

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 1—Views from Defender Services Committee and Defender Services Office

Judge Cardone: Before we get started let me explain a little bit about the format today. We have our first panel ready to go and we'll give you an opportunity to make a brief opening statement. You've given us written submissions. Actually yours is very long so I'm not too worried about you reading from it, but I do want you to know that we've reviewed those so you don't need to read from your submissions. After you make your opening statement, then we'll begin questioning by the panel. Let me introduce our first panel participants. We have Chief Judge Catherine Blake from Maryland; we have Magistrate Judge Jon Feldman from the Western District of New York; and Ms. Cait Clarke, Chief from the Defender Services Office. We'll start with you Judge Blake if you'd like to make an opening.

Judge Blake: Thank you very much Judge Cardone, Committee members, friends. My name is Catherine Blake. I'm a former federal prosecutor and magistrate judge, currently the Chief Judge in the District of Maryland, but I'm here today primarily in my role as chair of the Defender Services Committee, which I'll refer to as DSC. Let me start by thanking all of you for the very challenging task you have undertaken and the hard work that you are all devoting to this important study.

I'm here with Judge Jon Feldman, a member of the DSC and chair of our Budget Subcommittee and Cait Clarke, head of the Defender Services Office in the AO. We do have some opening remarks and then look forward to your questions. I did not submit any narrative testimony but as Judge Cardone mentioned, we did provide a number of background documents on the responsibilities of the Defender Services Committee and the Defender Services Office within the Judicial Conference structure and I will not repeat those documents.

As you know, the Judicial Conference is the policy making body of the federal judiciary. Its members are the chief judges from each circuit, and a district judge representative from each circuit. The conference is chaired by the Chief Justice. The conference does much of its work through its committees, one of which is the Defender Services Committee. I have been a member since 2010 and chair since 2012, this being my last year as chair.

The DSC members generally include one district or circuit judge from each circuit and a magistrate judge. Also participating in our meetings are a Federal Defender, presently John Sands from Arizona; a Community Defender, Reuben Cahn, a member of your panel; and a panel attorney representative, also known as "citizen" Chip Frensley, who I gather is not here today.

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Structurally I believe that the participation of the defenders and the panel attorney in our committee discussions is extremely valuable, indeed essential, to our decision-making process. As you also know the Defender Services Committee is staffed by the Defender Services Office at the AO headed by Cait Clarke. Cait will tell you more about the work of her office in regard to managing the budget, training and developing suggested policy guidance.

I will just comment that as chair I work closely with Cait who joined the office immediately after sequestration and just before the AO reorganization. Despite that bad timing she has done an outstanding job and presides over a very dedicated and hard-working staff.

Our committee has two subcommittees, one for strategic and long range planning and one to oversee the budget process for individual defender offices that is chaired by Judge Feldman. My plan is to talk briefly about strategic and long range planning, then about the overall budget process, and then about some possible changes in the present structure which your Committee may be considering.

First as you know the judiciary engages in long range planning and recently issued a revised plan in 2015. All committees have a general responsibility to comment on the judiciary's plan within their subject areas. I was pleased institutionally that as chair of DSC I was invited to be on the ad hoc Strategic Planning Committee that met to discuss the input from all the other committees and helped draft the final plan which is part of the background material we provided.

I would just like to point out that the 2015 plan for the judiciary recognizes the goal of providing well qualified representation to defendants including "sufficient resources to assure adequate pay, training, and support services." It also recognizes "where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions." It's part of the long range plan. In addition, the DSC and DSO have been engaged in their own strategic planning for many years. I think this has been a helpful process.

Just to give a couple of concrete examples, the committee with the assistance of DSO has supported the creation of Federal Defender, or Community Defender Organizations in every district with sufficient caseload and today there are defender organizations in all but two of the districts that meet the caseload requirement.

We have supported the creation of case budgeting attorneys at the circuit level, fair compensation for panel attorneys, the creation of capital habeas units, affectionately referred to as CHUs, in districts with a need for that resource, and of course training programs intended to maintain and improve

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the quality of representation provided by both defenders and panel attorneys.

Of course the Defender Services Committee like other conference committees cannot unilaterally adopt new policy for the judiciary. Rather we present recommendations to the Judicial Conference which votes on whether the recommendations should be adopted. One example I can give you relates to a problem I know you are considering of voucher reductions by judges for other than mathematical or technical errors. Approximately ten years ago the DSC proposed and the Judicial Conference adopted as guidelines the principles, and I'm going to paraphrase, that vouchers should not be reduced to save money for the program in bad financial times and when a court intends to reduce a voucher, counsel should be given prior notice and a chance to respond to the reason for the reduction.

Now the Defender Services Committee has no authority to reverse any specific cut that is made by an individual court or judge, but these policy guidelines provided a basis for me to send out a joint memo with then director Judge John Bates in December of 2014 reminding courts about these Judicial Conference policies in response to increased reports of unwarranted voucher cutting.

Very briefly on the budget process, our committee with the assistance of DSO and the guidance of the Budget Committee develops the proposed budget request to be made to Congress for the following fiscal year. In other words, at our June 2016 meeting we will agree on an amount that we believe is justified to cover the needs of the defender organizations, the panel attorneys, and program administration for fiscal year 2018.

As chair I meet with the Budget Committee in July of 2016 to present our recommendation. Much of the calculation is driven by caseload and staffing projections, but occasionally there may be areas of disagreement. If our recommendation differs from the Budget Committee and that difference cannot be resolved between the two committees, the Judicial Conference at its meeting in September will make the final decision. It is also the Budget Committee that presents the Defender Services request along with the other judiciary requests to Congress for consideration. I believe that Judge Feldman and Ms. Clarke may address in more detail how our Budget Subcommittee and ultimately the full committee allocates the money that Congress eventually provides.

Finally, regarding specific proposals that your Committee may be considering, let me offer my personal opinion about some changes that might be made within the present structure. I am not now speaking officially for the DSC and I prefer not to offer any opinion on more extensive reforms that might require significant statutory and structural changes including the relocation of Defender Services into an independent entity of some kind

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outside the judiciary. Whatever recommendations this Committee makes will be considered, I understand, and commented on after deliberation by the Defender Services Committee next year under a new chair.

Speaking for myself first, I strongly support the restoration of the Defender Services Office to its prior position of greater autonomy within the AO. I do not question the motivations of the judges and staff responsible for the reorganization. Indeed I applaud the goals of efficiency and better service to the courts that I assume led to the changes and I very much appreciate the hard work and commitment that has been shown by AO staff trying to make the new structure succeed, but defenders are not court employees. They are not a program service of the judiciary. They are independent advocates for their clients within our adversary system and indeed are sometimes adversaries of the court itself.

They should be compared in terms of resources, funding, training, and policy to the prosecutors with whom there should be parity. As a corollary to this recommendation, I believe control over the IT staff and computer systems that handle defender data should be returned to DSO and given sufficient dedicated staff and funding. Defenders have legitimate concerns about the confidentiality of their client data, much of which need not and should not be shared with the courts. Now the Defender Services Office and the Defender Services Committee certainly do need access to budget and workload data, but that access should be controlled by a more autonomous DSO working closely with Defender Offices. I believe that that transfer would help restore some flexibility and efficiency that has been lost under the reorganization and would also help restore defender trust in the AO. Again this is structural and not personal. I do not criticize the dedicated AO staff who have tried hard to make this work.

I also support returning to the Defender Services Committee the jurisdiction over compensation and staffing formulas that was transferred to the Judicial Resources Committee. I believe the work measurement process while well intentioned and successfully performed thanks to both AO staff and the defenders themselves, removes needed flexibility from the committee that has the institutional experience and responsibility to support the defenders unique mission and for example, respond to changes in prosecution policies or court initiatives in different areas of the country.

I support an increase in the panel attorney hourly rate as many of you already know. I also support a greater role for the committee, DSO staff, defenders and panel attorneys themselves in advocating to Congress as part of the appropriations process. While I fully understand the need for the judiciary to speak with a consistent voice, and I appreciate the difficult and generally successful work that has been done by the Budget Committee and its staff, I believe that there are issues specific to the defender and panel attorney

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programs on which we could assist and should have the opportunity to be heard. Thank you very much for your attention. I'll be happy to answer questions later.

Judge Cardone: Judge Feldman.

Judge Feldman: Thank you Judge Cardone and Committee members. I appreciate the opportunity to testify before the Committee. I join all those who have testified before me in thanking you for the time and enormous energy you have and continue to devote to studying the federal system of public defense. Your work is critical to the continued success and improvement of our public defense system and as I hope you know, the Committee on Defender Services fully supports your efforts.

By way of background, I have been a Magistrate Judge in the Western District of New York for over twenty years. I'm a former federal prosecutor, CJ panel member, and was appointed as the first federal defender for the Western District of New York by the Second Circuit in 1992. I have been a member of the Committee on Defender Services since 2009 and have been chair of the Defender Services Budget Subcommittee affectionately known as the DSBS since 2012. There are five other members of our subcommittee, all of whom are judges. In addition to the judge members of our subcommittee, we also have a federal defender representative who participates in all our discussions and deliberations.

The focus of my testimony will be to provide to your Committee information about the role of the Defender Services Budget Subcommittee in three specific areas. First the budget process for Federal Defender Organizations, second the funding of mega cases in defender offices, and third our initiative with regard to the use of best practices with contracting for private service expert and investigative service providers. I hope also to add a few personal observations about the problems I perceive with respect to the program's current structure.

One of the primary responsibilities of the DSBS is to consider and recommend for approval annual budgets for each Federal Defender Organization. Salaries make up approximately 80% of FDO budgets. The cost of space consumes another 10%, and everything else like equipment, furniture, training, library, travel, experts, and supplies make up the last 10%. As you can tell, the staffing formula is critical to the FDO budget process. Until last year, each defender worked with their assigned budget analyst for the next fiscal year and then those budgets were reviewed by our committee sometime in August. If there were any special circumstances which impacted a defender office, our subcommittee had the flexibility to adjust an office budget to meet those circumstances and demands including making staffing adjustments if justified. The work measurement study and the accompanying

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transfer of jurisdiction over staffing to the committee on Judicial Resources will in my view adversely impact the ability of the DSBS and the full committee to respond to individual FDO office staffing needs that inevitably but predictably arise during, excuse me, in a particular defender office.

As you know, the defense function is unique in that it only acts in response to prosecutorial initiatives, initiatives that are totally out of its control. While it is perfectly appropriate to use a staffing formula as the starting point for an FDO budget process, restricting the flexibility of a defender organization to adjust staffing needs in response to an unforeseen change in caseload whether by virtue of the number of cases or the complexity of the cases, or sudden changes in the law, places the quality of the representation at risk in my view.

In addition to developing budgets for approval of the full committee, the DSBS also considers and approves funding requests when a defender office has been assigned to a case likely to involve high representation costs. These cases are referred to as mega cases and although few in overall numbers, consume a disproportionate percentage of the defense appropriation in both defender and CJA sides of the ledger.

When a mega case arises, and they most often arise in cases involving a death penalty prosecution, either as a direct representation case or in habeas review, the assigned defender will develop a proposed budget and submit it to the chair of the Defender Services Budget Subcommittee. As chair and in order to preserve confidentiality even among DSBS members, I assign the case to one of the committee members to act as liaison with the defender. The judge liaison will then contact the defender and work closely with the defender to get the budget ready for presentation to our subcommittee.

Once the mega case budget is ready for consideration, our subcommittee will review the proposed budget. Our standard of review is that the defender's litigation plan must reflect the exercise of reasonable and informed professional judgment consistent with the best practices of the legal profession and that any requested expert, investigative, or other ancillary professional services are reasonably necessary or appropriate.

Our program is, of course, funded with taxpayer dollars and one of the committee's strategic goals is to provide cost effective defense services. In an effort to assist counsel in controlling the cost of private service providers, the DSBS developed and in December 2013 the committee approved several best practices initiatives for mega cases. These initiatives include requiring written retainer agreements when experts or investigators are hired, setting forth the details of the engagement including the hourly rate and the approved number of hours. Second, encouraging the use of presumptively reasonable hourly rate ranges for commonly used providers, of commonly used private service providers. Three, requiring travel time to be billed at a reduced rate

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for lengthy periods of travel, and fourth, requiring that Federal Defender's explore alternatives to an hourly rate of compensation where it is contemplated that a private service provider will be paid more than \$100,000 in any twelve month period.

The DSBS and the full committee are well aware and troubled by the fact that CJA counsel are not using private service providers and experts with the same frequency as federal defenders. By establishing presumptively reasonable rate ranges for commonly used private service providers, and encouraging courts to adopt these policies, we also intended that our new initiatives would be used by panel attorneys to convince presiding judges that private service providers should be used and sought and approved in districts where expert services are underused and to encourage judges to approve a presumptively reasonable hourly rate without question or reduction.

All of our best practices initiatives are set forth in a February 2014 memorandum. The memorandum is included in our written submission and I'm happy to answer any questions you may have about our best practice initiatives.

Finally, like many who have testified before you, I too have views on the overall structure of the federal defense system. Like Chief Judge Blake, I have to emphasize that the views I'm going to express are mine only and not those of the DSBS, or the full committee. My views are shaped not only by my term as a member of this Committee, but also in larger part by my experiences as a CJ attorney and my service as federal defender in the 1990s at a time when the committee chaired by Judge Prado was reviewing the CJA and we defenders were consumed with discussions and debates about the future structure of our program.

In some important ways the tensions that existed at the time of the Prado Report are identical to those that exist today. The first principle of the ABA's Ten Principles of a Public Defense system is independence. That structure or something similar of total independence remains the best, if not only option to fully embrace the principle of a truly independent public defense delivery system, but another black letter principle of an effective public defense system is that the quality and effectiveness of that system, the ability of the lawyers to meet their Sixth Amendment obligations, is directly dependent on the resources the government is willing to devote to that system of public defense.

That was the quandary that caused so much discussion and disagreement among defenders in the early 1990s and I believe those tensions still exist today. The reason they exist has nothing to do with defenders, or for that matter judges. It has to do with the one overriding danger perceived to be associated with complete independence, the ability to obtain adequate

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funding for the public defense function.

In important ways the defender program today is different than the one I was part of twenty-five years ago. It has grown and matured and established itself as one of the most respected voices of the principles for the Sixth Amendment. The staff and leadership of the DSO are among the finest people I have ever had a chance to work with. The defenders today are uniformly individuals at the very top of their profession, experts in the field of federal criminal defense who for the most part have devoted their careers to defense of the indigent. Putting aside the issue of whether total separation and independence from the judiciary risks inadequate funding, there remains in my view a compelling and immediate need to release control of many of the aspects of the defense function from the control of judges.

Indeed while I consider my service as a member of this Committee to be among the most important and rewarding of my judicial career, the fact remains that the direction of the defense function is controlled by a committee made up entirely of judges leaving the nationally recognized experts in the criminal defense profession, the lawyers charged with implementing policies and providing the representations, with no vote and little authority over the direction of the defense function.

A few moments ago I testified about the important duties of our Budget Subcommittee. Frankly in my opinion there's nothing the DSBS does that the defenders are not capable of doing themselves and should be doing themselves. The defenders and DSO staff are perfectly capable of using a flexible staffing formula to develop office budgets within an established appropriation without judges' involvement. As far as mega cases go, defenders have the experience and expertise most judges don't have in deciding whether a particular litigation plan is consistent with the best practices of the legal profession and whether a particular private expert or investigator is reasonably necessary or appropriate. In fact, their advocacy in convincing many members of my committee that a particular type of expert is truly needed or that a particular line of investigation is necessary, has been remarkable and persuasive. But I often wonder whether this is a hoop that they should really be required to jump through.

My point is that even with the limitations inherent in having the defense function placed within the judicial branch, more must be done to establish greater autonomy and independence. The current structure requires the voice of defenders to be filtered through the judges. That filter in many respects is unnecessary and more importantly, deprives the defense community of their best advocates on policy and funding issues of national importance.

If it's determined that the best option for insuring adequate funding for the defense function is to maintain the defender and panel program within the

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judiciary, then my view is to the extent possible, control of the defense services must not rely solely or even predominantly on judges.

I close with saying whether increased autonomy and independence is delivered by establishing some new national governing body within the judiciary or by revamping the existing Defender Services Committee structure to evolve and allow for voting membership of FDO, CDO and CJA panel members or by some other mechanism, is one of the many challenges you face. If there are easy answers to these structural tensions, they escape me but I thank you for the opportunity to be heard and I'll try my best to answer any questions you may have.

Judge Cardone: Ms. Clarke.

Cait Clarke: Good afternoon Judge Cardone, Committee members, and staff. As others have said, thank you so much for the opportunity to testify, but also for your time, hard work, and dedication to this historic study. My name is Cait Clarke and I am the chief of Defender Services Office in the Administrative Office of the U.S. Courts. Only a few blocks from here I used to volunteer as a tutor in a small public school when I was an undergraduate at Villanova University, and yes, this is not in my remarks, but I have to note not only do they have a wonderful basketball team and are national champions, but I want you to know that the University also instilled in its students an emphasis on public service and community service.

To that end, I would go every week to a small neighborhood in Philadelphia and tutor young men and women. In the mid-1980s that neighborhood where I tutored, law enforcement dropped bombs on row houses during a standoff. It started a fire that killed eleven people. Five of them were children. It destroyed 61 homes and displaced 250 people. The fire burned for almost an hour and the neighborhood was left in ashes. This was a very formative moment in my life and my legal career. I knew that the promise of America lay not in violence and hatred, but in the commitment to equal justice under law and giving voice to the voiceless or disaffected, or disenfranchised.

Today I am honored to serve as the leader of America's federal public defense program which is at its very core dedicated to equal justice for all. The scope of this Committee's review includes an assessment of support provided by DSO to Federal Defender Organizations and CJA panel attorneys across this nation. DSO office staff is committed to supporting and building the highest quality hybrid public defender system in the federal courts. A hybrid system requires us to become proficient on an array of laws, policies, internal judiciary procedures, and external political dynamics so that both the panel and the Federal Defender programs can provide a zealous defense in every single case. We must meet the needs of all clients.

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We at DSO work to support this program, but primarily I want you to know we are focused on the Sixth Amendment. To that end I wanted to just share with you and the Committee the work that we do, but start with an overarching, the principles by which I lead the office and we manage the national federal defense program. I think it's important that you know what our office culture is like and what we do, how we hire and focus on this right.

At the outset, we always ask questions about the Sixth Amendment. It is critical to recognize why we have a Defender Services program at all. The spirit of fair representation requires acts of dissent and a commitment to equal justice under law. Our American history is not to just tolerate a zealous defense, but encourage it. Why is the right to counsel in criminal cases recognized in the Constitution, affirmed by the Supreme Court, and supported by both Congressional authorizers and appropriators?

If you ask anyone on our staff in the Defender Services Office why we do what we do, they'll probably be able to cite three fundamental reasons. First, the basic value of the American legal system proudly engraved on the pediment of the United States Supreme Court building is. "Equal justice under law." Therefore, the Defender Services Program works to make sure that this commitment is kept, that our system of justice lives up to its noble ideals regardless of financial means of the accused.

A second fundamental reason for a strong defense function is to hold the government accountable. Through the quality of its legal advocacy, an adversarial hearing testing of the prosecution, the program helps assure adherence to the Constitution in all criminal cases on a daily basis.

Thirdly, the national defender program helps sustain public confidence in the administration of justice by demonstrating a firm commitment to fairness, due process, and the rule of law. In other words, our job is to support those who protect individuals inside the criminal justice system because public defenders, federal defenders, community defenders, panel attorneys, bring individual voices and their circumstances forth to ensure fairness and the rule of law. We're all connected. We all have a part in ensuring the rule of law is protected, not overcome by hatred or bombs, or over incarceration, or marches in the streets. This independent role is critical in an adversarial criminal justice system.

In service to these goals, my office, Defender Services Office staff dedicate themselves to this mission. We ensure that every accused person is provided representation consistent with the highest standards of the legal profession, so briefly let me tell you how we do that. I will share three examples after I explain our organization so everyone understands how the Defender Services Office is structured and then take questions.

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DSO is a component of the AOs Department of Program Services, and I report and our staff reports to the Associate Director of that department. DSO is organized into four divisions, all connected to providing critical support to the attorneys and staff in the field. First, our Program Operations Division, what we also call POD, has four main functional areas. As you heard from Judge Feldman, budget is critical. Yes, the POD budget staff formulates and justifies the program's annual budget, requests, and it is responsible for executing the enacted appropriation.

In fiscal year 2016 our budget totaled \$1.1 billion dollars and we support more than 3500 FDO personnel and more than 10,000 panel attorneys. Budget execution includes activities such as developing budgets for each FDO, tracking and projecting spending and caseloads, creating budget reports for management and preparing grant disbursements for the Community Defender Offices. Our Program Operations Division member staff provide daily support to FDO personnel for local matters that include supplemental funding needed for flexibility, help interpreting the staff formulas, implementing the formulas, mega case budgeting, and establishing capital habeas units.

The second is the assessments. The Program Operations Division provides team reviews, consultations on . . . in the field, reports on operations, and administration of the Federal Defender Services program in each federal judicial district. In order to ensure that it is administered in accordance with applicable statutes, Judicial Conference policies, and policies or practices of the Judicial Conference's Committee on Defender Services. The assessments also help us ensure that FDO administrative and operational processes are implemented correctly. We help offices from everything from HR programs, problems, audits, to union negotiations and when needed we send staff in to help whenever necessary.

Operations. The operations function area provides FDOs with non-budget services related to their unique operational needs such as Human Resources. POD for example maintains and updates the pay tables every year. We try to ensure parity with the U.S. attorneys and as you probably have heard, the U.S. attorneys' pay scale has been adjusted and we are working on that currently to adjust the pay scales in our offices. We work on space and facilities, not an easy task actually as some of you may know.

Procurement, Training. We train staff at the ADO Conference, the Administrative Officers Conference, and we also help with new defenders in ADO orientations. Travel policies, they can be quite complex. We track appointments of defenders. This is a service to the circuit courts as well, and we also support information technology.

Other activities under operations include maintaining the case waiting

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systems, our system of record for the case weights as you heard from Judge Blake, and we coordinate the management of data collections systems. Administratively, the POD division also functions in a way that addresses DSO issues and AO issues common to all other divisions, but this includes management issues, DSO's contributions for example to GAO reviews. As you know, the Government Accounting Office will call for a study and so we support that work to make sure accurate information is relayed to the GAO and in any financial audits we're very active in ensuring the judiciary meets all of their audit requirements.

The Legal Policy Division is the second division. DSO's second division serves primarily to support the Defender Services Committee which you have just heard about. Judge Blake and Judge Feldman and other members of the committee are incredibly dedicated and active. I just want to take a moment to thank them. It has been a true honor to work with this committee during a very challenging time. We work with the committee to coordinate the briefing materials and we also ensure that all of its subcommittees have accurate data and materials to prepare for their decision making.

At the direction of the Defender Services Committee, with the assistance of a professional research firm, our Legal and Policy Division staff develops, administers, and analyzes national programmatic surveys of federal judges, panel attorneys, panel attorney district representatives which we like to call our PADR's, and the chief federal defenders. These surveys are not just your normal surveys. They provide critical data and programmatic performance over time, over lengths of time, to help set our priorities for improving the program and initiatives. Data and stories are critical to the success of the Defender Services program.

The Legal Policy Division organizes annual conferences for chief federal defenders and the ninety-four PADR's, our panel attorney district representatives, and we coordinate contracts for national positions and services, a very important part of our job. Finally, the Legal Policy Division staff provides guidance on CJA and Judicial Conference policies on a variety of issues including panel attorney compensation and reimbursement. The use of experts and service providers, I know that has been a very important issue for all of you.

District and circuit CJA plans, disclosure of CJA information to the public. When we receive public requests, we ensure that they have accurate and up-to-date information. Litigation involving FDOs, we support those offices that are sometimes sued. International prisoner transfers and international case related travel, that's the Legal Policy Division.

The third division you have also heard a bit about, but I want to make sure you understand what the Defender Services Office does in terms of our

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Training Division. The Training Division develops and administers a variety of extremely high quality national, regional, and local training events for both FDOs and CJA panel attorneys. Among these programs are the Fundamentals of Federal Criminal Defense Seminar targeted at practitioners newer to the federal system. The Trial Skills Academy provides on hands, hands-on, excuse me, trial skills and many other events, including in 2015 we held a seminar on race in the federal criminal justice system.

Each year our Training Division supports and sponsors close to forty national programs. We broadcast a number of webinars and support hundreds of local and regional trainings developed by Federal Defender Offices. They also maintain fd.org which contains an array of resources for CJA attorneys as well as links to upcoming and prior training events with an archive of materials. Frankly, it's one of the best training divisions in the country. We can also do more. We can reach more people if we had more resources.

Our final division, which is Administrative, provides critical support for the administration of centrally held funds, the delivery of equipment, materials, and other logistics for national training and management seminars. We provide record keeping and accounting services. Our Administrative Division, which as you all know, are very hard working but also very critical to keeping not only the trains moving, but trolley cars and subways. They make all of this happen and I want to thank them because often times they go unnoticed.

Through the combination of these activities and many other which time prevents me from relating, DSO is constantly working to strengthen this right to counsel in the federal courts. As you've heard, there are areas of concern. We are working on these areas. Some of those areas if I may highlight, take a moment to highlight, are optimizing the program structure to best support its goals and needs. We are working to support capital habeas units. Improved data collection. We must try to ensure the availability of needed human resources with expertise. I'm a believer in leadership training and management and as the book "Good to Great" speaks about, you have to get the right people on the bus, but get them in the right seats and that's what we're working to do is make sure we have the right people inside DSO with the right skill set to ensure that we can provide the highest quality support.

We also know we have a ways to go with achieving the appropriate level of parity with the Department of Justice. It's not just pay parity. It's training, it's celebrating and improving our detail program on Capitol Hill and other places. We also must address unwarranted voucher reductions and the denial of under use of experts and other service providers.

All strong leaders know you need to identify and build upon your assets and then address these problems. We do have assets. We must acknowledge the

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Defender Services Office has many assets that are growing and we appreciate the support of the Defender Services Committee, the Judicial Conference, but also the work that you have noted that is working well. Let me just identify three and conclude. The first is our padre program. The Panel Attorney District Representative program deserves special mention because most panel attorneys are solo or small firm practitioners. Through the PADR program we have dramatically increased the effectiveness of the panel attorney component of the program. We have aligned their efforts with national objectives and fostered an institutional presence in every district. Now when we do our assessments for example, we work with the Federal Defender or Community Office, but we also reach out to the panel. Our panel program is very important in the hybrid criminal justice system.

The second example of an asset that I would like to note is our Case Budgeting Attorney program. Our legal and policy staff have been instrumental in developing and expanding the Case Budgeting Attorney program to ten of the twelve circuits. DSO provides funding and training for these case budgeting attorneys who act as trusted intermediaries between the courts and the panel attorneys. They help ensure that complex cases receive needed resources while remaining cost effective.

Finally, our Training Division administers the National Litigation Support program. You have heard from Mr. Broderick and I just want to note it is an asset, our national programs are a great asset to the Defender Services Organization and the Defender Program. Our National Litigation Support program in particular provides critical resources and training for the ever growing number of cases involving high volume, complex electronic discovery. In addition to expert national resource staff hosted by the FDO in Oakland, we have developed a joint e-discovery Protocol with the Department of Justice and contracted with three coordinating discovery attorneys to actively manage exceptionally voluminous or complex discovery issues.

We benefit, all of us again are connected, and we benefit from communications and meetings with those in the Department of Justice such as our death penalty protocols and our work with the Access to Justice Office. My remarks here only cover a sample of the work performed daily by the men and women of the Defender Services Office. Typically they work with little fanfare and recognition. I look forward to your questions to discuss these and other issues in more detail. Thank you.

Judge Cardone: All right, let's begin with questions and we'll start with you Judge Fischer.

Judge Fischer: Well, we could spend all three days with the three of you I think, and thank you for being here. Ms. Clarke I would like to start with you and the judges may have comments on this as well. You've given us testimony. You've

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given us this information about, a little bit about how the process works and the bad news for me was that it was so fascinating because it seems like that should be things I should have known before. I've contacted the DSO on a regular basis and called for information on particular cases or particular billing issues, that kind of thing. I don't think very many judges in the country know that that's an asset that we have and I would not have known it but for the fact as you know, that we have a staff person, a CJA supervising attorney, and it was she who said to me, well why don't we call DSO and see what information they have on this issue. It's a tremendous asset that I think most judges don't know about.

In addition, and here's my question, much of the time I get an answer, but the answer will be oh Judge Fischer, you always call us with such interesting questions and this is a gray area. There must be a lot of gray areas that you know about that it would be helpful for us to have an answer for so that what's happening around the country could be more consistent. One particular thing is how do we tell if a case is extended or complex? I know there is a little bit of information in the guide and there are certain things that are addressed in the guide. You can't pay for clerical for example. What would the process be to get us more information? I assume you can't just decide, yes we'll start paying for this. What would the process be assuming it all stays in the judiciary and DSO still performs the functions that it performs? We're still going to need help. How can we figure out how to get you more help so you can get us more help?

Cait Clarke: So if I might I'll start with the overarching message that you're absolutely right that we need to let more judges know about the Defender Services Office, but also educate them about the defense function. And so I'm hoping to that end we would have more opportunities with the FJC on training judges and providing really thorough training about not just what the Defender Services Office can do for them, but how we operate within Judicial Conference policy. Because I think that's where we get into the gray area that you might be referring to? I see you shaking your head . . .

Judge Fischer: I think that's right.

Cait Clarke: which is where we, because we work within the Judicial Conference policies, we can't often answer directly. We have to, of course, check the guide, of course, make sure that we're operating within the appropriate boundaries. I think you heard Mr. Kalar say in his earlier testimony we need a buck stops here mentality. To a certain extent we do do that, but in other ways we can't. Structurally we can't because of the work in our structure. I do want to note though that we train, we try to make sure that all new judges, chief judges in particular, we go to every single orientation and we bring this information to them. We're always offering our direct lines, our emails, and we have duty day attorneys in several of our divisions who answer questions all the time.

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Once people figure out that we have a wealth of resources or that we can find the right people, we try very hard to make sure we answer promptly and we do educate on those cases and the complicated cases.

Judge Fischer: That chief judge information is not necessarily getting beyond the chief judge.

Cait Clarke: Right, which was my second point which is if I could share a funny story. Which was when I first took this job I had several friends in the world that I worked in and they went online and they said, “Well congratulations, you’re head of the Training Division.” I said, “No,” and they said, “Well, we went to fd.org and we couldn’t find anything on the judiciary’s . . . ,” at that point, now it’s changed, but at that point they couldn’t find anything about what our office did and it was an education to folks, my friends at the Constitution Project, NLADA, NACDL. People who work in this field didn’t know much about the internal operations and the assets which we could offer. So that’s one of my goals, is communications and ensuring that we have greater presence that filters beyond the chief judge orientations with the FJC, and with the help of our Office of Public Affairs, who has also been very helpful in trying to raise our presence. But I thought maybe, would you like to speak about what cases qualify at least with DSBS?

Judge Feldman: Sure, the mega case is defined as a case in which you can reasonably expect it will take over 300 hours to complete.

Judge Fischer: Which is almost everything in our district and many others I’m sure.

Judge Feldman: Yet I would bet that very, very few magistrate judges or district judges are recommending case budgeting in things that are mega cases.

Judge Fischer: Absolutely.

Judge Feldman: The difficulty is, and you’ve identified it, is it’s very difficult to get judges to read memos that come out or be educated on things. I mean the case initiatives that I talked about, it went out in a February 14th memo, but I remember reading Kathy Williams’ testimony when she gets a memo from AO she automatically goes to the delete button. It’s really, really hard to get that information out there and you all know about it and people on the Defender Services Committee knows about it, but you’re absolutely right. Getting that information out there and the resources that are available is very, very difficult.

Judge Blake: Sure, I would like to add a few things. In terms of the extended and complex, a lot of that I think right now is simply defined by hours and dollars and that is useful to some extent. I personally think that the current case compensation

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maximum is a bit lower than it should be. I think there are many cases that require more than that amount that would not necessarily be considered extended and complex, would just be the normal kind of cases that we see. Going back to training, I would echo what Ms. Clarke said about the Federal Judicial Center and its ability not just to reach chief judges, I agree with you, but the baby judge training for example, periodically the educational workshops that we do have from time to time I would welcome, and they're certainly doing it, but I would welcome even greater involvement from the FJC.

We can in some ways disseminate guidelines through things like CJA Model Plans. I think we're working on an update of that now. We can, I think having local CJA committees that involve the defenders and the panel attorneys who may know some of what the AO does even if the judges don't. Then it becomes important with an initiative such as eVoucher which we haven't talked about in any specifics, but one of the important things I think for us and for our committee in the development of eVoucher is that it should conform to Judicial Conference policies, for example, requiring a reason when there is a reduction. It is an electronic system that people want to be as easy as possible, but we think it's important that it build in these guidelines that not everyone may be familiar with.

Judge Fischer: Or choose to follow if they are.

Judge Blake: Or choose to follow.

Judge Fischer: I guess that's the problem with dealing with Article III judges. A guideline is a guideline. Let me just ask also if you have comments on, and I'm not quite sure how to put this, but whether there's a tension, or how you deal with the tension, between your very specific function with regard to the defense but being within an organization that has as its mission or as one of its missions at least, serving the judiciary. I think that may have part of what resulted in the defense function coming under that. Go ahead, Ms. Clarke.

Cait Clarke: Did you notice Judge Blake said, "Go ahead Cait." Yes, without a doubt but I think that also I want to note that we are protected in many ways by the judiciary and I think there are many judges and staff who ensure that the defense function is well run, efficient, and serves . . . is client-centered. We are a very, as you could hear from my testimony, a client-centered, mission driven organization. There are times in that client-centered, mission driven decision making where a new initiative might come from the Hill and the Judicial Conference policy dictates what we do and it might be focused on, well that's awfully costly, or it's a lot of time for the courts, or if we do this, it will be a lot of money.

I'm thinking of immigration. I'm thinking of some of the work on *Johnson*,

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Drugs Minus Two, etc., etc. You all know as you're shaking your heads as well. That can be very challenging in that we will put forth our ideas, but again they're not always consistent with Judicial Conference policies so our writing will sometimes end on the floor of the cutting room as the statements go forth. That's where we are but we also make sure that we educate and continue to train and work in other ways.

The Judicial Conference policies are really what guide our Legal Policy Division and our office and that is what often happens, the conversations I have with the Legal Policy folks within the judiciary. I will say things like can we start an initiative on let's say compassionate release. Let's make sure we help people with compassionate release and I'll talk with Matt Rowland, my colleague in the Department of Program Services and Laura Minor's in support of it, but there are definitely boundaries by which we could do this work. Sometimes I dream of being able to be a little more proactive in certain areas. Not a little more, very proactive in those areas, but structurally that's not appropriate.

Judge Blake: I'd just add that I think Ms. Clarke does a very good job of walking a tightrope, but she is institutionally put in that position because obviously she is right now part of the judiciary. Her focus is on staffing our committee and on absolutely responding to the people that direct her work in the administrative office at the same time trying to maintain and support the mission of the defenders. It's a difficult role, one I think she balances very well, but there are conflicts.

Judge Cardone: Judge Walton.

Judge Walton: We have received conflicting views about whether it would be advisable for us to recommend that there be a separate entity providing the services that Defender Services provides. One of the concerns is whether you would be able to get the funding that you now get which I know is not adequate, but it's what it is. What are your feelings about whether you would be able to get what you need maybe to the level that you get now and maybe even more if you were separate as compared to being under the cover of the judiciary?

Judge Blake: I'll start. I don't feel comfortable giving you a final opinion, though. I mean I recognize this is a very critical issue. I think that we have done reasonably well with Congress. In fact I think the lesson of sequestration which was a horrendous ax but it hit everybody. I don't believe it was specifically aimed at defenders. Part of what we learned from that I think is that Congress was actually fairly responsive, understood those needs. In fact, defenders got one of the two, I think it was, anomalies or special additional amounts of money to help out during that crisis.

I think there is some good advocacy that can be done for the defense function

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whether it is inside or outside the judiciary. I also worry a little bit however that wanting to go outside the judiciary may be too much of a reaction to what did happen over the past few years. Sequestration, I hope, was unusual. It has not happened before in my memory, that degree of a cut by Congress and there are examples also of nonprofit agencies, of institutions outside the judiciary, losing the favor of Congress and being cut.

I think the judiciary, while we may not have done a perfect job all the way along, really does understand the importance of the defense function and that all of us and I include the Budget Committee and the Executive Committee, although we may have disagreements, really do want to secure adequate funding for the defense function along with the rest of the judiciary. So there is some protection in that placement.

Judge Feldman: I agree. You know I just remember back in the '90s this discussion and it pretty much is the same discussion. Should it be absolutely independent and separate? Yes, if you're looking at what the perfect is but I worry that the only branch of government which has an understanding of the importance of the Sixth Amendment and would defend that against other branches and against the power of the purse, is the judiciary. I mean this is an organization where the highest calling is representing the Loughner's and the Kaczynski's, and the Tsarnaev's and it would take very easily for the other branches of government to really use that against the defense function.

I think the only branch that can adequately defend it is the judiciary. That being said, I think there has to be a lot of changes in terms of giving more autonomy and independence to defenders and the whole organization. That's my view. It's not the view of the committee. I'm just speaking on my own behalf.

Judge Blake: As was I.

Judge Walton: Ms. Clarke.

Cait Clarke: I would agree with what was said. I would also just add that the Budget Committee and over the years as you've seen the program has grown. We now have eighty-one offices and we serve 10,000-14,000 panel attorneys. That support has grown over time. I think sequestration certainly highlighted a lot of challenges. What we have to think about is that relationships on the Hill are critical. It's not just a parachuting in relationship once in a while. The financial liaison office has excellent relationships with the subcommittee members and staff.

We have made headway. Judge Blake and I just recently were invited with Diana Simpson and Ed O'Kane who run the financial liaison office to go over to the Hill. It really was a moment that made me very proud because we

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connected with the staff members and it reminded me of my days when I used to do work on the Hill for other organizations about explaining the work and ensuring that you had . . . we had survey data, but we also could answer questions and tell stories. That ongoing relationship is very critical when Congress is deciding on our budget, but also on new initiatives or legislation like sentencing.

But those relationships have to be built over time and I think that's an important note that the financial liaison office has, that they've done a very good job. I think we could do a better job with them or along-side, or more proactive. That's my personal view just because I do feel comfortable speaking to people on the Hill about the importance of this work and parity. Remember the prosecutors have a number of details on the Hill and they influence not only policy, but budgets etc. I think we could improve our voice in the budget process and we are making headway and I want to say thank you to the Budget Committee and thank you to the financial liaison staff who have helped us. But I think we still have work to do.

Judge Walton: Does the current structure inhibit your ability to establish those relationships?

Cait Clarke: Yes, I, we work through the financial liaison office.

Judge Walton: If you were elevated to the prior structure that you had within the AO, would that address that concern?

Cait Clarke: We would still work through the financial liaison office but I think the FJC, well Judge Blake you were, and both of you were active in FJC, I think they though prepare their budget and the financial liaison office also takes it to the Hill.

Judge Blake: I believe that's correct. The Federal Judicial Center develops its own budget independent of the rest of the Judicial Conference structure, but has chosen to have the advocacy of the Budget Committee on behalf of the Federal Judicial Center to actually present that budget to Congress.

Judge Cardone: Do they fiddle with the budget at all or do they, is it a pass through?

Judge Blake: I believe it is a pass through. The Budget Committee does not, so far as I know, influence the particular parameters although they may very well consult on what is the general fiscal climate but I don't want to be taken as an expert on that piece of it.

Judge Walton: Budget cutting is something that we, I mean voucher cutting is something that we have heard in virtually every hearing that we've had. Fortunately we don't seem to have a big problem in that regard in my district I think to a large degree because of A. J. Kramer, but it is apparently a problem in other

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districts. If the structure cannot be changed, and I think that would be a major obstacle I think getting that change through Congress, but assuming we have to maintain the current structure, is there something that we could recommend be done in order to address that problem? I mean because as indicated, sometimes I hate to say it, the robe causes us to sometimes not be appreciative of the needs of others and we don't listen to what we're being told and we do things on our own lark and it works to the detriment of others. Unless we're mandated to do things, sometimes we won't do it. Is there any way we could change the culture to cause judges to be appreciative that cutting is in fact adversely impacting the ability of people to get the representation they are entitled to?

Judge Blake: We have, there are a combination of answers one of which certainly is education and I mentioned the fact that we could send out a memo, which I understand may or may not be read, but that we have Judicial Conference guidelines to support our position about voucher reduction. There are things like, again, model CJA plans, local CJA committees and strengthening them. I think there is also, I'll just mention briefly with my Maryland hat on, we have a position which we call a CJA Coordinating Attorney. It is somewhat like the case budgeting attorneys on the circuit level.

I do think case budgeting attorneys are a helpful way to address, or can be, the issue of voucher reduction, but within the District of Maryland we have a professional employee, a former defense attorney who is responsible initially for the substantive review of all the vouchers. It is not perfect. It has gone a long way to bring some consistency to what would otherwise be ten or fifteen different district judges who all may take slightly different approaches to the idea of reviewing the vouchers.

There is still some supervision by a magistrate judge and of course, again, it is a fairly low case compensation maximum and anything over that has to go to the circuit, but the involvement of case budgeting attorneys, a supervising attorney for the districts where the federal defenders are willing, if the federal defender were more responsible for the voucher panel management and voucher review, I think there's a lot to be said for that. I think one would have to get around the genuine concern about conflict, but if the federal defender for example is not reviewing the voucher him or herself but is supervising the trained professional and then there were some, perhaps some sort of review system, I think Judge Feldman might speak to this. I think there are some districts where if there is a difference about a voucher that cannot be resolved, panel attorneys and the defender are involved in mediating that dispute and giving the panel attorney a voice to explain why that voucher should not be reduced.

Judge Feldman: I would say two things. One, I think you have to have, whatever system you have, you have to have some due process built into it. I think it just can't be

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I'm cutting your voucher and from what I understand, that's the situation in some districts. I'm not a big proponent of having the federal defender do voucher reviews. I think there's an inherent conflict there that maybe could be resolved by having the federal defender have somebody independent of their office, not independent but within their office but not answering to them, doing the initial voucher review.

In our district our CJA plan has a committee made up of two magistrate judges, four panel attorneys, two from each of the cities, and our federal defender Marianne Mariano who is going to testify here tomorrow. When a judge has a problem with a voucher, the judge will refer it to the committee. The members of the committee, except for the judicial members, we don't get involved, the attorney members go out and actually do an investigation, interview the attorney involved, talk to the judge, find out what the problems are, and then write a written recommendation to the presiding judge as to whether the voucher is fair and reasonable or whether cuts should be made and if cuts should be made, what the suggested cuts are.

In all the years we've been doing this, I think there has not been a situation where the presiding judge after getting the recommendation of the committee has not adopted that recommendation. That recommendation has always not been to approve the voucher as written. That recommendation has sometimes recommended substantial cuts in the voucher because based on the committee's review, they felt the voucher was not appropriate.

Judge Walton: In several circuits we've heard that the problem exists at the circuit level review. Is there any good reason for the circuit to be involved in that review process?

Judge Feldman: That's way above my pay grade, but my answer is no.

Judge Blake: It's difficult for me to think of one.

Cait Clarke: Same.

Judge Walton: Thank you.

Judge Cardone: Dr. Rucker.

Dr. Rucker: Thank you Judge Cardone. I'd like to ask a series of questions if I may and a lot of it is going to revolve around money. We talked about the 1.1 billion dollar budget. One of the things Chief Judge Blake that you mentioned in your opening comments is that you thought the hourly rate was too low. What should it be?

Judge Blake: Well at least we should go to the statutorily authorized maximum which I

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believe this year would be \$146 per hour for non-capital cases. Someone will correct me if I'm wrong, but I think we should at least go to that rate. I have not set my sights higher because we have not yet been able to get to the statutorily authorized maximum, but that's what I would support.

Dr. Rucker: Let me follow up with that. I know we haven't gotten there and that's one of the reasons I asked that, but as we've gone around the country we've heard repeatedly that the rate is not high enough and people have suggested it should be significantly higher than \$144, \$146, \$150. They've gone much higher than that. Should we do it regionally? Should there be regional variations like we do with staff?

Judge Blake: That is an issue that I think the DSO and our committee has looked at from time to time. I think it's worth looking at it. I'm not yet persuaded that that would make a significant difference in the availability of qualified counsel. Sometimes what I have heard contrary to the thought that well perhaps you just need to raise the rate in the areas where the cost of living is higher, that is not necessarily true. There may be rural areas where there simply is not a supply of qualified counsel, or there are geographical challenges that mean you have to offer them more money if you really want to have them there.

I mean, in terms of the amount, one could look at the fact that DOJ I believe pays at least \$200 an hour when it appoints counsel to represent folks. We certainly pay more than that for civil rights work and so forth, but maybe the \$200 an hour the DOJ pays would be a good number to look at. As I say, I have not gone beyond focusing on getting us to the statutory maximum at this point.

Dr. Rucker: Judge Feldman, would you like to comment?

Judge Feldman: I can tell you that I think whatever you do you have to consider that most CJA counsel are not in big law firms. They're in smaller firms, sometimes solo practitioners. I think you have to figure out what the overhead costs would be and then work off of that. I think at the rates they currently are, I think the overhead is basically eating up a great deal of the hourly rate that's being paid. I think you do need to have geographical differences because I think that's just a fact of life that it costs more in New York City to get a lawyer than it would in other areas of the country.

Maybe you could have ranges that a court could adapt, but yeah, I do think that CJA counsel are definitely underpaid at the current rate and it's very frustrating I think to the committee that we're unable to get even a statutory rate approved and that we've been given advice where you shouldn't go for it all this year. You should go for it over two or three years. It's very, very frustrating to our committee to have to do that when it's deficient as it is even right now.

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Cait Clarke: I would just add when Judge Feldman says it's frustrating, I was and have been for the past three years, surprised at the amount of time we spend trying to reach the statutorily authorized rate and so yes, we do need to raise the rate but I also think that looking to the prosecution and what they pay their attorneys as well as their experts is an important, again, notion of parity. In an adversarial justice system I think that's what we should be looking to.

Dr. Rucker: Let me stay with this economic theme if I may. One of the things that we've seen looking at the data is there's a shockingly low rate of the use of experts and service providers. If we really were to use them at the rate that some people suggested we should be and pay the rates that we should be paying because there's been a lot of concern about the rates that they've been paid as well, it's going to cause an increase in the amount of money requested by the people. How do we get people to do more? Is it a training issue? And let me follow up with that and I'd like to hear from all three of you about this.

We have talked about training and that is one of the focal points of our Committee is to look at the training and the quality of training. What we've heard is the quality of training has been very good both by DSO and also by the local defenders. But what we've also heard is that there's not enough of it and that most of the panel members in particular are not getting the training that they need and it's even more complicated for them because they have to pay for the training and they can't bill for the training. So is there a solution for that as well and if there is, it would seem to me that's going to need for us to increase the request for money as well. I know that's a complicated set of questions, so let me start if I may with Chief Judge Blake.

Judge Blake: Sure, going back to the part about the, in some instances, apparent low use of, rate of use excuse me, of investigators and experts, I think there are a couple of answers. One, I do think it's training and I would add training of judges, not just training of panel attorneys. It's a matter of court culture and what people expect. I would point out that the increase in use of experts, and when we say experts this includes simply investigators, paralegals, that sort of place, it may be that some of that work can cost less to the federal government ultimately if what is happening now, at least in some instances, is that the panel attorney is doing that work him or herself. By employing the paralegal or investigator, they could do it more efficiently. Certainly there may be some increase in cost, but it is not completely dollar for dollar let's say.

In regard to training, I do think there could well be an increase in the amount of training that is provided particularly to reach the panel attorneys as you've mentioned. Reflecting again on parity and the prosecution, we all hear about the National Advocacy Center that DOJ has as a resource. They spend a great deal more amount of money I believe on training than we do. Whether one

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national center is the answer I'm not prepared to say at this point, but better financing and more extensive use of training and perhaps to some degree being able to provide that without passing the costs along to the local panel attorneys I think would be very welcome.

Judge Feldman: I agree with Judge Blake. I think there's . . . it's [a] two headed monster. You have CJA lawyers not asking for experts and you have judges not approving experts or not seeing the need for experts. I think training is essential. When I leave here I'm going to Charleston for a magistrate judge conference and we're putting on a training on best practices for CJA panels and panel management. That's one of the things we're talking about to judges is the need to approve experts and hopefully get them more up to speed on that.

I also think the current statute provides and I think, I should know this, but I think it's \$800. You can \$800 worth of investigative without going to the judge first. That's a ridiculously low amount. That needs to be raised considerably just as the statutory maximum needs to be raised from \$10,000. I think at least doubled. I think to get an investigator to do work for \$800 on a complicated case or even a not so complicated, that rate is ridiculously low and I think that would be one of the recommendations I would make to your Committee is that you've got to raise that rate.

On the judges side, you know much better than I do what some judges' attitudes are towards experts and I think this best practices initiatives that we've put out there, we're hoping . . . you know we call them commonly used experts, presumptively reasonable rates for commonly used experts. The assumption is that these experts would be commonly used and they include everything from paralegals to law students to investigators to mitigation experts and we're trying to get the word out there that these things should be commonly used and that these are rates that you shouldn't have to quarrel with, that you shouldn't be shocked by, or cut unnecessarily.

Cait Clarke: Dr. Rucker, I would just add to these comments that I agree and also one of the larger concerns from a national perspective that I have is that if the culture is where the experts or investigation is not authorized, the spiraling down to the lowest common denominator is very disturbing, not just in the local or district area, but also nationally because as you know our percentages in many areas for panel attorneys being authorized to hire these experts including investigators is a very low percentage. Shocking to some people, and what I feel is that we've got to make sure that creative lawyers are supported, endorsed, buoyed up.

Look at *Booker*, look at *Johnson* cases. Ms. Menendez went to the Supreme Court. I mean people have to be given the support financially and culturally to challenge, to raise creative motions, to make sure they hire investigators and experts to make sure that the government, the second principle that I

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talked about, is held accountable and to the highest standard. If we don't hire those experts, then what will happen is that we're not asking for the same amount of money each year and then Congress will say well you didn't use it this year, why do you need it, right, so we'll spin down to the lowest denominator. That's really what I'm worried about.

I think we have to make sure that we work on training and other issues to bring those numbers up and there are people on all spectrums who believe in a zealous adversarial criminal justice process including Senator Grassley and staff and others about the lack of trials perhaps is one term I've heard from all political spectrums. I hope that we can train more. We do need more resources for training, but I also think it's a cultural barrier that we've really all got to pull together to try to overcome.

Dr. Rucker: Thank you, Judge Cardone.

Judge Cardone: Ms. Roe.

Katherian Roe: Thank you. Ms. Clarke, I think that's accurate that people from every aspect of the system believe that there should be a Sixth Amendment right and it should be a zealous advocacy, intellectually. The question is do they want to pay for it? That's what I want to talk about a little bit. Judge Blake, I want to talk about the memo that you issued with Judge Bates back in I think it was December 23, 2014?

Judge Blake: Mm-hmm (affirmative).

Katherian Roe: Okay, and essentially as I recall the purpose of that memo was that there were judges, or you were certainly receiving information, that there were judges all over the country who were cutting vouchers because they believed that it was a cost containment issue and in order to save money, cut some whether it be 10% or 5% or 20%, whatever it happened to be, cut some of the CJA vouchers and there would be a cost savings. Is that why the memo, essentially why it was issued?

Judge Blake: Yes, essentially we were receiving information from panel attorneys, from some of the advisory groups within the AO that there certainly was at least a perception that vouchers were being cut because of the difficult financial times, that there were judges who genuinely believed that in a difficult financial time cutting everybody a bit was an appropriate way to go to help conserve resources. That of course is contrary to Judicial Conference policy and also to the extent that perhaps some judges believed that by cutting voucher they were saving money for their own court. That is of course not correct.

It's a nationally administered pot of money so we were hopeful that simply

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reminding everyone that it is not Judicial Conference policy, that that is not how you deal with difficult financial times and having in addition to the letter there was a frequently asked question section that referred people to conference policy. Yes, that was the purpose of the letter. It's very hard to evaluate the success, but we hope it made some difference.

Katherian Roe: One of the things it said in the memo was that it wasn't just that it was against Conference policy, but it also said that you should, that the courts should pay for reasonable and necessary services, that if the attorney actually invested the time and it was reasonable and necessary, that that should be paid. Correct?

Judge Blake: Yes.

Katherian Roe: I mean that's the policy.

Judge Blake: Unfortunately I don't have the letter opened up in front of me at the moment. I can find it.

Katherian Roe: I actually do.

Judge Cardone: I think she'll quote you now.

Katherian Roe: It says it mandates fair compensation for appointed counsel by providing in subsection D1 that attorneys shall be compensated for time expended in court or reasonably expended out of court and reimbursed for expenses reasonably incurred. Providing fair compensation to appointed counsel then is a critical component of the administration of justice in our federal courts.

Judge Blake: Yeah, I have found the letter. I am sure you were quoting it accurately.

Katherian Roe: First paragraph. The reason I ask that is because, or the reason I mention it I should say, is because I think some of the issue we're dealing with is a philosophical one. That there are judges who have this authority obviously to appoint counsel, determine what is an appropriate amount to pay counsel, to determine whether or not the voucher should be paid, and some of those judges believe in a good faith belief, that this process or this service is pro bono and that yes, the idea is to take away some of the sting of providing this service so it won't be so expensive for an attorney to do it, but this is a public service and everyone must participate in this if they're going to be a good officer of the court, a good member of the Bar.

When we talk about voucher cuts and trying to educate the judges and sending them memos like this and whether or not education is sufficient, the question I keep coming back to is what about the folks just like you folks get to make these decisions, just like the folks we've seen all over the country,

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the judges who get to make the decision, what about the folks who honestly believe that the attorney should not be fully compensated? They still believe, intellectually, that folks have the right to counsel and equal justice under the law, but they also believe that the attorneys who provide the services shouldn't be fully compensated.

And so if we don't have some kind of a structure, if we just make recommendations as people have made, as Judge Prado made twenty some years ago, as the Judicial Conference has made, as recently as a year ago you and the head of the AO, two years ago, I can't remember what the date is, 2013, 2014, so a year, just a little year and one half ago, recommendations the same recommendations over and over. And yet we go all over this country and we hear from attorneys that their vouchers just get cut and the judges say, well there's a certain amount of public service here. So how do we fix that if all we do is recommend?

Judge Blake: Well I think what you're asking is whether there needs to be a structural change and again ideally and only speaking for my personal opinion, I am not sure what the ultimate answer is but yes, if you want to completely eliminate the possibility of an Article III judge with the best of intentions taking a different attitude about how vouchers should be paid, I suppose you have to remove it from the authority of the judge.

Short of that I can only say again that education, Judicial Conference policy, guidelines, trying to be careful about how one develops a program like eVoucher, making it as difficult as possible to go outside of what the guidelines are, may be the best that we can do. I think it's important to focus on, again we've talked about this before, parity with the prosecution for example. We do not think generally of the prosecution as a pro bono service.

It may be public service in a larger sense and some of us may think that any government work is public service in a larger sense, but it is not pro bono. It is something that the attorney deserves to be fully compensated for and the client deserves to be able to attract a cadre of lawyers that are fully qualified and in our society today I certainly would not argue with you that full pay rather than some reduction of pay is critical to getting that good representation.

Katherian Roe: I think it's clear from, and I'm sure you've done this reading as well as I have and members of the Committee, but I think it's clear from the legislative history from the Criminal Justice Act that there certainly was a pro bono aspect of this, but the pro bono aspect was the rate.

Judge Blake: Exactly.

Katherian Roe: That that's what was supposed to be pro bono, not after you determine the

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rate and put in that service, then we cut you 20% or 50% whatever it happens to be.

Judge Blake: And at this point, I'm not sure that I would actually even agree with you that the rate should be pro bono. I agree we are not suggesting that panel attorneys, or federal defenders for that matter, go into this to make as much money as they could in private practice. Clearly they can make more money in private practice and our surveys show that for panel attorneys, but I think even so, so you were starting with the idea that we will not pay that rate but it needs to be enough. It needs to be enough, it needs to provide parity again with the government resources that are lined up on the other side. It needs to be fair and it needs to be predictable and not cut arbitrarily whatever that rate may be and I think it should be higher as I've already said, but it should not be cut.

Judge Cardone: Can I just insert something as part of this discussion? It is . . . there's indications to us that between 90 to 95% of the defendants in the federal system are getting court appointed lawyers.

Judge Blake: Yes.

Judge Cardone: And given the complexity of, I mean, these mega cases and multi defendant cases, and the criminalization of so many things at the federal level, is it realistic to even talk about pro bono? Should we be looking at attorneys that are somehow . . . I mean I certainly understand public service and the component of public service in these rates, but should we be talking about attorneys doing these complex cases with thousands and thousands of documents as a pro bono service to the government? Is that realistic?

Judge Blake: Again, I don't agree with the word pro bono at all. I mean I think I understood Ms. Roe's point that if there's anything pro bono about it you're starting at a reduced rate, let's not cut it even below that. But no, I think the concept should be well qualified representation sufficient to meet the resources of the government to deal with these complex cases as you said. Complexity comes in many, many shapes and forms. It may not only be the multi defendant, multi document case. People are dealing with complex mental health programs. They're dealing with folks that English is not their first language. There are young folks that find themselves caught up in a system that's completely different from the state system they were used to.

It requires building of trust. It requires a great deal of skill in many areas that we should be looking for just good well qualified people that are willing to do this and dedicate this in that larger sense of public service, but I don't think we should be considering it as pro bono at all.

Katherian Roe: Judge Feldman, I wanted to ask you a question about the expert rates. From

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what I can tell, at least I was a member of DSAG at the time that that was evolving and from what I can tell from your remarks, I think it was intended to be constructive and hopeful that it might encourage the CJA attorneys being able to successfully use more experts. But unfortunately one of the things and not necessarily as a result of this, but one of the things that we're hearing and that we know now is that a number of CJA attorneys, a lot of CJA attorneys, choose not to use expert witnesses or not to request expert services because that's considered part of the cost of the case and that if they drive up the cost of the case whether it be psychological, or for interpreter, were places where people would hire their own interpreters and pay it out of their pocket because they didn't want to drive up the cost of the case. Because then they would be seen as someone who needed \$10,000 to do a certain kind of case when someone else could do it for \$7000.

We're seeing the same thing with psychologists and psychiatrists that folks choose not to use those services because that drives up the cost of the case. You would like to believe that that's just something they are concerned about and it's not really an issue, but that's not really I think what we are seeing, that it is an issue and that judges do see that as part of the cost of the case. How do we deal with that issue with only a recommendation? I mean yes, this was well intentioned, but if these folks try to use these services then even with the well intentioned ability to do that, now they have harmed themselves.

Judge Feldman: Well the way you phrase your question, the answer is obviously you can't do it just with the recommendation. As much as you try, you're dealing with in some districts, particularly with judges who have some criminal defense background, they know it's not driving up the cost of the case. They know it's driving up the effectiveness of the representation, but you don't have that across the board. I think you have to take just as you're taking voucher review away from judges, I think you have to take expert costs away from judges. I think there was some discussion today at lunch about that, "You know, I'm in the best position to know whether you need this expert or not." Well, I disagree with that.

I think taking that away from judges and putting it in the hands of someone who understands the criminal defense function and the need for an expert and having that justified to that individual as opposed to the presiding judge is a policy, or a rule, or a statute, or however you do it, it has to be done because the fundamental principle that I think is the premise of your question is the use of an expert is not to drive up the cost of the case. It's to provide due process and the best representation to the defendant. Where you don't have that, you have a real problem in structure.

Katherian Roe: Thank you. Ms. Clarke I have a question about what you said about wanting to be more proactive. You were talking about the fact that you would give

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your opinions or your thoughts to the folks at the AO who were writing a policy or taking a position and essentially if it was inconsistent with the judicial, what benefited the judiciary the most I guess we could put it that way, or what the judicial position was, that it gets left on the cutting room floor. You said you dreamed of being more proactive. If you could be more proactive, what would that dream look like?

Cait Clarke: Ms. Roe you're putting me on the spot because . . .

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

Cait Clarke: I know. You are asking a question which I think, I hope the Committee will certainly come to some conclusions about structure, but I do think if you looked again at the prosecutors in the Department of Justice, they have a Government Relations Division. They have an Access to Justice office. They look at re-entry. They identified people in every office to be re-entry coordinators. Those are the type of things that I think we should be doing. We should be working on prisoner re-entry, ensuring that we have the defense voice at the policy making table.

I have the utmost respect for our Legislative Affairs Office and they will often help me, remind me that it's Judicial Conference policy that of course sets our direction. We could do that. I do believe that if we start the process within the Legal Policy Division with the Defender Services Committee giving us the nod, we could actually be proactive but it takes a long time. It goes through a lot of agenda item rewrites and processes to get to the Judicial Conference and it could be perhaps too late in some ways.

I think that both Judge Feldman and Judge Blake used a very important word which is flexibility. As you know, criminal justice reform is on the agenda on Capitol Hill and throughout this country. I firmly believe that the public defense voice is under represented and it has to be much more of a stronger, more proactive voice in new initiatives. And I would say, when I say the cutting room floor, it's done with grace and respect. It's just that our opinions . . .

Katherian Roe: Does that make it feel better?

Cait Clarke: No, the Legal Policy Division will be very good about saving those documents and using those for perhaps training or working with other divisions to make sure that that position doesn't get lost but I mean I think you and others know that when immigration reform came forward, there would be different viewpoints in that area in particular. So having a Government Relations Division would be ideal just like the prosecutors do. I would just add one other note. When you were talking about pro bono, it would be wonderful to see if the prosecutors do any pro bono when they take

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on one of these major cases and if the vouchers are cut. Maybe there could be a study of what the equivalent would be if we're talking about an adversarial process. I really do think we need to look at the Department of Justice and the structures therein.

Judge Cardone: I'm going to, we're running a little behind, and so we're going to start the next panel that was supposed to start at 2:45 we'll start at about five to three, but I just want to make sure if there's anybody . . .

Judge Gerrard: Can I just ask a follow up to . . .

Judge Cardone: Yes, and I would ask as you respond try to keep it brief because I do want any Committee member who has an important question.

Judge Gerrard: I did want to ask a follow up.

Judge Cardone: Okay go ahead.

Judge Gerrard: It's part to the structural question because you were talking about initiatives such as compassionate release or prison re-entry that you would like to see and there are certain strictures or tightropes that you're walking. I mean, is it enough to have a Government Relations Division? Is it something that should be outside of the AO or outside of the judiciary to truly be able to do that? I mean when you're talking about compassionate release, you've got weeks or maybe months. You don't have time to rewrite memos and I'm not talking about you. I'm talking about going through the Judicial Conference. Talk to us just briefly about structure. What are the strictures, what are the tightropes that you have to walk and would they be resolved by just having a Governmental Relations Division?

Cait Clarke: I think the strictures are very clear. We follow Judicial Conference policy.

Judge Gerrard: All right.

Cait Clarke: Full stop. The Defender Services Committee sets the direction for the Defender Services Office full stop. Is it enough to have a Government Relations office only? No.

Judge Gerrard: Okay, that's my question. All right. That answers it.

Judge Cardone: Anybody else?

Rueben Cahn: I'd like to ask a couple of questions, first for Ms. Clarke. Could you, and I know you weren't there for very long before DSO was demoted to its current position. So without even reference to what it used to be, could you talk a little bit about the specific authorities that would make it easier for you to do

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your job as you would like to do it that you don't have, putting aside the legislative part that we've talked about.

Cait Clarke: Well Mr. Cahn, I would say one is that we are, we spend a great deal of time having our work reviewed and there's benefit to that in that there's caution. On my way up here I read George Washington's farewell address and he talks about that the administrators of government must be very cautious. I agree that there's a certain amount of caution, but I think what I've noticed with some of the reorg, the impact is, and the removal of the jurisdiction, that has had a huge, and the removal of our IT Division. Those issues have made it more difficult I think to be efficient.

I suppose I would add one other piece which is that the Department of Program Services is I think the guts of the AO because it has judicial services, court services, data and analysis, but our work is different. We, the defense function, are different. And I think you know that and others that our data has to be very carefully vetted. We have to make sure before we release anything that it is, that we have a good grasp of it. I fear that with the development of the, or I guess as you said the restructuring, that we're not as the buck stops here in control of the data and making sure that we are proactively thinking about what you're going to need for the future.

Because you're absolutely right, Ms. Roe. It's a goal to have the highest quality representation. The question is will people pay for it. I think they'll pay for it if we have the data, we have the stories, we have the strength, to tell those stories. Right now the structure is with the IT Division elsewhere and with the Judicial Conference having removed jurisdiction and the work measurement formulas and a lot of the processes that we go through, I'm not sure that we're being the most efficient that we could be. And I would really like us to be efficient and flexible.

Rueben Cahn: Thank you. Judge Blake I had one question for you which is that you talked about restoring DSC's prior authority over staffing and compensation, but one authority that DSC always lacked was ultimate budget authority, the opportunity to determine and advocate for the funds that it believed were needed and appropriate to run this program. Is any solution that doesn't include that authority adequate?

Judge Blake: Well I guess I would disagree with you to some extent. I think that we do have the authority to develop and advocate for a budget that we think fully serves defenders' needs. You are quite right that we do not always prevail in persuading other members of the judiciary who have the ultimate decision making power to adopt everything that we recommend. I do think we have some influence. I do think our voice is heard. We do have that responsibility, at least initially, to ask for what we think we need and I think our committee does that. Ideally, could we still remain within the judiciary but have a bit

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more of an independent voice of the Defender Services Committee in advocating for what we think we need? I would like to see the Committee explore that.

Rueben Cahn: Thank you.

Judge Cardone: Anybody else? Any questions?

Prof. Gould: Just one quickly. Judge Feldman, I want to go back and just make sure I understand something when you were talking about the DSBS and the mega cases. You were saying that you review the budgets in those cases, correct?

Judge Feldman: Yes.

Prof. Gould: As you think about the budgets that your subcommittee has reviewed, how often does the committee return a budget because they think that the defendant, or the defender, or sorry the panel attorney, has not asked for enough?

Judge Feldman: I can't think of a situation where we've told them they haven't asked for enough. I think what we've sometimes said is let's divide it up into segments for example in a habeas case, pre-petition, investigation, and then do another budget. We do it in segments but I don't think we've said to them they haven't asked for enough.

Prof. Gould: Okay, so bear with me a moment on this because I want to see what your response would be. So we've heard, the Committee's heard testimony that not enough lawyers are asking for service providers.

Judge Feldman: Well not enough CJA panel attorneys.

Prof. Gould: Okay, are asking for them and you're saying that these budgets are not being returned for want of enough.

Judge Feldman: Just so you understand, because you're kind of mixing apples with oranges.

Prof. Gould: That's what I thought.

Judge Feldman: The Defender Services Budget Subcommittee does the mega cases for federal defenders.

Prof. Gould: Okay. That's what I wanted to know. That clarifies it.

Judge Feldman: If you have a mega case, you have to go in front of the presiding judge which presents its own set of issues.

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Prof. Gould: Okay, all right. That's all I needed to know. Thanks.

Judge Cardone: All right. Anything else? All right. Thank you very much. We appreciate your commentary. Let me say as we go forward and we gather the info and we begin to make some decisions, we may get back in touch with you if we need a follow up. If you feel you need to give us any follow up, please feel free to do that. On behalf of the entire Committee I want to thank all of you. We're going to take a short break so we can get started so we have five minutes and I'd ask everybody on the next panel to get in and get ready. Thank you.

Judge Blake: Thank you.

Judge Feldman: Thank you.

Cait Clarke: Thank you.