorneys understand that if you go to the clerk's office to assist the relatives of the defendant to pose bail that's just something that is beyond the legal duty or beyond what is considered reasonably necessary in the defense of the case as if you, the attorney, goes to the registry of property to get copies of the deed, certified copies of the deeds that are to be posted. So, that type of things that are . . . there's ambiguity as to how to apply that may bring a controversy here and there, but I don't think that's significant. We comply strictly with the notice and due process that is to be afforded by council and I think this is an important aspect in which all circuits should be required to do that and all districts as well. I think it's proper. What I have seen is many motions and many vouchers that still in spite of training and repeated training still

do not comply with what is required in terms of giving the proper explanation and justification.

Reuben Cahn: Judge, can I ask you a question about what you've just said and I'm sorry, normally we don't in opening statements, but I think this is . . . you've hit a very important point. Do your statistics reflect the percentage of vouchers, of that group of vouchers that were cut over that period of time?

Judge Delgado: Yes, they do. We did a sampling of 1212 vouchers in which 102 had judicial adjustments. That's 8%. Within that 8%, and we are still in the process, since the eVoucher system is being upgraded and still implemented, of narrowing down and breaking it by different grounds for that adjustment. We have those in which there were mathematical mistakes. There could be averaging or there could be a simple cut based on a given reason by the judge. Maybe including improper or not proper justification. It's an 8% across the board including cuts and averaging.

Reuben Cahn: I'm sorry to have interrupted you. I know that there are going to be others who have a great deal of questions about this particular area because it's one we've gotten to. I know the questions are something that we want to get to. If we can finish up and then we'll get to our last opening statement and we can get to those questions.

Judge Delgado: Aside from that what I would like to mention is, and probably I'll wait until there are questions, if there are questions on expert services, but that as well . . . I think that there is a need for education and for attorneys to develop awareness on how those expert services can be used more so as to the mitigation sentencing phase. I think that within the cases that are presented within the district, as I was sharing this morning with some of you, there can be somehow a caseload explanation as to why our percentage remains low in terms of use of expert services.

You take that 45% is our cases. Many, many of those cases. Mister Matthewman knows we have a large number of audio recordings, video surveillance, large number of cooperators. In those videos almost 98% of the defendants charge, you have a zoom of his face, you have a zoom of the plastic bag they are carrying of the money being counted right there. The type of testimony that is presented usually is a chemist. There are so many ways in which you can cross examine a chemist on whether that drug was heroin or was marijuana . . . or that was cocaine, I'm sorry.

Then when you go to the weapon cases which is 28% of our workload what we have? The expert goes, generally a law enforcement agent as to whether the weapon is capable of firing. In most of the cases we don't have issues of fingerprints. We seldom see that issue coming up or the need for an expert. If we talk about whether the weapon is capable of use

and being fired now the government is taking a video recording of the testing, which is presented in the case. I don't see the defense attorneys asking for another expert to rebut that unless the methodology is totally mistaken, which they take good care in making sure that it's not.

So you have 28% there. You have almost 50% on the other side. You have almost 70% of the cases in which the same technology that is used by the government is just blasting and overwhelming. For sentencing I do see a need, and I have seen a need for expert services that probably could have been better used to convince a judge of a reason for a variance or mitigation. In the death penalty cases of course then the story is totally different because we have the mitigation specialist. We have all of these people being brought on board. I think that around 50% of what the expert services in death penalty cases are for mitigation specialists and the other largest percent will be for investigators. I don't see and I haven't heard from the CJA panel committee or in my individual character as a judge complaints about an attorney saying, "I was denied my request for expert services on whimsical reasons of a judge."

Reuben Cahn: Thank you Judge. Judge Williams, do you have a brief opening statement?

Judge Williams: I do. Thank you, good morning. I do want to thank this Committee and all the staffers for agreeing to do this very, very important work. I was impressed by the long day you put in yesterday. I was startled that Mr. Cahn told me I had to be here at 8:30, and that you would have another long day, but that actually put me in mind of a story that Bryan Stevenson tells—who is the head of the Equal Justice Initiative—about meeting with Ms. Rosa Parks. Ms. Parks wanted Mr. Stevenson to explain what it is you're doing there. Mister Stephenson was explaining about how he intended to represent people who were accused of heinous crimes and make sure they got due process and try to avoid unfair sentencings. He went on for quite some time and Ms. Parks said, "All of that's going to make you very, very tired. That means you have to be very, very brave." I think as a Committee by the end of this process, you will be very, very tired.

Judge Goldberg: We're already tired.

Judge Williams: Then I was right, and you can credit some of my testimony as we go forward, that you will have to be brave, and I think bold, because I believe the reason I'm here is my history with the defender program, not only as a defender, but as the chair of the Defender Advisory Group. As I said in my testimony, I have a concern as to the future and most particularly the identity of defenders and CJA lawyers and the absolute need for respect for the independence of their function. I too want to give three brief illustrations as Judge Gleeson gave of instances that, as I said in my

testimony, always startled me as to how people in the system could not understand the work.

At one point there was a discussion of defenders sharing with probation officers, secretaries and computers because we're all part of the same court family. It took longer than I'd expected to go over privilege and confidentiality and again independence. Then there was an effort, and I think Judge Gleeson was aware of this, in a circuit to mandate that you would only get one trip to see your client. Only one would be paid for.

I met with lawyers and judges from all over the world and they were always by the end of the meeting awed by the fact that this government, the United States would pay people to stand up and challenge it. I think that any effort you can make to ensure that that system, that example, that beacon of constitutional guarantee can be maintained then you will have done your work, but you will be very, very, very tired.

I am open obviously to any questions the Committee has about my experience with the defender system. I do want to echo what Judge Matthewman and I believe some of my now colleagues said about this district, although I don't want to say too much and sound too self-congratulatory because I was the defender for a long time here and I worked with people like Bill Matthewman to develop the protocols we have. I think that's aspirational. I think there are considerations nationwide as Judge Gleeson has said that need to be redressed. I'm hoping that this Committee will take up that task.

Reuben Cahn: Thank you Judge. We'll start on the outside and move in. We'll start with Judge Goldberg on my left.

Judge Goldberg: Thank you Reuben. I want to ask a few questions of Chief Judge Delgado and pick your brain on this concept of whether CJA representation should be viewed as pro bono representation and to what extent. We've reviewed, I've reviewed a couple of circuit opinions where voucher cutting was challenged. I forget procedurally how it made its way to that circuit, but it did, and the circuit courts, I think there were two of them, wrote opinions that are frequently cited justifying voucher cuts because the circuit courts said, this is me paraphrasing, after all CJA work is pro bono work.

In your statement that you submitted, you said, "The Criminal Justice Act also makes clear that legal representation under the CJA panel carries a pro bono component. Thus the act makes clear that it will not be reasonable for an attorney to expect rates as those possibly paid to defense attorneys in private practice." So very early this morning I went and took a look at the CJA Act and I didn't see any reference at all in the act to this statement that CJA panel representation carries a pro bono component.

But I was bleary-eyed so I asked our legal counsel to double check and she confirmed that there is no statement at all in the Act that talks about the fact that CJA lawyers are obligated to look at this as pro bono.

I was wondering if you had any concerns about the concept of telling CJA lawyers that they're expected to in some degree, I'm not sure to what, but at whatever degree act as pro bono lawyers to whatever extent and I would like to hear your thoughts as to whether you have concerns that that theme could somehow detrimentally impact proper representation for indigent defendants.

Judge Delgado: Maybe my statement was misconstrued in terms of I was not necessarily attempting to quote from the statute, but actually it has been amply discussed and mentioned and it's perceived and actually that's the way in which even our CJA reps and CJA panel attorneys . . . the philosophy behind this is that of course in private practice you may have attorneys charging 200, 350 dollars per hour when they are privately retained defense attorneys. What we have here is under the statute certain cap amounts have been imposed, revised through the years and to the present stage there are some who still think should be 150. Others understood reasonable is 140, but the perception is that the statue per se, the work of these attorneys for providing services to the court, it has a pro bono component.

Whether it's because of the fees that are being paid that are perhaps under what privately retained counsels would charge or because not necessarily every single effort that they put into the case is compensated. That's why the guidelines per se have embedded the pro bono system because not everything that is being done, even by a solo practitioner in the office is necessarily subject to reimbursement. So in terms of the way in which attorneys perceive that is they understand it has in that sense, in that view a pro bono component, but at the same time when reasonableness of the cap is discussed I know that there are periodic, regular reviews I should say, of this cap.

Some may think it's still unreasonable. Maybe if 150 is [a] reasonable amount that is determined or is subject to extra reviews every two or three years. Honestly I don't have a fixed view on that. What I do know based on what I have seen is that still the amount being paid, the attorneys do favor it. In my district, in the district of Puerto Rico . . .

Judge Goldberg: I'm sorry, favor what? You say the attorneys favor it, I wasn't following, favor what?

Judge Delgado: Accept or recognize that doing work even for that amount is something that they choose. They're attorneys and every day the largest percentage

are making a living of CJA panel work. They have abandoned their civil practice, they have abandoned the state criminal practice and technically all they do is work under CJA. We have a large number of those within the CJA panel of attorneys.

Aside from that, as I mentioned, I don't have a view on what should be the cap if any. I think that whatever, if there is a cap, what I understand is there should be a leeway for the attorneys to justify a need to exceed the cap that is imposed for the cases. Here I'm talking about maximum amounts, and to be able to explain to the court why the services rendered need to be reimbursed and provide justifications as they are allowed to do right now.

Judge Goldberg: Have you seen instances of voucher cutting where judges justify voucher cutting on the concept that CJA work is pro bono? Because that's exactly what happened in the circuit cases I referenced.

Judge Delgado: I haven't seen much of that. I have heard from prior testimonies that something like that has been done. That's one of the areas which I think judges need to be trained and make clear that there are guidelines and there should be a more consistent way in which those guidelines are to be applied that will provide uniformity through the different circuits and through the nation.

Judge Goldberg: The current rate is $129 an hour. Your written submission indicated that you believe the current, you see the current fee appears to be reasonable. Continuing to harp on this pro bono theme, do you have any concerns that with $127 hourly rate, you don't think it should be raised to $150, that when we add in a pro bono component to this it's going to be more difficult to attract competent counsel because you have to factor in of course . . . I haven't done criminal defense work in a while. We have to of course factor in overhead and all of that. You do the math, I mean . . .

Judge Delgado: I'm not sure I'm understanding your question because the pro bono component I think it's embedded on the fee already fixed, which is not the one that most attorneys commonly in the private practice will charge. I'm not saying and taking a fixed posture that 129 or 127 is the right one or 144 or 150. What I do say is that to the extent that that is being regularly reviewed and the review is carried out to adjust that properly then there are some guarantees in there for the attorneys.

Experience-wise and based on that in our circuit we have more applicants to the CJA panel than positions. Same thing as in Florida. There must be something that is attractive. Either the type of work and the devotion or interest of that given of attorney in defense work or still it doesn't create an economic hardship as anyone or many other people may think. I don't

know what the reason is. I do know we have more applicants than positions and I do know many attorneys nowadays are making a living, in my district once again I say, out of CJA panel.

Judge Goldberg: Reuben, I have a quick question for Judge Gleeson and I'll turn the mic over. Judge Gleeson, first let me congratulate you on an incredible career in public service and ask you a quick question about the due process component. You cited I guess a policy statute, I forget what the number was, where you said there's been a lot of discussion, but there has to be due process with voucher cutting, but that is already in place. And it is, you're certainly right that it is in place. I'm wondering could you give us any guidance if you have any on how do we get, and I think you mentioned this, what do we write, what do we recommend, what do we say as a Committee that would actually get our colleagues to one, take note of that and two, actually implement it?

I can picture sitting around the conference table with my colleagues and some of them . . . I'll raise my hand and I'll say, "I just want to bring this to everyone's attention," and most people nod their head and there'd be a couple of people who will go, "Oh, I'm aware of that. I don't have to follow that. I can do whatever I want. I'm an Article III judge." Could you give us some guidance if you have any on how we could enforce that so to speak?

Judge Gleeson: Sure. Being one not to read the emails that come from the AO on a regular basis. I recognize that an email that apprises us all of a change in policy doesn't necessarily do the trick, but there are other ways to do it. There are FJC educational programs, we have circuit conferences every year. A lot of districts have their own district conferences. If we really care about getting the word out as an institution, any number of avenues to do that, to sensitize people. We could, the Defender Services Committee could do a better job of . . . and I was chair of Defender Services at the time, so shame on me for not doing a better job of having the members of the committee educate their colleagues as to policy changes like this.

But if we really mean, it we can get the word out. I hope that answers your question. Just briefly let me just express a different view on this pro bono matter you raised with Chief Judge Delgado. A basic tenet of any system that purports to deliver independent, well-resourced, quality indigent defense services has to be, it cannot be in any dimension pro bono. It should be anathema to any such system. For one thing, pro bono who? Whose bono is it pro? Public? Is it for the good of the public? Fine, but we're wanting people to represent defendants. It's for their good.

The logical extension of this pro bono notion was that district in Georgia that comprised its panel of anybody who happened to be a member of the

bar. You went on the panel. A bankruptcy associate from the firm came to the judge and said, "What? I'm a bankruptcy associate. The person's life and liberty is at stake. I can't do this." The judge kicked the person off the bar of the court because he failed to do his pro bono public service. We have to keep in mind whose interests we're preserving here and it's not the publics. A trial may be a search for the truth, but the defense lawyer is not part of the search party.

We have to keep our eye on the ball. And the fact, and I say this with all respect to Chief Judge Delgado, but in New York we get a lot of applicants too. But that rate attracts the wrong people. We get bottom-feeders. We get people who can't get retained work. Our mission should be to the extent that a piece of what our current panel attorneys are doing is pro bono, that should be an argument to the legislature to raise the rate so that's no longer, true so we get the right people on the panel.

Reuben Cahn: Judge Prado, would you like to question?

Judge Prado: Yes. To follow up on that question, Judge Gleeson, you were the chair of Defender Services. Judge Williams, you were a public defender. Judge Delgado, you were an Assistant Public Defender and Magistrate Judge Matthewman, you were a panel attorney. All of you have had experience in Defender Services. I was here twenty years ago and the same issues, the same complaints, the same concerns I'm hearing again. Here twenty years later we still have the issue of concerns about judges thinking they have the responsibility or maybe they do have the responsibility of overlooking the program. Maybe some go too far, micromanage, deciding who is going to be the defender, deciding who is going to be a panel attorney, deciding how much they get paid.

Is there a systemic problem? Is it in isolated areas or we need to educate our fellow judges about the importance of the independence of allowing defense lawyers to do their work? That requires a more drastic change to how we work, of the Defender Services and defense work coming under the courts. Should there be more independence? Is it just a matter of educating part of our judiciary about the importance of independence of panel attorneys and defense lawyers in allowing then to do their work?

Judge Williams: I'll take that. I do think that there is an educational dimension of this. As an active trial judge, as Judge Gleeson alluded to, mostly if I see an AO, even while I was a defender, a memo from the AO I'll hit delete because I am engaged in trying cases and resolving matters. But that doesn't mean the Defender Services committee and this Committee can't be more proactive in discussing the independence of the defense function so that these incidents are not raised again and again and again.

I think that goes to Judge Goldberg's question about how is it that this pro bono dimension became somehow affixed and affiliated with this work? I think I alluded to it by mention of the stereotype of the client, but that somehow this work, it is easier to undermine it and denigrate it because of the nature of the work. This confusion that it is somehow pro bono, I remember when TARP lawyers from major law firms were being hired by the government at $550 an hour. There was a huge article where they, the TARP lawyers were offended and outraged that they were being required to submit time sheets for the work they did.

There was a discussion about that. If a CJA lawyer wishes to know why his or her voucher has been halved there is not a standard mechanism adhered to by which they can redress that. I think it's because of the nature of the work. I think as judges we have a responsibility to do something to educate not only our colleagues but the public as to the value of this work. I made some suggestions in my submitted written statement. I think we need professionals engaged in the voucher process, at the circuit level, at the district level. I think we need to think anew about a national defender program that's kind of a standalone like the Sentencing Commission. But what is that phrase, insanity is doing the same thing over and over again and expecting a different result. We have to break away, do something, because the direction we are now going in and the fallout from sequestration I think was significant.

Judge Gleeson: Judge Prado, I'm with you. I was on Defender Services for nine years. I've never really drifted away from the concerns that arise repeatedly in that program, but my day to day brought me away from it. Then I say here yesterday and I was listening to the conversation and it all came rushing back. I felt like I had post-traumatic stress disorder. I think your observation, it basically points out that there is this built-in conflict of interest. We're doing the best we can, and we're not doing a great job as an institution, in delivering the services that the criminal justice act directed us to deliver.

But it's not a logical location for the delivery of indigent defense services. And the thing that struck me the most in my decade on that committee is how there was hardly any important issue that we addressed that was not a manifestation of the built-in conflict of interest. That's why they keep arising and they'll continue to keep arising as long as the apparatus remains the same. As long as it does remain the same, I agree with the sentiments already expressed, which is at the very least we need to sensitize. Sensitize the judiciary that it has this responsibility in any number of situations.

Chief Judge Delgado reminded me when the chair of the Executive Committee said to the Attorney General, "Would you please hurry up with

these seek or no seek decisions?" Defenders as you might expect, if you think about if for a little bit, defenders went crazy. They're like, "Excuse me, they're going to hurry up and seek if you make them hurry up." I don't mean to suggest for a moment that the defender's view on all these different issues should carry the day, let alone does carry the day, it rarely do, but should they be heard? Should there be some sensitivity among judges that run the branch to the fact that we have been imbued with this responsibility so we have to discharge it with the right amount of communication and the right amount of deference? Absolutely. And we're not there. We've never been there.

Judge Delgado: Actually let me clarify. My intentions of streamlining the process never far away from getting them to basically certify . . .

Judge Gleeson: No, no, I understand that.

Judge Delgado: I understand. Actually I'm opposed to it in essence and I think culturally it has happened and it has been demonstrated by the jury verdicts. I think Judge Matthewman experienced that first-hand when he was acting as a learned counsel in the district. Actually I think if Congress is so concerned of adequate use of funding that's a waste of resources right there. Processes under CJA are being severely affected by policies of the Department of Justice and it's a matter of . . . if you look through different statutes, different issues and even the rules of criminal procedure, they imposed a burden as to the funding within CJA.

Reuben Cahn: Judge Walton?

Judge Matthewman: Judge Prado, I think that the issue comes down to where is the voice for the federal defender and the CJA attorneys. I think, because I can recall back to the '80s and '90s when the hourly rate was just so low it was absurd, I think it was $30 or $40 an hour. The only lawyers who were on the panel were really lawyers who were sort of true believers, lawyers who really wanted to do this type of work. The hourly rate has creeped up. It has increased over the years, but the question I think has been would the defenders and CJA lawyers be better not under the umbrella of the judiciary? Would they be better I guess having some independent seat at the table? If so, at what table?

I think in my experience the judges have been, the judiciary has been very supportive overall of at least in our district and other districts I've worked in, of the CJA lawyers and the federal defenders. The question I guess is is there a better system? Is there a better way for the defenders and the CJA lawyers to have a seat at the table, to have a voice into what's going on? I'm just not sure of that, but I think it's an important inquiry for the Committee to look at. I think the over the last few years the sequestration

problems have exacerbated these issues and these problems. I do think in whatever format it is done, that I do think it's important for the CJA lawyers and the federal defenders to have a true seat at the table and a true voice in what is going on with the defender program.

Reuben Cahn: Judge Walton, would you want to ask some questions?

Judge Walton: Very briefly. I'm always on board with the idea of education. I think education can change perspectives and also trying to sensitize people about the importance of the work that criminal defense lawyers do. However I'm not confident that that alone is going to be adequate to cause, unfortunately, some of my colleagues to not respect the role that defense lawyers play in the system. I think unfortunately it's because many of us come from a perspective where we've never been in a situation where we have had to need the services of defense lawyers.

I was in the juvenile justice system three times. Two times I was guilty. One time I was not. I didn't have a lawyer on any of those occasions. Having experienced having been wrongly adjudicated guilty of something I didn't do it gives me a perspective that causes me to appreciate the importance of not shortchanging the role that defense lawyers play in our system. I just feel that if we only continue to require that judges, if in their discretion feel it's appropriate to provide a forum and an expression as to why they're cutting the voucher, I just feel that there are some of us, and I'll probably anger some of my colleagues, who just will cut regardless and they'll do it indiscriminately and they'll do it without explanation and they'll do it without giving a forum for people to express their opposition to those cuts.

I feel that maybe the only way we can do it if it stays with the judiciary, and I think we should play some role, is that we mandatory require that judges, if you're going to cut a voucher, you have to articulate why you're doing it based upon guidelines that are established for when you can appropriately do that. I don't know if any of you have any views as to whether you think I'm off base.

Judge Gleeson: Go ahead.

Judge Delgado: I will agree. We are doing that right now. I think that one of the problems is the lack of consistency throughout the districts in giving notice and giving due process to the attorneys and giving an explanation as to the voucher cuts. For example when I hear that from districts in which that is not happening at all or when I have heard the testimonies given in Santa Fe, taken and assuming as true and correct testimonies of some attorneys as to matters or issues in which they have been cut, I'm concerned about that.

But of course, that is what I don't see happening in my district. Still there will be attorneys that perhaps will have questioning as to any cut made by a given judge. I am not saying that we are all 100% marching along the same guidelines, but we have basically a coherent system in which it's being done for the evaluation process. Even if there is a discrepancy maybe with one of the judges still the notice requirement is there and as was suggested yesterday by the colleagues here from Florida, maybe there should be a review process. There's precious time that is being invested in the attorney coming back with a written request for reconsideration to the same judge that already has a way of looking at it. Maybe at the appeals court they should be taking it and have someone else review that for arbitrariness. I will not be opposed to that.

I think that if aside from requiring the consistent application of the guidelines, training judges, I don't see why this cannot be part of the training of judges that the FJC conducts on a regular basis. That will promote uniformity, more reasonableness in the things that are being done. We learn from experience and of course this same experience in which different judges and different districts are sharing what happens is enriching per se. We can learn. I think that the basis of all of this has to be mutual respect for independency in the job that is being done by each group. This can be achieved by training and close communication between defender's community and judges and maybe instituting a review process. Whether it's at the board of appeals or wherever the Committee feels it's proper.

Judge Gleeson: I have two suggestions. If you assume, as I do, and your question suggests maybe you might, that we're going to stay in the current structure, we're not going to make fundamental, dramatic, earthquake changes. There's a little bit of a conflict when the defender reviews a panel voucher. They are often in the same case. We've got the conflict that adheres in our own situation plus this lack of sensitivity. I don't think judges or defenders should either be completely out of the picture.

The two suggestions are what we finally got promulgated was a manual provision that said a judge should give notice and an opportunity to be heard to a CJA lawyer before cutting a voucher. You can change that should to a must. Here's another suggestion that I think naturally, since I'm making it, I think it's a good one. We had this problem in Defender Services where when you look at the panel side of the house—40% of the money—2% of the cases were taking up 30% of the money. The idea, and I'm proud to say I take no ownership of the ideas that turned out to be lousy ones, but I had some good ones. And my idea was we should do these case budgeting specialists and Bob was intimately involved in this. They were placed in three circuits. I think I heard that's now been expanded to other circuits. These case budgeting specialists were designed

to help judges in the big cases, the megacases, through requiring people to budget their time, but also to make sure they weren't hiring experts at an hourly rate that was excessive. That there was sharing. If there's ten lawyers each of them need a copy. Maybe we don't have to make ten separate . . . you get it. To be more efficient in the big cases.

It turns out the case budgeting specialist in our circuit who's a former panel attorney is actually used a lot in what might otherwise be voucher cutting situations. My colleagues will say, "I have this voucher that looks a little extreme," or upfront they'll say, "I have a request for an investigator. I'm not sure whether I should do it." I've sent them to Jerry Tritz who's our case budgeting specialist. He's been very helpful. A lot of judges are leery about this for the right reason. They don't want to intrude on the defense function.

Who occupies the position strikes me as really critical. We chose a respected panel attorney. It has produced a situation where in a lot of circumstances that might have otherwise produced a voucher cutting the panel attorney's happy, the judges are happy. There's this other third person in there that's very useful. The principles that inform why we did the case budgeting specialists in the megacases, in the capital cases, are all the same. It's all the matter of having some measure of uniformity and consistency. There would be pushback from the case budgeting specialist to the panel attorney. The questions can be imparted through the case budgeting specialist at the end of the process if there's a question about a voucher. You'll see this in my written testimony. I strongly suggest you consider that mechanism down to the granular level of the regular case because I think it might be useful.

Judge Williams: I agree with Judge Gleeson on the issue of having professionals such as a case budget analyst come in the circuit level, the district level. I think you made an important point, Judge Walton. I just want to expand on that, your concern about the capacity to educate. Judge Gleeson made an interesting notation at the beginning if this testimony that comports with an informal survey I took over the years I was the chair of the Defender Services Advisory Group. Not one judge on the committee asked to be on that committee. Not one. It was some place judicial careers went to die.

In fact many of the persons chosen had, as you noted Judge Walton, no experience perhaps with the criminal justice system from that perspective, but were prosecutors. And yet these committees came to, over argument and conflict and tension, came to support and recognize the importance of the defense mission. Even those committees were ignored by other judges. Their position has been downgraded, as it were. Those committees and the outside monitors and the people we hired as defenders, all of those voices telling a story that today we are still asking, "Is that true?" That is

something I would hope the Committee would engage in some introspection to understand why the simplicity of that message has not gained traction.

Judge Matthewman: I would just say that I think it's important . . . I know in our district voucher cutting is really not an issue from what I hear and see. However I've heard that in other districts over the years it has been. I think that it's important that due process be afforded the CJA lawyer in a voucher cutting situation. The question is what form does that take? I think perhaps there could be a recommendation that each CJA plan be required to include a provision for what happens when a voucher's cut and how an attorney challenges it. Then the question is what would be the due process of that CJA attorney if the CJA attorney disagreed with the determination or the cut.

A reasonable recommendation might be to establish a committee just like we have committees to review issues of attorney professional misconduct. A committee made up of various individuals who would review the voucher cutting issue and make a recommendation. I think that perhaps there's some way to do that to ensure that due process for the CJA lawyer, without making it a complicated appellate process. I think that would be something that would be very important to look at, but I do think that a basic tenet of every CJA plan should be to allow for due process and notice to every attorney and not just in a section that they may or not adhere to, but as a requirement or as a component of each CJA plan in each district. Then each district can perhaps determine how best to fashion that type of due process review.

Judge Gleeson: Judge Walton, can I also suggest that as important as this issue is I think a bigger problem is not the vouchers that are scrutinized and get cut or not get cut, it's the vouchers that don't get submitted. There are places, there are cultures in our country, criminal justice cultures, where the panel attorneys, this was briefly alluded to yesterday when we talked about the percentage of cases in which support services are sought, there are places where the vouchers don't have to be cut because they're never submitted because the lawyers know. They know they're not going to have an investigator approved or these hours . . . There are some places where the lawyers know a voucher's never going to go to the circuit, period.

They either do the work and it's not compensated, or they don't do the work. That's a very important piece of this. It's the vouchers that because of cultural imperatives . . . whether they're imperatives or not, cultural realities. There's a felt need not to put yourself in a position where your voucher might get scrutinized. I think that's just as important as the universe of cases in which the vouchers are scrutinized and cut.

Reuben Cahn: Chip, do you want to ask some questions? I know you've got some familiarity with these issues.

Chip Frensley: Thanks Reuben. I want to explore a little bit the role of district judges and circuit judges in the voucher review process. Judge Williams, since you're one of the very few people in the entire country who's had the experience both as a defender and as a judge, I want to ask you some questions about that role and particularly as it relates to other alternatives and specifically the alternative of the defender being responsible for reasonableness reviews.

One of the arguments that's been advanced for why it's important for judges to have the role of reviewing those vouchers is because of their unique familiarity with the case and that that somehow means that they're in the best position to determine the reasonableness in a case. Of course we also know and we've heard testimony from some defenders who are responsible for doing reasonableness reviews. I'm just curious, from your perspective, having served in both capacities, as a defender and as a judge, what you think about the role of the judge in reviewing that and whether or not their position is so unique that someone else couldn't do as effective a job of a reasonableness review.

Judge Williams: First I want to say that I believe, as is appropriate through law, that the court has a stewardship responsibility for CJA and the budget, but no, I don't believe I occupy any particularly unique position or talent to do voucher review. I do not like being put in the position I occupy now as a judge reviewing a submission by a lawyer who is litigating a matter before me. I certainly am conversant with criminal defense stratagems and I managed federal defender budget for close to twenty years, but I had personnel assisting me there that a solo practitioner doesn't.

I may know the elements of the case and the defense, but I know nothing about that client. It was interesting, the very first trial I had I was looking around in my office. I wanted to know where the 302s were and where the statement was and then I realized, "No, no, no, you don't get that. You are an impartial arbiter. You just decide on matters as they're presented to you in trial." If a CJA lawyer asks to go somewhere to interview a witness I don't feel comfortable saying, "Well, you know, if I were defending that case my choice would be not to interview that witness."

That is not my role. People were exquisitely precise during the confirmation process that that is not my role. I think there is a genuine and a better alternative in the form of case budget analysts or CJA supervising attorneys or circuit budget . . . whatever you call them, I think those persons hired by the court in consultation with the defender and perhaps a private practice lawyer who works in the court and would report

ultimately to the court, but who would make the recommendations and make the review, would put added efficiency in the process and integrity because there would be no question as to my, as a jurist, interfering with the defense of the case.

I think defenders reviewing CJA vouchers presents real conflict in that in at least in this district defenders are appointed first and then codefendants afterwards. There would be a rare instance where you wouldn't have that relationship amongst the codefendants. If I were a defendant I might look askance at Bob's lawyer telling my lawyer what he or she can't do. I believe that the proposals in Judge Gleeson's testimony, the one's I've touched upon and others who have appeared before you will allow what it is we're all looking for, accountable independence.

Chip Frensley: I understand obviously it would require statutory changes, but do you believe that the ultimate decider or the ultimate decision maker should remain a judicial officer or do you think that those staff individuals that you suggested, the supervisory attorney, the case budgeting attorney and individuals like that should be the final deciders?

Judge Williams: Realistically I think if there's going to be any important change we'd have to start with the ladder, that that person made recommendations to the court and worked with the court. They are existing now around the country in different capacities. I don't think that would require any statutory change, would just require a new attitude on the part of the judiciary in its governance.

Judge Gleeson: We could use a clear standard of review. This is what I thought professor Kerr was getting at yesterday in asking us questions. Is there deference, is it de novo. Do we start from scratch? I've always found a little asymmetrical this notion that when a defense attorney's performance is challenged, under *Strickland* we engaged in all these presumptions of strategic, all this deference. But then the voucher shows up and all of a sudden it's, "Wow, they second guess de novo every single decision."

My own view never having defended a case is influenced by a belief of, what do I know? What do I know about the appropriateness of this . . . I understand my responsibility and I discharge it, but it's influenced by a degree of deference that I think inheres in the fact that I'm just a judge. Especially now when 3% of the cases get tried, so much of the work goes on outside my courtroom. So I even feel even . . . not disabled, but more impaired in my ability to second guess. I think it would be useful to have a clear standard of review and some degree of deference if you think it's appropriate built into the review mechanism.

Chip Frensley: Judge Matthewman, just to ask a similar question in terms of the role, given your perspective as a CJA panel attorney and as a judicial officer as well.

Judge Matthewman: I don't think it's appropriate to have the federal defender review vouchers. I think there's too much of an inherent conflict in that situation. I just don't think it is the right way to do it. I agree with what I've heard so far, which there should be some specified guidelines, a specified standard of how to go about it and a determination as to who in the first instance makes the determination. I think that probably the most reasonable recommendation I would have would be that there be an independent either, whether it's a staff attorney or a clerk or a CJA administrator or something who makes that initial determination on the voucher and then would report to the judiciary.

I think it should not be the federal defender. There should be at the first instance an independent . . . not an independent, but somebody other than the court reviewing it. Then if there is any dispute about that perhaps at that point going to the judiciary. I don't know how that would exactly be structured, but I do think that since it seems like this problem is more prevalent in some districts than other districts that there should be a national standard for this and it should be a requirement to be in each plan. That it's specified as to what the due process is, how the due process is exercised, who makes the review and where the ultimate challenge goes to and keeping it from becoming unwieldy where it would be going to say an appellate court. I don't think you want that. I think you want something that's more streamlined that can be done fairly quickly in the district.

Chip Frensley: For those of you who advocate the use of supervisory attorneys or CJA case budgeting attorneys or other staff individuals like that, would you perceive those individuals to be court employees as they are now or would you . . . again, we're blue sky on this, but would you see them as being employees who have more of a connection or relationship to the Defender Services Organization? How would you envision that? What do you think would be the most appropriate role in that regard?

Judge Gleeson: The model I'm suggesting is just an expansion of a position we already have. There are in circuit executives' offices that perform that function already in the capital and megacases. They de facto perform these functions already in the Second Circuit down in smaller cases. I think that model works. It's a court employee. The input of the defenders and the panel attorneys and who occupies that position I think is important. I mentioned earlier, it's really key who's in the position. I have less hands-on knowledge of what happened in the Sixth and the Ninth, the two other original pilot courts. Second Circuit it worked very well and all the panel attorneys will tell you exactly that.

Judge Williams: I think the question you ask Mr. Frensley is one . . . on the one hand it's one of semantics and on the other hand it's a radical notion that has defined the tension between indigent defense and the judiciary since the start. I don't think the defenders or CJA lawyers or these budget persons work for judges. They work in the judiciary and they work with the judiciary, but they don't work for them. That is a notion that many people have difficulty embracing because some think it somehow doesn't acknowledge the judiciary or is trying to diminish some way the judiciary's commitment. I don't think so. I think acknowledging that enhances the judiciary stature and fully demonstrates their commitment to indigent defense.

Judge Goldberg: Just a quick point of clarification for me Judge Williams, given your unique background in this. Your ultimate conclusion is who should have the ultimate say, who signs the voucher that allows the check to be cut? The administrator as discussed by you and Judge Gleeson or the judge after review of what the administrator does?

Judge Williams: I think at some point perhaps it should be the administrator. I don't think that point is now. I think in order to promote the work of the Committee to adopt systems already in place like the ones Judge Gleeson has spoken of would be what I would recommend to the Committee.

Judge Walton: If I could just ask Judge Gleeson and Judge Williams, both of you have had the opportunity through your work with Defender Services to at least gain some familiarity with the operations of Washington. There's been a suggestion made by some that Defender Services should be a totally separate entity from the judiciary. How do you think such an entity would fare in seeking funding from Congress?

Judge Gleeson: I don't know. I really think it depends on so many things. I don't mean to be flip, you know that, Reggie. I think it depends on the climate at the time. If you have a defender general, who occupies that position. The precise apparatus that's set up. I've thought about this a lot when I was chair of Defender Services. Defenders didn't like this one bit. We kept running into these built-in conflicts. I devoted part of one of our committee meetings to step back and look at this structurally. I invited Kathleen Sullivan to come and give us readings. We had a little law school course and defenders didn't want any of this.

I think it's a fascinating question. I don't accept the notion for a moment that necessarily there's going to be a defunding of the defense function. Do I understand the risks, understand the protection that they feel being imbedded within the judiciary? Of course. I don't think it's a foregone conclusion at all that an independent structure, a completely independent structure, would spell the doom of the defenders from a fiscal point of

view. Having said that here's the Brady material I'll give you. We invited in, there's some states that have done just that, created defenders general who make their own independent budget requests, separate budget requests to the legislature. For the most part they got clobbered. They weren't funded well. I still don't believe that that would necessarily be the case. I think it's a really interesting question. It'd be fun to see it happen.

Judge Walton: Ms. Williams, sorry.

Judge Williams: I can't speak for the defenders today obviously, but when I was the chair of the defender I was ever fearful of being separated out of the judiciary. I was mindful of all the instances, the states' legal aid that were defunded in their standalone position. What I said to the committee at a meeting here in South Florida years and years ago was that the defenders did not want a divorce, but we did want counseling. I think that is what this Committee hopefully is about. I don't know at this juncture whether indigent defense is ready to be divorced from the protection of the federal judiciary, but I think there needs to be this dialogue and discussion and reflection, and I'm hoping that will enhance the position of Defender Services. Perhaps a discussion to reinstate them to the stature they once held and the Committee to the responsibilities it had in terms of governance.

Reuben Cahn: We've got . . . I'm sorry.

Judge Prado: Just one, going in another direction, because I think the focus has been about maybe vouchers. The process of selecting the head of the office, the public defender, it's still the courts and the judges select in the circuit court. We have not heard, we've had a few stories about judges getting in it, figuring out who's going to run the office, but the process that's in place of allowing the circuit to appoint and it being a four year term. Do you have any concerns about how public defenders are selected? I know community defenders are different, they have their own independent boards. With regard to how the public defender, head of the office is selected, you think that system is working and functioning or do you think it needs to be tweaked in any way?

Judge Gleeson: I have views, but I'm speaking too much. Let me defer to my colleagues first.

Judge Delgado: I don't have specific views. So far the system that has been in place, the circuit has consulted and has taken into consideration the district court views or recommendations. I think that has to be factored in as it must be factored in the community, the culture, the district that it serves as well. Any particular needs should be considered. Probably what has happened, and probably I see more eye to eye with the approach that was described yesterday here by public defender McNamara in which there was great

communication and that's what I aspire between panel, public defenders and the court. I don't see why that will certainly infringe upon respect of each one's independence and the roles in the work they do.

Lately and maybe within the last seven years or something like that it's kind of a different culture than the one that is being developed. To some extent when the circuit is the one that appoints there has been some misconception in the sense that the public defender may think that the views of the district court or the community that it serves in terms of the type of cases' structure, case assignment, even if it's defined on a plan, that they are not necessarily to be taking that into consideration.

Years ago, I am not saying this is currently, years ago I got the public defender telling me, "I don't serve the district court," and I don't say, you're not an employee of the district court. You don't serve in the sense that you're not a servant, but that you too provide the service to the district that the court serves as well and you have to take into consideration some matters that affects the way in which cases are managed here and court schedule and other administrative matters. Yes, you have to. But to a large extent right now I don't have any adverse comments to that except that the position or the views of the district court be factored in and those of the community as well.

Judge Gleeson: They should all be CDOs in my view. I respectfully disagree with the comments made yesterday by one of our brother judges from North Carolina who suggested that CDOs are not more independent. They're more independent. They're appointed, the executive directors are appointed by a board. The fact of the matter is, this is another built-in conflict obviously, even when you go to the places with the best most vigorous defenders, if you go there at the right time of the cycle you'll hear in conversation, "I'm up for reappointment," as sometimes it's joking.

But it's, the notion that the judges before whom the defender and her assistants practice law have a say in whether the defender . . . have a say through the circuit chief. That matters. It is a break on their independence. It's not the biggest break in the world. There's not a large number of cases analogous to the one you heard so much testimony about yesterday, but it's a built-in break. The community defenders, we have a community defender in New York, answers to a board of directors. It shows that deliberately no one took them out of legal aid precisely for that reason, to have greater independence from the judges.

Reuben Cahn: We've got little time left. I wanted to give both our reporter and the other committee members a chance to ask some questions because it's been a helpful panel. Judge Cardone.

Judge Cardone: I have a question of Chief Judge Delgado and that is you cited a number of statistics in your opening. I was just wondering for purposes of the Committee whether or not you'd be willing to provide, I think you did in your statement, but if we need . . . we believe in dealing in facts. If you can, if we need the background to that and those statistics, do you have any problems with providing those?

Judge Delgado: Absolutely no. I'll be please to submit the statistics that you request.

Judge Cardone: Then I just have one other follow up and it's back to vouchers. In preparation for these hearings our attorneys, our research attorneys do a good job of getting us as much information as they can. We were talking about vouchers. I noticed in the district of Puerto Rico and I'm only going to use that as an example because we have the Chief Judge from there, but I'd address this question just generally to everybody. There are some standing orders about submitting vouchers in the district. One of the standing orders says, "For services rendered entries such as interview with client, read and analyzed order and prepared motion are vague and unacceptable. Entries shall include the purpose, the topic, the title of the order or motion, specific person with whom the conversation or interview was held and whatever other detail you deem necessary for the court to evaluate the entry."

That's just one example. I guess my concern, because we've been talking about, I heard yesterday someone mention, judges do review for acceptable attorney's fees all the time and civil matters. These are ongoing cases. When I have interim vouchers and I'm trying a gang case or a thirty-six defendant case and I'm trying to decide reasonableness, I'm uncomfortable with having to review some of these very specific details in order to determine whether or not I'm going to pay these. We talk about inherent are conflicts and we talk about maybe having the circuit review these or circuit executive review these, but the issue still becomes that we're looking at work that's being performed by an attorney, especially in an interim voucher.

Should the judges have a role? I'm just really trying to understand how we balance because you talked about the conflict that the defenders may have. How do I not have a conflict when I'm looking at these very detailed specifics about what an attorney is doing in one of my cases. Any response?

Judge Delgado: Let me put this in a context because you've read and referred to a description or an example that was given in my district. Let me begin by saying that technically interim vouchers are not, have not been largely adopted. For example, in multi-defendant cases if it's perceived that it's going to last for a long period of time, yes, some judges have approved

interim vouchers. Most when approving interim vouchers will pay upfront for trial time so that the attorney keeps receiving some income while the case is ongoing and is on trial. During pretrial stages if the case is taking too long maybe vouchers have been approved for six months. There was once a judge that approved monthly vouchers and all of a sudden he was swamped in reviewing vouchers aside from dealing with the legal issues of the case and he modified the order.

Yes, details like those that you suggest to be given, probably there would be a conflict. But we basically, what is being requested, if the research is on multiplicity of conspiracies, it's just a broad general statement, not much different from the information that I may get on a status conference that I frequently hold in multi-defendant cases where I give every defense attorney to give me an idea aside from the case management order that's specifically drafted for those type of cases to expedite the discovery and the exchange of information. But in those conference I ask every attorney to give me what are the hurdles that you are confronting so that I can issue an order to expedite the discovery process or to help to reach a solution with the U.S. attorney in order to move on.

In that one I learned about complexities with the defendant, how difficult it is or the need to involve relatives because of the defendant's son mild mental competency or mental retardation that may exist, problems of communications, needs for expert. All of that is addressed in the status conference. I don't think that with that what's meant to ask for information that I will turn to be privy of things that I should know during a pretrial stage of a case. And still we are talking in a district in which not necessarily a large number of interim vouchers or frequent interim vouchers are approved. The possible thing may exist.

What we are trying to avoid and sometimes we see is that sometimes we'll see vouchers in which the attorney says every time he's going to MDC to interview, review entire case file, summarize entire case file. If you need to do that every month or every two weeks when you go to the institution it doesn't sound reasonable. Then of course probably there will be a flag and there will be a questioning of the attorney as to why that is needed. That sort of things. Sometimes they say research and you look at the docket and there's no one single motion being filed. At least give me an idea of something that didn't result. If it's ratification of conduct by juvenile that's all I need. I'm not demanding detailed or specific information.

Judge Williams: Judge Cardone, I agree with you in terms of the level of discomfort I have with ongoing litigation and reviewing vouchers in any granular detail. As Judge Gleeson said, who am I . . . I don't know what's going on outside of the courtroom. I don't know what kind of negotiations are going on in the

U.S. Attorney's office. I certainly don't know what moneys the U.S. Attorney's Office have been provided in the prosecution of this case, and what it is a defense attorney may need for a particular client.

That's why I find the analogy to our review of civil matters to be not quite persuasive. For example in an FLSA case, it comes to us at settlement. The parties have agreed. The reason we are asked to review is because we want to make sure there's then no collusive activity to deprive that individual of what is just and right and due, but two lawyers in this community have agreed market rates 350 and higher should be awarded for the work. I can think of any number of CJA lawyers that would say, "Yes, I'd like to do that. I would like to go from market rates at the end of the case and then you tell me if you think that was appropriate," but it's apples and it's oranges.

I think having a Criminal Justice Act review lawyer to do that as the case is ongoing gives efficiency, gives integrity and allows . . . this is a business. The CJA component of the judiciary budget is as we were told time and again the fastest growing and the largest component part next to judges and staff salaries. Any business of this size would have CEOs and regional managers. It's not radical to think that we too in our governance of the program should have such persons.

Reuben Cahn: Kathleen?

Judge Cardone: I think Judge Gleeson had something.

Judge Gleeson: Just three quick points. One is we actually use and I understand that isn't necessarily importable everywhere because New York is New York and everybody's right there. But we actually use the case budgeting specialist for precisely that purpose, even in non-megacases. You have an interim voucher. You don't want to second guess what's going on, have him take a look. See whether this is within the bounds of reasonable. It might be a useful tool in that setting.

Second, I think this implicates the degree of deference issue. It strikes me those questions suggest a level of scrutiny that might not be appropriate to the occasion even if judges review the voucher. Third, and this is more abstract, in those interim voucher cases I bet those people are facing decades in prison or the rest of their life in prison. I mentioned this in my written testimony, I found out by accident that the government was paying a prison guard who was facing a very small amount of damages . . . there was a conflict of some sort, but they're paying outside counsel to the represent a prison guard in a *Bivens* action $250 an hour.

What are we doing? Why are we going over with a fine-toothed comb these expenditures when we're appointing someone to represent an individual who's going to spend the rest of his life in prison if he's convicted? Honest to goodness, I don't really get it. I think part of it is we get into tight budget times. I mentioned this as well in my written testimony. We get into tight budget times. Everybody knows we're in tight budget times. Things are tough. Sequestration is coming. There's really only one thing a district judge can do to save money. Can't do anything about our clerk's salary or the clerk's office or probation, we can cut vouchers. And I think that needs to be addressed, that overarching, the atmospherics of voucher review are such that it cuts a very poor . . . it places the panel attorneys in a very poor situation.

Reuben Cahn: I think we've got time for a quick question.

Katherian Roe: Thank you. Chief Judge Delgado, I wanted to ask you a question about the multi-defendant cases that you have in your district. You indicated that in Puerto Rico you're the number one district for multi-defendant cases. Excuse me?

Judge Delgado: Or among those, yes, with the highest number.

Katherian Roe: My question is, obviously you were an attorney before you became a judge and now as a judge you certainly know that let's say there are ten people involved in a multi-defendant case. There are folks involved in that case who have very different criminal responsibility and so their attorneys are representing very different people and have different responsibilities in that representation. We've heard about a concept of averaging in voucher review in that when the attorneys put their vouchers in the judges collect the vouchers they can, as many as they can, before they make a decision about the payment. In collecting them, they then take the average and decide that that's the appropriate amount to pay. Then the folks who are above the average get reduced. Unclear if the folks who are below the average get increased, but I don't think that's happening. But folks who are above the average get reduced.

Obviously that's not . . . let me say this. It seems like that's not what was intended when attorneys are required to present the work in their voucher at the hourly rate of now $129 an hour. Can you tell me if you're aware of this practice in your district? I know you had referenced it earlier in your testimony. Is that something that you consider to be acceptable?

Judge Delgado: Let me put it this way, let me clarify. First of all the averaging not necessarily has the purpose of taking the voucher to an amount below the maximum cap. Sometimes you used as the model of the cross reference a voucher that is still above the maximum amount. That's the first thing. It's

not necessarily to bring it to the $10,000 that is now or $9,800 that was before. Next thing is the averaging and the cutting of hours if any does not occur necessarily on the time of effort that the attorney puts in like investigation hours or things. Sometimes it's placed on, where I have seen that, in amount of discovery. Where you may have that the . . . usually the judge takes the highest billing time from all those other attorneys.

Let's say for example purposes, it's thirty-five, and then you get this attorney with seventy hours in reviewing that same package of discovery. You ask the attorney, why is this. Is there any discrepancy or any differences? You will have in terms of the practice and how it follows that in multi-defendant cases the U.S. Attorney will give a general package of discovery that involves a discovery as to everyone. Then they will identify where you or your client is and what is the concise evidence that is against your client and who the cooperator as to your client is, same information that we try to elicit during the status conferences. More so if you are one of the very few as to which there is only testimonial evidence. The court tries to get all of that evidence beforehand to put you in a position to assist your client to make a decision.

When we get to the average thing is usually where I have seen it it's there. With the amount of time reviewing the discovery. Some attorneys have placed the billing for the time that appears in that video even if the camera is just going up and down where the informant is traveling on a bicycle to the drop point. Then it gets to the transaction that probably will last a couple of minutes, and technically that is being told.

I can understand an attorney telling me, "I need to review everything for adjusting case," but still there are attorneys who have done that and are not billing that type of time. Besides, as I said, it's a minimum. I see the same attorneys coming up in that list, I'll say less than five, which are the upper billers in that sense. Averaging, I repeat what I said, is . . . I'll say to a minimum. Perhaps there might be an issue with a given judge. I know that recently there was one case that I will consider to be in that small group, but is causing a lot of noise, but that is not the practice nor the norm nor what I consider to be proper. Averaging, when I mentioned judicial adjustments of an 8% the averaging is in their voucher cuts, is in there. I can't say that's a pervasive problem.

Katherian Roe: Can I just ask you another question about that? I understand that from your perspective it may not be a pervasive problem. But even 8% may be to the attorneys.

Judge Delgado: I'm talking for my district. I can't talk for other districts.

Katherian Roe: I'm only speaking about yours, ma'am. My question is this. It may not seem a lot 8% to you, but of course to the person whose voucher gets cut it will seem significant, especially if the voucher is halved which is one of the one I'm speaking of. But, more importantly, well, it seems unusual that the attorney, at least the CJA rep who we've received testimony from, indicates that vouchers are often cut, in fact said almost always cut, and that the information that you provided to us today is that statistically you believe it's only in 8% of the cases based on the information that you've presented. Can you explain in any way the disparity of the perception of the CJA attorneys in your district that the vouchers are cut often, almost always, and the disparity between that and then 8%?

Judge Delgado: I will just say get the statistics. As a member of the CJA panel committee, we on the reappointment process, one of the stages is to interview the attorneys. We seldom get that type of complaints. Sometimes and way back even more we got some complaints about delays in voucher review. As I said, there was a time in which we had a huge increment in the vouchers and the staffing was reduced in order to do that initial screening to get the vouchers to the judges. We have worked hard to improve that situation, but we don't get the frequency that is being voiced or that you may hear it's being presented.

I think you have representations here of a vocal minority and that sometimes if the perception of the defenders is that there should be a change in the way that vouchers are reviews then that's just an instrument that is being used to put forth that type of request. Certainly this Committee can ask any district court for any given period of time going back to check on those statistics and report and be able to evaluate whether that given district has that type of problem or not. I won't have a problem in having mine evaluated as to that. I remain confident that it's not a pervasive problem and that actually I think that will be solved if clear guidelines are set and uniformity's promoted and judges are guided and taught on how to apply those guidelines and we can seek more uniformity.

As a chief judge I can't say that there have not been times in which I have gone to a district judge after talking to an attorney or after an attorney approaching me on comments on a given voucher and I have talked that judge into being more reasonable, but as to a pervasive problem, no.

Katherian Roe: Let me just one thing and this isn't a question. It's just a follow up. That is I noticed that both in your testimony, your written testimony and your oral testimony today, that the 8% figure that you gave us didn't have any time period associated with it. When you provide that information . . .

Judge Delgado: March through November 2015.

Katherian Roe: I saw that time period as to another voucher reference. Let me just say that when you give us the information that Judge Cardone requested I would just ask that you have a specific time period.

Judge Delgado: Very well.

Katherian Roe: Thank you.

Reuben Cahn: Thank you. We're overtime, so unless the Committee wants to run into the next panel I know our reporter had at least one cleanup question he needed to ask, so if we can do that.

Professor Gould: Thank you. This is directly to Judge Gleeson and all of the rest of you if you'd like to chime in you go ahead. I was surprised and frankly a little disappointed in one of the opening pieces of the written testimony that you provided the Committee where you said that you thought a great deal about the appropriate structure and provision of indigent defense in the federal system, but you weren't going to tell the Committee what your thoughts were. I think this point where you say that you don't think fundamental alterations is appropriate at this time, but as you heard the Committee member say, they are approaching this from a blue sky perspective. So even if the structural changes aren't feasible I think it might be helpful for them to hear from you what you all think should be done if we had a perfect world.

Judge Gleeson: I was hoping to make you beg John.

Professor Gould: You know I will.

Judge Gleeson: I think there should be fundamental structural change. I think resting the obligation, the responsibility to deliver indigent defense away from the judiciary is a good idea. We've just gotten used to the fact that it's in the judiciary. It doesn't make a whole lot of sense. I'm not sure if we had a blank slate and we were divvying up responsibilities now and that was on the table we would take it. I would take it out of the judiciary and find a really good defender general.

Judge Goldberg: Didn't you . . . you were head of a committee that came to a different conclusion. Is my memory right?

Judge Gleeson: We were asked as part of cost containment to look into this and address a number of suggestions. The short answer to your question is yes and we're over time and I'm happy to take us through the long answer to this question, but one fulcrum of that decision was a representation from the Budget Committee that we accepted. And that is that having the defender program as part of the judiciary had no impact on the defender program

budget. That is to say it was not the case that a dollar into the defender budget was perceived as a dollar out of the other spending programs. I don't think that's true.

Judge Williams: Anymore?

Judge Gleeson: I don't think it was true then, but we accepted it as true. Does that answer your question, Judge Goldberg?

Judge Goldberg: A little bit, but we can talk.

Reuben Cahn: I think we need to wrap it up. As I said, this has been a very helpful panel and my thanks and the Committee's thanks to all of you for the time you've given to this.

Judge Delgado: Thanks to you.

Reuben Cahn: We'll take a ten minute break to try and get us back on schedule. [Crosstalk]