Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing # 2–Miami, Florida
January 11-12, 2016

Transcript: Panel 5—Views from CJA Panel Attorneys

Reuben Cahn: You all good? Okay, welcome to the afternoon session of our second day of hearings, here in Miami, of the ad hoc Committee to evaluate the Criminal Justice Act. Judge Cardone, our Chairman here with us. We have a panel entirely of panel lawyers, and one former panel lawyer, I believe, today. We have lots of questions for you all. Our panel members, in terms of the questioners, are going to be Neil MacBride, who's a former U.S. Attorney for the Eastern District of Virginia, and now a partner and a criminal defense lawyer at Davis Polk, among other things; Chip Frensley, the national CJA rep.; Katherian Roe, the Federal Public Defender in Minnesota; and Judge Reggie Walton from the District of Columbia. I'm Reuben Cahn, I'm the Federal Defender, the Executive Director of the CDO in San Diego. Welcome, we're very happy to have you here. We're very interested in the information you have to share. We'd like to get very brief opening statements from each of you, I'd like you to limit them to five minutes. Just like the court of appeals, we're going to have a timer up here. What we'll do is we'll start at the outside and work in. Mr. Ayers, do you want to be begin and give us an opening statement?

James Ayers: I'll be glad to. I'm Jim Ayers, I'm from the Eastern District of North Carolina. CJA panel attorney, of course, I think I've been on the panel twenty-two, twenty-three years. All good experiences, I think you've heard from Mr. McNamara, who runs my district, runs it very efficiently. There's been a little growth in the panel, and I think I mentioned in my letter that has caused a reduction of leaving the number of cases that panel members receive. Of course, that can be caused by the number of cases that are being prosecuted as well, and a number of variables. I generally like to handle seven, eight, nine, ten cases a year, ball-parking. I think that creates some efficiency in my knowledge of what I'm dealing with. I'm always willing to ask for more money, Ms. Costner inquired as to if I was willing to come here. She is a panel rep is my understanding, from the Middle District, or has moved up through the national level into other areas. Generally, fees have lagged behind market rates for lawyers since I got into this, they always have. I would, of course, expect that they always will.

I'm here to ask for more, if that's proper, and/or to answer any questions. Fee voucher cutting transpires or occurs in my district, but not very often. I've had judges call me and tell me they're going to reduce my fees, which has always been fine. I had other judges send me letter and explain their positions, which has been fine. I think I've raised an issue, in all my time, over a fee maybe once with the defender, Mr. McNamara. Other than that,

I think it's worked well. I generally bill at $300 an hour, I litigate some cases in addition to federal criminal, so I don't practice just federal criminal law like a lot of my contemporaries do. Generally, my overhead runs probably half of my hourly rate. As a result of that, generally the federal criminal rate has been below what I would consider a sufficient amount to cover a firm's overhead. My firm is a small firm, only two lawyers, a couple of staff, and we try to keep it small. Other than that, I've tried to address the other bullet points in my letter. I'd be happy to answer any questions at the appropriate time.

Reuben Cahn: Thank you. Oh, I was just reminded that if I can ask all of you to try and speak directly into the microphones. We are streaming this, and even if we can hear you fine, the broadcast may not pick it up. As I said, we're going to work from the outside in. Miss Copeland, I'm interested to hear from you. You're one of the last of the orphan districts.

Amy Copeland: I am, Mr. Cahn. I am one of the last of orphan districts. My name is Amy Lee Copeland, I'm from the Southern District of Georgia. I live and work in Savannah, Georgia. We are one of the two or three districts in the United States, in the ninety-three judicial districts, that do not have a federal defender. It has changed from a manner of involuntary servitude to a volunteer army, but there are still problems with that system that I'll be happy to talk about in the question and answer session of this hearing. My concerns really focus on the quality and adequacy of representation in the current system in our orphan district. Some of those we set out in my letter. Just by way of background too, I am also on the CJA panels of the Fourth and Sixth Circuit Court of Appeals and do some work by appointment on the Eleventh Circuit, which work very differently than the CJA appointments in my own district. With that, I'll give the rest of my time back and just wait for the questions. Thank you.

Reuben Cahn: Thank you. Why don't we go to Miss Reback?

Rochelle Reback: Thank you. My name is Rochelle Reback, I recently retired. Prior to that, I was a criminal defense attorney for my entire career, which was about thirty years. I was on the panel in the Middle District of Florida in Tampa for about twenty some odd years of that time. I was here in the audience listening to the prior panel, and I was struck by the remarks from the attorney from upstate South Carolina, where apparently ice cream doesn't make you fat and you ride to court on a unicorn. You can basically assume that everything that works right in her district works wrong in my district. The two points that I really want to talk about, I'd like to echo what Professor Bascuas said, too. I think primarily the problems in my district revolve around the issue of values and the sense that my judges in my district seem to believe, not all of them, but many of them, seem to believe

that service on the CJA panel should be pro bono. You should just be happy for whatever you get, and that indigent defendants don't necessarily deserve a full-throttle defense, in terms of resources, experts, forensic accountants, et cetera.

There are judges who come from a background where they are completely unfamiliar with criminal defense. I've practiced nothing but criminal defense for rich people my entire career. I was fortunate that my practice was robust enough, my private practice, that I was able to be very selective in the cases that I accepted from the court. They were primarily large, multi-defendant, white collar cases. There were judges who had those cases who were appreciative that I would take them, and some other attorneys would take them because we knew what to do with them and they would give us the resources that we needed to do them. There were other judges who felt, or seemed to feel, that a full-throttle defense was sort of obstructionist, or annoying, and held up their docket. As long as that kind of attitude prevails, then everything in this system fails. I want to point out that we cannot overestimate the influence of individual judges, predilections, personalities, temperaments, prejudices, and egos in this system. With that, I'll yield and I'll be happy to answer questions.

Reuben Cahn: Thank you. Mr. Jones?

Mark Jones: Thank you. My name is Mark Jones, I'm a panel member from the Middle District of North Carolina, in the Western District of North Carolina, and on the Fourth Circuit. Before becoming a defense attorney, I was an Assistant United States Attorney in the Western District of North Carolina in Charlotte and Asheville. I had the opportunity to clerk for two different Middle District court judges. As I see it, we really have a three-tiered system. We have the Department of Justice, the United States Attorney's Offices at the top; we then have the Federal Defenders, or Community Defenders Offices; then we have the panel attorneys at the bottom. Every federal case, from the government's perspective, is going to come with an investigator, the case agent, sometimes two, who often is an attorney or an accountant. The resources that they have are seemingly unlimited. The federal defenders offices have built-in research and writing attorneys, many of them. They have a pool of investigators that they can go to at the onset of a case for assistance, and they have those structural advantages.

The panel attorneys, at least in districts where I practice, are predominantly solo or small-firm practitioners who have their time, and usually a secretary, and for anything else have to go hat-in-hand to the district court. We heard some testimony yesterday from Louis Allen, who's the federal defender in the Middle District of North Carolina. I think Professor Gould has some statistics about the number of CJA panel

attorneys in the Middle District of North Carolina who sought out investigators, or paralegals, or psychiatrists, or mitigation specialists. I think the number was 1% of CJA-based cases are using those types of services. It means that we're coming from a district that has a cultural problem where we are not taking advantage of the resources that are out there. I want to just speak briefly about why I think that exists. There was a time when these requests were summarily denied by the district court judges. It has gotten so that people just don't ask anymore, and they haven't been asking for a while.

I think if you were to ask the judges now, they would say, "No one is asking us. Please ask us." The panel has been conditioned not to ask. Even though the composition of our bench has changed somewhat over the last five to seven years, I still think that cultural legacy is there. You don't go asking for paralegals, you don't go asking for experts, you don't go asking for investigators. There are two reasons for that, I think. The first is that first, you've been told no so often that there is a chilling effect. Also, I think there are panel members who believe that asking and being denied is going to have adverse consequences, and that it's first going to have adverse consequences in their case, perhaps for their client, but it's also going to have adverse consequences for them. I think they equate a denial when they ask for an investigator, or for an expert, as the court saying, "Your request is frivolous."

Then they get, in their mind, they think they're going to come under heightened scrutiny with all their further requests, all their other vouchers that, in their mind, the court sees them as a person who is making frivolous requests to the court. That is the culture that we need to change in our district. One of the things that we do have easy access to is interpreters. We don't have to seek permission beforehand, we don't have to file a motion, we just go get the interpreters. Then we can use them, and they do their own CJA billing. For paralegals, for investigators at the beginning of the case, if there were some similar pooling of available services or service providers that the panel members could go to, I think that would make it much easier for the panel members to access those services. I don't know whether it would be the Federal Defender's Office who could help coordinate that, but making it easier to get these services would change the culture a bit. It's also the act of having to go to the court and ask for permission.

Neither the government, nor the federal defenders have to ask for approval, or specifically justify how an investigator is necessary to adequately defend their client. That's often hard to articulate in the beginning of a case. I think making access to investigators and paralegals would go a long way to our districts using them more. Then very briefly,

the other place that I wanted to turn to has to do with the strain that high document and high data cases are putting on the CJA panel. It is so easy now, through a grand jury subpoena, or a search warrant for a cell phone or a computer, to collect just incredible amounts of data. The government is, in most cases, collecting huge amounts of documents and data. I'm sensitive to the government when they say, "We're not dumping this on you, we're producing this to you because this is what we've gathered in our investigation." I believe that it's a production and not a dump, but it still means that in routine cases, an attorney is seeing 10 to 250,000 pages, plus the data that's coming through.

For the attorney that has a secretary and his time, it can be a monumental task just to triage it. What I'd like to see is some way that we start to use either data search providers, or ESI-trained paralegals to encourage the use of those things. If nothing else, if this Committee were to make a recommendation that for high document cases, that production of those includes some rough index that generally described the nature of the information and the source of the information. I think that would go a long way in cutting down the amount of time that panel attorneys and defense attorneys spend in triaging it. I will say that the Federal Defender's Office, fd.org, has an excellent go-by that I've seen setting out different categories for an ESI production. I think that is one place where there's a meaningful opportunity to cut down, really contain cost, and also benefit defendants in our districts.

Reuben Cahn: Thank you. Mr. Markus?

David Markus: Thank you. Judge Cardone, Mr. Cahn, and the rest of the Committee. Thank you very much for having these hearings and listening to us. I know it's been two long days, and we appreciate the Committee's time and effort in this very important matter. I was trying to think which David Bowie song to quote to start off with today, whether it was, "Changes," or "Rebel Rebel." I couldn't decide which was more appropriate, so I decided instead to quote a more important luminary, Kathy Williams. In Kathy Williams' written testimony, she's talked about this many times, she said that, "Indigent defenders are the red-headed, freckled-faced, jug-eared, bucktooth, bastard stepchildren of the federal judiciary." She's well known for talking about that, and she's right in every single respect, except one. That is, we're no long children anymore. The CJA act was passed over fifty years ago, and it's time that we got some independence. We're all grown up now.

I know this has been a theme over the past two days about indigent defense independence, and you've heard some of that this afternoon on this panel, and I'd be happy to answer questions about that as well. The

other topic, and Mr. Jones just spoke about this, that I addressed in my written testimony was discovery and how important I think that issue is right now. It used to be, for many years, when I started out as a public defender that we couldn't get any information out of the government and most of the motion practice was about, "How can we get the government to produce anything to us?" We couldn't get document number one. Now, we have the complete opposite problem, which is getting truckloads of documents compressed onto a hard drive.

Besides the absurdity of this, it really is silly that we're not told exactly what the government intends to use in its case in chief. Putting aside the absurdity of that, it costs the CJA lawyers and the CJA act so much money that this is an opportunity for us to really cut down on costs and make the system more fair. Whether it's changing the rules and recommending that Rule 16 be changed, because it's long overdue for a change, or employing some of the methods that Mr. Jones talked about, it is time that we start to look at the discovery practices of the government. How, in recent years, it's just impossible to review that discovery in a way that you can effectively represent your client.

Reuben Cahn: Thank you. Judge Walton, would you like to start the questioning?

Judge Walton: Sure. Mr. Jones, you talked about the culture that exists in your district, and you think some past practices of the judiciary has had a chilling impact and therefore, things aren't being done that should be done. Requests aren't being made that should be made. You mentioned one way you thought conceivably that could be addressed, but what do you think this Committee could recommend that would have an impact on what's taking place, in that regard, in your district?

Mark Jones: Two things, Judge. There was some data that was shared during one of the meetings yesterday, so I think this Committee could set up a body that would create that data and then share that data with the panel representatives. If it was widely known in our district that 1% of CJA attorney cases were using experts, that that is something that the chief district court judge, panel rep, and the federal defender would want to address. I think they could address it through training. Also, this Committee could have recommendations or require certain training on the use of experts and obtaining experts. Also, what the Committee could do is to reduce the standard by which the judges are determining whether or not an investigator or an expert is necessary. There's an inherent difficulty, as a number of people have said, with judges evaluating whether or not it's necessary in a case, and it's often difficult to articulate exactly the benefit.

Oftentimes, an expert tells you exactly what the government expert tells you and you've now eliminated that possible defense. I think if the judge were asked whether or not this was a clearly frivolous request, and if it's clearly frivolous, deny it. If not clearly frivolous, accept it. That would go a long way to increasing the number of experts that were being sought and used in our district. I also think that raising the cap before circuit approval is necessary, would go a long way to getting psychiatrists, psychologists, and mitigation experts involved in a case. Our district moves very quickly, and from arraignment to trial is often thirty days. From plea to sentencing is often two months. The process of getting circuit approval is a cumbersome one, and it can take time. I think if that amount were raised to $5,000 or $5,500 before circuit approval was necessary, that would go a long way. It would cut some of the red tape, and it would encourage our panel members to use those types of experts more.

Judge Walton: Miss Reback, you indicated that you thought that there was a respect for a full-throttle defense when it was someone who was of means, but the same perspective or mentality doesn't exist when it comes to representing poor people. What do you attribute that to, as far as what you see in that regard in your district?

Rochelle Reback: It comes down to having to beg for resources. My private clients can pay without having to go to the court and request a forensic accountant, or a paralegal, or any number of things that would be necessary to a complex case defense. On the contrary, when I represent someone in a complex case who is a CJA defendant, I have to beg for these things. As Mr. Jones indicated, in the beginning of the case, it's often very difficult. I'm retained generally much earlier in a white collar case by a private client. I know about the investigation, I know what documents have been seized from my client. I know who's been interviewed in the corporation, I know all these types of things. Whereas in a CJA case, I meet the client for the first time at their first appearance or arraignment, I don't know anything about the investigation. I don't know whether I'm going to be getting one CD or two terabytes' worth of discovery material, and it becomes difficult to really assess what you're going to need in the early stages of the case. That's one problem.

I would just like to say that it's interesting to me, listening to the perspectives of people from so many different districts. The things that I'm hearing people raise as problems in their district are so far ahead of where my district is. I did submit written testimony, and if you've had a chance to review it, you can see that in my district, the judges have maintained complete and total control over every aspect of the CJA. There's no independent administrator, there's no independent CJA committee. There's no substantive review of lawyers who want to be on

the panel. Basically, the criteria for admission to the panel is that you've practiced two years in any kind of law practice, sinkhole lawyering or title review, and you've taken one CLE on the Sentencing Guidelines, and you can be on the panel. You can represent a federal felony defendant facing ten to life. That's a problem so fundamental, I think, and so far behind all of these other quite reasonable and necessary recommendations that Mr. Jones has made.

We are just so far behind, and yet each time . . . I've been on the panel over twenty years, and both formally and informally, we have requested the judges to put some sort of independent review over the panel to cull the panel. It's much too big for the needs of indigent defense in my district. What that means is that new lawyers to the panel, and they're constantly coming on the panel, they might get a case once every year, twice every year. They have no incentive to really keep up with federal criminal practice, or pay $400 to go to a United States Sentencing Guideline seminar, or keep their skills up. That's a problem. When they come to court and they don't know what they're doing, the judges are appropriately offended. Therefore, they don't trust any of the lawyers on the panel. They don't know you, you've been in front of them once. This is your first appearance, and you're doing a poor job. As a consequence, the judges who do know you continue to appoint the same lawyers over and over again.

In the last five years, six years of my practice, all my cases were in front of the same judge. Because they were big, white collar cases, all my CJA cases, big white collar cases that the judge knew and trusted that I could manage. The judge appreciated a vigorous defense, so I benefited from that favoritism, but it's not right. Now, I'm retired. Who's taking my place? It doesn't give the new panel lawyers the opportunity to become me, and that's not right. I think that the problems in my district, frankly, are the problems of the judges not wanting to let go of any authority whatsoever. When the panel lawyers know that the judges have complete authority, frankly there's an intimidation factor. They don't want to offend the judge, they don't want to ask for too much. They want to be sure that maybe they'll be called next time, so they don't want to take up too much time, file too many motions. That's not right.

Judge Walton: Just one other question. Miss Copeland, you said you're one of the few districts that doesn't have a federal defender. Are there any negative consequences as a result of that, and do you think there should be a requirement that each district have at least one federal defender?

Amy Copeland: Thank you, Judge Walton, for asking that question. I am sitting up here listening, I feel like Miss Reback, but to an extreme. Not to minimize

anybody's concerns, but sometimes I feel like I'm hearing that the air conditioner won't go below seventy-five degrees, and we're struggling with how to get clean drinking water in my district. It is tough to get adequate and effective Criminal Justice Act representation, unless you just get lucky, in my district. There is no federal defender, I'm sure you've read my testimony. For a while, it was anyone who was admitted to practice in the Southern District of Georgia, anyone. Bankruptcy lawyers, I used to be an Assistant U.S. Attorney, I was the appellate chief for ten years. It created this strange relationship between the prosecutors and the defense attorneys. "I'm not telling you what to do, but you may want to see if a suppression motion's good because there was a traffic stop in this case." That sort of relationship.

I even talked on the down low with some AUSAs in my district, and a little bit of that still goes on now because there is no gate-keeping function whatsoever. I think I became a member of my district's CJA panel by sending an email to the magistrate judge's deputy saying, "Sure, put me on the CJA panel." I think it was about that official of a process. There is still some desire to help out people who need it by the assistant U.S. attorney's, pointing people in the right direction. I think I cited some cases in my written submission about somebody, he was an insurance defense attorney and decided to try some cases. A great insurance defense attorney, I'm not taking anything away from this person. Decided to get involved in criminal defense cases, gets assigned to something with a life sentence, and pleads out his client to a life sentence. You're sitting there hearing this and you're thinking, "It's really not going to get worse, baby. You can go to trial on these cases and see what happens."

I get emails sometimes from other attorneys asking me questions about how to proceed forward. I've seen cases where . . . I've been an attorney for twenty-four years, people out of law school for six months are trying cases on federal felonies with a twenty-five year cap. It just is whoever gets a phone call from the deputy clerk that day. There's no gate-keeping function, there's not strata of qualifications within our system as to who handles what. There's also the fact that the district court bench and the U.S. Attorney's Office traditionally have been very chummy. I benefited from it when I was there, but there's, for instance, these court family picnics that the U.S. Attorney's Office goes to with the entire court staff. They work out at the same gym, things like that. I talked to some other panel attorneys in my district who were really upset about that same gym thing. I'll tell you where it really filters down, sort of a lack of an independent agency.

Within the last year, I believe almost a year ago to the day, the U.S. Attorney's Office disclosed that an ATF agent and a prosecutor had had an

affair that ran for a number of years. It was extramarital on both sides, and it may have affected up to 400 cases in the U.S. Attorney's Office. The U.S. Attorney's Office first sends an ex-parte communication to the judge, the judge publishes it and says, "We're not doing it this way. Here are all the names of the cases that are involved in this, potentially." The U.S. Attorney's Office sets forth its analysis as to why there's really no problem with these cases, and everything's great. I get appointed on four of the cases, ended up it wasn't so great in those cases, and ended up getting some substantial relief from my client. I also got, as part of that broom function, if you will, cleaning up, I also got carte blanche from the chief judge of the district. "If you become aware of any other cases to which I need to appoint you, please let me know. I will appoint you on these cases."

That is great, I love that, but it would've been nice if we'd had somebody who could've had two or three weeks to pull files and sit at the U.S. Attorney's Office and say, "Show me these cases that you're talking about." Trust, but verify, if nothing else, just to get through everything so that you could've seen if the analysis was correct, if there were really other cases that should've been identified. Catastrophic events don't happen like that terribly often, and this is a good thing. I think we're all glad about that, but sometimes, bad things happen. It would be nice if you had an agency that could be devoted to that. It just gets difficult sometimes, in my district, to see the quality of representation.

Judge Walton: Do you know why a federal defender's office was never created in your district?

Amy Copeland: Judge, I know all sorts of scurrilous rumors and muckety-muck.

Chip Frensley: Do tell.

Amy Copeland: "Sit closer, Amy Lee!" There was one a number of years ago, and then it just was closed down. I've been practicing in that district for almost twenty-four years. During the time I've been practicing in the Southern District of Georgia, there has not been a Federal Defender's Office. Like I put in my note, it used to be everybody. You would lose your admission to the Southern District of Georgia Bar if you told a judge you were not qualified to represent criminal defendants. That has changed with our new chief judge, who has made it a volunteer-only. I would like for it to go a step further, perhaps, with the gate-keeping system, a power-ranking system, whatever you want to call it, so that if you want to become a criminal defense attorney . . . I get that we all have to start some place, but why don't we start with base cases, as opposed to life-in-prison sex

trafficking cases. It seems to be a little bit better way to work your way up in the system.

Judge Walton: Thank you.

Amy Copeland: Thank you, sir.

Reuben Cahn: Mr. MacBride?

Neil MacBride: Thanks Reuben. Welcome to the panelists, thank you for our presence here today, for your written testimony, which we've all read, and your willingness to engage with us. I want to start with a question on . . . one of the first principles that we've been thinking about as a Committee, I think we're still trying to figure out exactly how to approach in the face of anecdotes, in many instances, which can vary across the spectrum. I'll set the stage this way: when I was leaving to come down to join my fellow Committee members, my nine-year-old said, "Now dad, what's this Committee you're on, and what is it doing?" I said, "Well, it's basically a report card for how judges and defense lawyers get along." He said, "What grade are you going to give them?" I said, "Well, it's really challenging. I think the judges are giving out A's and A minuses to the relationship, and the defense counsel are given out C pluses or F's." Alastair said, "Wow, that's a big difference. How are you going to figure that out?" I said, "Talk to me in November and we'll let you know how we come out with it."

All kidding aside, we have heard stories from defense counsel that describe a pathologically dysfunctional, broken system in their districts. We've talked not just to judges, to be fair. We've talked to panel attorneys or defenders who describe a much more positive, healthy, and functional relationship. Everybody's entitled to their own opinion. It may be that we just have a crazy quilt across ninety-four districts, and things look very different. Even by division, things may be different. I was U.S. Attorney in a district that had four divisions, and it sometimes felt like four mini districts within one division, in lots of different respects.

One question that I wanted to start with, it built on a question that Professor Gould asked earlier, and that Judge Walton was engaging with Mr. Jones about. That is are there objective, if you will, criteria, statistics, or benchmarks that we can look to that may be a somewhat dependable proxy for how healthy or independent the CJA panel is? The one that Mr. Jones mentioned is the use or percentage time that outside experts are approved for CJA cases. Just in the interest of time, I'll move across, maybe start with Mr. Markus and move over Mr. Ayers. Is that an example of something that you think may actually be a portal into the independence or strength of the CJA panel? Whether it is or not, are there

other similar things that you would point to that we, as a Committee, could look at to help get below the anecdotes.

David Markus: Sure, and I'll start by saying it seems like you had a much healthier talk with your nine-year-old than I did with this morning. My debate with my nine-year-old this morning was about whether she would eat the waffle for breakfast or not, and you had a debate about grading judges and CJA lawyers. I think that's a really difficult question about how to judge that. Maybe I want to fight the premise a little bit and say that's a reason why we need more independence from the judiciary, because I think it is so hard to come up with objective criteria like that. Each district, you're going to hear something so different, and it maybe the learned helplessness that we heard about Mr. Jones' district where people don't even ask, so the statistics may be skewed. In this district, it gets approved. Some judges are great, and some judges are awful. It's really a judge-by-judge basis. I'm not sure that you're going to find criteria that work, certainly nationally. Even district by district, I think you're going to run into all sorts of problems like that.

I've been watching online, these guys are doing a great job over here. I've been watching a lot of the testimony, and I think one of the themes that has come across is the panel really has to answer to the judiciary now. We have to, as Miss Reback said, beg a lot of times for what we want. I think that's the real problem, and I don't think that there are criteria that we can come up with that's going to really come out and show that, other than talking to people who are on the line, like me and the other lawyers. At least what my feeling is, is that if we can create more of an independence where we work with the public defender's office to deal with experts, investigators, and so on, I think you're going to get a lot better representation than we get now.

It's funny, I heard judges don't want to let go of this control, which is so true. Then when you talk to judges about the CJA, they love to complain about having to review bills and review these requests. I love to complain too about stuff, then I don't want to give up control either. I think it's in our nature, we want to keep control and we want to complain about it. I think you guys are in a great position to objectively get us out from under that control in a way that we don't have to beg anymore. The objective criteria I think is going to be very, very difficult, Mr. MacBride. Maybe some other people have different answers, but I think that's going to be difficult.

Rochelle Reback: Can I just add one thing very quickly? In my district, we have a model CJA plan. We've had it for years, it's be re-adopted any number of times, the last time was 2011. We have it, but the judges of my district totally

ignore it. It has different things on it about criteria for admission to the panel. There's supposed to be a mentor panel, you're supposed to have a three-year review. They don't do any of that. It seems to me that as long as we are under the thumb of the judiciary, who within the system has the authority to tell an Article III judge they're doing it wrong? They don't care.

Neil MacBride: It's a great question, and I don't pretend that maybe this Committee can tell judges they're doing it wrong. Armed with what you just said Miss Reback and Mr. Markus, let me quickly ask Mr. Ayers, just at the risk of restating the question. I didn't mean to suggest that if approval ratings on expert witnesses went from 1%, as is the case in one district Professor Gould told us about, to 80%, that that solves the question of the first principle, as to whether that's still the right structure. If it turns out, and I'm just making up the numbers to pose the question, if a third of all districts only have a maximum of a 10% approval rate on expert witnesses for each CJA cases, does that not sort of make Miss Reback's point perhaps that there's just something fundamentally broken? That it's the exception, not the rule that lawyers like you are getting the resources you need at least some of the time in some of the complicated cases to vigorously, zealously defend your client.

James Ayers: I can only speak from my own experience. I was a panel representative, and I would go to some of these meetings and just hear these stories about how things are different in other districts. My assumption is things run much more efficiently sometimes in my district, probably because Mr. McNamara, or the person that ran the defender's office ahead of that. I just don't see how you can do that quantitatively, or some measurement. I can tell you I've done a variety of different cases, terrorism cases and some other cases, and I've never had a judge deny my request for an expert. I've had some comments about the quality of my motion and had to go back and do homework and things of that nature, but that's to be expected. I just don't have a negative experience to share with the panel. In terrorism cases, I've had a number of experts where I've asked for them, and as long as you substantiated your request with the appropriate facts and the need, I've just never had a bad experience. I just can't speak to these other districts or measurements or complaints, to be honest.

Neil MacBride: Mr. Chairman, do I have time for one more question?

Reuben Cahn: Yeah.

Neil MacBride: Okay.

Reuben Cahn: We're doing well, go ahead.

Neil MacBride: A quick question to Mr. Jones and Miss Copeland. You're both former AUSAs, I'm a former AUSA. I, for better or worse, have spent most of my career in the Justice Department. Have not been a CJA attorney before. I will confess that as an AUSA, even as a United States Attorney, I spent zero time thinking about all of the issues that you guys have spoken about this morning, and that we've heard about for the last two days. Maybe that's as it should be, because the idea is to keep prosecutors very far away from that process. At least, I hope that was the answer. Otherwise, statement against interest, I never thought about it. I will say that intuitively, as a young prosecutor, while we didn't like losing to good defense counsel, there was part of us that always liked it when we were up against a really good defense counsel.

Whether that was an FPD, an AFPD, a CJA lawyer, or just a retained counsel. The question is, in your guys' minds as former assistants, as Committee, should we be thinking about any potentially constructive role that the justice department can play in strengthening the funding and administration of indigent defense? I don't mean by necessarily taking over the program, but do you see any role for trying to leverage the justice department? As Judge Cardone said earlier today, after all, it's called the Department of Justice. It's the only executive branch agency with a moral virtue in its title, it's not the Department of Incarceration, it's not the Department of Conviction. In theory, it should care a lot about these issues. Just curious if you have any reflections.

Mark Jones: I believe that all prosecutors want a good defense attorney on the other side of the aisle, and I think they know that the system only works when everybody is zealously represented. Earlier, I mentioned the ESI production, and I think that might be one place where DOJ guidelines could help defense attorneys in sifting through that data. If getting through it was easier because of an index, I think that's a place where we could see real benefit. Another panel member earlier said that in their district, the United States Attorneys and the AUSAs will provide a list of hot docs. That can be useful, reverse proffers can be useful, but there's a grain of skepticism that needs to be taken with everything that the government is giving you. That might be the most important documents to them, but your defense might focus on a different subset of documents. Other than that example, and sifting through discovery, I'm not sure that I can think of, right now, any specific examples where a change in DOJ policy would increase the representation for defendants, except perhaps to say that I get the sense that a lot of AUSAs feel differently about sentencing versus guilt or innocence. Once guilt is established, the prosecutors are often going for high-end or large sentences. When defense attorneys come in and offer arguments and mitigation about childhood trauma, about mental health issues, and are asking for varying sentences, I often feel like the

government is pointing to their criminal record that often has drug use and violence in it and saying, "There's a disparity there between what each party wants." I don't know if there's a place where the priorities of the DOJ could be changed there, but that's a place where I think there's a difference between prosecutors and defense attorneys about what the right punishment is after someone's already been adjudicated guilty.

Neil MacBride: Thanks. Miss Copeland?

Amy Copeland: I was a Department of Justice employee from January 16th, 2000 until September 25th, 2009 and I thought about the issue of good defense counsel every single day on that job. I was the appellate chief, which meant that I handled the appellate work. I also handled, either directly or in a supervisory fashion, but mostly directly, the § 2255 claims and then effective assistance at counsel petitions. As a result, I became the mother confessor of our entire district. I got calls from attorneys who were so stressed out because they had no idea what they were doing and why there were representing a felon in possession on gun charges when they were trying to put together a bond offering. True story. My colleagues at the time were keenly aware of the limitations, and in preparing for my remarks today, I knew I'd arrived when one of them told me that they really didn't feel the need to be real friendly to me anymore in court.

There is a whole thought that they do need to look out for the person who may or may not be truly adept at criminal defense attorney. Yes, I always loved seeing a good attorney. It would raise my game, and I really appreciated that. I think the only thing that would concern me about the Department of Justice carrying any of the burden is that with most my indigent defendant clients, they are extremely distrustful of anyone that they think of as "the Man." I think that the DOJ is, in fact, the man. I would have trouble, if I were ever called upon to explain to them, telling them why exactly the Department of Justice who was prosecuting them was also trying to help them, too. That would just be something that would be poorly received.

David Markus: Could I just speak really quickly on that issue? I think it's really important, and I'll give you the other perspective because I've never been a prosecutor or worked for the Department of Justice. I feel strongly that we should keep the two separate, because it's an adversary system. I think it would be a huge mistake to have the Department of Justice involved in the Criminal Justice Act. Really, I think it would cause a problem for the reasons that Miss Copeland stated, and for just optics reasons. I don't think it would be in the best interest of our clients or indigent defense. Yes, it's called the Department of Justice, but the reality is we go to court every day fighting with prosecutors.

It should be a fair, good fight, but we are fighting with them and we are adversaries with them. I think it would be a real mistake to try to solve the CJA problems by involving the Department of Justice. One perfect example is we've seen the recent memos that have come out from the Attorney General about *Brady* and *Giglio*, about how the policy should change with line prosecutors disclosing it more readily. But, the Department of Justice has fought very hard against any actual rule change with *Brady* and *Giglio*, they just want to give this advice to line prosecutors, which line prosecutors are free to disregard, and many, many, as we see every day, disregard it. Yes, it's a nice name, but in reality, we're adversaries, as we should be.

Reuben Cahn: Thanks. Katherian?

Katherian Roe: One of the difficult problems we've had in doing this, having these hearings, gathering this evidence, is that a lot of what we're trying to wrap our hands around, if you will, is cultural and anecdotal. I'll give you an example. The issue of self-reduction of vouchers, there's nothing that, we can't get any evidence of that, actual numbers and how many people reduce their vouchers. We can't get any numbers, any data if you will, as to how many attorneys just don't make requests for expert services because they've made them over and over again, and they've been denied. Or, because as one of you was saying earlier, they were concerned that their other vouchers would receive heightened scrutiny if they made these requests and were denied. We really have no choice but to ask you about your own districts and ask you to tell us what you know about this information because we can't get those statistics.

Mr. Ayers, I'm going to begin with you. We've heard from Tom McNamara, and we know about your district, and I know that it's a very good district. We also know that there are vouchers that are cut. One of the things I want to ask you about is a few minutes ago, when you testified, you said sometimes your voucher would get cut. The judge would cut it, and that was fine. It was just very much, at least I got the impression it was very much like that's the way it is, and I'll move on from that. In your written testimony, you indicated that you didn't necessarily think it was fair. I think the implication was you had done the work, but you weren't going to be compensated for it. I want you to address that, but I also would like you to address the issue of self-reduction. I know that you don't choose to do that yourself, but my question is more about the other attorneys in your district that you know do do it and why.

James Ayers: The topic of self-reduction is just lawyers have told me that they do that, that they'll reduce vouchers. They told me that as lawyers, not just from my district, I specifically remember it from other districts where they've

done that on their own accord. I just don't think it's a good practice because . . . I'm a business major. I keep meticulous track of my time because I have to send in a voucher for a CJA-appointed case. The vast majority of my cases are civil cases, and my client expects for me to have the time written down in those cases. I oftentimes reduce civil bills, just part of being in business, it's a good practice with your clients if they raise an issue. I won't expect that not to happen just because I'm doing a CJA case, to be honest. I liked a little feedback. The cutting of vouchers used to take place a lot more often, in my mind, than it does now. When I first started this, the rates were much lower, but the time's always been the same, in my mind.

It takes a significant amount of time to meet with people that don't trust you to try to get them to do what's in their best interest, and that's never going to change. When they meet me, they don't hire me like my civil clients do. They feel like they're stuck with me, and I have to be a wee bit of a salesman to try to address those issues, from that standpoint. Over the last year, for example, I probably had three or four vouchers cut. It could be a little bit longer time, but several of those, I got a letter from the judge saying, "We just don't feel like you justified your fees." Which, of course, would aggravate anybody whose fees have been reduced, in my mind. They went through the pains of taking a letter, probably commentary prepared by Mr. McNamara, and said, "You should've spent more time in your letters."

The one thing I can't stand doing is writing letters to justify fees and filling out a CJA 26 Form after I've turned in time sheets, and I've turned in spreadsheets, and Excel sheets, and to be honest about time that I review a bill, I'm probably two to three or four months past the conclusion of that case that started usually, I would say, a year before, or eight months before. I really don't personally like going back and reviewing it, but I do send letters in. It's just generally I've relied on my time sheets because of the detail that I put in there. Mr. McNamara, I like Mr. McNamara. He's been doing this for a long time, but he's got a job to do. He's got to justify every voucher that goes to a judge, who's got to justify it to the Fourth Circuit judges whenever it's above the limit. I know that, but I just don't like writing the letters. I understand it's part of the process, and I'll spend time on them sometimes. I've had significant vouchers that were paid that were budgeted. I think one case, I had to budget where there was never an issue. It was paid, and it was a lot of money. It was a terrorism case.

Katherian Roe: Did you do the work, sir?

James Ayers: Oh yeah.

Katherian Roe: Isn't that the standard, whether or not you did the work? The way you sayit, it's like they paid you, but you did the work.

James Ayers: I always do the work.

Katherian Roe: I'm not going to try to get into it with you, but it seems like you're justified if you did the work. Here's my question: is it mostly a business decision for you then, at that point, instead of going back and forth trying to convince them that you should get paid for the work that you did, it's just easier to move forward?

James Ayers: Absolutely, in every case. If I feel that someone's written a letter that I disagree with, I'll respond. My job is to represent my clients, and secondly I think I should be paid. When I represent my clients, whether it's for these expert services or anything else, if I want something, I'll ask for it. I'll do it respectfully with the court. Same thing with vouchers and things of that nature. Nine times of out ten, I don't have anything to say. On some occasions, I don't ever know why they're cut. I get no explanation, and that's not going to change. I can beat a dead horse and I can throw gas on the fire, or . . . it's just like a civil case. When my client comes in and says . . .

Katherian Roe: Part of doing business.

James Ayers: Yeah, sure. That happens in every kind of case I've ever done.

Katherian Roe: Thank you. Mr. Jones, let me just ask you a question. You had said earlier, you were talking a little bit about the vouchers, the heightened scrutiny of the vouchers. You were talking specifically, I think, about expert requests, folks not asking for experts because they had been denied a number of times and they didn't want the court to give them a heightened scrutiny in the future. That heightened scrutiny you were referring to, would that be on their attorney vouchers? Is that what you were referring to?

Mark Jones: It was. This is also sort of an answer to Mr. MacBride's question. I don't think that you can do a data-driven analysis of the CJA panel and determine the health of the panel in any given district. If you look at the Middle District CJA expert rate, I also have to say that in the last four or five years, I haven't asked for an investigator and I've gone and done it myself. I haven't asked for a paralegal, and I've done the work myself and have mostly been compensated for it. I don't think that even where you see an outlier, that that represents sub-par representation of defendants in that district. I think it's hard to equate data with the services that the clients are getting in that district. I'll also say we have a chief district judge, a CJA panel rep, and a federal public defender who are all very

conscientious and do a great job representing a defendant. I don't think even that data point accurately demonstrates or represents the health of the panel in that district.

Ms. Roe, as to your question, I don't know that other panel attorneys would express it as I have expressed it. That they would say, "I am afraid that if Judge X denies me here, that when I submit other vouchers, they're going to give me that scrutiny." I think the act of having to go and ask for the money, then being denied creates that type of relationship. You're always asking for something from the court, and it leads to things like self-cutting. It leads to things, as we heard somebody else say in the last panel where if you spent four hours trying to get the production to work on your computer and can't do it, you don't submit it. If you have to print it, and you have 5000 pages, you aren't submitting a request for those copies.

I have self-cut my voucher as a business decision because I've looked at the time that I thought it would take me to file the CJA 26 and to work with the district court judge, and the amount of money that was involved. Sometimes, it's been $1000. Sometimes, it's been three or $4000 but made that decision. I don't think in the Middle District though, we have a large problem with the district court judges cutting vouchers. I know that it has happened, but I don't think it happens frequently. When they are cut, the judges are doing a very conscientious job. In so doing, in the Western District, the vouchers that had been cut have been cut at the Circuit level. The district court judge sent a reasonableness letter that said this is a reasonable fee and it was cut at the Circuit level. I don't think in either the middle or the west we have a large problem with voucher cutting, though it does happen.

Katherian Roe: Just as a follow-up, when the circuit did cut the voucher, was there any kind of due process?

Mark Jones: There was. I was sent a letter and was allowed to write back and respond. I did an analysis, and they actually modified their cut. I explained why I had spent X amount of time in that case, and it was a large RICO case with multiple defendants and hundreds of hours of wiretap communications. They didn't meet me in the middle, but they gave me more than they had initially said they would with the cut.

Katherian Roe: Thank you.

Reuben Cahn: We're going to get follow-up questions from the panel, and then from other members of the Committee who haven't had a chance. I'd actually like to ask one question, just so I can understand something. As a public defender, I know what I do when I need an investigator, or when one of

my lawyers needs an investigator, needs a psychologist or whatever. It occurred to me, as I listened to you talk, I don't really know what you do. What do you put in your application when, at the beginning of the case, you've gotten initial discovery. Maybe it's a small case and you've got a pile of § 302's that's only like this. Maybe you've got a bunch of events, you need a timeline, you need to figure out what's what, and you need to develop an investigative plan. What do you put in a motion for appointment of an investigator? David, how about you, we'll start with?

David Markus: I think it depends on the judge. If we have a good judge, you've heard from some of them in the last two days, you can put very little and you know it will get approved. Although, you have to decide how much are you going to ask for, and that takes time. If you're going to ask initially to bust the cap, and you need circuit approval, well shoot, it's going to take some time to get that approved. Don't I want to get the investigator working right away? I may ask for a little less because I know I need that investigator quickly, then ask later to go over the cap. With the good judges, you can put a lot less and just say, "It's a complex case. Here's how many defendants, here's how many documents I've been provided. Here's how many witnesses I need to interview." And put those sorts of things.

With a less sympathetic judge, you're going to have to get a lot more detailed, which obviously is a problem for lots of reasons. One of the reasons I think we, to go back, and it's beating this dead horse, for independence of the panel. Having to go beg for an investigator, and lay out some of the things that you don't want to lay out early on, is a big problem. With good judges, you don't have to lay out a whole lot. That's generally the case here in this district, but there are some who are going to ask for very detailed explanations of "Why do you need this psychologist?" If you don't submit the report at the end from the psychologist at sentencing, "Well what did that report end up saying? I spent the $800, or whatever it was on that psychologist, and now you're not giving me the report."

Reuben Cahn: $800?

David Markus: Whatever it was.

Reuben Cahn: Okay.

David Markus: That's the cap, whatever the cap is. "We spent that money, and now I don't see the report attached to your sentencing memo. Your guy must've been doing what?" There's all sorts of problems. I know that's not answering your question, but it's a problem.

Reuben Cahn: Let me follow-up on that, just one more. You talked about a psychologist. I know when the requests come to me from a lawyer in my office, almost always, the very first piece of useful information that they give me concerning their request, it's directly derived from attorney-client privilege communications. "These are the impressions of my client, based upon the meetings that I've had with that individual." Obviously, this is matters that you shouldn't really be talking about anyway. How do you deal with those requests? How do you justify to a judge, "I want a psychologist because my client is giving me delusional information that leads me to suspect we've got a problem here.

David Markus: I think, unless it's the most extreme case, lawyers are not asking. They're just not asking for the psychologist unless it's such an extreme case where it's going to turn out that the client is incompetent. Or, the client has serious issue that it's obvious and it's going to be disclosed at some point. If it's anything other than that, at least my experience with myself and others, has been you're just not going to ask for it.

Rochelle Reback: Right, or an alibi. What if you need an investigator to investigate an alibi? You don't want to tell the judge that. It's crazy, it's ridiculous. David's right, it's totally dependent on the character of the judge. It's a matter of trust and respect between the judges and the lawyers. There are some judges who understand the conflict who will take a bare-bones request and say, "Go and good luck." There are other judges that want to just micro-manage your defense. That's just not appropriate.

Amy Copeland: While I have identified some problems with the CJA panel in my district, I will say my judges are terrific to me, they are fantastic to deal with. I typically don't have to disclose too much. One time, I felt like I had to disclose more than I felt comfortable with, and I asked for refusal of the magistrate judge from the case because he handles the discover and the appointment issues. He recused himself and reassigned it to another magistrate judge, and that's how I handled it. I, too, was surprised that that worked, but it did.

Rochelle Reback: If that had happened in my district, no lawyer on the panel, whoever hoped to get another case, would ask for the recusal of a magistrate, only because they're desperate, I guess, for CJA lawyers in her district. I can't imagine that ever happening in Tampa.

Reuben Cahn: Thank you. I want to give this to Judge . . .

Judge Walton: Excuse my ignorance, but if you have, Mr. Markus, an indication that your client may be incompetent, but you have questions about it, you're not going to ask?

David Markus: No. In an extreme case where there's a competency question, yes. I think in [inaudible] run of cases, the question isn't one of competence, but is there some factor that would help at sentencing? Or, something that a psychologist could help me with, as an advocate for a lower sentence or something like this. Or, an explanation for why he or she did what they did. In those cases, at least in CJA cases, I'm not asking. Competence is something different, that rarely comes up. In my retained cases, a psychologist is almost a matter of course that I bring into as part of the team, either to help the client and family through it, which I understand is not going to happen in a CJA case, or to explain some of the actions. It's amazing when you have the resources to do those sorts of things, what you can find out about explaining people's behavior. With the § 3553 factors, which I think unfortunately, you see a huge difference in retained cases in the presentation of those factors to a district judge, and CJA cases, in how someone's behavior is explained at sentencing.

Judge Walton: Have you found that to be effective in causing the judge to give a sentence that otherwise may not have been given?

David Markus: I have. I think this is a new era of sentencing, obviously. We're just scratching the surface of all the different lawyering that can happen. What I've seen is a lot of the old mentality on sentencing still exists. People still think, "Well, we're just going to go in and argue about sophisticated means, or minor role." There's whole new areas to argue and to explore. I do think there's room for some great lawyering there, but if a CJA asked for some funds to put something like that together, even the good judges here in this district, I don't think, would look upon that favorably.

Judge Walton: That's distressing.

David Markus: Yeah, I agree.

Reuben Cahn: Any of the other panel members want to follow up before we . . .

Chip Frensley: You mentioned the difference between the level of practice, with regard to sentencing in particular, for retained practice versus CJA work. Is money really the issue? Is it a structural issue, is it a training issue, or is it a combination of all three?

David Markus: I don't think it's a money issue for the lawyer, in other words. The lawyers are going to do the best they can, it's the resources available to the lawyer. Whether it's going through the discovery, whether it's getting an expert, paralegal, or investigator. Or, just the structure itself. Yes, money is absolutely an issue. Getting the resources is absolutely an issue to effective representation of clients. Again, I think this goes back, in a lot of

ways, to independence of Criminal Justice Act lawyers. We've heard this, and I'm repeating it, but the public defender doesn't need to go to a judge and ask for an investigator for lots of reasons, and we've heard some of them from Mr. Cahn. Neither does the U.S. Attorney's Office. Can you imagine the uproar if we told the government that they would have to go to a judge to get an extra agent to help go through discovery? The uproar! It would be squashed in a millisecond. Yet here we are, we have to beg for help to go through discovery. When you think about the disparity between the resources and just the ability to look at the documents in a case, it's incredible. It really is. Yes, money is absolutely an issue.

Rochelle Reback: If we had, which we do not, if we had a CJA administrator, like the South Carolina panelist earlier discussed, we could go to that person and we could make our case for what we need. In my district, because we have no one like that and no committee, what winds up happening is inexperienced lawyers, or even experienced lawyers who are unfamiliar with a particular judge, for example, wind up calling around, either to the CJA rep, or . . . twelve, fifteen years ago when the CJA model plan was first adopted and one of the magistrates did try to empanel a group of mentors, I was one of them. These are the people who would get called. These people, the mentors, the CJA rep, they don't get paid. They're being asked to volunteer to hold the hand of a new lawyer through an entire process. Whether it's case budgeting, whether it's what to put in a motion for resources, whether it's even whether to ask that particular judge, that takes a lot of time. We had an excellent CJA rep two times ago.

I canvassed the last three CJA reps in my division before coming here, in preparation for this testimony. The one that was most effective for the panel, who offered the most help, the most guidance, who acted as an intermediary when vouchers got cut between the aggrieved lawyer and the judge who cut them. That person resigned after about eighteen months, fourteen months in the position because he kept his time and recognized that it was taking approximately six hours a week of volunteer time to perform those functions because we don't have an intermediary. We don't have a CJA administrator. Somebody should be able to counsel, lawyers should feel free to ask for advice about how to case budget, how to make requests for resources. Nobody should have to do that for free, that should be a paid CJA administrator.

Reuben Cahn: Other members of the Committee, some questions you'd like to put?

Judge Prado: I was just going to ask a step further. I think I know the answer, but if you are retained, yay, you got some money, but it runs out, have any of you ever gone and said, "I need money for an expert. Even though I was retained, there isn't sufficient money there for an expert. I need additional

money, or I need to get appointed because the funds have run out?" Have you, or do you know of anyone who's had that situation, and what was the result of that request?

Rochelle Reback: In my district, that has happened. My understanding was that there was a hearing with the magistrate, an ex parte hearing. The lawyer had to disclose what they had been paid to-date, all their hours had to be disclosed. If they were above what they would've been paid as a CJA lawyer, then no further payment was forthcoming. That's for the fees. As far as the resources, I'm not aware of anybody asking for resources when the money has run out. I think people just feel like that would never be granted.

Amy Copeland: In my district, you're in for a penny, you're in for a pound. You got to quote it right, and you got to get paid up front because that's it.

Rochelle Reback: Yeah. We have a local rule that says when you are a retained lawyer, you are retained through appeal. That's it, in for a penny, in for a pound, through appeal.

Judge Prado: The other, have any of you had that experience in your district, or heard of it?

Mark Jones: I don't have anything to add.

Judge Cardone: I have two questions, one has to do with experts. The question is whether any of you know of yourselves, or know of anyone who has asked for an expert, and it's been denied, and it's been taken up on appeal. That's my first question, does anyone know of a situation where you, or anecdotally someone you know, asked for an expert, it was denied. The person felt strongly enough that they took it up on appeal, and then what was the result of the appeal? That's my first question. Anybody?

David Markus: I don't know anybody who took it up on appeal.

Rochelle Reback: I don't know anybody that took it up on appeal, either.

Amy Copeland: As an Assistant U.S. Attorney, I worked on the government side of somebody who lost the expert battle and raised it on the direct appeal after the conviction and sentencing in a death penalty case.

Judge Cardone: They took it up on appeal?

Amy Copeland: It was part of their direct appeal following the sentencing, yes.

Judge Cardone: What happened?

Amy Copeland: They lost.

Judge Cardone: They lost their request for an expert?

Amy Copeland: Yes. They found that the judge acted within his discretion in denying their expert request.

Prof. Kerr: Just wanted to understand, was the cause of action for that claim a Sixth Amendment cause? Or, was it a statutory claim?

Amy Copeland: I don't even remember, I think it was a statutory one. The reported decision is *United States v. Brown* from the Eleventh Circuit, 2003 or 2004.

Judge Cardone: For those of you who know of it being denied, do you know why it wasn't taken up on appeal, or why further action wouldn't be taken if it was denied and felt necessary?

Rochelle Reback: One was mine. I had a fraud case in the Middle District of Florida where there was also a concurrent SEC action in the Southern District of Florida. I asked for a lawyer admitted in the Southern District of Florida to basically shadow our case so that the client I had in the Middle District of Florida could be represented in the SEC action in New York because there were things that were really going to affect his defense in Florida. I thought he should have an attorney appointed there consistent with maintaining his defense here. I was denied because he wasn't entitled to an attorney in the civil case there. The reason I didn't take it up on appeal is simply because I found someone I knew in New York, a personal collegial relationship with an SEC lawyer up there who agreed to just advise informally. While he didn't agree to put in an appearance in the SEC case, he would at least monitor it and advise me. I figured that was the best I was going to get.

Judge Cardone: Did you have any comment on that question, Mr. Markus?

David Markus: I don't, your Honor. I'm sorry.

Judge Cardone: Okay. The next question, I don't know if any of you were here this morning. I mentioned that in the District of Puerto Rico, they have some standing orders regarding vouchers and the submission of vouchers. I'm going to read you two paragraphs from one of those standing orders, then I would like any of you who wish to comment, or would be willing to comment, to comment: "The court finds it unconscionable and

unacceptable for CJA counsel to invoice for that basic research and drafting. Counsel cannot seek compensation in case after case for researching what they already know, or should know, or for submitting in any motion or memorandum a generic recital of basic sentencing principles, many times previously prepared by another attorney. Accordingly, effective immediately, CJA counsel shall not invoice for any research or drafting concerning basic sentencing principles. That research and drafting will not be compensated." Any comment?

David Markus: I'll comment on that. I think the intent of that rule is you should just bill for the real time that you have. If you actually do research on "What are the latest cases on aberrant behavior in the First Circuit, after *Booker*?", I would think even under that rule, you could bill for that time. If you're just block-quoting from your last sentencing memo, that's not time that you're actually doing, it's just moving something over. I don't think that needed to be said, CJA lawyers aren't going to bill for ghost time, they're only going to bill for real time. If you're writing a new memo, you should be able to bill for that if it's the first time you're doing it. You shouldn't be able to bill for recycling an old memo, but you certainly should be able to bill for writing a new one. That would be my only critique of that rule, even if it's basic. If it's the first time you're doing it, you should be able to bill for it.

Rochelle Reback: I have something to add on that, I have two things to add. Number one, again, it goes back to this trust and respect between the lawyers and the judge. That if the judges know the lawyers and the quality of their work, and they're familiar with them, generally when they look at the voucher, they know whether innovative arguments, creative defenses, and what have you, have been made, they generally don't cut those vouchers. In my canvas of the CJA reps over the last few years, my understanding is that the vouchers that have been cut in my district are mostly vouchers of inexperienced federal criminal defense lawyers. People who don't know the lay of the land, for whom basic 3500 principles or basic boilerplate-type information is all new to them. It is new to them, it wouldn't be new to us. My district doesn't have a rule like that, but again, the CJA rep was asked to counsel them about that type of thing so that there wasn't over-billing. That's point number one.

Point number two, the other way my district addresses those kinds of issues is that there's a de facto pool, or cartel if you will, of lawyers who always get the same kind of cases. For example, we in the Middle District of Florida are the headquarters for Operation Panama Express. That means we have a constant flow of these maritime drug smuggling cases. They're all indigent, they're all not citizens, and they all speak Spanish. There's a cohort of lawyers in my district on the panel who specialize in that. They

are generally native Spanish speakers, and they just do a ton of boat cases. The judges and the magistrates know who they are, and they continue to get appointments on those type of cases because the court knows that they're not going to be billing for the same thing over and over again because there are so many elements of those cases that are the same. That's one way that they choose to deal with it. It also means that new lawyers can't get into that cohort, can't get into that cartel of lawyers who might provide just as good a defense. This little group is concentrated, the judges know them, and they're going to protect that fiefdom.

Reuben Cahn: Does it also mean you don't ever see creative motions work in those cases because the same people are doing the same thing again and again and again?

Rochelle Reback: You would think, but I don't believe that to be true. What happens is, if the cases are the same, the motions are the same. When the cases change, for example, when we went from freighters to semi-submersibles, all that semi-submersible litigation was out of Tampa. The guys were pretty creative with it. I wouldn't say that, but to the extent that the elements of those cases are the same, they're treated the same. They're just not that different. You might suppose that maybe new blood could provide a different way of looking at it, but again, because in my district, there's no process for who gets appointed to what case.

Reuben Cahn: That's maybe sharpening the point of my question. Might new blood get you some more creative work on the same type of cases?

Rochelle Reback: It might. Again, they're going to be appointed if they speak Spanish because we have to save money on interpreters. Only native Spanish . . . not only, mostly native Spanish speakers get appointed to those cases.

Chip Frensley: When Congress allocates money to a program like this, there are two important elements. One is the administration of the program. How are the funds going to be spent, and how are the services going to be delivered? Then there's the accountability component, or the oversight component. Now, we all know that that oversight or accountability, specifically as it relates to voucher review, is in the hands of the judges themselves. Question I want to pose to you is if you were the person who was deciding how that accountability or oversight function was going to happen, what would it look like? Would it be what it is right now? Would it be something different?

David Markus: Emperor Frensley, I think, would be in charge of reviewing the vouchers.

Mark Jones: I think I would like to see it in a federal defender's office with a panel administrator or someone who has experience as a defense attorney, and who understand the challenges and the culture of that district. I think that's the best place for it because they're in a position recognize that there are differences between clients. You'd want somebody that had experience representing an array of defendants so they knew the challenges that defense attorneys meet. I think the difficulty of some judges that have never had criminal experience or had to deal with a criminal client, it's hard for them to understand. It was hard for me when I went from being a prosecutor to a defense attorney, just to understand what's involved with representing individuals. I think other people on different panels have said you'll go meet with a client who you'll spend hours explaining the law and the plea. You feel like you've made real headway, only to get a letter two days later that they don't understand anything and you're trying to trick them.

I don't think the court understands that, and I don't think people that haven't practiced defense work understand those challenges. Either that, or intense counseling and training of the judges could work if it stayed with the judiciary, but I think someone that's done similar work is probably in the best position to do it. I think one of the issues that we have with the judiciary does it is something that Judge Cogburn said the other day. He said that, "Whoever does it needs to be a good steward of the taxpayer's money." I think that's correct, and there needs to be oversight. Judge Walton, you were talking about the difference between retained practice and CJA practice. An example came to mind, and I think this may answer the question.

If you say to a retained client, "I want to hire this expert and do a psych evaluation and it's going to cost about $5,500, and I think it's going to help me maybe, in your case, more effectively argue for a low-end of the Guideline sentence." The client's going to say, "That might save me two years, absolutely. Here's $5,000," if they have it. In a CJA case, if you were to submit that to a judge to say, "I want $5,000, and this may help me get the low-end versus the middle-end, or the low-end versus the high-end", I don't think the court is going to see that, in most cases, as a good use to taxpayer money. For that reason, I think getting it out of the judicial branch may be helpful.

Rochelle Reback: It has to be somebody who doesn't handle cases in the courthouse. Years ago, the Administrative Office called me because I did all these big white collar, complex cases, and asked me if I would take on the task in my district of being a consultant to the panel for attorneys who wanted extraordinary case resources and make recommendations to the court as to whether their requests were reasonable. I said, "You mean like a full-time

job?" "Well, I don't know. We haven't really decided that, whether it's going to be a job, or whether you could do it as on a CJA rate on an hourly basis." I said, "I'm not going to take a full-time job and give up my private practice." As for doing it on an hourly basis on a CJA rate, that's not going to happen. I'm not going to go to judges and make the case, and be fighting with judges on behalf of this lawyer's request. I don't even want to do it for myself. As far as I know, that whole idea was dropped because they couldn't get anybody to take that role on who still practiced in front of those judges. Who would want to do that? "I'll go, I'll be on the firing line. David, just stay home and I'll make the case for you." Nobody would want to do that, that's crazy. I would just like to . . .

Katherian Roe: Can I just follow-up on that? I know you're saying nobody would want to do that, I assume you're not saying it because you wouldn't want to engage in the fight, because I assume that's who you are.

Rochelle Reback: No. Do I look like I wouldn't want to engage in a fight?

Katherian Roe: That was my assumption. To follow through, the reason you wouldn't want to do that is because you would believe that there would be repercussions to your own practice.

Rochelle Reback: Exactly. To my practice, for my private clients, to the potential to ever getting appointed another one of these good CJA cases that was the reason they were calling me in the first place. All of those things. I would just like to very quickly recommend the land of unicorns and ice cream doesn't make you fat. The upstate South Carolina lawyer recommended her district. If we had that, life would be peachy keen in the Middle District of Florida. We have nothing, so that system sounds like paradise to me.

Chip Frensley: If the Mark Jones model were to be adopted as the standard, where you had this administrator who was knowledgeable in criminal defense function who was within the defender's office, but had the separation and answered your concern, Miss Reback, in terms of potential conflict and what not, what, if any, role would you all see to be appropriate for judges in that system? Certainly, that would be a way to answer the question of how to deliver the services and how to have accountability for the services. As far as in that system, would there still be any role for a judge, and what would you perceive it to be?

David Markus: I think this is going to sound crazy, but there should be no role for judges in this. It should be the same as the U.S. Attorney's Office. The judges don't oversee whether they hire an expert, whether they bring an extra agent onto a case, whether they do any of those things. For some reason, it's ingrained in us that for the defense side, there needs to be some judge

overlooking the defense lawyer to make sure that the defense lawyer doesn't overspend the taxpayer money. It's the same taxpayer money on the government side, and nobody's overlooking them. The judges aren't on them saying, "You know, you probably don't need that third paralegal carrying a box into the courthouse. You could probably carry that box yourself, Prosecutor." There's none of that going on. We all carry our own boxes, we're going to keep carrying our own boxes. If it's left up to us and the public defender, we're not going to bring on an investigator to carry the boxes and waste the taxpayer money. Even though it's deeply ingrained in us that judges need to look over and babysit us, we've grown up. We don't need that anymore.

Judge Walton: Mr. Markus, I agree with what you're saying. I have enough to do on my docket where I wouldn't mind giving up this responsibility. I think, unfortunately, that may not be a political reality. If it's not a political reality, what's the best next alternative?

David Markus: That's a good question.

Rochelle Reback: Maybe an administrator at the circuit level, and just bypass the district court, the judges who are going to hear the case. Or, maybe a financial limit. If you go above $5000 above the cap, then you need pre-circuit approval, something like that.

Judge Cardone: Can I ask a question about circuit? That's one of the questions we have. How do you feel it is that a circuit judge, who has nothing to do with your case, is going to have any sense of what amounts of money you should be spending? I'll give you an example. I'm a border court, the realities on the border are so different than other places. What makes a circuit judge have any sense of that?

Rochelle Reback: Right. I'm just trying to think of a way to take it away from the district court judges who are going to hear the case. I just really don't think that's appropriate.

Mark Jones: I think that there is a role for the court to play, and I think it's at the front end in the composition of the CJA panel for that district. It goes back to trust. The think the court's involvement in putting together a panel of attorneys that it trusts and annually, or every couple years, reviewing that panel to make sure that that panel still has the trust and the confidence of the court, is where the court can play a role. It seems like in all other aspects, if you don't like the decision, there's some bureaucracy that goes up. Here, it goes straight to the court. I don't know if maybe there's some function that can be created within the Administrative Office that's not a judge. Someone who's dedicated to review CJA work. Just like the

districts have someone who's done defense work, maybe we have somebody at the national level. If you don't like what the district Federal Defender's Office has done to your voucher, there's something that's created where you can appeal that. I think there are mechanisms that can be created that don't send us to the Article III judges.

David Markus: I've agreed with every single thing Mr. Jones has said, except for involving the judges in the composition of the panel. Again, we don't ask the public defender's office to get approval from the judges before they hire a lawyer. We don't ask the U.S. Attorney's Office to go to judges before they hire a lawyer. We shouldn't ask the panel to seek approval of the judges before they bring on a lawyer. Again, we want to be liked by these judges, so we want to make sure that they're involved in our process. I don't think the judges really want to be involved in the process, like Judge Walton says.

Reuben Cahn: David, don't you think the judges can provide . . . I'm not talking about select or not select, because I think that gives the same problem. Don't you think judges can provide meaningful input on the quality of lawyering?

Rochelle Reback: I do, yes.

David Markus: That, yes. That, for sure.

Rochelle Reback: That's why I think we should have a committee, judges among them, a committee that reviews applications for lawyers who want to serve on the panel. Perhaps that same committee could allocate the lawyers among different tiers of professional practice as CJA lawyers. You might start out being general felony lawyer. If you choose, if it's part of your professional goals, you could progress up to complex case representation. If you want to work part-time, or you want to work from home or whatever and you want a more limited practice, maybe you choose to just do habeas or appeals. This committee, of which judges could and should be a part, would be the way to create and maintain, and review the panel regularly. Not just judges, there should be respected panel lawyers on the committee, just no prosecutors. Maybe representative of the public defender's office, people who are in court all the time and see the work that the lawyers do.

Prof. Kerr: Just so I understand, would the committee you have in mind play a role in granting or disapproving requests for say, experts for example. Or, is it so . . .

Rochelle Reback: Not if we had the South Carolina model, but maybe it could carry out the review function of those decisions by a CJA administrator.

Prof. Kerr: It does seem like, and David this is largely a response to you, that core difference between an individual CJA lawyer, and say, a public defender's office or a prosecutor's office is in those larger offices, there's some structure where someone's saying, "Here is the caseload, here are the resources we have." Then they set some baseline assumption of, "Here's when you can go to an expert, here's how much time you can spend on the case, given the resources more broadly." Whereas, with an individual who does not have that structure, they don't have any such natural limit. If you told people, hypothetically, spend as many hours as you want, or hire an expert whenever you want, it's hard to know what the natural limits would be of that.

David Markus: Orin, I am not advocating that lawyers should be able to do whatever they want. I just think the structure should be instead of asking judges, I think we should be discussing it with the public defender. There would be a public defender review of experts, or investigators, or vouchers, as opposed to judge's review. I want to be clear, I don't think it should just be limitless. That would create other problems.

Rochelle Reback: But not the public defender, you mean the Chinese wall public defender employee.

David Markus: The public defender, an ideal word that employee, but yeah. I think this conflict idea is overstated. I don't think a public defender's going to say they shouldn't have that investigator because of some codefendant issue. I don't see the conflict issue coming up all that often. When it does, we can address it like we do anything else. I know there's been a lot of talk about conflict with the public defender running it, and maybe I'm just not seeing it. I just don't see this huge danger in having a public defender's office administering the CJA panel.

Rochelle Reback: I think that the potential for conflict exists in multi-defendant cases with conflicting defenses, or where the prosecutor basically says, "You're all on the bus, or you're all off the bus." Those kinds of deals are on the table. I think that there is a great potential for conflict. I'm comfortable with the South Carolina model where it's a public defender employee, because likely as not, they're experienced with criminal defense, but they are Chinese walled off from the cases that the Public Defender's Office handles. I think that would be conflict-free, it would be administered easily, it would be efficient. Perhaps if we need a review, other than the circuit, because I agree with you Judge Cardone, the circuit doesn't make sense. If we need a review of that person's determinations, then maybe it should be that committee where it's judges, public defenders or their representatives, and experienced panel attorneys. Maybe that's the key to review.

Reuben Cahn: Does that person need to be someone in your district, that individual panel administrator? I'm saying because frankly, there's not a lawyer in my office who would take this job for love or money. It's got to be somebody who's decided that they're done practicing, which means it has to be an employee in their busy districts where we'll four of those people, or eight of those people. There are other districts where we need half of a person. Could it be someone outside the district performing that role?

Rochelle Reback: Again, to the extent that the judges have to sign those orders, and the person doesn't know the judges, what they're like, how they like to have things presented, and what they're likely to do, I don't know. It would be best if it was someone from the district, but someone is better than no one.

Reuben Cahn: Yes?

Mark Jones: I don't think it's necessary to have somebody from the district. I'd be nice if there was someone that was close enough to know a little bit about the district, but North Carolina, for example, has three different federal districts. I think one person could oversee all three districts because they'd have enough time to understand the different cultures of different districts.

James Ayers: It's still going to be a government employee, so you're still always going to have a partiality question. It's always going to be looming there, there's no way to get rid of that.

Reuben Cahn: Well, you've got government money being spent, so someone in the government's going to oversee that. The question is what is their bent. I'll give you an example, when a lawyer comes to me and wants money for a case, my question isn't, "Do you absolutely need this?" My question is, "Is this likely to be beneficial to the case? How is it likely to be beneficial to the case? Have you considered the particular judge involved? Have you considered whether this expert is really the best expert? Maybe you ought to look at this other expert." Then finally, down the line, "Did you ask him if he'd cut $25 an hour for his fee? Well, if you asked him $25 already, maybe you can go get $50 from him off of his fee." That's the last set of questions. It's a question of the orientation of the individual making those decisions more than it is just, "Is there any oversight?" My lawyers have oversight.

Dr. Rucker: Reuben, if I may follow up on that. There's two or three other models, they've been used a little bit in the federal courts, not a lot. Judge Gleeson referred to one this morning that he and I have been working with, and that's a circuit case budgeting or case managing attorney. My guess is that none of you have worked with any of them?

Rochelle Reback: I have.

Dr. Rucker: Oh, you have? Okay. I'd like to hear your comments about that. Another is a district focus, and it's a CJA supervising attorney. All these are people who have had criminal experience before, but are not working in the defender office. Then we have a model in the Ninth Circuit which is unique in the nation, and it's an appellate attorney who reviews CJA vouchers at the court of appeals. Those are people who would not be in the defender office who would not necessarily have the issues of conflict, but I would, particularly Miss Reback, if you'd comment. If any of the others of you would like to comment about that, or ask questions, I'd be very interested in what your thoughts are.

Rochelle Reback: My first experience with that type of a person was years ago when we started to get the kind of discovery that now is just commonplace, which is a ton of material given to us in digital form. None of us were prepared to deal with that. We couldn't even, as panel attorneys, go out to Staples and buy a hard drive. The government wouldn't give us our discovery unless we supplied the hard drive. We had to file a motion to buy the hard drive, or to be reimbursed for the hard drive so that we could give it to the government so they could load it up with material then give it back to us. At that point, they did, somebody earlier was talking about this antiquated program that they had that they used that was proprietary to their office. We didn't have it, we couldn't run it. It was just a giant mess. I was referred to somebody from the defender services office who was in Colorado who was supposed to be a tech specialist.

It was a disaster, frankly. It was just a disaster. We were so far behind, and he was so far ahead. The things that he was telling me that we had to have, nobody in the district had, nobody was going to grant. It was cumbersome, it was inefficient, and it took months. That was the other thing, it took months for me to get a hard drive. It became a joke, it became a joke. That was experience number one. Experience number two with case budgeting was a little different. It was, as I said earlier, I did these big complex cases, I pretty much didn't do any other kind of CJA cases. When I got called by the AO to be a case budgeting advisor, and I rejected it, I declined politely, respectfully, "What?!"

At that point, I just became an informal case budgeting advisor for my panel. People would call me up and they would want to spend all this time. Quite frankly, it became very expensive, in terms of my time, to do that. We did not have, during my practice, an actual case budgeting attorney in my district. If you needed help with case budgeting, you would have to call the defender services office for help. There were people there would who help you, but none of the new CJA lawyers knew that. They didn't

know they could call AO for help with case budgeting, for help with sentencing issues, for help with anything. They didn't know that.

Reuben Cahn: I think the Eleventh doesn't yet have a circuit budgeting attorney, but the Fourth does have one in place. I'm sorry. The Eleventh doesn't yet have a circuit budgeting attorney, but the Fourth does have one in place. Have any of those of you in the Fourth Circuit used the services of the circuit budgeting attorney?

James Ayers: I have.

Reuben Cahn: Can you tell us a little about the experience? Was it positive? How did it work?

James Ayers: That case I had called the budgeting attorney about, it wasn't supposed to be a big case that required a budget, based on what I knew about it, but I had a feeling it was going to run over the statutory cap. Because he was newly appointed, he hasn't been in there very long, I knew he was going to be reviewing the voucher later on, I just called him up and said, "What in the world do you need me to do in order to get this fee or voucher approved at a later date?" He and I just talked about it for a while and said, "Put more detail in your time sheets, and your bills, and things of that nature so the judge just has more information. Which, I'm sure he's talking to the judges, so it made perfect sense.

I did not have to do a budget in that, it was more along the lines of, "What do we need to do to try to make sure everybody's happy down the road in this case?" I sent a letter to the judge saying I don't think this is going to be over. I talked to the attorney up here, and if it gets out of control, we'll have to do a budget if it's for trial or something. I did use a budgeting attorney out of another circuit in the terrorism case that I did, which was a large case with a lot of money, a lot of paralegal work. I can't remember the individual's name, but I'd never done a budget. He walked me through that process, and we were able to get that approved. It was timely paid, I think monthly, if not mistaken, over the period of maybe two years.

Reuben Cahn: What circuit was that?

James Ayers: The circuit where the budgeting attorney was?

Reuben Cahn: Yeah.

James Ayers: We didn't have one at that point, so I made use of one of the . . .

Reuben Cahn: Second Circuit New York?

James Ayers: I don't want to say New York.

Chip Frensley: Jerry Tritz?

James Ayers: I don't remember. It's been a while, but it was a wonderful service because they had been doing it and we had not. I had no experience. The difficulty is you don't know what you're going to do in the case, and you're wholly dependent on someone telling you, "This is what we're going to give you when you're doing a budget as well." You're dependent on the U.S. Attorney's Office getting this case organized and telling you, "This is what you're going to have to deal with" because you're kind of flying in the dark. You don't want to have to amend it over and over and over again. I thought it was a good service or process, to be honest.

Reuben Cahn: Judge Cardone?

Judge Cardone: I have a question about mega cases. How many of you have done a mega case? I think you've indicated with your terrorism case. Then about the budgeting process where you've actually had to submit that kind of a budget, gotten your judge to approve it, it's gone up to the circuit and it's been cut. Or, are they generally approved? What's the status of interim vouchers for you on those kinds of cases? Do your judges generally grant interim vouchers? I'd really like to hear from each of you, because you each come from a different area, as to that process.

James Ayers: Mine were approved and paid on an interim basis every four to six weeks, give or take a few. The judge was trying the case, as well as reviewing vouchers and trying to get through all that process at one time. It worked well. It took some effort on everybody's part because it's not something you do every day.

Mark Jones: I'm not familiar, and I might be mistaken, but if any cases that have been designated as "mega cases" in the Middle District. I know in the Western District of North Carolina, we're just now starting to get online. There's been new guidance about trying to reach out to the court early if it's going to be a case that's likely to be protracted or a high-doc case. I know that there are other CJA attorneys that have requested and have received interim vouchers, but I don't know that I have enough data to accurately report it from the west.

David Markus: By and large in this district, the judges are good about the mega cases and helping us with interim payments. There are some that don't like to do it, but by and large, they do. The budgets have mostly been approved because what happens is the lawyers get together and speak to lawyers who have done it before, before that judge and figure out the best way to work it.

The judges are very helpful. I know that time is running out, so I just want to say one last thing. Representing poor people is very, very hard, and it's a burden on the lawyers who do it. From going to the jail and waiting to get in, and dealing with the discovery, the prosecutors, and the judges.

I know Judge Walton's question was right on, which is how can we do this in a way that can get by the political barricades? It's very difficult, and you guys are in a very hard position on how to put together a report that has some political viability. I think at the end of the day, all of us just want it to be a little easier. We just want it to be a little easier so we don't have to beg so much, so there's not so many hurdles in just providing basic representation to our clients. I don't know how to politically put that together in the best way, Judge. That's what you guys are being paid the big bucks to do. I think what all of us just want is it to be a little easier. That's all.

Rochelle Reback: I only did mega cases for the last eight years of my practice, so I can speak to this. Again, it's about the trust and respect between the judges and the lawyers, or the lack of it. I believe I hold the record in my district, in my division anyway, for the longest pretrial continuances, and the most interim payments ever. I did these mega cases, one of which, for example, was an international insurance fraud case that the government had investigated for twelve years involving three different law enforcement agencies in three different districts. At one point, in fact, there were two stings going on where one agency in one district had a sting going on where they were selling fraudulent insurance and looking for the buyers, and the other was buying what they thought was fraudulent insurance and they were investigating each other for a period of eighteen months. That's how ridiculously complicated and silly this case was. But, it was complicated.

The judge who had it knew me, knew enough about the case because there were all kinds of MLATs, "Letters Rogatory," and what have you that had come before him pre-indictment. He knew enough about the case to know that it really was this crazy, complex case. He approved all the interim vouchers, he approved my budget. He approved my need to hire an attorney/investigator in Costa Rica, to hire a notary in St. Thomas. It was a phenomenally expensive case, and he approved it because he understood that it was necessary to the defense. On the other hand, I had another ridiculously mega case in front of a different judge that was also international that was also a crazy multi-district kind of case. I represented a lawyer from Texas who was charged with fraud. In that case, I worked on that case with that original judge, the same one from the crazy insurance fraud case. I worked on this other case, the lawyer case, for three years.

That judge approved all my vouchers, approved interim payments, approved experts, et cetera, et cetera. Then, the government decided to sever my defendant from the rest of the case. It got reassigned to a different judge for trial. We were three weeks away from trial, and that judge took another look at the pretrial services report and noticed that my client had, I don't know, $85,000 in an IRA. Decided that she was no longer indigent, three weeks from trial, and basically fired me as a CJA lawyer, despite three years of preparation. Then said, "Go get the $85,000 from your client if you are going to try to case." I said, "I can't put my client in that position. You're basically coercing her to hire me and spend her $85,000 on me. That's inappropriate, I think it's unethical." That's what he did. I didn't pursue the case after that. That judge was just not going to grant any further vouchers, any further resources, or anything. She wound up hiring another lawyer, case got continued for six months, and it went to trial.

Amy Copeland: We're not a hot bed of mega case litigation involving indigent defendants, I can't recall one.

Reuben Cahn: I think we're out of time, we need to wrap up. It's been very helpful, thank you all for your time. Really appreciate it.

Male: Thank you.

Male: Thank you.

Female: Thank you.

Reuben Cahn: We'll take a ten minute break.