

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 2—Miami, Florida

January 11-12, 2016

Transcript: Panel 6—Views from a Mixed Panel

Reuben Cahn: Tell me when you're ready. Welcome to the final panel of our second day of public hearings in Miami. This is the second set of hearings by the ad hoc Committee to review the Criminal Justice Act, chaired by Judge Cardone. I'm Reuben Cahn the defender from San Diego; I'm chairing this particular panel and this particular day of meetings. We're very glad to have you here to offer us information and to help us in this rather difficult task. It's a great group that we've got here. I'd note that you may think it's a little bit odd we've got five panel lawyers, criminal defense attorneys. And a former Chief Judge of this district, current member of the Executive Committee of the Judicial Conference. I know that Judge Moreno is actually a former public defender and criminal defense attorney in private practice after that, so it's actually a perfect fit.

Judge Moreno: Okay, it's my courtroom, I feel weird.

Reuben Cahn: It is your courtroom.

Judge Moreno: This is what it looks like.

Reuben Cahn: It is your courtroom as well. I forgot about that, that we're sitting in your courtroom.

Judge Moreno: I haven't. I have a case in the twelfth floor.

Reuben Cahn: We thank you for the use of it. It's been very helpful. So, with that I don't want to waste the time of this panel. I want to get right to you and we will start with opening statements. I'll start at the outside and move into the center with Judge Moreno having the last word. Why don't we start with you, Mr. Schaffnit?

Gilbert Schaffnit: Starting my phone as well. Good afternoon, my name is Gilbert Schaffnit. I am the Defender Services Advisory Group representative to the Eleventh Circuit Court of Appeals. I'm in my second term, and since 1995 in the beginning I have been the northern district of Florida panel representative. I'm also currently serving as an advisor, as a committee member to the national model plan revision committee. So, if you have any questions concerning the national model plan that's under revision, hopefully I can address those. I have done written submissions as well. Just to give you an idea, of course you all know where the Eleventh Circuit is. It includes Florida, Georgia, and Alabama, home of the Scottsboro Boys, and to be fair, the current national champions, the Crimson Tide.

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The Northern District of Florida for those of you not familiar with Florida, if you drive on the turnpike north for five hours you will come to the base of the Northern District which is Gainesville home of the fighting gators and the University of Florida. That is one of the divisions driving north and west you go to Tallahassee which is our state capital. I'm told Tallahassee also has a university and I'm told they also have a football team. From there you drive another two and a half hours west on I-10 and you will go to Panama City. The other division affectionately referred to as the Redneck Riviera. From there you drive again on I-10 ultimately to get to Mr. Cahn's place in San Diego, I think. Ultimately you get to Pensacola which is primarily a military base, and the cases kind of reflect the division. You got a lot of drug cases, a lot of cases involving sex trafficking. You got a lot of cases involving fraud particularly in the Pensacola division. I've been representing that district since 1996.

Let me just say this, in 1962 in the summer I was a ten year old boy living in Connecticut. My parents decided that we were going to move to Florida, a place called Deland, Florida. Back when ten-year-old boys were allowed to go to movie theaters by themselves I went to a movie theater on a hot summer day. Segregated theater, I might add and saw a movie that forever changed my life called TO KILL A MOCKINGBIRD.

There are three things that even as a ten-year-old I took from that movie. The first was, that when Judge Taylor came to Atticus Finch's porch he said to Atticus, "Atticus I need your help in representing Tom Robinson. A black man accused of raping a white woman." Years later I would think to myself, was Atticus on the panel list? How did Judge Taylor pick him out? I suspect he's the only judge and Atticus was the only lawyer. Atticus, as you remember was known for doing civil work. He was doing civil work in exchange for chickens and hogs. He took on that representation not having done criminal work and did as you saw an amazing job.

The second thing I took from that movie back then and particularly now, was when he got his butt handed to him by the all-male jury and he was getting ready to leave Pastor Sykes turned to Jem and to Scout and said, "Rise, your father is passing." And even as a ten-year-old I thought to myself as they're standing in that segregated courtroom, what a wonderful thing to be respected like that. To have the respect of your peers.

Then the third thing that I took from that movie was after Tom Robinson had supposedly escaped. Atticus had the difficult job of going to Tom Robinson's family and informing them that he had been shot dead.

I'm sure he would not get windshield time for that voucher to go to inform them of the death. Jem and Scout were talking to Ms. Atkinson and she

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said to them something that always stuck with me. Because they asked, “Why is my dad doing this?” What she said was, “Jem there are some people that are put on the earth to do things that are difficult, your father is one of those people.” Those are three things that stuck with me from that movie. That movie was filmed or Gregory Peck went to Monroeville, Alabama place that I ended up going and visiting. The courthouse is still there. A year later, Gideon wrote his famous writ to the United States Supreme Court. Gideon accused of robbing and burglarizing a pool hall in Panama City Florida, in my district in 1963. Along the way, that was my inspiration.

I became a panel lawyer in 1984, and became the first panel rep in 1998. I just wanted to say this, when I first got the panel list as Joel Osment said, there were a lot of dead people, “I see dead people.” Our list literally included dead people on the list. We revised the list. I think we have an outstanding system right now to pick panel lawyers. We have an outstanding set of judges. You won’t hear a lot of complaints from me and my district. I do have some things that I want to bring to your attention. One that is particularly disturbing in my district and I suspect in other districts. That is the aging out of the panel. Everyone on my panel is my age or older. They’re retiring, they’re all white, they’re all male. And I fear for the future of the panel despite all my best efforts in getting younger people and a more diverse panel. So, I’ll be glad to discuss that at a later time, thank you.

Reuben Cahn: I go to the opposite end, to you Mr. Beauvais.

Steve Beauvais: Thank you, Sir. I’m Steve Beauvais I’m an attorney and private practice in Savannah Georgia which is the Southern District of Georgia. I serve a federal court on the advisory committee. I serve as the district representative to the CJA panel. I also serve as the CJA resource counsel. I’ll be happy to explain that a little when we get to the question and answer period. When I heard Ms. Salvini describe her relationship with her public defender, her panel administrator, I was struck by the fact that most of the upstate South Carolina is separated from my district by a river, the Savannah River. She might as well as have been describing an alternate universe as I had no idea what she was talking about. Every year I go to the national panel and I talk to new people there and tell them that I don’t have a federal public defender. And I have a CJA that’s comprised of 3,000 lawyers. If you can practice in our district, you’re subject to appointment. That’s what kind of backwater place it is. Difficult place because it’s been home to me for twenty-three years.

In my written comments I focused on two time periods, pre-2011 and post 2011. The reason for that was simple and perhaps delusional, but I am hopeful that we are seeing some movement in our district, glacially slow

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and probably will remain that way. I'm hoping that my comments here will maybe prod some change.

In April 2011 the court sent out a questionnaire and allowed people to either opt in or opt out of being appointed under the CJA Act. That was a huge change in our district. Because some of the prior administration I'll say, absolutely was not open to that suggestion. About 200 lawyers opted in and said that they were willing to accept appointments on CJA cases. That's probably grown to maybe about 225. While an improvement it is minimal and incremental and there is a lot of work still to be done.

Representation in our district falls to those lucky enough to maybe get somebody competent. There's far too few accepting those cases. Although these attorneys expressed the desire to be appointed, there's been no steps to ensure that they have any competence. We have no admission, other calling up and saying, "Hey, put me on the panel." There's no review as to whether or not you stay on the panel or whether you're competent. There's just no criteria. Attorneys are appointed because they get called up by the court's or magistrate's judges, docketing clerk 90% of the time.

Many of the people on the list when I review it are simply lawyers from larger or mid-sized firms, they're new associates. They've been practicing for six months to a year or two years. For many reasons, those firms want those lawyers to be taking these cases. I don't think any of those reasons have anything to do with actually representing a criminal defendant. I don't think you should cut your teeth representing a criminal defendant. It's not the place.

When I started in the Marine Corps many years ago, you were not allowed to be a criminal defense lawyer in the Marine Corps, which is not the most progressive organizations, until you've been a trial counsel for at least a year. You weren't going to learn the basics representing somebody accused of a crime. That change also came during a period of an economic downturn in this country. Many lawyers I've spoken to agreed to be on the panel because when you got out in our rural areas, \$129 an hour ain't bad, because you're probably not getting it from privately retained clients out there.

They're on the panel, they want to be on the panel. The majority of this panel, these 200 lawyers now that are supposed to get the appointments have no intention of practicing criminal law. They aren't criminal law specialists by any means. I believe you have to be, to be effective. To be a criminal law specialist and know what you're doing, and you have to have enough cases a year to remain competent and current.

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My last comment will be the absolute need in my district for a federal public defender and a Federal Public Defender Office to counterbalance an extremely professional United States Attorney's Office, that has twenty-eight lawyers, seventeen of whom do nothing but criminal defense work. Most of them career prosecutors. They're practicing against six-month, one-year, two-year, junior attorneys and associates. We need a Federal Public Defender's Office and United States Attorney's in Southern District.

Reuben Cahn: Mr. Beauvais can you just pull that mic a little bit over in front of you.

Steve Beauvais: Yes, Sir. In preparing for this one of the things I did do, I wanted to get a realistic idea, would an office be viable? Because the cases I hear about are usually these huge multi defendant ones. Federal public defender is only going to be able to represent one person. I had clerk's office break down for me what the breakout was. We average about 600 indictments a year over the last five years in the district. Of those 600, 45 on average a year were multi defendant cases. That leaves somewhere in the neighborhood of 550 individual defendants that probably could have been represented by a Federal Public Defender Office. The vast majority of those individuals would have received far better service with a dedicated Federal Public Defender Office. Thank you for the opportunity to address the panel.

Reuben Cahn: Thank you. Mr. McCann.

David McCann: Good afternoon, Judge Cardone, thank you for your invitation to appear today. I've sat in on yesterday's proceedings and most of today's. The discussions have been very enlightening. I've been at this a long time. And every time I come to one of these regional meetings and national meeting I'm somewhat surprised by the differences throughout the country in how things are done. I hope the work of this Committee and its reasons for these hearings will maybe improve some districts and educate others. My epiphany in this kind of work was not like going to the movies in Florida at ten. But, out of law school looking for work I got a job in the South Carolina Department of Corrections as an ombudsman. Which meant I went behind the walls. The walls and the big houses they call that in Columbia.

It was clear to me very soon that there are two different kinds of justice in this country. The type you pay for and the type where you don't have the money, and you take what you get for a lawyer. That hit me hard. Most of the people I dealt with in the Department of Corrections, this could have been in 1973, many of them were there way before appointing counsel was mandatory, had clearly been given the short end of the stick. So, from there on until today, I've been in the criminal law practice field. The

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District of South Carolina encompasses the whole state. We have four separate divisions, as Mrs. Salvini told you today, she's co-rep in the Northern part of the state and we have two other co-reps throughout.

We have about 225 lawyers on the panel complete. Basically four separate panels that handle the matters in Charleston, Columbia, Spartanburg, and Florence. Most of my practice, almost 95% of federal district court has been in Charleston where I had the closer management of the panels there. We do have a CJA committee that the speaker down to the left on the last panel talked about it. We need it in Tampa where we screen applications, take care of other administrative problems. Where they be disciplinary problems with a member of the panel.

We haven't appointed anybody to the panel in over a year. The cases have been down and I think that's true throughout the court system. We have a pretty good system, it works pretty well. Most of the time there be some instances of cutting as was reflected in the NACDL report. I think was presented to the Committee last December. I believe it was in New Orleans about a serious cut of a voucher at the Fourth Circuit level. I'd be happy to address that if that question comes up. Again, thank you for allowing me to be here to answer any questions the panel may have.

Reuben Cahn: Thank you. Mrs. Brill.

Rachel Brill: Thank you. I am Rachel Brill I practice in the District of Puerto Rico and for the First Circuit. I very much appreciate the opportunity to testify, address this Committee today. In my written testimony I presented three different areas of concern and I hope today to make each of those areas a little more concrete for the Committee. But, given Mr. Cahn's admonition, I'll shorten even what I was intending to present, just give a few concrete examples for each of those areas and why I think it's important ultimately to have—as so many people have testified before this Committee— independent review of panel selection, panel appointment, and panel voucher review.

The first area that I mentioned in my own written testimony was and I'm paraphrasing here, and using adjectives I didn't use in the written testimony, "unfair, petty, demoralizing, debilitating voucher review that we have in our district." And, I'll skip the example that I was going to give from my own experience. That particular example was from a particular judge, it doesn't happen with every single judge. On the whole and in the clerk's office in our district, and particularly the clerk's office, but several judges as well, view every single voucher, every single presentation from defense attorneys with disdain, not with respect. They treat lawyers like mercenaries not professionals.

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This is a conclusion that I've come to after many years and many experiences and a lot of thought and a lot of even heartbreak. The concrete example that I wanted to present involves a dear colleague and panel member who passed away suddenly in 2014. He was quite a character and he was quite a presence. He was quite irreverent, so I don't think he'd mind if I characterize this portion I'm about to say as the case of the reductions to the dead man's voucher.

This attorney got sick in 2010. He received treatment for a couple of years. We all thought that he'd gotten better and he passed away as I said suddenly in 2014. A few of us, got together to help his stunned and desperate widow. And we learned in the course of all that he hadn't filed a voucher since he got sick since 2010. There was times he had absented himself, he wasn't taking cases. There were forty-one outstanding vouchers, some were very small but some were somewhat substantial. We took it upon ourselves to try to collect whatever evidence we could and file the vouchers on his behalf. As I said, some were small, some were more substantial, all were very meaningful to his widow.

I'll pass over how difficult it was to get the authorization for any of us to file on her behalf. How time consuming it was to get approval for interim vouchers in this particular case. There was one voucher; it totaled less than \$2000, it was for a complete case from start to finish. All we could piece together from the documents that we got from the court docket sheet was an amount that was somewhere between \$1800 and \$2000. The attorney got an email and I got copied on the email, trying to be irreverent and morbid. What I was told and this was for a total of .3 hours, was that the time invoiced for reviewing docket documents was adjusted as to reasonableness, and or grouped with other entries to reflect the complexity, and the length of the documents reviewed. Then if I wanted to challenge this recommendation I had four days I could write back. I wondered where I could go to challenge all of this and say, "Yes the time had been spent." Anything that was placed on the voucher, there was some document to support, there was some piece of paper, there was something in the files that his family could piece together. And I objected. I wrote all that down and I got a call from the district judge. And the district judge said that this clerk's office was recommending this reduction and it only amounted to \$37 and \$0.80 cents and what did I think? I said again, everything that we filed, there was a piece of paper, there was some kind of support. And the court reinstated that time, and the bad taste from that episode hasn't gone away.

On the one hand, I spent most of my professional time as a lawyer, as a defense attorney speaking up for people who for one reason or another can't speak for themselves. Of course that episode was no exception. It left an indelible impression of the lack of regard, the disdain that I've spoken

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about for what criminal defense lawyers do. I give it as, a hopefully slightly memorable, concrete example of what we face every day to smaller and larger degrees. The situation with experts and third party service providers in our district is even worse. It's very cumbersome for CJA attorneys to request experts and third party service providers. It's even more cumbersome for those experts to eventually get paid. It's something that's just draining and difficult.

There came a point where I made a proposal. I said, "Well can we try to streamline this process in some way? Can they file paper vouchers the way they used to?" Because things are done electronically now in our district, "no everything has to be electronic." Well can we streamline it that way? Can we just make it completely electronic? Take it off of the docket, the U.S. Attorney's Office never has to see that we ask for an expert? It doesn't become a matter of litigation, instead of ten steps it's six steps. And I had consulted with some people in the Defender Services Office and I made a proposal, that was designed simply to streamline the process not to take anything out of anybody's eyes. Instead of a response that said, "This is what it would take to change our workflow, to streamline your process," we got a ninety-page PowerPoint presentation of, honestly I couldn't summarize it, just that it would be too difficult for the clerk's office to not keep on doing things the way that things are continued to be done. And so we still have a very cumbersome and difficult process when it comes to experts.

I'm skipping over what so many people have already spoken about, which is people not even asking for experts because they know they're going to get denied. People asking for the experts and then getting denied. I'm simply saying that even when you're lucky enough to have a voucher for an expert approved or have done the tremendous amount of work that it takes to get a voucher expert services or third party services approved, it's still a tremendously cumbersome obstacle filled process.

Just thirty more seconds to say that I can address, because I know I've been here all day and I know what the Committee has already heard. I'm sure you'll have questions about the third area which is information and access to the information or the accuracy of the information from my district. And I just want to say something, since this is my opportunity to speak and to say something in conclusion. I'll go back as we all will to our districts, and I will try to continue to work within the parameters and the limitations and the opportunities that we have, and I'll continue to try to push the boundaries, and I'll continue as many other attorneys will to try to make things better. I'm very, very grateful to be able to address all of you, who are looking at the much bigger picture, with the much bigger opportunity to make much grander changes.

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Somebody, Mr. MacBride, I guess he's not here anymore, he spoke about his nine-year old son. My son's eighteen and he is just about to graduate from high school. As a gift, my parents gave him a trip to see his favorite London football team. I'm going to get it wrong the Tottenham Hotspur team. I went along and it was very exciting and we learned a lot, and of course I tried to quiz him on all the trivia. And it turns out that the team motto for Tottenham is, "To dare is to do." It's all over the stadium and it's all over the uniforms. It's all over the signs in the streets in Tottenham about what this team can do, and there must be something right about it because they beat the Norwich Canaries three to nil. And so, it's been a couple of weeks now but I still have that phrase in my mind, and I want to try to leave it with you also. Which is, I was so intrigued, I was so edified, I was so inspired, by what Judge Gleeson said, about fundamental change that's necessary. "To dare is to do," and I hope that all of us and all of these sessions can lead to something really positive getting done.

Reuben Cahn: Thank you very much. Mr. Foster you're going to be next.

Mark Foster: Alright. Good afternoon, thanks for inviting me. I've been a panel attorney in Charlotte in the Western District of North Carolina for twenty years. I arrived there after having about fifteen years of practice experience. I got on the CJA panel instantly because there were no criteria, no standards. You just had to be alive, breathing and admitted to practice. So I got on the list and took a lot of cases. Then about six years ago I became the panel representative which I still am.

About five years ago I became a member of the board of directors of our Community's Defender Organization and I'm still on that board as well. In our district we have had the, since the community defenders were formed ten years that's when they took over administration of the CJA panel. Prior to that it was done by a couple of clerks in the clerk's office. Each of them worked for the two magistrates, and they just sort of farmed out cases, making phone calls to whoever they could find in a sort of a hit or miss thing. Since the Community's Defender's Organization has been in place, they've done a very good job of equally doling out the cases, avoiding conflicts and providing a lot of assistance to the panel members. This gets more difficult in multi defendant cases, I think they've done a very good job also of making sure that everybody gets a qualified lawyer. Obviously the federal defendant is only going to take the first or one of the defendants. They usually take the one who looks the supposed "kingpin" or the one with the most evidence. Or the one with the most complexity involved. Then try to find a qualified lawyer for each the other defendants. I would say they do go to the next person on the list except in some cases the cases are highly complex, and they need to find somebody who's adequately experienced to give the case to.

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As far as discovery in the multi defendant case is that's always been tricky. We've made some good use recently of the discovery coordinating attorneys. The one we use for some reason is out on the west coast, we're in Charlotte, but he's out of Seattle, Russ Aoki, and his firm. They've been doing a great job of taking a bunch of disparate discovery in various different electronic formats, most of which is unsearchable. Putting it together so that you can access it in one place, it's searchable. All the individual defense attorneys can record their own search and what they're doing. It's separate from what the other public defendant attorneys are doing. So, I'm assuming this is a great efficiency and cost saver. Rather than have each attorney individually slugging away trying to figure out how to get through all this stuff.

Something else that seems to appear a lot, is we get discovery from the U.S. Attorney's Office on discs which is sometimes a lot of it is single page PDFs which you have to open individually, look at, close, open the next one. So, if there was an effort under foot to get the U.S. Attorney's Office to combine this into large PDFs, then then we could then make searchable, I think that would save a lot of time and money. Attorney time, review and discovery and would be very helpful.

In our district, we had an increase . . . it used to be that we had no criteria for panel attorneys and then the judges finally instituted a set of guidelines, I believe about seven or eight years ago, set a criteria that you have to satisfy in order to be on the panel. So, what they did is they took everybody who previously had been on this panel that had about 200 people for the Western District, which included Charlotte, Ashville, and Statesville, and basically started over. Everybody had to reapply and you had to have certain things in your resume to qualify. People didn't apply who had already actually been on it. The list got smaller and we modified the qualifications once or twice. So, we're in the process of hopefully creating a better panel of CJA attorneys than what it once was. There's a panel selection committee that takes applications once a year and the panel attorneys are broken down into three groups. They come up for reconsideration, the three year term. Every three years you have to reapply. That seems to be making progress in getting a better qualified panel of attorneys to handle the cases. So, that's what I have to say at this point.

Reuben Cahn: Thank you, Mr. Foster. Judge, as I said you get the last word.

Judge Moreno: Oh my goodness. That's not necessarily a good thing after two days of hard work and we can open that so some light gets in here so you won't think it's so late. Thank you for inviting me. You know, I haven't been able to hear what everyone has said, but I know that you've had two judges from our district, Judge Scola and Judge Graham, who are very

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experienced. So makes no sense repeating a lot of the things that I suspect they have said with their experience. One a much newer judge than the other and both of them being practicing criminal defense lawyers.

My perspective is that, as Mr. Cahn has said, because he's tried cases in front of me so I do have the perspective of being a judge for a long time, twenty-five years. Sometimes when you're a judge for so long, you do need a reminder of what it was like to practice law. It is true, and some need to be reminded more often than others, I confess. Before that, I was also a state judge. So, when you compare federal court with state court, you're very happy to be here, no matter what the complaints are because there's always someone who is worse off than you are. Whether it's a judge or even a private lawyer.

Then, I was also an assistant federal public defender. We've come a long way since the time when I started practicing, I think I put that in my two page submission. Where the rate was \$20 an hour for "out of court." I know it was a long time ago, but still I'm not eligible to go senior so it wasn't that long. And I still remember what became a future colleague of mine cutting the fee that was for \$120; it was a suppression hearing. I still remember, and he chopped it to \$100. I understand . . . I assume later on I figured, I'm taking about thirty years later, that it was obviously an automatic cut. I still remember, I haven't forgotten that.

We've come a long way when now the rate is \$129, \$128, but there's still some issues. I would like to divide the concerns in three parts; federal defenders, CJA panel, and then perhaps the more difficult one, the judicial involvement. Federal defender is easy. I think certainly in our district and I think even in most districts, the ones that have it. I remember being on the defender services committee for six years in the Southern District of Georgia always came up. That's an issue, and I think we can have some changes with that. You can have national standards like that for . . . and you have to figure out whether it's worth having community defender's organization versus federal public defender I think you can do that nationally.

What I don't think you can do is eliminate the geographic differences that we have in America. I mean we have that with sentencing, we have that with, maybe if we have a blue states and a red states, we have blue districts and red districts and maybe blue judges and red judges, I don't know. And I think most judges I say are going to be fair and most judges are susceptible to the suggestions that you all will have. There might be some that won't, and I don't think a Committee can really change that minute portion of the judges. With federal defenders, they're great. We've had a great office here in the Southern District, Judge Williams was the

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federal defender, before that Michael Caruso does a great job. Their main problem is to make sure they have enough funding to survive.

I do think that we should look at things with the bad view of the sequestration. I think that was an exception, and we shouldn't re-live that over and over. Because if we do that, I don't think we accomplish anything. As long as they have their funding, they decide when they need to use experts and you know what happens? When it needs the money that's in your budget, you think about the cost. When it's not your budget and then the tendency might be to ask for more experts. They get paid a lot when I was an assistant federal public defender, I was the second highest paid assistant federal public defender for \$24,000. I was the second longest serving a year and a half. We've come a long way. The Federal Public Defender's Office now is great. I think they pay them a good salary and that's what we need to do.

Same thing with the CJA panel, but there's a little difference with the CJA panel. In my view the CJA panel we have here in our district, they are lawyers. You wouldn't know the difference whether they were privately retained or court appointed. They're the same lawyers in our district and they do the same type of work. And I think we have to remember that the right to be appointed is really the defendants right, not the lawyers. Now here in our district, the lawyers want to do it. The lawyers want to do it I think for different reasons, one of them is public service, there's a little bit of that. I know when I was younger, there was a little dual motivation. If you're before the judges and you do a good job, they start trusting you. Maybe you can even get more cases done through reputation. So, I think we ought to focus on the right of the defendant. The lawyer should be treated with respect, but that doesn't necessarily mean we approve everything that they ask for.

One thing that we do in this district that I think I've heard from the lawyers that they appreciate, we have what we did for you yesterday, we do it at other times. We have awards, we invite them, we are doing sequestration, we use our bench and bar fund that every district has. Every district has a fairly big bench and bar fund from the pro hac vice motions and all of that. We helped them with their seminar when they weren't getting the money. I think that goes with the respect. I think the lawyers don't just want the money, they want respect. I think that would help.

The last thing I'll say before my time runs out is the judicial involvement. That's a little bit more difficult. I mentioned in the letters so I don't want to repeat myself. We all mentioned Judge Gleeson who is a great guy and I was looking, last night I was reading THE CHAMPION, you know the National Association of Criminal Defense Lawyer. I get it, I imagine every judge gets it but I don't know, I'm on a special list, I doubt it. The

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quote for Judge Gleeson when he got an award was, “the federal indigent defense system is the crown jewel. We have a great deal to be proud of in the federal system.” I think our problems majorly in the state system and we ought not to forget that. It doesn’t mean we don’t have problems, he’s discussed them as he’s leaving the bench.

I think we ought to be more positive about it. I think it would be a mistake to divorce the judicial involvement just because there are some complaints about one or a few judges. There’s really not much that you can do. Once a judge has been appointed and confirmed, I don’t know what you could do. And, I think it would be a mistake to create another bureaucracy that would review vouchers. Another bureaucracy that would review the experts’ costs. First, it would cost money that could go to the lawyers or for indigent defense. More importantly, who would appoint that? Would it be the judges? If the judges, I mean the court of appeal appoints a federal public defender, we as judges as I mentioned in my letter, deal with attorney’s fees all the time in civil cases but it involves private money.

In class action of fair labor standard act cases and civil rights cases, if we trust the judges to do that in those cases, I think we should trust them to do it with tax payer money. That’s not to say that we cannot be educated just sitting here. I’ve learned a lot, and it’s a little bit sad, and I know that it happens in other places not here. I think we have to focus on what actually can be done in balancing the national standards that you should set and the geographic differences that we have circuit by circuit, rather than repeating what some of my colleagues have said. I’ll respond to any questions. I did it in less time, right?

Reuben Cahn: I actually gave you some extra time.

Judge Moreno: You have?

Reuben Cahn: That brings to my former chief.

Judge Moreno: He provided death penalty and we did a great job.

Reuben Cahn: Judge Fischer, would you like to begin our questioning?

Judge Fischer: Yes, thank you very much. Thank you all for being with us and for taking the time and to provide the written testimony as well. I want to start with Mr. Beauvais and we’ve been encouraged and urged by various sources not to come up with the one size fits all recommendation or solution. I do want to ask for whatever other thoughts you might have about either an FPDO or a CDO in your district. Thank you for providing the answer to my first question. You said you have about 600 indictments per year and

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45 were multiple defendant cases. Let's just even take 500 as the number that any FPDO would handle.

That seems to me to be a sufficient number and the information you gave about, a number of AUSAs is also would indicate that. You indicated that there was a two year experience with an FPDO that wasn't good. Do you know anything more about that that you are willing to tell us or can tell us that might help overcome any reluctance by your district? Or do you have an approach that could be taken with your judges to try to move further in the direction of getting one of those kinds of entities?

Steve Beauvais: Your Honor, it's my understanding that that experience happened back in the early '80s, I don't really know when. Well I got to the district in '92. I had no personal knowledge. It's my understanding that they did hire an individual as a public defender. I think it went south in a hurry. I don't believe they hired any assistant public defenders. It lasted, it may even had been less than eighteen months, that was just my best information from talking to lawyers that were around. My senior partner was around back then at the time.

I think and I'm hopeful that there is a change of foot because we've had a significant change in our judiciary over the last several years. We have two new magistrates, we recently lost one of the judges who was around during that experience and then simply was unapproachable on the subject. We do have two relatively new district judges who I don't believe are philosophically opposed to the Federal Public or Community Defender Organization. That's why I'm somewhat hopeful that we can move in that direction over the next several years. I would like to see it sooner rather than later, but I think we are moving that way.

Judge Fischer: And you mentioned with regard to vouchers that you thought perhaps the issues were either more related to the individual judge or the individual attorney in that maybe better descriptions and the reputations of the attorneys were relevant. Let's talk about this, attorneys with excellent reputations, and we've heard from Ms. Copeland [referring to Amy Lee Copeland, who testified earlier], and you're here. Do you have a core group of well-respected attorneys that you think go to the judges or could do something along the lines of organizing or improving the state of affairs with regard to even selecting better people for your panel?

Steve Beauvais: I believe our chief judge is approachable on that issue and I think there's a group of attorneys that serve on a Federal District Court Advisory Committee and also some others that are not necessarily on the committee that could approach the judge. That will open up discussions in that regard.

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Judge Fischer: Thank you. Mr. Schaffnit, you indicated concern on I think a number of panels have this concern about, in your words the “old white male panel.” And it’s aging out. You talked about an emphasis on recruiting younger members and minorities. How are you doing that? Is it being at all successful? You indicated that recent graduates aren’t interested in criminal law, and how does that all work into the rate, what reputation perhaps there is for not being able to get valid compensation or experts in those sort of things we’ve been talking about?

Gilbert Shaffnit: Well Judge Fischer, I guess, the people that are on my panel and again I’m talking about district-wide but also the Gainesville division saw the same movie I saw in ‘62 and they’re very devoted to the concept of indigent representation. When I started it was \$20 an hour for out of court time. Adjusted for inflation it was inadequate then, \$129 in 2016 adjusted for inflation is woefully inadequate today. I’m an adjunct professor at the University of Florida Law School. I try to recruit as many minority students. I find out where they’re going, and once they graduate, do they have any interest whatsoever in criminal defense? Would they be interested in going into federal court? What I find is that unfortunately minorities’, in particular African American women, are almost uniformly not interested in going into federal court for any reason.

They’re being recruited heavily by major law firms to do PI work. They have a huge student debt load that they have to service when they get out of school. They’re not able to get out debt free like I was able to and take cases a \$20 an hour or \$129 an hour. As so as a result what we have on the Gainesville panel are . . . the good news is we have an extremely large number of very experienced lawyers. The other good news is that we don’t have that many border cases and so most of our clients are either white or African American males. We don’t have the diversity of clientele but we also don’t have the diversity of representation. We don’t have any Spanish speaking lawyers on our panel, we have no Latinos on our panel, we have no African Americans on our panel.

I have gone to Federal Bar Association meetings, National Lawyer Guild meetings, young lawyer division meetings, they’re simply . . . it’s a combination of a fear factor and going into federal court and quite frankly the abysmal compensation level. They’ve heard horror stories much the same as what the Committee has heard, about not only getting paid, but getting the resources necessary to adequately defend a federal criminal case, and quite frankly most of them are not just interested in starting their legal careers in that fashion.

Judge Fischer: I think even if we applied what’s allowed by statute, the rate would only be between \$145 and \$150. Would that be enough or do you think we need to . . . ?

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Gilbert Shaffnit: You know Judge Fischer I think, no, it wouldn't be enough, but it would indicate a level of respect. Right now the congressionally authorized level just never seems to be met. And there's always a reason for it. It's either sequestration or some kind of budget crisis de jour and the panel lawyers are very devoted to the defender system. We've taken cuts, we've deferred payments, because we believe in the federal public defendant system. We want it to flourish and as panel lawyers, most of the people on my panel have a robust privately retained criminal practice. That's not the case in other districts. When I go to DSAG meetings, so my other DSAG people from, say the Ninth Circuit and other places, have a clientele that's basically, a number of them do get a sizable amount of their income from panel's work. That's not the case in my district.

We have made the sacrifices. Quite candidly it's a matter of respect. I think that at the end of the day, \$145 is not enough, but I would much rather sell that to a new lawyer and say, "Yes, it's only \$145 but it's going to be adjusted for inflation and we are going to get more money and we have the ability to get the resources." One of the other things that I wanted to mention because I think it's very critical is, I am very concerned about the independence issue as it relates to the topic that I just spoke of, and for this reason. In the state of Florida, I think Judge Moreno just mentioned it, we have an abysmal system of conflict representation that didn't exist before Governor Scott decided to save money and create what's called "a conflicts office."

Right now when the state public defender withdraws, it doesn't go to a cadre of very seasoned well qualified vetted lawyers. It goes to an office of conflict representation. They are more underfunded than the public defender. Their case loads are huge and it's just a very bad system. My concern is if we separate from the judiciary is this, they will be put on an island and that will be going to Congress trying to get money and trying to get . . . lobby for things that at least now we have the imprimatur of the judiciary to help us. Whatever model the Committee comes up with, I certainly don't want to be in a situation where we lose what we struggled so hard to get, and that is these incremental increases in the rate. I think the rate is abysmal, but more importantly we need to raise the caps because that's really what is driving a lot of this problem that we are experiencing with vouchers and experts.

Judge Fischer: Thanks so much. One brief question for Mr. Foster. We heard yesterday, if I understood the judge correctly, about a concern with a Community Defender Office. The Community Defender board members perhaps having conflicts when they were representing a codefendant, and as a CJA lawyer, but we are also on the community defender board and the community defender district. Do you perceive that in your district? Is that a concern that comes up?

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Mark Foster: I never perceived it, and I don't think any other members of our board perceived it until recently in the last half a year that issue was presented, and we all started thinking, oh gosh, technically that sounds like a conflict, but in practice, I never saw it. I've handled cases where the federal defenders are representing someone who is maybe testifying against my client and vice versa and never even occurred to me that I, never occurring to other members to try to pull rank and say, "Hey, you shouldn't be doing this because I'm on the committee that oversees your office." I haven't seen that played out in real life has been a problem but if you sit down and look at it on paper, I suppose it can be viewed as a conflict.

Judge Fischer: Reuben, that's it.

Reuben Cahn: Judge Walton. You're up.

Judge Walton: Ms. Brill we've heard two different versions of what is taking place in Puerto Rico. I mean we have to try and get to what actually is taking place there. When we have those two different versions, how do we reconcile them? How do we get to what actually the situation is? I'm not discarding what you've said.

Rachel Brill: I was here. I'm aware of that.

Judge Walton: How do we resolve that conflict?

Rachel Brill: Certain numbers speak for themselves. The number of, speaking about experts, the number of times in cases that people actually ask for experts, I think you can extrapolate from that. That's just a number that will speak for itself. The number of times experts get denied is the number that will speak for itself. The amount of money, I know that the Federal Public Defender from our district cited some statistics, a national average concerning third party providers and our average, those numbers, I think you can learn from those numbers. It's not somebody's recollection whether it's mine or the chief judges or anybody's recollection over the way things are. I think with respect to experts and third party's service providers, there's objective. If you do want to get to the bottom of it and not simply jump rope to the fact that we need to be encouraged, to be using third . . . I mean it's true in civil cases, it's true in high school, you get out of things. The more you put into something, the more you get out of something. I think we could "not get to the bottom of it" and just skip over to more encouraging of that kind of use of providers. If you wanted to, I think there's some objective numbers that could speak for themselves. With respect to vouchers and voucher cutting, I was here and I . . . well I shouldn't say that, because I was part of it, I was on I-95 and I was listening to the feed and part of it I was here. I heard a whole bunch of numbers that I have never been exposed to.

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I have asked, and maybe it's not for me to have those numbers as a panel attorney as a member of the committee, maybe it's not, but I've never heard those numbers before. I've heard other numbers from other months and other time periods and I went and I say this, it's not going to sound like that, but I say it with respect, I just don't trust those numbers. I think if you wanted to, I think you'd have to set an objective set, an objective way of looking into the number of vouchers filed, the number of cuts by the clerk's office, the number of cuts by the judges, and I think it would be a case by case set of statistics. That again I wonder if there's a need to actually get to the bottom of it, or if we should just kind of accept the third thing that I want to say, which is that there's many issues at the bottom of this, there's many fundamental issues. But one of them is just a fundamental issue of attitude. I think that you having listened to all the people, you've listened to the public defender, the chief judge, the attorney that spoke in the second panel, me now, I think you can conclude that it's just a matter of perspective and a matter of attitude.

When I worked at the public defender's office which was from 1990 to 1993, Chief Judge Delgado was the first federal public defender. She was my supervisor and she was one of three people that most influenced my career as a defense attorney, one of three mentors. Maybe even the top of the three. One of the reasons why I so admired and admire her and one of the reasons why I learned so much is, because I can still see it now, every single file . . . and at that time our office was not getting complicated cases. A lot of illegal entry, not even, re-entry, it wasn't that . . . no case was that complex, but very few cases were that complex. Every single one of her files was at least three inches, four inches, two files, accordion files for the most basic of misdemeanor pleas and sentences on the same day. I mean I learned how to find out about a person's background and I learned . . . I think I learned and I think she was able to do that because of the luxury, no I won't say luxury, because I think it's a little less than a luxury, I think it's a need. Because of what everybody that has ever worked in the Public Defender's Office or still does knows which is that you can deal with this case the way it needs to be dealt with. You can take the steps you need to take, you can defend your client, you can get to know your client, you can pursue every avenue that needs to be pursued, you can do what Atticus did to represent his clients. I think, I need to finish that novel, where your stand obviously depends upon where you sit and what you have responsibility for. When you're a public defender it's one thing and what you think you have responsibility for in terms of managing a very busy district is another thing. But I think that that's just . . . the clerk's office, the people that have the power right now do not look at what criminal defense attorneys do the same way that people sitting in public defender's office, people sitting here at this table look at it. That's what we need to do to get to the bottom of what . . . we need to find a way, locally in my district in my district, and nationally to change that attitude.

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Judge Walton: Thank you. Judge Moreno basically everybody who spoke about how the program operates here in this District had uniform praise for how the CJA program operates. I think you and your colleagues are being commended for that. Nonetheless, we still heard from several that they still think that there is a problem of independence. They say, “Well, nobody supervises the U.S. Attorney’s Office and tells them when they can retain an expert or what things they can do in order to prepare and present their case.”

Yet, you feel like the court system has to control how we operate in the representation of people and the protection of their Sixth Amendment Rights. If you were writing this report, how would you reconcile that dichotomy because the system seems to work well, but nonetheless there are people who do the defense work who nonetheless feel that there is not sufficient independence?

Judge Moreno: Well, I think it is a question of perception. I find that the lawyers who come before us are very independent. Just because you appoint a lawyer doesn’t mean you are going to control them, trust me. We can control the costs though. I think the view that a panel attorney or even the federal defender is going to get the same amount of money as the Department of Justice, is just not realistic. I understand and I think the only way to achieve some equity would be with the office of the federal public defender. You could increase their salaries, provide enough money for them and then they control their own budget regarding the experts. Once they have the money they can decide within certain parameters what to do. The panel attorneys is a separate issue, but with the federal defenders I think they are very independent. Yes, they are under the rubrics of the courts but if it weren’t for that they couldn’t get what they want from Congress. Certainly not in this climate. It is a lot easier for the Department of Justice to get money than if someone who was to argue on behalf of say the Federal Public Defender’s Office.

The panel attorneys, I think are in a separate situation. One thing that I think could be done by the Committee is a matter of discovery or experts and you can shift the burden to the government. In other words judges could order whenever there are issues on discovery and the government would say, “No, we are not going to pay for all of this.” I think a judge has the authority to order, “Hey, you invited us to this party, you made the indictment to the grand jury that means that you going to have to provide discovery to everybody and not charge the courts basically if they’re panel attorneys’ or the federal defenders office.” That would be one way to make things more balanced.

As far as perception, I know what we did and I see that Michael Caruso is here. When he was sworn in as a federal public defender, we gave him the same party and oath as we did when Willy Ferreira, who also testified

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before you, was sworn in by Attorney General Holder when he came down. There are things like that that can be done and it is a change of culture that it doesn't really involve too much cash. There is always going to be a little bit of an antagonistic, "Hey, they get more money." They are always going to get more money. The Department of Justice is always going to get more money than the Defender Services. I think it is a reality. The question is how do we approach that? I mean, I don't know what else to say except that you guys have a difficult job.

I think the more difficult, what troubles me is the differences with judges. I have learned a lot here and that's almost impossible to change. I mean judges are different, right? Even within the same district, there are some judges who routinely cut vouchers just automatically. There are others who don't care. I think most judges would rather not even participate in this. If you were to take a poll, I would say it would be in the 90's.

They would rather not participate in this petty thing that is why sometimes district judges send it to the magistrate, that is why the Chief Circuit Judge appoints someone to rotate and I'm sure it is not one of these things that you wish you go for. It is a tough thing but it is still tax payers' money and I think we have an obligation to some supervision. I think it is a question more of educating and maybe the fault is us as judges in talking to our colleagues and maybe us as judges not being open enough to the lawyers to tell you, "This is what it is like." "You have forgotten what it was like to practice law." Thank you.

Reuben Cahn: Katherian, do you want to . . . ?

Katherian Roe: Thank you. Judge Moreno I just want to follow up on that.

Judge Moreno: I should have been in an earlier panel and continue my case.

Katherian Roe: I hear what you are saying about it is judges and you say something that a number of judges have said to us before. And that is, once you get sworn in and put the robe on, one you may forget what it is like to have been a lawyer if anyone was ever a criminal defense lawyer, I know you were but if any of them were, and two, that no one can tell you what to do anymore.

You are an Article III judge, no one is going to tell you what to do. That's the issue. The issue is that you can tell judges, I'll give you an example, the Judiciary Guide. A few years ago a number of people including Judge Gleeson, fought to have language be placed in the Judiciary Guide. That if a judge was going to cut a voucher that the judge had to inform the lawyer and give them an opportunity to be heard.

Judge Moreno: I remember I was on the committee when that occurred.

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Katherian Roe: And we appreciate that. Unfortunately that is like, “Hey, you could do this or you cannot do this.” It is in the guide but no one does anything about the fact that judges don’t do it. Some judges do, probably more judges don’t. What happens is it is meaningless in the districts in which the judges don’t abide by that, even though it is in the guide, even though it was hard fought to get it there. What we come back to is the issue of judicial involvement. If in fact you cannot tell a title three judge what to do because they are going to choose to do what they want to do and if . . .

Judge Moreno: Or what they think is right.

Katherian Roe: Or what they think is right, and if in fact that means that they not only don’t give notice if they are going to cut, but that they may cut not because they don’t think the work was done, but they may cut because this is just too much to pay for that kind of case. We just don’t pay that much, we can’t afford that much, whatever it is, and that is certainly a rational that is given by many judges when they cut vouchers. If that’s true why should we not take it out of the hands of the judges and put the management of the panel, the payment of the vouchers somewhere else?

Judge Moreno: Well, first of all you have to decide, where do you put it?

Katherian Roe: Agreed.

Judge Moreno: Who gets the job of overseeing that? A former private practitioner, a former panel member who knows the lawyers, an individual who doesn’t know what happened in the case? Who knows more about the case but the lawyers who tried it and the judge who oversaw it. The judge is the one who knows not the most, but he certainly knows more than a bureaucrat who would be overseeing it, right? That’s the problem. That bureaucrat would have to get information from the judge. How does he know that for example, the few times I have cut, have been in multiple defender cases. You have several lawyers. One lawyer has really been the lead lawyer. The one who files the motions, the one who knows what is going on and she does a great job. There are other lawyers and they are good lawyers but they have been going along with it. You get the vouchers and the lead lawyer maybe he is not as efficient in the voucher, but asks for \$8,000 and the non-lead lawyer asks for \$10,000. Well, yeah, I say that is not right because I know who filed the motions, I know who made the argument, I know who was lead, it is just not fair to do that.

Now how would a third person who would become a bureaucrat, who would be paid a salary, who would need a staff, who would need an office decide that, in especially in a big district where you’ll have hundreds, thousands of cases? It is true that most judges do not read every day the guide that is done by the Administrative Offices of the Courts.

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It is not something that we relish reading. We want to do what we think is fair. The problem of course is there are different views of what is fair, but I don't think that you can take it away from the judiciary particularly when the judiciary is the one that is obtaining the money from Congress. That's the problem. It's almost like your children when they say, "Hey, we want to be totally independent." All children always want to be independent when they are eighteen and nineteen. Then they say, "Hey, can we have some money, can we borrow the car." If you are going to have the money that the courts have obtained for you, we have an obligation even though we don't like doing it, to oversee the money that the tax payers are paying for.

I think defenders are better off with the judges supporting them. Putting aside sequestration, which I think was an exception, you are much better off. Be careful what you ask for because if you are alone and totally independent in getting a budget from Congress you are going to need the lobbyist, you're going to need a lot of things. I know that many judges and many individuals, the Administrative Office of the Courts is not that popular. They are more popular than GSA for example, but just about anybody is. They do a good job, they were very helpful in getting the rate increase and I know it is not super, I know. But if it weren't for them, they are the ones who constantly are talking to the staffers in Congress. It is not just the senators or the congressmen, a lot of things are done by staff. Who would be doing that for the federal defenders? It takes a lot more than writing a good editorial or an article in THE CHAMPION to get something done. Someone has to be there in Washington pushing it. That's what my fear is. If you go at it alone and you have your own person and then you have to get the money too, and then what is going to happen?

Katherian Roe: Well, I think that is the question though isn't it? I mean we are looking at not just the independence but we are looking at the structure. Is there a possibility of staying within the judiciary and having a different structure as far as who manages the panel? I think that is one of the things.

Judge Moreno: When you get the money, then you'll get the car.

Katherian Roe: That is how it works with my son.

Judge Moreno: It's probably more love, I mean I like the lawyers but there is probably more love between you and your son, than some of the lawyers. Seriously, it is a difficult thing. I think other than the respect issues, which I think are very important and not superficial. They just don't cost as much money. I do think that the lawyers are independent. The lawyers do what they want. I mean I don't want to go back to the days Atticus Finch didn't get paid anything for doing what he did. All right, and now it is terrible and horrible and what happens in state court, Florida is one of the best. When

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you read about some of the other states, it is terrible even in death penalty cases and that's still a minority. But I don't want to just be the optimist, but I think we are not . . . even Judge Gleeson who is a strong advocate for the Defenders Services thinks that we are a pretty good system with some improvements. I cannot believe . . . you know, I remember because he told me he was going to talk about something with one the Defender Services was, let me call it downgraded.

Reuben Cahn: Demoted.

Judge Moreno: Demoted, whatever the word was. All of that is bureaucratic talk that is really not in my view significant to the lawyers in the frontline. Whether the head of the Defender Services gets the office in this floor and gets this and that, those are the fights that happen amongst the bureaucrats that really do not impact the lawyer. What the lawyer wants is, "give me the money so I can defend this case, give me for this." I cannot see how creating a new bureaucracy is going to help the lawyer. They are going to have the fight. I'm kind of astounded that the clerk's office in some district is the one that does the . . . I mean they do the computation here and we had until she retired, she was wonderful. She would always re-compute these lawyers do not even know how to add or subtract. She would always say, "You are not asking enough, you don't know how to add in our district." The judges are the ones who decide whether we approve it or not, and the circuit court decides whether it should be "excess", which I think is the major thing, is their excess. This case sometimes I speak with some of my colleagues and I convince them I say, "Hey, this was a plea, how can someone ask for an excess." I say, "Well, think about it what kind of a case is this?" Is it a Medicare fraud, will they have to go through thousands of documents.

Yeah, you didn't see him. You saw him at the guilty plea but it was a lot of work. That's really education within our conferences, during our seminars, that's what we have to do. And I think it would be serious mistake. It takes away work but it would be a mistake.

Reuben Cahn: Let me exercise chair's prerogative, I'm going interrupt and ask you a question since you are talking about this subject. Which is, it always seem to me a very, very curious model to have the highest value employees of an organization involved in what's basically accounting and bill paying. In the DOD you don't have the Joint Chiefs of Staff to deciding whether or not to pay a bill that a contractor submitted. And so, even if you accept that it is going to remain within the judiciary, and the judiciary employees will look at bills and decide whether they are following appropriate guidelines, why does it need to be the judges on the cases who are that the lawyers who are actually appearing before, that needs to sign off on those bills? Why would they do that?

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- Judge Moreno: They are the ones who know. The bureaucrat sitting in some place, do not know. I know that when you came before me and entered a guilty plea and spent only the twenty minutes, fifteen minutes that it takes me to take your guilty plea you still deserve \$10,000 because of the document.
- Reuben Cahn: But you just . . .
- Judge Moreno: Now the bureaucrat would be like that clerk in Puerto Rico who just going to do plus and minus and that is what is going to happen. You are going to have guideline and then it is just going to be numbers. The problem is you have to have a good judge who knows about the case and who remembers what it is like to be a trial lawyer and that we have no influence over.
- Reuben Cahn: Judge, you just made a point that I think is really relevant to this. You are the judge or the judge on the case but you don't know when I have just haven't filed the motion and I have sort of gone along in the wake of the lead lawyer. You don't know that I'm the lawyer who had the most difficult client who required me to run to ground a thousand different issues and meet with him eighteen different times.
- Judge Moreno: So, if I'm going to cut your voucher you tell me.
- Reuben Cahn: I can explain that to the bureaucrat too.
- Judge Moreno: Nah . . . what is the bureaucrat's background, a former lawyer?
- Reuben Cahn: It got to be.
- Judge Moreno: A former lawyer who did that.
- Rachel Brill: What's a former lawyer?
- Judge Moreno: A former panel lawyer. Who appoints him? Say you are creating something that is unnecessary. What you need is more money and more respect from us, not another bureaucracy.
- Reuben Cahn: Judge I'm going to delve into one other question with you then I'm going to turn over to Chip because I'm eating into his time. One of the things that you've talked about and you talked about this district and of course I practice in this district, so I know a lot about it. It is sort of an exceptional district. It's exceptional in terms of the quality of the panel, it's exceptional in terms of the independence and the leeway that the judges give the panel lawyers, it's exceptional on the hands off approach of the Eleventh Circuit to the defender offices. You know, because you have heard some of the stories and you have heard even more of them when you

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were in Defender Services, that the rest of the country, many parts of the country are not like that.

Judge Moreno: Maybe the solution is to spread the good word from Eleventh Circuit instead creating a bureaucracy.

Reuben Cahn: I wouldn't want to spread everything from the Eleventh Circuit. How do we deal with that? That we've got parts of the country that are really in very bad shape. As you said when Article III judges are in charge, as you put it you can't say anything to an Article III judge. What do we do?

Judge Moreno: No, I didn't say you couldn't say anything, but you couldn't tell them what to do, but you can still talk. Dialogue is good.

Reuben Cahn: Okay, we can't tell them what to do no matter how bad what they are doing is. How do we deal with that?

Judge Cardone: I mean I know I'm out of turn but let me give you an example, Judge Moreno. I'm in the Western District of Texas, every district is required to have a CJA plan; I'm in a district, where in Austin, Texas there is no CJA plan. They won't have a plan, they refuse to have a plan and nobody can tell them what to do. I think the dilemma of the Committee and I think Reuben Cahn's question is, if we are going to make a recommendation that the judges stay in charge, how do we hold judges accountable who aren't like the good judges who care and are going to follow rules or recommendations, like: "give us a reason why you cut the voucher." I think that's our question.

Judge Moreno: I would work through the circuit councils. The circuit councils are the ones who really have power in the judiciary. The chief judge of every circuit and the councils. I think recommending to them a circuit council could go as far as saying, I don't know whether they would and I certainly cannot speak for anybody, I'm only speaking for myself, I'm not speaking even for this district, and then definitely for committee that I maybe a member of. I'm speaking for myself. The circuit councils, that way you are balancing the geographic differences that we have in America and at the same time. So, the Eleventh Circuit council could say well, let's look at the Southern District of Georgia, right now there has been some changes. Some judges have left, some judges have come aboard. I think we can convince them. It is a lot easier for a circuit court judge to convince a district court judge that it is for a lawyer to convince a district court judge. That's what I would do. I would talk involve judges like Judge Prado, judges from the circuit court who have the power and the influence not to dictate, but to convince them. This is the right thing to do. . . "Hey, Fred this is the right thing to do in your district." The Federal Public Defender should be the head, the administrator or the panel so that

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we have qualified people. We should have a panel or we should have a Federal Defenders Office. I think that is the only way you are going to have change. I think it would be a terrible mistake to create a new bureaucracy but I'm generally against new bureaucracies' maybe because I had to deal with them for seven years as chief. I just don't think it is something's that worthwhile among the cost benefit analysis.

Judge Walton: Judge Moreno, I share some, well most of your concerns, but we have heard that the problem rests with the top of the totem pole.

Judge Moreno: Where the chief circuit judge is?

Judge Walton: There are problems with some of the chief judges of the circuits. They are the real problem.

Judge Moreno: I'm not privy to that, and I'm kind of glad that I'm not.

Judge Prado: It is so nice to have your own courtroom and not have to share.

Judge Moreno: I said this before, federal district judges are like Scottish feudal lords. They only get together when they are going to fight the English. And I think, I don't know how I would describe circuit court or appeal judges.

Reuben Cahn: The English.

Judge Moreno: It is a difficult thing but instead of creating something I would just spread the good word. You know, I'm sure in San Diego you don't have the problems that you have in other places, do you?

Reuben Cahn: We are far better off than some place but not as well off as we were here.

Judge Moreno: Yeah, and that is just part of life.

Chip Frensley: I think if Judge Moreno's idea that the money and resources necessary and the respect and appreciation from the judiciary we probably wouldn't have a Committee like this and we probably have a hard time finding people to come and say something about it. But, unfortunately, I think as it has been discussed that's not the case everywhere.

I feel really fortunate to be in a district that's like that, where we have resources available to us and we have the respect and the appreciation of our bench and I'm always amazed to hear the problems that exist in other places. While Judge Moreno's earlier comments about not divorcing the defense function from the judiciary, I probably agree with. I love the judges but maybe it is time for us to start seeing other people.

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Judge Moreno: Go see your congressman and your senator and tell me who you would rather be with.

Chip Frensley: I think there are two issues. You are speaking to the bigger issue of the program administration as a whole, and what I want to talk about a little bit and we have been discussing throughout course of our hearings, is the more micro level of the voucher review, and activities, and relationships between the judges and CJA lawyers. I want to ask the other panel members, I mean you have heard Judge Moreno's remarks and some of the other judges who have advocated similar positions, and you have also I know been in these hearings and heard other folks talk about other models. . . such as panel administrators, what Judge Moreno would probably call bureaucrats. What do you think about other alternatives? What would you propose, what do you think about some things you heard? Do you share concerns that Judge Moreno has about how putting that responsibility in the hands of bureaucrats, if you will, would impact the quality of representation because it is ultimately what we are about? Gil, why don't we start with you?

Gilbert Shaffnit: Well, first of all again I'm blessed to be in a district where we don't usually get questioned about submission for experts and we don't usually get cut on our vouchers. We are only one National Election and a few Senatorial appointments away from the days in 1980s where we did have voucher cutting issues. I support those districts that have problems because our district could have a problem in the future. I believe circuit, I shouldn't say circuit, a panel administrator, however you choose to put them either in a district or if it's too small in multi-districts who is divorced from the judiciary, not appointed by the judiciary, not be holding to the judiciary as our probation officer say. They are not arms of the court, they are not court family. They are not bean counters. They are people who have practiced criminal defense who know what it is like to plead a case, and with all due respect to Judge Moreno, I think that he made the comment that actually doesn't make the case. When you have a plea on a massive fraud case you don't see the work that is put into that, you as a judge. Often times, I tell my panel lawyers, "I know that this is not above the cap, but I think you should submit a memorandum because you are the lead lawyer on this case, you are the one that the discovery came through, you are the one that disseminated to your co-council, you are the one that took the lead on the motions, you are the one who took charge of the case." And what is going to happen is you are going to bill, and then what is going to happen as Judge Moreno indicated is somebody is going to charge something close to that and the judge's is going to look and say, "Well, that lawyer didn't do all the work, the only lawyer I saw was this lawyer." He was the one or she was the one that was making all the arguments and filing all the memoranda. And so, sometimes I think it takes a look from someone and I wouldn't call them a bureaucrat, I think

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they need to be somebody who's is involved in the practice of criminal law or has been, who know what is like. Who knows that in a situation where you got problems lubricating a plea that you may have to go out to a remote location and talk to a defendant on multiple occasions. I don't think it's judiciary job to decide how many times I should be contacting my client. How many times I should be involved with their family. They don't know what it takes for me to run my case. I feel uncomfortable explaining that process to the same judge that is going to be deciding my client's fate.

I do a lot of work in child pornography cases. I do a lot of submissions for experts for forensics reviews. I do a lot of request for psychologists. Often times I don't use those individuals, and yes I'm concerned, even with the best and the brightest of the judges that we have of, "Well, I didn't see that expert testify, I don't see anything concrete from that expert," and so I'm I getting my money's worth, so to speak.

You don't have that problem with U.S. Attorney's Office. The other thing I would add and it is kind of related, I do want to mention it. Two things, one is the reason that U.S. Attorney Ferreira in landscaping his division chiefs didn't see that there was a problem with voucher submissions for experts, he shouldn't know about them because they are submitted ex parte. I don't know if there is a problem in the Southern District or not but if there is he would know about it because those things under *Ake v. Oklahoma* are supposed to be delivered under seal ex parte.

The other thing on discovery is we're on a situation where the U.S. Attorney's Office and Holder could do a lot to help us bill less time by putting it in a format that we can read and access and guys like Russell Aoki and those folks can help us with. Right now to use an audio analogy, ATF maybe using a 33 $\frac{1}{3}$ LPM to get the thing to us, somebody else is using an 8-Track player, somebody else is using a cassette tape, somebody else is using an MP3 player, and the government's response to me is, "We don't control what those agencies use as a platform." There needs to be some way to force the U.S. Attorney's Office to give it us in a format that doesn't make us expand the time and inflate our invoice. We don't want to bill for that time. We'd rather be representing our clients but we need to get the discovery in the formats that's reasonable for us to be viewing.

David McCann:

I agree with Judge Moreno. I don't think we need another agency to do what the judges are now doing. The system that's been in place in South Carolina has been discussed by several speakers, is working for us. Where we have a problem is its sum averaging at the district court level maybe not over the cap, some over the cap. Then cases that are over the cap that are blessed by the trial judge in a letter to the Chief in the Fourth Circuit saying, this lawyer did a great job, pay what's he submitted, it's

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reasonable. One judge made a mistake of saying he was successful. The letter coming back from the Fourth Circuit is, success doesn't make any difference. It went back and forth and it's in the materials. They paid the lawyer \$4000 less than the term he used to me, than the \$8000 haircut the Fourth Circuit gave him to begin with.

That's where the problems lie in our district. I think success does matter. The length of time that you've had a client as Mr. Cahn said be it in the jail with client how obstinate they can be, calls from their family, "I want another lawyer," they're writing letters to the judge saying you're not doing your job. And you stick with the client and get the best results you can, you get a good result. That takes time, the voucher is going to be higher. I think that all those things need to be looked at.

Finally when the judge feels that he or she has to reduce a voucher, just notice to the lawyer so that it can be submitted to the CJA committee if that's possible, in your district. I hope it will be possible in our district soon so that it can be aired. Maybe some guidelines will come out of it, some directives will come out of it so it happens less frequently. Thank you.

Mark Foster: In the Western District, a while back the judges had hired a new assistant to be in the pipeline of reviewing CJA lawyer fee applications. With the goal apparently of making sure they're accurate and finding out obvious things that need to be fixed or whatever. Problem was it resulted eventually in what was discovered to be a big blockage in the system. It didn't help in fact it was contributing to massive delay as another added delay, layer of bureaucracy that backfired. That person is no longer in that job and that blockage has been eliminated. It's an example of having another layer of bureaucracy of review by someone who's not particularly qualified to be reviewing the vouchers.

This person wasn't a lawyer, was not a judge they were just a clerical person. They really didn't contribute to anything positive. Right now it goes to the Federal Defender's Office where they have some expertise reviewing these things. Then it goes to the court, to the individual judge's chambers, and things are moving more quickly now in general.

Chip Frenslley: Are you opposed to the review before judicial signature, or are you in favor of it if it's done correctly or efficiently?

Mark Foster: If it's done by someone who's qualified and knows what it takes to be a criminal defense attorney in a federal case, then I don't think I have any problem with it. Unless it's going to be adding a massive time delay because there's one person doing it for the entire district. As long as there's someone who understands all the problems of: getting a client who

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is recalcitrant and not educated, and is trying to get his head around mail fraud, wire fraud, money laundering and you're trying to convince them of why the case against them is going to be successful, and you have to battle to get them to take the plea. Or something like a Ponzi scheme, hedge fund case where it takes hours and hours to review all the stuff to make sense of it before you the attorney can even give advice to your client about, do they have a case or not. Somebody is got to be able to understand that. Otherwise if that person doesn't have that background in interviewing and reviewing it, it's a waste. I think it depends on the qualifications of the reviewer.

Rachel Brill:

The Federal Public Defender's Office is that Judge Moreno speaks highly of around the country. I do too from my own experience and from everything I've heard. They're an example of the child that gets the money from their parent but has real autonomy with what they do. No judge would know what kind of decisions are made by someone like Mr. Cahn about what experts to allow his assistants to use, what to suggest they do and which transcripts to order. Just any of those decisions are made with a wonderful degree of autonomy by the public defender's office.

I wouldn't call that a bureaucracy at all either. I would call it as Judge Moreno I think would call it, an example of the way things can work. But I don't think that the defender office ought to be reviewing any panel attorney's vouchers. I agree with everyone, I won't go through them again. For all the different reasons that everyone that has disagreed with that has put forth. Just used in a word, there's just too much of a conflict.

An experienced independent panel administrator that has an understanding of all the things that defense attorney go through and has a mandated degree of deference to what the attorneys say happened. If I'm going to file a voucher and say I did these ninety-five things, as happens now, the person in the clerk's office literally goes one through ninety-five and makes sure that I did each of those things. Whether it was attending a status conference or whether it was read a motion.

This is a case where they actually sit and read a motion. They say, "Well that only took me two minutes to read that motion. Why does the lawyer bill for half an hour for reviewing that and doing something with it?" Anyway, I think it needs to be an attorney. I think it needs to be someone with an appreciation of the defense function. I don't think it would add any kind of bureaucracy.

I do think there also as I said needs to be a degree of deference that's either in a statute or in a guideline or in a plan that has some teeth. Where that person is told, if an attorney that we have entrusted with panel membership says that this was a necessary thing to do. There needs to be a

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really good reason for you to say that it's not necessary. If somebody is abusing this, they shouldn't be on the panel. It's not a question of saying, "well, let's punish everybody, let's make sure that everybody does every little thing." I've seen abuses, they shouldn't be countenanced. We shouldn't be presumed to be abusing. We should be presumed to be reasonable. We should be presumed to be rational and we should be presumed to be professional and it would work and it wouldn't be a bureaucracy.

Steve Beauvais: I started my career off at the MCRD Parris Island, which is just across the Savannah River in South Carolina, and I'm thinking it's time for me to move back to South Carolina. If I had my brothers, obviously we need to have a Federal Public Defender Office. I would like to have a panel administrator within that office. Because I think they have from everything I've heard a tremendous amount of resources and support. I know how hard they work to support their CJA panels from everywhere I've heard. We obviously need a CJA panel and I have no objection to a panel that has a lot of input from the judges with regard to its make-up and its members and its qualifications of the lawyers.

I also like the independence of somebody else looking at the vouchers that is done through a program administrator. In just running the programs so that the cases are handed out fairly. Currently everything is controlled 110% by our judges and it's very concerning. If I were to wake up tomorrow and the Eleventh Circuit council decided they were going to pressure my district into adopting a Federal Public Defender's Office, I would be very happy. Thank you.

Reuben Cahn: We've got about fifteen minutes left and I want to give some other members of the Committee an opportunity to ask questions in the remaining time.

Judge Cardone: I have a question for Mr. Forster. Mr. Foster yesterday we heard from Judge Cogburn about problems that were happening. You had a CDO I believe in your district and now it's going to be converted to an FDO, correct?

Mark Foster: Right.

Judge Cardone: One of the concerns we heard was that, and you are on the board. One of the concerns we had was that the person that was selected to head the office, Judge Cogburn indicated, I think it's a she, that she has no trial experience. I think the judges, at least my impression was that they were somehow at loss to understand how the head of . . . this CDO could make the decision to hire this person. This person has . . . the way it came across to me very little trial experience, very little federal court experience. I

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know these are personnel decisions, but did you guys hire someone with no federal experience to manage an office, I guess is my question?

Mark Foster: No, we hired someone who'd been the first assistant in that same office to the original executive director Claire Rauscher. She had become the first assistant when the previous first assistant left to take a job elsewhere. Then she remained the first assistant after Claire Rauscher left and another executive director was hired, Henderson Hill. When he resigned, she had been in the job of first assistant for maybe three or two years give or take. I'm not exactly sure. As far as trial experience, it may be accurate that she did not try any federal trials. She did a lot of federal appellate work in the office before she became first assistant. Also she had practiced in South Carolina doing capital defense work for some number of years before that . . . I cannot recall exactly whether she tried any cases. She was in a practice that involved trial work as my understanding to the best of my recollection. She was also very experienced at the time that we picked her as far as being in the office and doing a lot of federal appellate work and my understanding, sentencings and that sort of thing. We felt on balance that she had the qualifications to be the administrator to lead the office. I just don't recall us believing that she never tried a case in her life. It may not have been the federal system, it may have been in the South Carolina state system.

Judge Cardone: Just one other follow-up question. How long have you been on that board?

Mark Foster: I believe roughly five years.

Judge Cardone: Did the judges ever come to you with any complaints about the quality of representation that was being given by the office? I mean, you were overseeing essentially as the board the office. Did you ever have any communication from the judges or desire to meet about issues involving the quality of representation coming from that office?

Mark Foster: Not that I recall. The only thing that I can think of was there was an instance where one of the attorneys in the Community Defender's Office had done something that one of the judges believed was not proper or ethical. That complaint became known and was believed that the judge was not happy with the office's response to that. The communication that came between the executive director and the judge was not apparently satisfactory or the involvement of the executive director was not satisfactory.

At some point somehow we became aware of this. To the best of my recollection that was somewhat after the fact. I don't recall that being presented to us as the board as something that we needed to do something

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about. I don't recall anything ever being said about in general the quality of the representation by attorneys in the office being subpar.

Judge Cardone: Thank you.

Reuben Cahn: Any other members of the Committee a follow-up or . . .

Chip Frensley: I just want to ask if I could. Judge Moreno in light of the comments to the rest of the panelists. Does that impact or influence your views about this bureaucracy in place of judicial review at all or . . . ?

Judge Moreno: No. Let me tell you, I do think. First of all the Southern district attorney, just try to get the federal defender. Don't ask for [crosstalk]. One step at a time. It doesn't because who the person is going to be, who appoints the person? That's the first question, right? Who decides who it is? I think these are artificial issues. For example, who appoints the federal defenders? The circuit court of appeals. That doesn't mean that the federal defender is not an independent person and the office is not independent and they are appointed by the . . . not only are they appointed by the circuit court, but the circuit court judges can also remove a federal defender. Think about that. In fact in the districts, if the president doesn't appoint a U.S. attorney and the U.S. attorney doesn't get confirmed within I think is 120 days or so, a few months, guess who appoints? We've done it in this district, the U.S. attorney, the judges, the district judges can appoint a U.S. attorney when there is a vacancy and enough time has gone by. Now, that doesn't mean the U.S. attorney is not independent. I think it's kind of sad that we are talking about not trusting a United States District judge who's the one who decides habeas corpus, whether someone lives or dies. The sentence that your client is getting, that is even more important than \$129 whether someone is getting life or not. If we trust the judges for that, why can't you trust them? The judges don't want to do it . . . so now let me tell you, if you all came up with that, and somewhere or other work to be approved, the judges would be delighted about it because they don't have to do it anymore. It's a task, it's not a numbers task, it's a task of understanding what it takes to defend someone. Now it is incumbent upon you all and I know we do it in this district to explain why you want to go over the cap. You tell me why you want to go over.

We usually know when a defendant is difficult because we get the letters from the defendants, we don't want this lawyer. The judges know more than you all think. Now there are sometimes we may not know and, then tell us! I think it's better than have another lawyer who may be a very good lawyer, the one lawyer who is going to oversee here we've got all the judges. Here they all have their cases. You want one administrator of vouchers for a whole district to review all of it and you don't think . . . he's going to do one of two things.

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Either automatically approve everything until the money runs out or, and then there's going to be a delay, and then it has to be approved by the circuit court anyway. Maybe that might be a solution, is take it away from the circuit court and defer to the district court who knows more than the circuit judge. Because that's what you have now.

Now you have the circuit court delegate here and our circuit is Judge Jordan for the time being, it gets rotated, before they get strong take to look at something, to oversee in case the district court judge didn't do it right. Then maybe you shouldn't do that and you should trust the district judge. You all don't want to trust the district judge. You want to trust the guy who's going to be appointed by whom.

Reuben Cahn: We haven't settled that yet. I'm going to leave this because our reporter has some questions and I want to give him some time.

Judge Cardone: Before we do so, I think Mr. Schaffnit wanted to say something just now.

Gilbert Shaffnit: Thank you. I just had one thing and I don't want to leave today without mentioning it. First again thank you again so much for what you do. I have an issue that I think would help me recruit more CJA panel lawyers of whatever age or diversity. And that's this, under 18 United States Code section 3006, Cap A, the way the federal district judges have read the statute is this, it's the old show flap rule, in for a penny, in for a pound. Whether you're retained to represent the person or you're appointed to represent the person. And here's the problem, you're appointed to represent the client, the client is happy with you until the verdict comes in. The verdict comes in and all over sudden he or she wants a different lawyer on appeal. It's just natural. The level of trust is gone, if it's not gone, it's certainly impaired. And the client would prefer a fresh set of eyes to look at that case and decide what the issues are on appeal. Most of the judges including some very good judges in my district have called me and said, "You have a panel lawyer that represented this client." He got convicted, they filed a motion to withdraw and they said, "Our firm . . . I am incompetent to do the appeal." While I do a lot of Eleventh Circuit appeals and let me tell you they're no fun. They're no fun because they change the rules every six months on what's a record excerpt, what's an appendix, what to include, they shift the briefs back and I do a lot of this work.

Yet there are times when I get nasty-grams from the Eleventh Circuit saying, "You've got fourteen days to correct this error. Most of the panel lawyers that are on my panel really would prefer that they not have to do the appeal. Whether it's because of loss of trust with the client or just they're not competent to do it. They're trial lawyers.

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It's I think a better solution to allow more flexibility to the district judge through a change in the statutory language whether there is no presumption, that just because the trial lawyer handled the case that he or she is going to be . . . I think it's a matter of money to be honest with you, that they will be spending less money or vouching for less to do the appeal. If you're a competent trial lawyer, you're going to read that appeal, you're going to read that transcript over again anyway just as any good appellate lawyer would.

So, I think there needs to be some kind of warning in the statute to allow district judges who feel that there are somehow confined by this rule that you have to appoint the same lawyer to handle the appeal. I think it would encourage more lawyers to join the panel if they didn't feel like they were burdened with having to do the appeal.

Reuben Cahn: Jon . . .

Prof. Gould: Thank you. Ms. Brill, I believe you recommended to the Committee that they ought to look a number of times that attorneys are asking for third party service providers . . . and how often those requests were granted. The Committee had some data that speak to some of that. Putting aside our host district, the Southern District of Florida, which apparently is Shangri-La.

Rachel Brill: I thought South Carolina was Shangri-La.

Prof. Gould: Well, I'm going to be deferential to our hosts here. Looking at the five total districts that are on our panel here, the average number of representations in which a panel lawyer asked for third party service provider is 5.4% of the representation, and without identifying any one of the districts, the low was 1% and in that district the average dollar amount is \$13.

Male: That would be us.

Prof. Gould: I admire your willingness to speak but I won't . . . [INAUDIBLE]

Reuben Cahn: Accept responsibility.

Prof. Gould: Here's the question I think the Committee is going to be struggling with, which is in your experience, this is a reflection of lawyers not asking for the experts, the court not granting it and this former attorney is not asking for it. Do they not know that or are they scared of asking for it?

Rachel Brill: I think it's everything that you've just said. I mean speaking from my experience and about my district, it is everything you said. I think there

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have been occasions in the past when lawyers have asked and they've been denied and they've been burned and they've stopped asking. And we can talk about what is incumbent on the defense attorneys and I am certainly someone who is to say the least, encouraging my fellow attorneys to do this, and to say more than really harassing my fellow . . . I mean I think it is incumbent upon us to do it.

We don't and some of the reason is because we've been denied, we've been discouraged. We've been discouraged by the denials. We've been discouraged in more public for about cost containment that we are still talking about in our district and I wish somebody would just come whether it's Judge Prado or for some circuit or some place and say, "We are not in the time of cost containment any more. Somebody needs some authority, needs to say that." I think that we've been discouraged both by the denials and in public about that. I think that we as a group are not creative enough to ask enough and I put myself in that group and my eyes were opened at a recent panel rep national conference when the theme was . . . around the country you people need to start asking for more experts.

I learned why that was the case and I tried to transmit that to my fellow panel attorneys but I don't think there's a culture among panel attorneys in general that the more you put into a case the more you get out a case. I don't think people have that experience, I don't think they are encouraged to have that experience and I think they need to be trained more to get it. I think the blame is everywhere, I think as I said earlier the number speak for themselves and I think it just has to change.

Every anecdote, it's to the point where it's not anecdotal indicates that third party providers like colleges, weapon specialist, finger prints specialist, copy services that can call out documents based on date stamp pages. Any kind of third party service provider you can think of, makes a defense attorney representation of their client better, enhances it. I maybe think you wanted a more precise answer, but I think your question begged all of those different causes.

Prof. Gould: Mr. Schaffnit, your comment?

Gilbert Schaffnit: Well first of all I think when we broke you were asked if you could furnish the statistics to us that you just recited and you said you weren't sure that you can release that document, correct?

Prof. Gould: I do not know whether that's possible. That is why I'm not telling you, but if you remember [crosstalk].

Gilbert Schaffnit: Right, well the problem if we don't know there is a problem, we can't address the problem with our CJA panel lawyers. I have no idea what the

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numbers in my district for request for experts if you will tell me what it is and how it compares to the other districts and whether it's out of line, I'll educate my panel members to be asking for more experts because in my district the judges will approve it. I have no idea because I don't have the data and the data to me should not be a secret. I don't know of anything that would be proprietary about what you just described. I think that should be shared with the panel reps throughout the ninety-four districts so that we can encourage our panel lawyers that aren't asking for experts to do so.

Reuben Cahn: Just . . . Gil I'm in complete agreement with you, it should be shared and I can tell your public defender has the data, has the authority to share it with his panel. Please go to him and ask for that data.

Judge Prado: Just one quick, I promise there will be a short answer. Ms. Brill, I guess I'm trying to figure out the Puerto Rico situation, is it something that's developed since sequestration? Was it there five years ago, was it there ten years ago? You said attitude, is it the attitude of the particular judges in this committee trying to remedy situations? We take the risk to remedy the situation in Puerto Rico, we could affect Judge Moreno see if their crew might not have a problem. Do we concentrate on certain district for it is a district problem or is it a systemic problem that we have to set up rules and regulations that's going to affect everyone so that Puerto Rico doesn't happen around the country?

Rachel Brill: There have been ways, I've been practicing there since 1990, I've been a panel attorney since 1993 so it was \$40 an hour when I started, it wasn't \$20 an hour but it was down there. There have been waves and it's certainly driven by personality and sometimes we like to say that Puerto Rico is a land of men and not laws. It's not the Wild West either. We have a very good plan. Like every plan, it's ambiguous. You heard the chief judge saying that we adhere to the plan and we do kind of do adhere to the plan. It's not with an attitude of respect, not with an attitude of difference, not with an attitude of professionalism on any side here.

We have a good plan, we have ten judges, half and half. Half are lawyers, we will call them abusive and half are fantastic and like many judges describe their districts. Isn't that what ninety-four districts are all about and thirteen circuits are all about? Aren't we supposed to let some things develop and evolve on their own? Perhaps it's something that can be done. I think that the way to fix Puerto Rico needs to come from the First Circuit. It has come from the First Circuit. The First Circuit has proven unwilling, and if somebody could help me, or help somebody in my district, figure out how to get the First Circuit to really take a stand on what's right and what's wrong, I think that will fit.

Transcript (Miami, FL): Panel 6 – Views from a Mixed Panel

Judge Prado: I can't even get the Fifth Circuit fixed, much less than others.

Rachel Brill: The particularly problems of Puerto Rico I think the First Circuit right now needs to fix them and I'm trying, I'm hoping, I want that to happen. I think nationally what you can do as if you haven't already done it two, or three, or how many times is it now? . . . is, what I said before, a national standard of enforced deference. I think while you might say that respect has to grow organically, I think we need to enforce respect for what criminal defense attorneys do. It's not just criminal . . . the retained bar gets the respect. Somebody who has been sitting in his seat earlier explained how as a retained attorney she didn't have these problems. The federal defender offices as a whole get this respect. It's the panel attorneys that are representing indigent people that don't get the respect and it needs to get enforced and it needs to get enforced at a national level and the places where it's happening, great. You're not going to make anything worse. In the places where it isn't happening, people need to be . . . not get the message, not have a trickle down but be told, that what defense attorneys do is essential, and to a certain extent it is protected. I think we can agree on a, we are going to call that protection kind of a bubble that protects it, that's not a very positive word. I think we can sit here and between all of us we probably define that bubble incredibly similar. What just needs to not be touched about this process, and if that can be done at a national level, I think it might aid my district. The very particular problems of 2016 I think we need the intervention of the First Circuit at this point on that.

Reuben Cahn: Thank you. It's time we've got to wrap it up now. We are a little bit over time and it's been a long day after a long two days. I want to thank all of the panel members. You were very helpful. I want to thank the Southern District in general and Judge Moreno in particular for his hospitality and the loan of his court room and we really appreciate all the assistance that you have given us. Thanks.

Judge Cardone: I think we need to be upstairs just of a little while.