

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 2a—Views from the Judiciary

Judge Cardone: You can see we're running a little behind, so I appreciate all of your patience, but we got started a little bit late, and so it sort of dominoes into our time and so we're starting a little bit late here. I'm going to introduce all of you, and then I'm going to ask each of you if you could make brief opening remarks. I know we've received submissions. We've had the opportunity to review those, but we would appreciate some brief opening remarks and then we'll be asking you some question. Originally Judge Leo Sorokin from Massachusetts was going to be on this panel. His train is running a little late, so we've moved him.

For those of you, the Committee and the public, we've moved him to the next panel. This panel is composed of Judge Cathy Bissoon of the Western District of Pennsylvania; Judge Luis Felipe Restrepo of the Third Circuit; and Chief Judge Petrese Tucker of the Eastern District of Pennsylvania. Welcome to each of you. Thank you for being here. We'll just go in order with Judge Bissoon. Whenever you're ready.

Judge Bissoon: Well thank you Judge Cardone, and thank you Committee for allowing me an opportunity to address you here today. I'm going to rely largely on my written submission. Today, I just wanted to make an observational comment, probably one that you've heard numerous times during your travels. I'm in the Western District of Pennsylvania. In the Western District of Pennsylvania, we have a group of talented, dedicated, creative and tenacious federal public defenders, who are underpaid, understaffed and overworked.

These folks come to us not because they couldn't find anything better to do with their time, but because they truly have a dedication to justice and the Sixth Amendment. They believe in that cause and have dedicated their lives to that public service. I hope that the Committee and all of its wisdom will find some ways to recommend increases to their salary structure and to their resources, so that they're better able to serve their clients. I have the benefit of sitting through the last panel. I do also observe that the hourly rate for our CJA panel is woefully inadequate. I hope that there'll be some suggested revisions to those matters as well. I'm just thankful to be here today.

Judge Cardone: Thank you. Judge Restrepo.

Judge Restrepo: I would echo Judge Bissoon's comments. With respect to the Eastern District of Pennsylvania, which is really where I grew up as attorney and I was a judge for seven years, a magistrate judge, and about two years of district court judge, I can say with a great deal of confidence that the CJA act works very well, and in a large measure it work as well as it does, because of the efforts

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of our federal defender. Our current federal defender, Leigh Skipper is a wonderful . . . runs a great office. The office provides tremendous support services for CJA counsel, the court and really the bar at large.

One thing I'd like to touch on, and I think it may permeate a lot of the discussion we're going to have is that the judges, our judges, are not well educated on the CJA. And I can tell you that when I went through baby judge school as a magistrate judge, as a district court judge and a circuit judge, there was no discussion of the CJA. I asked a couple of my colleagues today at lunch about their exposure to CJA, there was absolutely no discussion, no mention of the CJA during their training. I think it's really important that that change.

There are quite a few judges that come to the bench with no exposure to having defended the indigent. The CJA is literally thrust upon them. I would encourage the folks that train judges down the line to expose new judges to the CJA, the protocols for appointing counsel, the protocols for approving vouchers, submitting vouchers, reviewing vouchers, as well as the role that the federal defenders play in their respective districts. I just really wanted to emphasize that. I would refer the Committee to my written submission.

Judge Cardone: Thank you. Judge Tucker.

Chief Judge Tucker: Thank you for the opportunity to address the Committee. With the decision of *Gideon v. Wainwright*, the responsibility for appointing counsel in federal criminal proceedings, for those unable to bear the cost of representation historically rested with the federal judiciary. With the enactment of the CJA of 1964, there was provided a system to appoint and compensate the attorneys. Up until that point, the system was generally one of pro bono representation. Our court strongly recommends that the judiciary extend best efforts in seeking federal funding adequate to provide full staffing for the operations of the Federal Public Defender's Office, which accepts up to 75% of the criminal cases under our CJA plan.

The Federal Defender as it operates today in the Eastern District is [a] cost effective and efficient way of providing counsels to all those who require counsel, and who are not represented by attorneys appointed by our CJA panels. Those private sector attorneys who take time from their hectic schedules to serve on the panels are to be commended for their dedication and hard work. In the Eastern District, service on the CJA panel is considered to be one of the high marks of a legal career, and as such, appointments to the panel are coveted, and taken very seriously.

The Federal Defender's Office and the court jointly present a CJA panel training seminar on a yearly basis, which is well attended by local members of the bar eager to serve on the panels. In the Eastern District, the Chief Federal

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Defender, Leigh Skipper, chairs the CJA panel selection committee. The committee consists of Leigh Skipper as Chair, Jeff Lindy as Panel Rep, Paul Hetznecker, Lisa Mathewson, David Welder, and Fran Shapiro, who review panel applications and make recommendations to the Court's Criminal Business Committee.

In turn, the Criminal Business Committee which is chaired by the Honorable Legrome Davis carefully reviews the selection committee's recommendation and recommends successful applicants for approval, or removal by the judiciary. I understand that the Committee has heard a lot of information from all over the country about voucher cutting. Both CJA and investigative or expert vouchers. While I'm sure that some of our judges reduce vouchers, I am unaware that there is a systemic problem with our court, and I have not received any complaints from the defense bar on this issue. While our circuit does not have a case budgeting attorney for larger cases, our court has put in place a CJA analyst who is well trained to review the vouchers before sending them to the individual judge.

A review is completed by the Third Circuit and Judge Restrepo before the appeal is finalized. The Eastern District continues to fine-tune its CJA operations. Most recently in 2005, the Clerk of Court, Michael Kunz and the Administrative Chief Deputy, Lucy Chin, have implemented the new CJA eVoucher System, which greatly expedites the process of approving CJA panel vouchers. We have submitted an extensive presentation for your consideration. Again, thank you for the opportunity to address you.

Judge Cardone: Thank you. Let's start with Judge Prado? You want to start with Judge Gerrard?

Judge Prado: No. That's fine.

Judge Cardone: Okay.

Judge Prado: Judge Restrepo, I wanted to ask you. I don't know if you have enough experience yet on the process where the public defenders are appointed by the circuit court. And I guess that was a way to shield them from the district court trying to run their office and they're appointed by the circuit and up for reappointment every four years. As well as, anytime they need more staff, more lawyers, they have to come to the circuit to ask for that additional staffing, which has already been approved by the Defender Services Committee, but yet, the circuit decides how large their office is going to be. Have you had any experience with that responsibility yet?

Judge Restrepo: No sir, I've been in the circuit for about two month. That issue has not come up. I am familiar with a different model. If I had to endorse a model, I would probably endorse the community-based Federal Defender that is completely

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independent of the circuit.

Judge Prado: Okay.

Judge Restrepo: Which is the sort of defender operation we have here in Philadelphia, in the Eastern District of Pennsylvania.

Judge Prado: A Community Defender type of . . .

Judge Restrepo: Community based. Yeah.

Judge Prado: Okay.

Judge Restrepo: There's no court, and I don't want to use the word 'intervention.' But there's no . . . they're independent completely from the judiciary.

Judge Prado: Okay. You would suggest going away from the way the public defenders are organized into more of having nothing but Community Defender type . . .

Judge Restrepo: I don't know if I want to go that far, because I don't have the range of experience, but I think the model's worked well in the Eastern District of Pennsylvania. Anecdotally, the other defenders from the circuit that are appointed by the circuit, I've never heard a complaint, but I do like the concept of the independence that the defender in the Eastern District has.

Judge Prado: Okay.

Judge Cardone: All right. Judge Gerrard.

Judge Gerrard: Yes. A couple of three questions. Judge Restrepo, I'd noticed in your testimony, both orally and in written, you have suggested CJA training, and I think Defender Service training at new judges' school. I frankly couldn't remember what I got on the first day, because it was like drinking water from a fire hose. There was number of faces that came in and provided phone numbers, but one of them was not DSO or anything about Defender Services. I would second your endorsement and particularly for phase two of new judges training. Once you've had the nine months or ten months or a year of experience, I think that would be very helpful. I wanted you to expand just a little bit about what you would like to see in training for judges, whether it would be just in phase one or phase two or other training.

Judge Restrepo: Judge, I haven't thought it through other than there should be some exposure. The exposure would include maybe meeting some CJA lawyers, because there are different ways of doing business in the different districts, and meeting some representatives from defender offices, to just educate the judges as to what it means to represent the indigent in federal court, both from a 30,000

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foot perspective and then the boots on the ground, with respect of vouchers, expert authorization. I noted in my comments that the use of experts at least in this circuit is about 12 to 13%. I'm not familiar with other circuits. I think part of the reason is that there's just not enough education with respect to the availability of funds for experts.

Judge Gerrard: Exactly, yeah. To Judge Fischer's point earlier in the first panel, I think many judges are . . . it's a matter of just not being aware . . .

Judge Restrepo: Sure.

Judge Gerrard: of what DSO services are in order to just make the phone call.

Judge Restrepo: I listened during the previous discussion that there was a lot of talk about voucher cutting by judges. Again, I think judges needed to be educated from the beginning that this is not pro bono work. This is difficult, complicated, very important work. It's tethered to the Sixth Amendment. Voucher cutting, just to cut vouchers, should be strongly discouraged.

Judge Gerrard: All right. Then I have a follow up question with that topic in mind. Did I read somewhere . . . incidentally, congratulations on . . .

Judge Restrepo: Thanks.

Judge Gerrard: on your circuit . . .

Judge Walton: Well, that depends. I can talk. I don't know.

Judge Restrepo: No comment.

Judge Gerrard: As a result of that . . .

Judge Restrepo: I liked working for the Chief here.

Judge Gerrard: Did I see somewhere you're now the designated hitter, the voucher review.

Judge Restrepo: Chief Judge McKee deemed me worthy of that position.

Judge Gerrard: That brings up the question, what type of guidelines are provided in the Third Circuit? So, you have an excess voucher come to you and the claim is that it's extended or complex. What type of guidelines are provided in the Third Circuit? Because we've heard many different circuits, so I've not been able to talk to a chief judge or . . .

Judge Restrepo: I have resources available to me. A lot of it is visceral quite frankly. I was a CJA lawyer for thirteen years. I know what these cases look like. I was the

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CJA rep to the AO here for about ten plus years. I represented three individuals in capital cases. So I have a good feel as to what these cases look like and what the voucher should look like. But when in doubt, we have a very experienced case budgeting attorney who has a global perspective, and our circuit executive is well versed in these issues. They're both ready, willing and able to help.

Judge Gerrard: Okay. Your visceral review is probably much more accurate than many other chief judges. Do you have an opinion whether the chief judge of a circuit should be involved in a review such is that not having been involved in the case?

Judge Restrepo: Well, I think under the current protocols, he or she has to be involved.

Judge Gerrard: I understand.

Judge Restrepo: Then in our circuit I'm designated for half the circuit and Judge Vanaskie's designated for half the circuit as the excess compensation judges. Again, I think somebody has to make those decisions. Somebody has to review the excess comp vouchers.

Judge Gerrard: I guess my question wasn't clear enough. Structurally, do you think that is the ideal system, that the circuit court should be involved in the ultimate voucher review?

Judge Walton: In other words, should we recommend that that not be a part of the structure?

Judge Gerrard: Right.

Judge Restrepo: No. I think that it works. I mean, in this circuit, I think it works. I'm not patting myself on the back. I think it works. The one footnote to this discussion is that I think there should also be due process, or more due process when a voucher is going to be cut. Right now, the guide suggests that there should be some notification to counsel, But I think it should be a little more emphatic. Maybe "shall," counsel shall be notified of a voucher cut and shall be given the opportunity to respond or provide reasons to why it shouldn't be cut. We have a protocol in the circuit that if we're going to . . . and I know this by way of speaking to my predecessor excess comp judges that if a voucher cut is being contemplated, a letter goes out to counsel and says, "We're considering cutting your voucher for the following reasons, would you care to respond?" We have a back and forth by way of written communications.

Judge Gerrard: Okay. Very well. Judge Bissoon . . .

Judge Cardone: Can I just ask a follow up? I'm sorry. But we've heard a lot about conflicts

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that, for example, whether the Federal Public Defender should be involved in vouchers, et cetera. I guess I have a question about what you're saying, because you haven't seen a problem. But let's say for example that you have a budget that comes up to you. The judge at the local level has recommended to not give them all the money they need, maybe not to give them experts, maybe not to do certain things. You approve it and then it comes up to you on appeal, because they weren't able to fully defend the defendant. How do you balance that inherent conflict? You've approved a budget based on something that a district judge has recommended and now, it's resulted in appeal before you. Do you see any problems there?

Judge Restrepo: Sure. Under that matrix, yes. But what we're doing in this circuit, we have a very strong case budgeting attorney. The program's only been operation for about a year, the first three months is kind of a roll out period where Rene, who's our Case Budgeting Attorney was out there explaining to folks, to lawyers and judges, that we have a case budgeting attorney in the circuit. Over the course of the following nine months, she budgeted approximately . . . over 100 budgets were reviewed and authorized by the district court judges with Rene's assistance encompassing some sixty defendants. There's been a lot of give and take.

Rene is in a position to advice counsels as to how they might want to structure their budgets, where they can save money, where they might need more help in terms of document review, where a lot of CJA lawyers are not equipped, so to speak, given the infrastructure of their offices to deal with some of the enormous document production in these cases. So with the budgeting attorney and the attorney signing off on the budget, it's then presented to the district court judges. The way we've structured it in this circuit is that budgeted cases don't go to the designee. It goes straight to the Chief Judge.

I think an effort has been made to build in some give and take between the lawyers, the circuit and the district court judges through the offices of the circuit executive and by extension, the case budgeting attorneys. I think it's worked well. It's my understanding that we could use another one. I would encourage the good folks in Washington to consider finding funds for another case budgeting attorney in our circuit.

Judge Cardone: So, I guess a follow up to that is the case budgeting attorney is a relatively recent phenomena. I don't know how long you've had it here.

Judge Restrepo: We've had it about a year.

Judge Cardone: Okay. Before that, you didn't have it. Then there are circuits that still don't have it. If you didn't have a case budgeting attorney, would you feel the same about reviewing those budgets?

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Judge Restrepo: Me personally, yes, because I know what these cases look like from boots on the ground, having ‘been there, done that’ perspective. I would feel comfortable doing it.

Judge Cardone: Even though you might have to review the issue of whether or not you were too harsh and not allowing . . .

Judge Restrepo: If that were the case, I could always recuse myself. The judge that made those decisions could always recuse themselves from that particular decision, should it come to that.

Judge Cardone: Okay. Thank you. I’m sorry, go ahead.

Judge Gerrard: No. That’s fine. I had one question for you Judge Bissoon. This is a topic we haven’t really covered in your district CJA plan. It provides as many other plans do that there shall “The panel shall be large enough to provide a sufficient number of experienced attorneys to handle the number of cases, yet small enough, so that the panel member will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work.” I know our district has battled with that for years.

What standards do you apply in the Western District of Pennsylvania? It’s always difficult to make sure your panel is large enough and yet small enough that there’s going to be sufficient numbers. I’d ask two things. One, what standards do you apply? When you talk the number of cases to enable the proficiency, what type of cases and what numbers?

Judge Bissoon: Well, I would say that I don’t sit on the Panel Selection Committee. The Panel Selection Committee is charged with determining the number. There’s never been a concerted effort to come up with a number itself. It really is looking at the number historically and whether or not we have run into problems with our panel, which we have. We have had years where due to the number of big indictments, we’ve had conflicts such that we’ve just plum run out of people who don’t have a conflict in a particular case.

Those incidents are instructive as to whether or not the panel is large enough. We, as a CJA Plan Committee, did discuss whether there is such a number. It was the feeling that we should not come up with a hard and fast rule. As to whether or not people are getting an adequate number of cases from which they can gain experience, thus far, that hasn’t been a problem. We have had a number of people who are definitely repeat players in our court. But beyond that, I think I mentioned this or read reference to it in the context of my statement, we do have an aging panel. The aging panel tends to be sometimes picky with what they want to handle and what they don’t. Sometimes, there are cases that they instinctively know will be a little more problematic and they do not wish to handle those cases.

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As a result, we have had the ability to give some of our younger panel attorneys more court time and more opportunity to hone their skills in the context of these cases. So thus far, that hasn't been an issue. We have in the context of our new plan developed some qualifications for counsel going forward including the ability to handle a certain number of cases. We want to really jump on this issue of panel counsel remaining on the panel, and yet taking only those cases that they want to handle, and really not necessarily contributing in a way that we want them to.

We discussed perhaps an emeritus system of some sort where those counsel might be called upon in particular cases, with the eye towards developing some room at the bottom so that we can actually have new counsel enter the CJA panel in order to develop skills. We've created a probationary program and a mentoring program as well, so that new counsel can hone their skills with the backdrop of having experienced CJA counsel be by their side throughout. And so, thus far, I'd say, maybe to answer your question, we don't have any hard and fast numbers, but the reality is we've also not encountered a huge amounts of difficulty in terms of the current panel size that we have, which is roughly in the 70s.

Judge Gerrard: All right. Judge Tucker from the Eastern District, how do you handle the issue, and particularly the second part of the equation making sure that panel members receive an adequate number of appointments to remain proficient?

Chief Judge Tucker: We have a cap on the number of persons that can be on the panel. There's not an automatic sign up to a second year or third year. They have to reapply, because we have more than enough lawyers who are interested in being members of the panel.

Judge Gerrard: All right. Do you know roughly how many cases panel members receive in a year? If you don't . . .

Chief Judge Tucker: I do not.

Judge Gerrard: You don't. Okay.

Chief Judge Tucker: I do not.

Judge Gerrard: All right. Very well. Thank you. That's all I have, Judge.

Judge Cardone: All right. Judge Walton.

Judge Walton: In your districts, is adequate diversity a problem?

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Judge Bissoon: Yes. Generally speaking, I mean I would say that across the board, in the legal profession in our district, we have that issue. I also anecdotally will say that we have a number of up and coming diverse lawyers in our system. What I just discussed with Judge Gerrard, at the top of the organization, at the top of the CJA panel, when I say, “the top,” I mean the most experienced lawyers, are sometimes, as I mentioned, not taking cases that don’t suit them. There is an effort on our part to try to create both a mentoring system as well as a probationary system to get those diverse lawyers into the system. So that frankly some criminal defendant see lawyers that look like them in the system.

Judge Restrepo: Judge Walton, could I just add one area there and that’s the issue of language. When I say this district, when I was in the Eastern District of Pennsylvania as a lawyer, as a judge, we made significant efforts to try to appoint particularly with the Spanish-speaking folks lawyers with fluent Spanish. We came to a realization that that is a big deal. There’s not enough folks that are really bilingual in Spanish, but we do try to identify those folks that are bilingual and pair them with non-English speaking clients.

Chief Judge Tucker: Diversity is an issue.

Judge Walton: Judge Restrepo, you used a lot of “shalls” in reference to due process that should be building to the system regarding the voucher cuts. One of the problems is I previously indicated to the other panel is that we have judges who, the recommendations are just not sufficient to cause them to do what they should do. Should we have a requirement or recommend a requirement to the judicial conference that a voucher cannot be cut, unless a judge is prepared to articulate a non-fiscal reason for the reduction?

Judge Restrepo: That would be wonderful. Right now, the reality of that happening, I don’t know. I do think the due process is important in terms of voucher cutting. One of the great frustrations lawyers expressed to me when I was the CJA rep is that vouchers were cut with no explanation and no recourse. If there was some transparency in the process and lawyers were told this is why it’s being cut, they had at least a dialogue with the individual cutting the voucher, I think it would be a real improvement to the Act.

Judge Walton: You had indicated that you thought that there was a role for the circuit to play in the voucher process, but we have heard certain circumstances where circuit judges will cut a voucher even though the district judge who presided over the case thought that the cut was not appropriate. What are your feelings in reference to that?

Judge Restrepo: I guess again, this visceral feeling is that the district court judge probably has

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a better idea as to what the case involved than anybody reviewing the voucher. The Act right now provides for circuit review of excess compensation voucher, so it's reality we have to deal with. The one thing that I've come to learn in this position is the excess compensation voucher that more information from the district court judges to the circuit judge that has to review these vouchers is extremely helpful. And I would encourage district court judges to educate the circuit excess compensation judges to why the voucher looks the way it is, and if any cuts have already been to the voucher. I think a lot of these problems could be solved with some more back and forth.

Judge Walton: You indicated that it was, I thought you said 12 or 13% of your cases here have expert witnesses or experts in the case?

Judge Restrepo: I was able to get those numbers from the Defender Services folks. They gave me the numbers for the Third Circuit. And I believe it's 12 or 13%.

Judge Walton: When you say 'experts,' does that include investigators or . . .

Judge Restrepo: It does include investigators.

Judge Walton: It does?

Judge Restrepo: It does not include translators or interpreters.

Judge Walton: Is that your experience out in Pittsburgh, that the numbers are that low?

Judge Bissoon: Yes. I would say that that's probably true. We would typically see investigators, not a lot in the way of what I would call a traditional expert.

Judge Restrepo: Judge Walton, one of my frustrations as a district court judge was that folks have been underrepresented, sentencings and revocation hearings, given the different factors that go on to the sentencing process now that may have been available to them, had they explored retaining the appropriate experts.

Judge Walton: The other question which I posed to the other panel, we have heard from some defense counsel, and I understand philosophically why there is a desire to have absolute autonomy from the judiciary. But what are your feelings about that? Do you feel that it could put funding at jeopardy as to whether Congress, if you had this independent entity, would give the resources of that they're receiving now, even though inadequate?

Judge Restrepo: I think that's the political reality of the situation, yes. If they're completely free standing, I think funding may become more difficult given their constituency basis.

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Chief Judge Tucker: I think we have a responsibility. The judges have a responsibility toward everyone, not just the court. We have a responsibility to use our reasonable judgment to marshal the funds, because that's our job, not just to make sure that the defendant is represented.

Judge Walton: This may be difficult to quantify, but do you feel in the cases that you have presided over that indigent defendants are not getting under the current system the quality of representation they should receive for whatever reason, whether it be fiscal or otherwise?

Judge Bissoon: I think that's fair to say. I think that when I see the folks who are interested in becoming CJA panel counsel, they are rarely the folks at the big law firms who are known to be the best litigators in the city. They are not willing to take what is currently the billable rate of a CJA panel lawyer. I do think that is a disincentive for some folks getting involved. I think that the cap is also a disincentive in terms of the compensation that CJA panel lawyers get. I see a lot of folks who are currently interested in being CJA panel. Again, I'm leaving aside those folks who've done it for a good part of their career.

We find young folks interested in getting into court. For them, some of them, sole practitioners, this money coming in the door is something that is prized, because they're probably not really bringing a whole lot of money into their new firms. They're looking at it as an effort to get their names out there and build a reputation for themselves, and perhaps move on to some private defense work. But I don't see a big draw for some of the folks, who we know out there, are fantastic litigators whose skills could really be utilized in the context of criminal defense work.

Chief Judge Tucker: I think often times the attorneys who have most experience continue to accept the CJA appointments because, as a favor to the court quite frankly. They don't do it for the money. As far as the experience, the lack of experience in some attorneys, I think clearly the representation that they get, the defendants get is inadequate. And that the, it wasn't for the Defenders Association having such a high level of achievement and representation, we would be in a very sad state if we had to depend on the CJA lawyers.

Judge Restrepo: I guess I'm somewhere in the middle. I think the CJA Act works well. For the most part, there are outliers where maybe they don't vigorously represent, or adequately represent their individual clients. But I think for the most part, it's been my experience, the CJA Act works well. We do lose people. We do lose a lot of good people to the rate system. A lot of folks from the firms that leave the Defender Office, or the U.S. Attorney's Office, or some of the more experienced private practitioners, we do lose them, because the firms are not in the position to underwrite representing folks, particularly in some of the more protracted trials.

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Judge Cardone: Can I follow up just real quick to something you said, Judge Tucker. Do any of you see an issue when an attorney feels like accepting a CJA appointment as doing a favor for the court?

Judge Bissoon: I think so. I do think so. And I think that it's partly because of something Judge Restrepo mentioned earlier. It is a failure on the part of the judiciary to know or to understand that it's not a favor to the court. This is something for which lawyers should be adequately compensated. I've talked to our public defender and I do know around the country that there is a lot of voucher cutting going on. I think that that is a function of a lack of education on the part of some members of the judiciary, as well as this sense, I think, if I can perhaps put it into words, you have this system where you have a cap on what counsel can make in an ordinary case.

Then perhaps you come across an extended and complex case, where you see this cap blown to . . . you may have a variety of defendants in a particular case and with respect to one of two of the defendants, the cap is just well out of whack. So you may be looking at say, a six-figure bill as opposed to a four-figure bill. The reality is I think that there is a visceral reaction to that that may not be borne out by the actualities of the case and the realities of the case. I think that sometimes there is a thought that either judges are saving money for the government or perhaps are some . . . these gatekeepers, who must look behind these numbers at every step to ensure that CJA panel counsel is not ripping off the government.

I do think that there's a little bit of that going on. That has resulted in a situation where panel counsel sometimes is not adequately represented. I'm discouraged to hear that there are situations of voucher cutting just for cutting. I do know that in our district there has been cutting of vouchers on occasion necessitated by at least perceived abuses of the system that have been borne out by the due process afforded in our court which is akin to what Judge Restrepo mentioned earlier, I think we follow a pretty much the same process that he suggested should be followed.

The notion that there are judges out there, and I know this to be true, because I've heard it on any number of occasions, who believe that this number is just too big, given how much of a cap we put on these numbers generally speaking. That's not something that will benefit the system. It's certainly not benefiting individual defendants in the context of their representation.

Judge Cardone: And do you think that extends, I think you said it's 13% in the circuit, do you think that extends to even complicating a case by bringing in an expert?

Judge Bissoon: Absolutely.

Judge Cardone: You don't want to upset the judge?

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Judge Bissoon: Absolutely. You don't want to upset the apple cart. I think that the bigger the number on that sheet of paper, I think that is, there are some judges who react to the number itself. It sort of doesn't matter what has gone into the case or what the nature of the case is. Once you start seeing six figures, I think that there could be a sense on behalf of some members of the judiciary, which is why it's so important to have some sort of educational component to this. Once you start looking at numbers in the six figures, you start seeing the numbers of private counsel. And you wonder to yourself, "Well, is that just too much?" I'm not sure how those judges who do cut viscerally justify that. I do think that there should be a justification component to any cutting that goes on. That would be something that I would recommend. But I don't know . . . I have to believe that that is something that's going on.

Judge Cardone: I'm sorry, Judge. Anything further? Mr. Cahn.

Reuben Cahn: Thank you.

Judge Cardone: Microphone.

Reuben Cahn: Judge Restrepo, can I start with you? Did I hear you to say that there had been cases where you were frustrated that the attorneys in front of you had not explored retaining experts, you felt it might have hurt those clients at sentencing?

Judge Restrepo: I think the playing field as it were for sentencing is different now post Booker and with the emphasis on the statutory considerations going to imposing a sentence. I think attorneys need to be made more aware of what might out there in the client's background. You just can't rely on the presentence investigation report. I see too many lawyers just rely on the presentence investigation report and not drill deeper, so to speak, and there are experts available. There is a mechanism by which to approach the judge ex parte and that's another piece of the training. I've had judges come to me and say, "Hey, somebody is trying to get to me ex parte," and I had to explain to them that that's perfectly legitimate under the Act. I don't think defense counsel take advantage of these resources or protocols as often as they should.

Reuben Cahn: Have you seen, and I'm really referring to your experience in the district court. I've got the same question for . . .

Judge Cardone: A little bit closer.

Reuben Cahn: I'm sorry, the cord is very short back here. I've got the same question for both of you. Have you seen situations where either in the presentence investigation report or in the pitch that's being made to you by the defense attorney, there's an indication that evidence developed through an expert would be beneficial

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and no expert has been requested?

Judge Restrepo: Often times. What happens regrettably is many times you get the sentencing memorandum, it's, they're laying out the presentence investigation report, not taking it any deeper than that.

Judge Cardone: As you were talking to Judge Restrepo, I was sitting here, I mean, I've sentenced hundreds of folks even at this juncture in my judicial career. I was trying to think of how many experts I've seen in the context of sentencing. I perhaps have seen one or two in writing, but other than that, I've not seen any.

Judge Restrepo: It's hard to say if it would have made a difference if it's not presented.

Reuben Cahn: No. I know you can't make that judgment.

Judge Restrepo: Right.

Reuben Cahn: But I mean, I've had judges say at times and in certain circumstances, I've heard judges say, "You haven't brought enough evidence in front of me to justify X or Y or Z." Sometimes that will lead to request for continuance and opportunity to develop more evidence on that particular function or that particular factor. And so that's the context in which I'm asking the question. I guess Judge Tucker, I have the same question for you. Is that something you see?

Chief Judge Tucker: That is something that I see. I've only seen maybe three or four experts for mitigation. I also think it's not because they don't know that mitigation experts exists, but it is something that I don't think that most judges would permit as an expert. Because if someone pleads guilty, they say, "Well, just give me the information in the presentence report, and I don't want to have to pay thousands of dollars for a mitigation expert." To me, that's a situation where you need a mitigation expert, but they don't do it. Not because they don't know about it, but because I think their thought is it will not be approved.

Reuben Cahn: I guess the next question I have following up on that. Why don't we start with you, Judge Bissoon? Is there any feedback loop that goes that way? For instance, we have a feedback loop if we think somebody has done excessive work on something that their voucher doesn't get paid for that. Is there any feedback loop that goes the other way that say, "Maybe you should have done more. You should have looked at this"? Is there anything? If not, is there a way to create such a feedback loop?

Judge Bissoon: Well, that's interesting. I do sometimes look at vouchers and I think, "How'd you do that?" No. I would say the answer to your question is no. There is no feedback loop. I've not seen one. I've not heard of anyone suggesting, "Hey,

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you know, you should've probably charged some more for this." I have to imagine that there are many situations in keeping with, I think the thread of our entire conversation, where CJA panel counsel cut their bills, don't bill for certain things. I have to imagine you've heard that from CJA panel counsel. In terms of identifying that, I have to say that even for myself and speaking for myself, I am guilty of raising an eyebrow when it's too much and perhaps not raising an eyebrow when it's too little.

Judge Restrepo: In terms of the feedback loop, the only real feedback loop is, typically in our district, we could reach out to the folks that are on the panel, that administrate the CJA and say, "Hey, lawyer X, not so much. You should really take a good hard look at lawyer X when he or she reapplies." That's really the only formal protocol that we have. Typically that's funneled through Leigh Skipper, who's our federal defender for the district. I was on that selection panel also for many years. Occasionally, people would come to us and say, when I say 'people,' judges would come to us and say that this particular lawyer, we should take a real good at this lawyer before we knew him or her.

Reuben Cahn: In your district, you're on a three-year cycle, is that correct?

Judge Restrepo: Yes.

Reuben Cahn: Let me ask . . . Do I have time to ask one more?

Judge Cardone: Yes.

Reuben Cahn: One of the questions I'm really interested in, because I've never been a federal judge and I've never approved a voucher, I'm just a Community Defender. I'm interested in how judges go about the process of deciding, "Should I approve this expert? Or is this voucher reasonable?" Let me give you a couple examples of things and ask if you can sort of walk me through your process. These are just random examples. Let's say, run of the mill, what appears to be run of the mill felon and possession case, you've have that defendant in front of you enough time that you haven't seen any indication of severe mental illness, but you got a request for an expert.

My question would be, what things do you want to see in that request to justify? To give you an example with regard to the voucher, if you'd like to talk to that, you've got a motion or an argument, a lengthy argument, in regard to a sentencing that California robbery is not a crime of violence. There's twenty-five hours of research and writing that goes into it and you end up of course overruling the objection. How do you evaluate whether that was appropriate and reasonable? If I can ask each of you to talk about either those examples, what questions you ask? What criteria do you apply? How do you decide what's right?

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Judge Bissoon: Well, I think that in terms of the voucher itself, it is my expectation when I see a voucher, particularly if I see something that's an outlier like that, that you explain it. You tell me why it was that you needed to do that. In the context that you mentioned about whether or not a particular crime was a crime of violence, given the situation in the case, hopefully, as the presiding judge, I have a sense that that was an important issue for you to have to research. I'm not sure that I would necessarily question that research in the context of the case. The same is true for experts, to the extent that there is argument that Mr. X has some mental ailment or that is either a defense in the case or relevant to sentencing, from my perspective as a presiding judge, regardless of whether or not that ultimately is used in the case, I think it is a valid analysis to be had be if there is some suggestion that that would have been relevant either in the context of trial or at sentencing.

Reuben Cahn: Okay. So I don't want to put words in your mouth. But you're saying, you look for some indication of mental illness and then some plan of a way to use that in the representation?

Judge Bissoon: I guess not so much that, but to the extent that there is some reason to believe that there is mental illness, or that is an issue that is relevant to the case, either in the context of the case itself or at sentencing. I think it is a completely valid thing for a lawyer to explore regardless of whether or not that actually ended up panning out. So I may not see that ultimately be argued in the context of any case, but perhaps it was relevant for the particular lawyer to look into. I may not at trial ever see an expert who would testify about that, or I might not at sentencing see an expert who might testify about that. But if it was enough for the lawyer to explain to me that this is something that he explored, that's sufficient for my purposes.

Reuben Cahn: How about you Judge Tucker? The same . . .

Chief Judge Tucker: I would question why the lawyer felt it was necessary, not specifically wanting to know what the defense is, but what is it that he or she intends to prove or show with the use of a psychiatrist or psychologist.

Reuben Cahn: How much detail do you need about that request to feel comfortable in making a judgment?

Chief Judge Tucker: It would be difficult for me to say how much I would need. I would need a reasonable explanation as to what it is that they intended to show by using such an expert. I would also assume that it would be filed ex parte, so that they would feel comfortable in giving me an explanation. But I would require an explanation.

Reuben Cahn: So one the things that occurs to me is we discuss these things is that so much is very nebulous. It's hard to say how much detail we need. It's hard to say

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what facts we would need to know. One of the questions I have is how can we give guidance to judges who are charged with this, when it's very difficult to set out any clear standards?

Judge Restrepo: I think we go back to the first thing we talked about is educating the judiciary, because there are a lot of moving parts in any case. Every case is in essence tethered to what the facts are, who the defendant is, who counsel is. It'd be difficult to have a pro forma type checklist for every case.

Reuben Cahn: You spent what, seventeen years a defense attorney, is that right or . . .

Judge Restrepo: About, yeah.

Reuben Cahn: So you've obviously seen a lot of cases knowing that many of our judges may not have seen a single criminal case before they came to the bench other than on TV. How do we give them the depth of knowledge to analyze the myriad sets of facts, circumstances, charges?

Judge Restrepo: Well, you've got to start. Right now, nobody has even started knowing that. I think you need to start. You need to start educating the judges. You need to bring in folks that have done this sort of work. They can educate the judges from the time they begin and it's an ongoing process.

Reuben Cahn: I guess it brings me back to the question of, would we be better off having somebody engaged in that analysis who has that knowledge, the type of knowledge that you have through your seventeen years as a defense attorney. Would it be better off if we task this job only to people who have that experience?

Judge Bissoon: Well, I do think that those matters . . . I don't necessarily disagree with that, and I guess reserve judgment on that issue as to whether or not there should be a separate individual charged with making those sorts of decisions, or at least making recommendations, with respect to those sorts of decisions. On some level, I find it intriguing. I think it was Judge Feldman who indicated earlier that there was sort of a system like that at least in his court, whereby the judge and panel counsel to the extent that they disagreed on compensation issue could send that to another party for a recommendation on that issue, somebody who's experienced criminal counsel.

I personally think that that's an interesting thing that we do not do currently on our court. It would be something that I would be willing to explore. But I do think that we as judges get training in any number of issues. I think about not only baby judges school, as it's called, but subsequent training in issues of sentencing, resources to call on issues of sentencing. I don't think that there is a same attention paid to these issues, issues of CJA panel counsel and what is appropriate and what isn't. I can pick up the phone on a sentencing issue and

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say, “What’s your take on this, Sentencing Commission folks? What do you think about this particular issue that I’m encountering?”

Other than having sat through the session earlier today, I didn’t really have a firm knowledge that there was such a resource for me to call up and say, “Hey, what do you think about this?” That is something that I think is lacking, not so much that the resource is necessarily lacking, although, I wonder whether there could be more resources like that. I do think that training on what is available is lacking as well as continuing training in this area. It’s not just a one-shot deal. I think baby judge school is where you start people thinking about, “This is what it means in the context of your job. This is the function that CJA panel counsel performs for you. This is what the Criminal Justice Act is about.” Beyond that, annual training, we have annual training and sentencing. I see no reason why we couldn’t do annual training in something like this.

Judge Restrepo: Mr. Cahn, one model that kind of addresses your concerns is the budgeting attorney that we have in the circuit. It’s almost an ombudsman that helps counsel and judges come to terms with the cost of some of these cases. In the smaller cases, that’s just not available. I want to make it real clear that, I’m not suggesting that budgeting attorneys review vouchers. It’s a very different process. I think it’d actually be productive if the budgeting attorneys were to ask with reviewing vouchers. I don’t know if that would take away from their time to do the other work they’re doing as budgeting attorneys.

Reuben Cahn: It’s interesting. There are some circuits where the budgeting attorneys review the excess vouchers. Do you think that’s good idea? Assuming they have the time, assuming they’re still available to do the budgeting work that’s necessary.

Judge Restrepo: I really haven’t thought about if it was a good or bad idea, but I just want to make it clear that I don’t think that budgeting attorneys should be reviewing the vouchers for mathematical precision or for reasonableness quite frankly.

Reuben Cahn: Judge Tucker, what do you think about the idea that the people dedicated or tasked with reviewing vouchers deciding expert requests should have experience in criminal defense and we should sort of offload that.

Chief Judge Tucker: Well, I think that they should have experience with criminal defense. But as judges, each of us have come from a particular area of the law. We are tasked with not only criminal work but civil work and patents and everything else, so we have to come up to speed. I think that it would be possible if we not only trained the lawyers when we have the training, but we train the judges. We have recently looked at the CJA rules that we have. They need to be updated. Our Criminal Business Committee is working toward that end, so that the more familiar we are with the Act, the better we can do what we need to do.

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Judge Cardone: All right. Anybody in the back? Any questions?

Judge Goldberg: It would be tempting for me to question my Chief Judge and Judge Restrepo who reviews my decisions. I'm deciding whether I should . . .

Judge Restrepo: There's no other chance.

Judge Goldberg: dive in here.

Judge Bissoon: Yeah, this is your chance.

Judge Goldberg: I'll throw a softball out to Judge Restrepo. It's more curiosity than anything. The Community Defender system and the issue of taking the judges out of the process of the appointments and hiring and all that. It's a board on the Community Defender system? How's the board appointed? How does that work?

Judge Restrepo: The Chief Federal Defender here reports to the Chief Defender of the Defender Association of Philadelphia. That is . . . She reports to the board of the directors. The board of the directors are appointed from the community. It's a working board that in essence has the ultimate authority.

Judge Goldberg: There's no connection to the judges in that system at all?

Judge Restrepo: Zero. No connection whatsoever.

Judge Goldberg: No connection, okay.

Judge Restrepo: The funding comes from the AO for the Federal Defender. The funding for the local defender comes from the city. There is autonomy with respect to the judge doesn't have a dog in the fight with respect to who's appointed those positions.

Judge Walton: The board oversees both?

Judge Restrepo: Correct. The Chief Federal Defender, his direct report is the Defender.

Judge Cardone: So I guess a follow up to his question is, for Judge Tucker and Judge Restrepo, have you, because we've talked about whether judges should be involved and in that system, overseeing the CDO, they basically don't. Do you call in the head of the office, Mr. Skipper and say, "You need to get control of these people, or, you know, they're filing frivolous motions?" Do you feel . . . we've heard this in other districts. I guess my question is, do you feel any compunction or ability to be able to do that when you have a problem with somebody from his office?

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Chief Judge Tucker: I think we have a very good relationship and most of the judges or all of the judges feel comfortable in contacting the Federal Defender if we have an issue or we have a problem.

Judge Restrepo: Likewise. Mr. Skipper has been very responsive to whatever inquiries, not that he does what we ask him to do, but he's willing to engage in a conversation.

Judge Cardone: And you don't feel that you have to have some thumb over him in order to get that?

Judge Restrepo: No. Absolutely not.

Judge Cardone: Okay. Now you're a different system, is that right?

Judge Bissoon: We are in a different system, but I would say the same holds true. To the extent that there are any particular issues, our first line of defense is our federal defender Lisa Freeland.

Judge Cardone: Do you feel that she feels any pressure by the judges?

Judge Bissoon: Oh, I don't think so.

Judge Cardone: Okay. Thank you. Anybody else in the back?

Judge Prado: I guess I'll ask the question if nobody's going to ask one. Is there a process for removing someone from the CJA panel out of their term? If someone is not doing their job or has a personality problem with a judge. How is someone removed from the panel?

Judge Bissoon: Well, in our district, we've just come up with these procedures. It wouldn't be so much that if someone has an issue with the judge. It would really have to be for cause. A judge would alert the Panel Selection Committee who is the Chief Judge of our court, the federal public defender, two panel lawyers and the Chief Magistrate Judge of our district. They would be alerted to whatever the issue is. I can't envision a situation where it would be anything other than cause. I don't think a personality conflict would really suffice under that situation, nor have we had something like that.

Either the lawyer is not doing their job, the lawyer has done something particularly problematic, unethical perhaps, and there's a mechanism in our current CJA plan to investigate and allow due process to play out so that the individual is afforded an opportunity to defend themselves and their decisions in the context of the case. The committee would vote and decide whether or not that individual should be removed. That would ultimately go to the board

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of judges of our court also to vote on after the recommendation comes from the subcommittee.

Chief Judge Tucker: Likewise. Our procedure is pretty much the same. Usually, the issue is brought up by one of the judges. The matter is referred to the panel. They contact the lawyer, give the lawyer an opportunity to answer the claims of the charges. If it's a vote that's needed to either keep them on or remove them, it comes to the board of judges and the vote is taken.

Reuben Cahn: And again, your panel is made up of both judges and lawyers, the one . . .

Chief Judge Tucker: Yeah.

Reuben Cahn: that reviews these claims.

Chief Judge Tucker: Yes.

Judge Cardone: Well, just one last thing. Is there anything that we didn't ask you that you'd like to add having heard some of this discussion, Judge Bissoon, Judge Restrepo, or Judge Tucker? Anybody have anything you'd wish to add at this point?

Judge Bissoon: I guess the only thing I would add, and this particularly stems from Judge Restrepo's discussion, I am comforted knowing of his background in criminal defense work, but I do wonder whether other judges are similarly situated. And so, you know, if I have a voucher that is somehow appealed ultimately to Judge Restrepo, I have great comfort that he will take a look at it and assess it, and decide for himself based upon his vast experience, whether or not that is appropriate. I guess that is unique to him. I don't know that I have the same level of comfort when a judge may not be so vastly experienced in that particular area. So I do wonder whether there is any way to address that.

Judge Cardone: Judge Restrepo or Judge . . .

Judge Restrepo: I'd like to say thanks, to all of you for doing for what you're doing. It's a very important work. It's very time consuming. I know that Judge Goldberg speaks very highly of this entire process.

Judge Cardone: Judge Tucker.

Chief Judge Tucker: I would only say that Judge Restrepo is different than most judges. We are all happy that he is reviewing the vouchers at this point.

Judge Cardone: Well, on . . .

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Judge Gerrard: Can I just follow up?

Judge Cardone: Sure, absolutely.

Judge Gerrard: How do criminal defense lawyers think or feel as their vouchers are being reviewed by judges at any level that may or may not have had sufficient criminal experience?

Chief Judge Tucker: I understand. I think that that is a valid point. I do think that one of the ways to defend against that is adequate training on behalf of the judiciary.

Judge Restrepo: And to afford some due process, some real due process.

Chief Judge Tucker: Absolutely.

Judge Restrepo: For the vouchers that . . .

Judge Gerrard: The back and forth that you talked . . .

Judge Restrepo: Right.

Judge Gerrard: Okay.

Chief Judge Tucker: At least people understand why the cut is being made.

Judge Cardone: All right. Well, thank you. I do want to just say one more thing. If there's anything you want to add that when you get back, you think, "Oh, I should have said this," please feel free to give us any submissions. The more information we have, the better it is. Don't hesitate to contact us to send us a written submission. On behalf of the entire Committee, thank you for being here and we appreciate it.

Judge Bissoon: Thank you.

Judge Restrepo: Thank you.

Chief Judge Tucker: Thank you.

Judge Cardone: We're going to take a short break. We're going to resume at 4:15.