

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

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Transcript: Panel 2b—Views from the Judiciary

Judge Cardone: Well, to our next panel, welcome very much, we appreciate all of you being here. I know, Judge Sorokin you've took a train and got here so we've switched you.

Judge Sorokin: Thank you.

Judge Cardone: You're welcome. Before we get started let me just say briefly I'm going to introduce all of you, but I would appreciate it if you would make a very brief opening statement, so we have time for questions. Those of you who've given us written submissions, the Committee has had opportunity to review those so we don't really need to, and I know yours was a little late, but we appreciate it. If you would just go ahead and give us a short brief opening statement and then we'll begin with questions from the Committee.

We have here retired Judge Nancy Gertner from Harvard Law School; we have Judge Leo Sorokin, from the District of Massachusetts; we have Magistrate Judge Cheryl Pollak, from the Eastern District of New York; and Chief Judge Nancy Torresen, from Maine. So if we want to go ahead and we'll get started just right in order, Judge Pollak.

Judge Pollak: Well, first of all I want to thank you, Judge Cardone and the Committee for the opportunity to appear today on behalf of the Eastern District of New York. I've spent some time reviewing the submissions and prior testimony given at the earlier panels, and I applaud the important work that the Committee has undertaken here. I've also taken the time to discuss the concerns of various proposals for change with our board of judges. Our judges take very seriously that portion of the oath that we all took to do justice to the rich and the poor and our court has worked very hard to create a program that ensures that we provide for our indigent defendants the highest caliber of defense attorneys available. Briefly, my background is that I was a prosecutor for nine years before becoming a magistrate judge in Brooklyn where I've served for over twenty years now. I've been a member of our court's CJA committee for fifteen years, and for the past five years I have served as the chair of that committee.

Now, based on the discussions I had last week with our board of judges, the general consensus, and I'm not speaking for every one of our judges, but the general sense was that the CJA program in the Eastern District of New York works very well. Not only have we been successful in attracting and keeping a panel of CJA attorneys, who by and large surpass the quality and experience of the private bar, but the issues of voucher cutting, to the extent that it occurs in our district is rare. The overwhelming sentiment of our court

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was that it would be a mistake that could adversely impact the quality of defense representation were there to be a complete overhaul of the program. To the extent that changes may be needed, and I can see there are some, the sentiment was that minor changes within the existing system would fix whatever problems there are, at least with respect to the way the program works in our district.

Indeed, I would urge the Committee to consider certain aspects of our CJA program as a model for possible reforms that are more practical than a complete legislative overhaul of the entire system. Our CJA committee, which consists of four judicial officers, three federal defenders and five criminal defense attorneys drawn from the panel and from the private bar is solely responsible for selecting the panel attorneys. Each year 1/3 of our panel comes up for review and while we solicit input from the other judges, the decision to appoint is made by consensus of all committee members.

The committee has also made a concerted effort to expand the diversity of our panel and to provide education and mentoring for new recruits, because we view the issues of diversity as an extremely important one. In terms of voucher reductions, as I said before, they are extremely rare. Less than 5% of the vouchers are reduced, according to the information that I received and the vast majority of the adjustments have been made because lawyers can't do math. I mean that's why we all became lawyers. Most of those adjustments are made, not by the judges, but by the voucher processing clerk, and with few exceptions, the judges in our court routinely grant request from investigators and other experts. I've been told that, to the extent, there's a concern about a voucher request; our case budgeting attorney, Jerry Tritz, who I think testified before this Committee several months ago, has been extremely helpful in acting as an intermediary, negotiating a resolution between the judge and council. The consensus is that this has worked quite well.

The one sentiment that was shared by the majority of the judges was that it would be a mistake to take the judges out of the voucher review process altogether, because they're the ones who review the attorney's written submissions and who observe the attorneys' conduct in the court room.

Finally, I would be remiss if I did not express to you the biggest concern that our judges raised with the proposal to remove the CJA program from the umbrella of the judiciary and that is the issue of funding, which was, of course, discussed at the last panel. There is a widespread belief that an independent CJA program would face serious problems obtaining sufficient funding from Congress. Our Chief Judge, Carol Amon, fought long and hard during the sequester to obtain additional funding for our federal defenders who were decimated by furloughs and budget cuts to the extent that there has been expressed a fear that the judiciary does not appreciate the work of our

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federal defenders and CJA lawyers. My fear is that Congress, which is even further removed from observing the critical work that these fabulous attorneys do will be even less understanding of the need for funding without our support.

Thank you again and I'm happy to answer any questions.

Judge Cardone: Judge Gertner.

Judge Gertner: Thank you. It's wonderful to be here and to be with old friends, candidly. I think that is was part of the reason why I wanted to do this. I come to the subject with a very sort of diverse background, both criminal defense lawyer and civil rights lawyer for twenty-four years and on the bench for seventeen and now I am teaching and candidly sticking my toe in criminal defense work as well and some of my observations then come from that experience. It was said during the previous panel about the extraordinary changes in criminal prosecutions, but I don't think that you can emphasize that enough. Even the ordinary drug sale on the corner has surveillance tapes, cellphone data, etc. There's the distinction between the mega-cases and the ordinary cases have become narrow. Certainly the mega-case may have substantially more expert megabytes and terabytes, but even the ordinary case seems to have a substantial amount of that as well.

The U.S. Attorney comes to the table with substantial resources, I don't want to go over this point and then once the indictment is brought, the U.S. Attorney determines how long to get to the indictment, once the indictment is brought, the pressures of time begins, speedy trial act pressures which then, given this kind of complexity of federal criminal prosecution makes resources all the more critical. The defense lawyer needs the resources precisely to deal with these kinds of pressures; something I didn't put in my remarks, but I thought up as we were sitting here, the bench has spent a great deal of time talking about the e-discovery in connection with civil cases and the transaction costs that came about through e-discovery and the disproportionate resources. To some degree I want to look at that in connection with criminal cases as well. The government comes to the table with so much more resources to deal with electronic data than the defense does and yet the U.S. Attorney's Office is not reviewed in the same way as the defense is so I think that that's an issue as well.

I think all of this is through the lens of the continuation of extraordinary punishments . . . just extraordinary punishments on the federal side, ten, fifteen, twenty years, even life for drug offenses, but you all know that and then something that was mentioned in an earlier panel . . . being a good defense lawyer, an effective defense lawyer today is more than just knowing the cases and knowing the defenses. I did a little description in my remarks of the extraordinary cases that have come down from the Supreme Court, which

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speaking to the importance of creative lawyering and not just knowing the case. Knowing the case, knowing where the law is going, knowing what to preserve.

I also noted that the First Circuit, for example, is one of the circuits that regularly dismisses arguments for not having been preserved. It has one of the highest bars for this; in other words, a lawyer is chided an argument that wasn't made below or not made adequately below or made as the last argument in a brief is then considered waved. That puts a premium on a lawyer, not just doing the ordinary work, but making sure that all the "i's" are dotted and the "t's" are crossed.

When I look at the guidance, the guidelines for the CJA list, as I was sitting in the audience I thought that somehow what comes out of what I saw, and I will go into that in a little detail, is the following message: it's as if we all know the case is going to be a plea, we all know the likelihoods that it will be a guideline sentence, perhaps a guideline sentence that's modified by what the government agreed to so why bother and some of the guidance that I saw from my former court seems to reflect that attitude.

I also indicated that since 97% of the federal docket are pleas of guilty and I can speak personally to this, you get to the case at a time when you don't know what went into that bargain. You have simply no idea and if you come to the job with no criminal law background at all you have even less of an idea. I might add that I have been struck since I've left the bench with the extraordinary changes in the criminal practice just in the past twenty years, a practice that is faster passed, that is now extraordinary amounts of email, so judges don't know what they don't know, which is what went into that plea.

I just heard just as an anecdote of a judge that shut down a database of information to which all the defense lawyers could get access because it was too costly to keep up. You could only get your portion of it rather than seeing the discovery that was offered to everyone else. That makes a difference to the defense, that is to say it makes a difference whether you see the whole or just your part of it.

I was concerned about, as I noted in my remarks, I'm trying to think through what I saw was a disproportionate racial impact on one of the guidelines, which I'm not sure that the court understood. It says, "4.8: discourages seeking the services of a psychiatrist or a psychologist as a routine matter, limiting such testimony to instances where there's a genuine issue," quote genuine issue, "a serious mental impairment that may have a material effect on matters of criminal responsibility." I paused when I saw that. For the most part, the vast majority of African-American defendants that I sentenced had disciplinary records tenth or eleventh grade. I have no doubt that, at least I speculated, that the misconduct that got them treated as disciplinary problems

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in their schools might have been the subject of a referral to a psychiatrist in middle-class schools and so the language of psychiatry, psychology was just never brought to bear in these cases at all. They were discipline problems. I thought that the question of whether or not someone had a serious mental impairment required examination, not something that you could assume before you inquired any further.

I was concerned about that and the provision of other experts in a post-*Booker* world; this is really taking a page from Judge Restrepo's comments. The enterprise post-*Booker* was to individualize. You can't individualize, psychiatrists and experts are not something that the probation department would know about. You can't individualize unless you have the information with which to individualize. This was a guideline that was going to discourage precisely the kinds of experts that I thought was needed.

One of the other things I didn't note in my remarks was on the subject of "you don't know what you don't know". I recall taking a plea and sentencing a woman and I began to read the pre-sentence report with the strongest sense that, in fact, she had been beaten by the man for whom she was working and that there was a battered woman's syndrome issue here. I didn't know and I inquired at sentencing to see if anyone had ever examined them. The lawyer made it clear that he hadn't examined that because he feared that if he did, first he wouldn't get the funds for it, but in addition he would lose acceptance of responsibility points for vigorously going after this. I paused, asked for this examination to take place, as for the lawyer, if you thought that the examination was appropriate and it turned out that in fact she had been beaten and it was a reasonable thing to look at.

I'm not sure where I come out and perhaps I'm too far from the nuts and bolts of the administration of the CJA Act to speak to this, but I understand the importance of training, but, correct me if I'm wrong, apart from baby judge school, the training programs are not mandated and what I've seen, I remember taking law and neuroscience training, which I now teach, but the judges who go to the training are those who are already interested, so I'm not sure that training is the way to solve the issues here. I think, I appreciate the concerns about the risks of an independent agency outside of the rubric of the judiciary, but it does seem to me that some kind of expertise, non-judicial expertise has to be brought to bear here, a panel of experts on these cases that would recommend to the bench . . . I'm not sure that would remain within the judiciary, and I know that Miriam Conrad of our district is considering or has already proposed some kind of algorithm, a presumptive relationship between the expenditures of the U.S. Attorney's Office and the expenditures of the defenders.

There were many wonderful defenders when I was on the bench, but I saw some troubling defense work as well and during the time that I was on the

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bench, the very best lawyers, unlike Judge Pollak's experience, left the list, did not want to stay on the list, which was of concern. Thank you.

Judge Cardone: Judge Torresen.

Chief Judge Torresen: Good afternoon. I know it's late in the day, and I'll try to keep my opening remarks brief. First I want to thank you, Judge Cardone for the invitation to give you some feedback on the CJA program and I want to thank the whole Committee for all of the work you're doing. I realize this is a lot of time out of your normal duties and it's a good cause. To give you some background on myself, I've only been a judge for four and a half years, which is enough in Maine to make you the chief so I don't know what that means but . . .

Prior to becoming a judge I was Assistant U.S. Attorney in the U.S. Attorney's Office in Bangor, Maine for twenty-one years. So I've seen our CJA panel kind of grow over the years. I've seen the addition of the federal defenders office in 2005 when that first opened in Maine and I've worked with almost every member of the CJA panel in Maine and all the federal defenders in one capacity or another.

I have to say that, in Maine, the system, by and large, works. We have excellent representation from our CJA panel attorneys and we have a really fantastic Federal Defender's Office headed by federal defender David Beneman, who is really a great leader for that office as well as for the panel attorneys. I observed some of the comments at lunch time and one judge made the comment that one size doesn't fit all and I think that's something that I see here. We're a very large state, geographically, but a small state population-wise and we have a very small Federal Defender's Office. Only three federal defenders and a fifty-four member panel and we've reached that balance and it seems to work pretty well for us. It allows the individual panel members to each get around three to five cases a year which allows them to keep their skills up and the Federal Defender's Office has deliberately kept itself small. They could hire additional attorneys but they don't so we can keep that all in balance.

I don't want to go on too much. I liked the exchange when you asked questions so I think I'll pause there and just kick it over to Judge Sorokin.

Judge Cardone: You may regret that statement with the question and answer period. Judge Sorokin.

Judge Sorokin: Thank you for both having me and accommodating my delay also not only for the work you've done, but for the work I expect or anticipate you're probably going to have to do to finish this process, so I thank you for that. I'll be really brief. I've been a district judge not quite two years. I was a magistrate judge before that for eight or nine years and before that I was in

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the Federal Public Defender Office for eight years in Boston. I did a few other things before that but they're probably not as relevant to what you're doing.

I would say just a couple of quick points. One is, I think generally the system that we have, at least for our district, works well. We have a superb Federal Defender Office. I think that they do a great job and they're very helpful as I explained in the comments in terms of training for the CJA panel. We have a good panel. I think some of the lawyers on the panel are superb and some aren't superb. We have a reasonably effective system. Trying to review that, but that's a process that we're trying to figure out how to do better at in terms of getting more timely and better feedback about how people do when there are issues.

One of the tensions is always that the panel now, we have about 100 lawyers, which gives them about two to three cases per year given how we equitably allocated the cases, but we need a relatively large panel because sometimes we get either a big, we just had fifty-eight-defendant indictment, so we need fifty-eight, fifty-seven lawyers beyond the Federal Defender. You need a larger panel to accommodate that. That's a pretty big case for our district, but it's not unusual to see an investigation that leads to thirty defendants and essentially everybody is conflicted from all the other defendants whether they're in one or several indictments. So there's a certain tension in managing that, I just highlight.

If I would leave you with three points to think about they'd be these: one, I think you should focus on quality. In think in the federal system we're very focused often on measurements that reflects how fast we can do things or how efficiently we can do things, but we rarely have metrics that look at how well we're doing things. Really this is something where what matters is how well the defendant is represented. There's nothing more unsettling than sitting in a courtroom and watching somebody represented by someone who seems deficient and that was unsettling when I was a lawyer, it was unsettling at detention hearings as a magistrate judge and it's very unsettling as a district judge.

I'm pleased to say, by and large, I don't see that . . . sometimes where I do see it is in appointed, not in . . . in retained cases actually, but there's often less you can do about that but that's the issue I think. Quality is really important and I think quality is particularly important going forward because we're seeing two massive changes in criminal law that affect how people practice law: one is the sea change with electronic evidence. Mostly in terms of my experience of practicing law on the other side of it, I didn't see a lot of it as a lawyer, but everything is coming electronically now and the amount of data has vastly expanded and the way you need to process and think about it is starting to change. If you have hundreds of hours of pole-camera data

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you're not realistically be able to sit there and watch it all, but on the other hand you need to be able to figure out ways to access that, whether it's by looking at reports or whether it's by finding electronic tools that will search that data to help you find what you want.

Finding people who are equipped to do that, but also I think that means is our model of the solo practitioner who practices criminal law and has skills from law school and skills from trial experience and can show up and try cases is not as perfect a model as it once was because you need to handle these kinds of cases, with that kind of information you need different kinds of resources. The defenders, by and large, it seems have those resources, I think, but we need to figure out a way to deliver those resources to individual CJA lawyers or the lawyers who are on the panel because a solo practitioner's not going to be able to do it. At least in Boston, there's some big firm lawyers that are on the panels but it's functionally, for them, a pro-bono activity at \$125 dollars an hour and they may do it and that's fine but we're not going to get huge numbers there.

The second sea change, I think, is that the system is more and more focusing on viewing people, viewing the response to convictions as more than just sending people to jail. Sometimes it's not sending people to jail. When it is sending people to jail, it's not just sending them to jail and I think that we're understanding that the system is changing to see that there's rather than there's two boxes that are divided. One is people who aren't in the system because they're not guilty and those who are in the system and those who are in the system go to jail for long periods of time and that's that; there's a lot of responses to these problems and we're starting to see that there's drug treatment, there's a variety of . . . I'm sure you're all familiar with, front-end programs that have begun in different districts and a variety of different initiatives that have developed over the last ten years in the federal system that requires somewhat different lawyering skills and bring up different kinds of issues. So I think that's why I come back and say quality is really significant and I would ask that you really focus on that.

I'm not saying that as an indictment of what we have, because it's not, but it's that you're writing the report for the next twenty years, so you need to blueprint not just for what should happen this year and next year, but you need to think long term, as best as you can foresee the future, as the kind of changes that are happening now and how to equip the system in that way.

The second thought I'd leave you with is that I think you should hear from people who have been represented. I think that too often we have the surgical model. The old day surgeons didn't talk to the patients. Surgeons knew what the patients required and they did it. The lawyers talk, in our system, to the "patients" that are in our system, the defendants. But I think that, I don't say that their prescription for how to adjust the system is the blueprint, but I think

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that they would have useful insights and would give you different perspectives. Also, it's a practical issue from how often they're visited in jail, whether that's really helpful, looking at electronic evidence; it has to be and I hear it a little bit that electronic evidence is a lot harder to see in pretrial detention facilities so they would have a useful perspective as would the defense lawyers you're hearing from. I urge you to hear from them as best you're able. With that I will stop talking.

Judge Cardone: I do want to tell you, Judge Sorokin, we have heard from defendants, particularly in the Portland, Oregon hearing but we do hear what you're saying. Okay, let's start with Judge Walton.

Judge Walton: Judge Pollak, you said that you don't have a problem with lawyers leaving the panel which is intriguing considering the cost of living in New York. What are your feelings about whether there is a sufficient amount of money being paid per hour for legal representation of poor people and is it enough in New York?

Judge Pollak: I would say that it is not enough, that the rates clearly are too low given the cost of living in New York. I think that part of the reason we have been so successful in keeping lawyers, and I'm not saying we haven't lost any, but we have been very successful in keeping the top notch lawyers because I think they're dedicated to this work and they don't do this solely to make a living. They do this because they're passionate about the representation that they give to these criminal defendants. And I think that service on our CJA panel is viewed as an honor. Reappointment is not guaranteed. People are rotated off every year in order to give an opportunity for younger, new lawyers to get their feet wet and to learn the system so I think they value service on our panel.

Judge Walton: Judge Gertner, you said your experience was somewhat different.

Judge Gertner: One of the innovations of our CJA panel when I was on the bench was that it really had the very, very top of the profession on it, I mean lawyers who one day would be front pages of the newspapers defending some well-heeled defendant, was also on the panel and it was quite extraordinary.

My understanding is that that has changed. Most of those people are off. I wonder, and I just speculate about this, whether part of it is that the Eastern District did not have a culture of cutting vouchers and that, to some degree, more of that happened in the District of Massachusetts and when you select a lawyer who is a competent lawyer there is, forgive me, an element of disrespect in second guessing to this degree. What I understand is that some of the best and the brightest have left the list, so there's a relationship between who you get and how you treat people.

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Judge Walton: Judge Pollak, you also said that you thought the system should not be significantly changed, but there were some changes that were needed. What changes do you think are needed?

Judge Pollak: I guess my major concern is to the extent that there is voucher cutting that is done in our district it's limited to one, or two, or perhaps three judicial officers. Judge Gleeson, years ago, he's no longer with us unfortunately . . .

Judge Gertner: No longer sitting on the bench, he's with us.

Judge Pollak: No longer sitting on the bench. For me it's the same thing.

Judge Gertner: Retirement does not mean death. I just want to make this clear.

Judge Pollak: To me it does. He pushed very hard for a provision in the plan to require some sort of opportunity to be heard when there was voucher cutting. I've heard and listened to these panels where the judges don't pay any attention to what's in the plan. They don't pay attention to the prescription that they need to give an opportunity to the lawyer whose voucher is being cut to explain why he thinks it shouldn't be cut.

To the extent that I think there needs to be a change, we need to come up with a system to systematize that review process, that opportunity to be heard and to the extent that we're dealing with Article III judges who, with all due respect, don't like to be told what to do, a committee suggesting that the voucher is fine is going to work for some, but not for others. I don't really know what the answer is.

I know that there have been occasions where lawyers have come to me and said, "My voucher was cut" or "An investigator was denied" and I've gone to the judge and he said, "Well, I thought it was appropriate." And that was it. There was nothing more that I could do apart from politely arguing with him to persuade him that he was wrong. That's where I see a potential issue that could perhaps be dealt with in a better way than we deal with it now.

Judge Walton: Judge Torresen and Judge Sorokin, you both said that in your districts panel lawyers receive maybe two to three appointments in a year. Do you think that's a sufficient number of cases to stay proficient?

Chief Judge Torresen: We have a CJA selection panel with a number of members of the panel on it and that's the number, ours is three to five that they've settled on. The minimum would be three because they do have to do the training and just stay on top of the guideline changes. There's a lot of work to keeping up to speed but that's the magic number for us. A lot depends on what the U.S. Attorney's Office bring in a particular year too.

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Judge Walton: What type of other work, are they doing criminal work?

Chief Judge Torresen: Yeah, most of our CJA panel also do retained CJA work and they do some state work.

Judge Sorokin: I think it depends, to be honest. I think if you have a lawyer who has a criminal practice and includes a federal practice then they're probably already up to speed and only receiving two or three cases a year is enough. On the other hand if you have a lawyer whose entire practice has been in state criminal courts and now is coming to the federal court which has, at least in Massachusetts, a whole different set of rules and a different culture and a different approach and requires a different way of practicing. There's a lot more writing, at least in our federal court than our state courts in Massachusetts, two or three is a little bit hard. If you have a lawyer who's committed and they go to the trainings—we have a training for all new panel members that's required and we've recently required yearly training for everyone on the panel—they go to those things, it can be enough. But more cases would be better. I think that's one reason the federal defenders are better.

The problem is we need some number of lawyers because we get the bigger cases we don't have enough lawyers for everybody. The Federal Defender can't represent everyone. I do think that's one of the reasons why in, culturally, encouraging lawyers to talk to each other and reach out, so at least, and maybe this is my own deficiency, but as a lawyer and as a magistrate judge, as a district judge I regularly talk to my colleagues about what I'm doing and what kind of issues are presented. It's a little bit harder, I think, near the defender's office, you can walk down the hall, you can talk to other people, there's a wealth of experience right there to draw upon. At least in our district the defenders will answer any question from any CJA lawyer at any time, but the CJA lawyers . . . you need to foster a culture that will encourage those phone calls and make people feel that that's welcomed.

Judge Walton: Did I correctly hear you say that the, as far as quality of representation is concerned, that the lesser quality have been in cases where lawyers were retained?

Judge Sorokin: Honestly, that's my view. There are some, and I'll explain, there are some retained lawyers who are as good as any lawyer in the city, and when I see those people on those cases, they do a great job, but I have seen retained lawyers in cases who've never been in federal court before, they represented the defendant when it was a state case, now the case got federalized but it's a different kind of case now, maybe a different charge, even though it arose out of the same incident and they're just out of their league. They're not well representing the person and the person's poorly represented but they have a fee and whatever they, I don't know what the arrangements are so there are

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cases I see like that and they're . . . in my view, some of the lowest quality representation I've seen is in that scenario.

Judge Walton: We heard some people say, "Well, people who are getting court appointed lawyers, they're only entitled to a Chevy, they're not entitled to a Cadillac." I don't think that's a good analogy, if I were in trouble I would want a Maserati, but in any event . . .

Judge Sorokin: A Hummer if the government were coming after me.

Judge Walton: Some may use that to say, "If the worst representation is provided by counsel who's retained, why should we be concerned about putting more money into the system for people who are appointed, if it's even appointed council?"

Judge Sorokin: I think I would say that the first answer to that is, the constitutional standard is not the worst quality of lawyering that's possible. That isn't what we aspire to, that isn't the standard. Those cases frankly, cause us all sorts of other problems. They aren't things that as a system we want. We may be constrained and not be able to do something about it, but it doesn't mean the ineffective assistance claim isn't coming in later that we have to deal with and all of the collateral consequences.

The second is I think that it says something about our society, about what kind of representation we afford to people who we're talking about putting in jail. I imagine when we've gone to other countries to spread the word, they already had judges and prosecutors, but they didn't have real defense attorneys. Real defense attorneys mean something and it says something about the way we're going to treat everybody in our society. It's a little hard to make the automobile analogy but it seems to me that we should be providing very good defense to everybody, when it's somebody that can't afford it.

I think the second part of it is what it does is, and this is where I find Miriam Conrad's algorithm proposal interesting, wherever you locate the defender function, it is in a way a cost of the government bringing the case, is the defense. As the system becomes, not only more electronic evidence, but you have more forensic evidence, those are more complicated things to challenge.

We had a situation in Massachusetts in state court, but it infected federal cases. There was a woman that worked as a lab analyst at the crime lab where they test the drugs. She was falsifying documents, she was intentionally contaminating substances, so she'd get a sample and she would put cocaine into the sample, she was skipping over tests and they had a check procedure in some fashion and they had some reviews, and nonetheless, it went on for a long time, it affected like, I don't know, maybe Nancy would remember that, was it 10,000 or 40,000 cases.

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Judge Gertner: It's still affecting cases.

Judge Sorokin: It's still affecting cases. So having a robust defense function is a critical part of responding to problems. When you think about quality, I think about the medical world where you could look at that problem we had in Massachusetts and say, "Well, that was one bad apple. It was one person. She's been prosecuted. She's in jail. Problem over." In a hospital they wouldn't view that as one bad doctor or one bad nurse. They would step back and they would look at the system and they would say there's a problem with the system. The problem with that person, deal with that person, but there's system problems as well and you would try to adjust the system. So part of the way that we secure against those problems is having meaningful and robust defense functions so we're providing first a quality defense for that defendant, but we're also providing it because it's part of the . . .

The defense attorney that found that problem or whoever found that problem in that scenario in Massachusetts, they were benefiting a lot of people beyond that individual case that it came up in, so I think it serves a lot of functions, I think it's important. That said, it's public money and we should use it wisely.

Chief Judge Torresen: I don't want to pit you against your colleague, but Judge Gertner said there has been, at least in the past, a problem with voucher cutting in Massachusetts. Is that still a problem?

Judge Sorokin: It's not a problem, from what I understand, it's not a problem now. I talked to the new head of the CJA Board, we have a Board, and asked her about that. She took over in November, and it's more recent news and she said she doesn't see it as a present problem. I think part of the problem, and I can't speak to what Nancy was talking about, particularly, as a magistrate judge, I was on the court, I didn't review vouchers in our district, only the district judges do.

It may have been a problem, I don't know, but it may also be the restaurant phenomenon, in other words the criminal bar is a very small community. So if you go into a restaurant and you have a bad experience one day, you tell people about it, that can be the death of that restaurant, even though that might have just been a literally bad day for them. I think what happens is there's one voucher, when you have one or two vouchers cut that can also ripple. I'm not saying there aren't problems in other districts and there may have been problems in our district or there may be individual judges who are doing it. I don't really have information, a base, to say yes or no on that. I haven't seen it. I'll stop if you want, but I would think people are better situated than judges to review the vouchers, but that's a different question.

Judge Gertner: I think the restaurant analogy is a very good analogy. One of the things that I

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do is I lurk on the CJA listserv, so I have a sense of the complaints. They allowed me to lurk. I do a little bit more than lurking but there's no question. It's hard to know what the scope is, but there are certainly some celebrated cases, the voucher that was cut as I read it for excessive research. The voucher that was cut because of the psychologist. Particular judges have developed a reputation for doing more voucher cutting.

I don't know what the scope is, but certainly the noise on this list serve is that it happens a lot and I'm not sure but it may well be as Leo's saying one or two celebrated cases. I think you were going to have people who were testifying before you; in fact, in one case where the lawyer moved to disqualify the judge because he sought partial payments, the judge denied it and he wrote a motion to disqualify the judge for not essentially taking into account what the difficulty of the defense was. I don't know the legitimacy of that. I only know that it happened.

Judge Cardone: Judge Prado.

Judge Prado: Just a follow up, on what I think you said [to Judge Sorokin], that maybe voucher reviews should be done by someone else other than judges. Do the rest of you think that it should stay with the judges, that it's part of our responsibility to review the vouchers and we're in the best position to see it because we're there. Does it put us in a conflict situation because we're dictating what the defense is going to be, how broad it's going to be, or how narrow it's going to be depending on what we allow and each one of us is different so you're going to have inconsistencies. Some people say we're in the best position to evaluate it because we know the case, we know what's going on. Others say it puts us in a conflict situation because we're dictating to the defense how they're going to prepare for their case, so I'm just wondering, you think it's best to stay with us or you think it should go to someone else and if it should go to someone else, who would be the lucky person to be reviewing vouchers?

Judge Pollak: Well, the sentiment of the judges on my court was that they should continue to play a role in it. I think that it was also a sentiment that the case budgeting attorney, who, in our district goes beyond just sitting down and helping attorneys budget for the mega-cases, but also volunteers role is commandeered, if you will, to assist when there is a question. The judges, by and large, take what he has to say to heart and if he tells them this is a reasonable expense, by and large, they go along with it and when there are issues, what he told me is often, if the judges raise something with him, he generally agrees with them and then he goes and negotiates with the lawyer to fix the voucher so they take out whatever is a problem.

I know there've been a lot of discussions about taking it out of the judiciary completely. I do think judges have a role to play, because they do see what

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goes on in the court room and they do review with great care the twenty-five page brief that was cut and pasted from another case, very clear, because the defendant's name is wrong and the lawyer has billed forty hours to prepare this cut and paste job. I don't know that an independent person would take the time to read it. The judge obviously has to. So that would be what I would say in response to that question.

Judge Gertner: I would almost want to ask the judges on the panel whether or not they feel that they understand what has gone on in a case that pleads guilty. Numbers of times, someone, I'd hear nothing about the case, I'd know nothing about the case until I'd hear that there was a plea. What you don't know, you don't know the charges that were dropped, you don't know the evidence that the lawyer developed and got the government to go in the direction that they went.

Something that is litigated is one thing, but in a case with some many of the cases that I saw where issues were not specifically litigated, I'm not sure that I knew, and I had been a criminal defense lawyer, I knew what had gone into it. There may be an audit function, as I indicated I was on the committee for Public Counsel Services before I was a judge and there's certainly an audit function that someone within the judiciary could have, making sure that someone isn't billing nine million hours for a day, where something is filed, taking a look at it, but I see the advantage of having at least an independent entity within the judiciary, understanding the risks of having it outside the judiciary of people with expertise in criminal defense work, who'd be able to ask the questions about what went on that you actually didn't see in court.

Chief Judge Torresen: Well, actually I started an email and I got the response from the first judge was we should have them set up a defender general's office just like the attorney general's office and let them manage the whole thing. The response to that was, two responses, one was, "I think we're in a better position to determine what has happened than most people who would be reviewing these vouchers." Then the other thing that I thought was interesting and it's been mentioned here today is that "is the judiciary really the better body to ensure Sixth Amendment compliance? Are we in the best position and are we the ones that care about it more than it might be cared about in the executive branch or anything other than that?" It was the same kind of debate among my judges as I've heard all day today.

Judge Sorokin: I think with respect to the vouchers, separate from whether the defense function should be within or outside the AO or the judges, I think it's probably better if it's somebody other than the judges for a couple of reasons. One is, if you centralize the function, people see across the board. I only see my 1/11th of the cases in Boston, the vouchers. But if there's a more centralized function you're seeing all of the cases and since this is essentially an audit kind of function, you're going to be in a better position to evaluate

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cases and the amount of time spent. Especially when a lot of the time is spent in things that we don't see in the courtroom and may not necessarily be reflected in pleadings that we can evaluate.

I also think there's a difference upfront, when you're reviewing . . . the conflict is heightened when the case is going along and someone comes to you, will you approve this or not, and we have a model for how it's done when we don't have that conflict, which is the defenders. The defenders approve their own expert determinations. They already have to make those judgments, are making judgments about . . . we have a budget, how do we do it, how do we spend it, is it worth it in the case or not, does it make sense? There's a way to do it and it seems to me it presents a nicer model than having us sit on that as the case is going forward and making those judgments about it.

I do think there's a role to play for judges because in that example, for example, the twenty-five page cut and paste is a lot different than the really thoughtful memo addressing the complicated issue of law that they might have lost on or they might have won on but reflected a lot of work that was well done and properly done. I'd be inclined to say, given the conflict, I would move it to someone other than the judges. I can't say that that's a consensus representation of our court. I know there are a number of judges on our court who feel the conflict and think there is a conflict and as a result it should move away from the judges at least to some degree, but we didn't really take a vote on it or anything like that so I wouldn't want to represent that as the views of the entire court.

Judge Prado: Another issue that as I listen to y'all came to mind is with so many cases now pleading guilty and the panel lawyers coming in only a few times a year how do we go about evaluating the quality of representation? Ms. Gertner, Judge, Honorable. It has H-O-N. Hon. I don't know if you lost that when you got off the bench.

Judge Gertner: You keep it forever.

Judge Prado: You still keep the Hon?

Judge Gertner: You keep it forever just as long as you say retired afterwards.

Judge Prado: You pointed out the woman that had the battered woman syndrome that the lawyer overlooked. How do we as judges know that the lawyer has done an adequate job of evaluating the case and doing an adequate evaluation when it just looks like we're a guilty plea factory, and everybody is pleading guilty and we really don't know if that lawyer has done a good job. We're happy because we're not going to be sitting in the courtroom for a week trying the case and he's a good lawyer because he got his client to plead guilty. I'm

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joking.

Judge Sorokin: I understand what you're saying.

Judge Prado: How do we know if that lawyer is doing a good job or not when they plead guilty most of their clients and we really don't know if they've done a proper investigation of the case?

Judge Sorokin: I think it's hard to answer that question. It's hard to know that in that circumstance. You'll know it if you got the voucher and it said forty-five minutes of time and no investigation, but you have already sentenced the person by that time. Sometimes you can draw upon clues. Maybe the case went from here to much narrower and you can maybe draw the conclusion that the lawyer accomplished something in the course, and that might be some evidence of solid work. Sometimes it might be in little details. In a child pornography case it might be the lawyer is raising an issue, "Well the no contact with children but the defendant has a child who will still be a minor when he gets out of prison and that condition should be modified in some respects with respect to the child." That says well that's a person paying attention to the details. It gives you a clue that you can draw the inference that maybe they are, but I think that's a problem and that's to some extent why, at least in our district, we rely on the CJA board to evaluate. We give judicial feedback. We rely on the CJA board to make recommendations to us as to who should stay and who not to try to get the criminal defense bar to weigh in on that.

Judge Cardone: Don't we actually send the opposite message when we see guilty pleas and we say, "Couldn't have taken that much time. Why did you spend so much time on a case that resulted in a guilty plea?" The concern is that we hear a lot of CJA panel attorneys say, "We put a lot of work in it to get to the guilty plea, but the judge doesn't see any of that." How could a judge ever know that? We hear repeatedly, "We're the best judge. We did this case." They didn't do any of that.

Judge Sorokin: Is your question how would we know that they did all that?

Judge Cardone: Yes.

Judge Sorokin: I think it would be hard to know that. I think that's a problem. In terms of if you're evaluating the voucher and saying, "Why are these 100 hours here? All you did was come in and plead your client." Maybe that 100 hours accomplished a whole lot that we just didn't see in the course of the plea in the courtroom.

Chief Judge Torresen: I just wanted to say I don't know if other districts do this or not, but we do in the District of Maine. At least most of the judges have a pre-sentence

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conference before a sentence, and I mean days before a sentence or weeks before a sentence. It's an in-chambers, around the conference table kind of a chance to talk through the issues that are going to be coming up and you get a sense of what the case is about and it's also really an opportunity for the defense counsel to make those points if there are some. I think that's one way of getting to know a case a little bit better and getting to know what the defender or the panel attorney has done in a particular case.

Judge Walton: Then again we may never know. If somebody is representing a real problem client and they have to spend tremendous amount of time trying to get the confidence of that client and the other things you have to do when you have a difficult client. The lawyer is probably going to be ineffective if he tells you or she tells you this is why it costs so much.

Chief Judge
Torresen: A lot of times those little details do come out in that conference.

Judge Walton: Probably shouldn't though should it?

Chief Judge
Torresen: Maybe not, but I don't think that hurts them. I think you get a sense of it, maybe not in so many words but you get a sense.

Judge Cardone: All right. Professor Kerr.

Prof. Kerr: First, thank you all for some particularly strong testimony both in written and oral form. It has been very helpful. Broadly speaking, the issues that we're trying to answer for each part really boils down to two different questions. First, who has the power to make the decision and then what is the standard or process for making the decision. Judge Prado just asked the important "who should have the power" questions. My own impression from your testimony and from testimony we've had on prior panels is there's just uncertainty. There's no one correct answer that seems to emerge from that with each question maybe having its pros and cons of judges versus alternatives. I want to focus instead on the question of what the standard or process should be. Judge Pollak, you had mentioned that Judge Gleeson and the Eastern District plan had ensured that there's a process for voucher cutting, for example. I think it was that each judge should explain the process or the reason for the voucher cutting and have some sort of procedure by which a CJA lawyer can seek review of that. That's one example of a concrete process change that we could say, "This is a way of improving the system, even if only in some incremental way."

I want to open up to all four of you. Are there other processes that you think, or standards that the rules should adopt that would make for some sort of marginal improvement even if just a small one, given the difficult balancing of interests and the nature of wanting to have oversight but not too much

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oversight or rules versus standards. There are always going to be complicated trade-offs, but are there other concrete ways in which you think here's a change in terms of, for example, who reviews a decision or should it just be left to the discretion of the judge in terms of whether a particular time is deemed reasonable. Versus should there be more rules in terms of presumptions maybe that a certain amount of time is deemed reasonable, up to a certain threshold. Clearly there's some of that found in the current framework. Are there changes to that that would improve the system that we can basically grab your idea and put that into our report in a concrete way?

Judge Pollak: I thought a little bit about what a standard would be, and I think the problem is that as has been pointed out here, every case is different. A presumptive number of hours for speaking to your client, for example, would be impossible because as Judge Walton indicated some clients are difficult. They take a lot longer to prepare, to talk to. You need more visits to MDC. I just think the best we've done is reasonable. What's reasonable? That's the problem. I do think that some sort of review process where the attorney feels that the judge has been unreasonable, is warranted. What exactly that is, I don't know. I will say this. There's some irony to the fact that the judge in our district who tends to cut vouchers more frequently than not, is a former criminal defense attorney. The argument that criminal defense attorneys know better than judges who haven't been criminal defense attorneys falls flat in my example. I don't really have any suggestions to you as to what kind of presumptive standards we could set. I'm not sure it would work. We have so many different cases. We have terrorist cases that go on for months and months. What's presumptively reasonable there?

Judge Gertner: Tomorrow I think you're going to hear from Miriam Conrad who is in the audience now who at least when we all spoke, talked about coming up with a system, I don't know how difficult this would be, to pitch at least as a target amount for the defender a comparison with the prosecutor. There are real issues about finding out what the prosecutor spent on X case, but clearly if you have a case in which there are multiple prosecutors and multiple FBI agents involved, if there is some kind of algorithm we could come up with so that the defenders resources would match or be a function of what the prosecutor's resources are because I think that's really the core of the problem here. In a simple case that the prosecutor brings, while the defense lawyer may do a considerable amount of work, that's one issue. The more serious problem that I think people confront is when the government has done a huge amount of work as they have a right to do and the defense is playing catch up and the judge doesn't see what that takes. If there's some kind of way of coming up with an algorithm that would be interesting.

Chief Judge Torresen: I think of the teacher that punishes the whole class because there's one or two misbehavers. I think that it might make sense and maybe this would work more in a district the size of Maine than in some of the bigger districts, but it

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might make sense that if you have some misbehavers to go and educate them. Tell them why it's not appropriate to . . . and I know they are Article III judges, I understand that . . . but make your efforts there. Because in Maine we had 3% of the vouchers were cut last year and that amounts to four to five vouchers, four and a half vouchers. It doesn't seem like it's a big problem. It seems to me that the judges in Maine are pretty well situated to understand what the case is about and often times we can see what the prosecutor has spent. Not in any detailed way, but I know when I'm in trial and the prosecutor's agent is referring to report number 457 that this prosecutor went crazy. I still feel that the judges are in a pretty good position to get a general sense and maybe better than somebody else.

Judge Sorokin: I don't know how you implement the algorithm, Miriam Conrad told me about the other day before I wrote the letter to you. I think it's an interesting idea. I didn't understand it as case specific but more system specific. It strikes me as a thoughtful way to encompass the larger, if you could figure out the algorithm correctly in some way, and to give you a neutral principle. I thought that's an interesting way to solve some of the problems. In terms of who decides, that's sort of what your question is right? I agree with what Judge Torresen's saying that to the extent you have problems that part of what you should do is try to fix the problems rather than rework the system to solve a problem in a particular area, if that's what you have.

I do think people who have vouchers cut should receive notice of the basis and a chance to respond. Sometimes it might not look from the submission like there was a good reason to do that. If someone was called out about it they can submit a short explanation. We have a process in our plan that that's what's supposed to happen. Somebody can submit something. If they do, a judge can look at it and say, "Okay, well now it makes sense." Or, "No, it doesn't." There ought to be that back and forth. I do think that answering what's reasonable or what is the right standard to some extent is helped if it's done by people who are doing this all the time. That's why I think, I just look at the defenders and say, at least I know in our district, but I think I sense when talking to other judges, people are uniformly happy with the quality of representation by the defenders and they're making a lot of these decisions in individual cases. It's not being made by judges and it's working very well. We're having this discussion about the CJA. It suggests to me we should look at that to try and figure out how to do that.

Prof. Kerr: The comparison between what public defenders and CJA attorneys have in terms of resources brings to mind the striking disparity that we've seen in many districts at least between the use of experts between public defenders and CJA lawyers and I'm interested in your experiences. First, whether you've also found that same disparity exists between the frequency of use of various experts, both investigators and say psychological experts or other kinds of experts between CJA lawyers and public defenders and then also

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what you think the causes of that might be in terms of why CJA lawyers are not having the investigators, not bringing them to bear, not using them as often and if there's any change in the law or change in the standards that might equalize those.

Judge Pollak: To the extent that there is a difference, I think it may relate to the presumptive rates that the circuit has for investigators and experts. It's almost impossible to find certain experts at the rates that are listed in the Second Circuit's plan. If I were a CJA attorney and I was trying to find an expert that I could pay at the rate that I'm allowed to pay that's a problem. That's a pretty simple fix, I think.

Judge Gertner: I think, and maybe Leo could answer this question, the public defenders have experts that they can go to, can count on, a certain book of business with the public defenders. The individual CJA lawyer doesn't have that. His ability to even bargain for these rates is limited. That's another issue. The rates have to be higher. I think, as I've said in my testimony, I think the government pays double what experts are in the CJA list, which is really an outrage.

Chief Judge Torresen: I don't see a difference between CJA panel's use of experts and federal defenders use of experts, and I haven't studied those numbers so I couldn't say exactly, but I haven't seen that disparity. I know this year or last year was 19%. We're a little higher than the national average on use of experts. We see a lot of psychologist experts in the sex offender cases at sentencings. The Federal Defender's Office doesn't tend to do that as much, I don't think. I guess I would say I'm not sure I see it in Maine the way you're seeing it in other places.

Judge Sorokin: I think there's a disparity, but I don't really know. I don't know the numbers. I heard a few numbers just before I came on from Miriam Conrad. I think you should ask her when she's on tomorrow for our district because I think she's on top of the numbers, and would be able to explain them to you better. I have a sense that it might be true, that there's a differential, but I'm not positive. If there is a difference I bet the difference varies, at least in our panel, across the panel. In 100 lawyers there's a certain amount of variation. I suspect in the best third of the panel they're using experts whenever it's necessary and appropriate and seeing at it. Whereas, maybe in a third of the panel that might be weaker, or not as strong, it might be less. I don't know if that's cultural because they're not as familiar with it, they don't have people doing it all the time. They haven't done that many cases. They don't really know about the process of applying for the money. I think that might be the issue.

Judge Cardone: Mr. Cahn, and into the microphone.

Reuben Cahn: Sorry, my back's getting to me at this point. Can I ask a quick question of

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you Judge Pollak? You mentioned and actually I guess also Judge Gertner and Judge Sorokin because you all mentioned in your districts that the circuits have presumptive rates for experts that are unreasonable. My question to all of you would be has there been any effort on the part of the districts to go to the circuit and say, “You need to revise these rates. Our lawyers cannot get the experts they need.”

Judge Pollak: Not that I know of.

Judge Sorokin: My understanding is that it’s not set by the circuit. I’m not aware of that. Maybe it’s one more thing that I’m ignorant of, but my understanding of the way it works in our district is the state public defender has a list of approved rates that they pay and those, I think, are incorporated in a reference by our CJA plan as sort of presumptive rates. Those rates are particularly low and I bet the difference between what the government pays that Nancy was referring to as being double is in reference to that. In answer to your question, yes, we have just begun the process of looking at developing some sort of rates that on the one hand would be reasonable and would enable people to get quality experts when they needed them and competent people but would be a wise use of the money. We have literally just begun the conversations to talk about that. I don’t think it’s something we need permission from the circuit for, at least as far as I’m aware.

Judge Cardone: Microphone. Sorry.

Reuben Cahn: Let me turn to another area. When you started your testimony, Judge Sorokin, you mentioned that you think one of the things we really need to be focused on is quality and I certainly agree with that sentiment. One of the things as we talk through these problems and again I heard this as everybody was talking about what’s in place is that all the mechanisms that seem to be in place have nothing to do with quality. They all have to do with cost savings. We look at cutting vouchers. We look at denying or approving experts, but there’s almost nothing that either fosters or encourages quality representation. It’s very easy in a defender office I can do that. For instance my supervisors review the files of my attorneys and look to see did they exhaust these avenues? How often did they meet with the client? What did they pursue? You can’t do that when judges are involved in the process. My question to all of you is, can you envision alternative mechanisms that we could put in place in the current system, judges in charge of things that would encourage, foster, and incentivize quality representation?

Judge Sorokin: I think it would be a good thing. I would be in favor of it. If you said, how would you graft on the present structure? Doing that I think, from a judge’s perspective, it’s a little bit difficult because I think one way or another you’re involving exactly what you’re describing as happening in your office. You either have the lawyer reaching out talking to people and you want to

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encourage that. One way we can encourage that is we can pay for it when it's in the voucher. That would encourage it, talking to other lawyers. The review is the other way, being undertaken. We're not really in the position to do. If it comes after the fact it creates a § 2255. From my perspective I'd rather have it before the fact because I'd rather have the person represented correctly the first time than have the problem the second time. From the defendant's perspective the standard is so much less favorable later that they're better off earlier. I think that starts going down a road of having some sort of different system than the judges in charge. I'm not sure.

Reuben Cahn: Same question for the rest.

Chief Judge
Torresen: My only thought is that I think what is very effective in Maine is the fact that the Federal Defender is completely available to the panel. I talked to him before I came here and he said every day I talk to someone on the panel who is asking a question, and it's that kind of a training component. It's like that voice down the hall that you value as a sounding board. I think that kind of a mechanism, I'm not sure how you can implement it in the bigger districts, but it's that tight connection and communication between the Federal Defender's Office and the panel attorneys.

Judge Gertner: I think the first thing is that the emphasis on the guidelines in Massachusetts and that's all that I know of, is almost 100% on cost containment. There is a few words about excellence but the rest of it is all about cost containment. I think you have to change that emphasis. I also think there's, and I'm not in a position to totally evaluate it, it's almost as if there's a common law of voucher cutting. When it gets around in the restaurant way what people's vouchers were cut for and that communicates a really don't do too much issue. It may be wrong because it may not cut across the district, but when that happens it matters. To some degree it may be a question of taking the authority for this or at least taking the intermediate authority away from the judges so that there's some kind of expert group that the judge then gets a recommendation from might be helpful to deal with that problem of this common law of cutting.

I think the other way to deal with the, although the CJA panel needs to be independent I know that when I was on the bench if there was a lawyer that was particularly terrible we would just tell what we had seen in court. It was up to the panel to decide whether that person stayed on or off. Perhaps, in the case of the battered women's syndrome case I ought to have said to someone I was concerned about this lawyer's representation of this woman. If I'm the only one who had that problem of course he won't take it into account. Maybe making it clear that you're policing the quality of the CJA panel and not just what they are billing is an important message.

Judge Pollak: I would say that we have a great Federal Defender's Office in our district and

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I think David Patton is actually here in the back of the room and I know that they are always available to our CJA attorneys and our CJA attorneys are a very tight knit group. They go to one another for advice. There's no way to supervise them on an ongoing day to day while they're on trial or preparing a case. That would require a complete change in the system it seems to me. What we do do is we provide training in conjunction with the federal defenders. We have a very serious mentoring program that we try to use to train new lawyers and we have a system very similar to what Judge Gertner said which is the judges are encouraged at the year-end time for review of the third of the panel to tell us what they think. We get good reviews, bad reviews and reviews during the year when something specific happens. We take that into account. It has nothing to do with how much they bill. I have no idea how much a particular panel attorney bills on a case by case basis, but I do know when I've got four judges calling me to say that they've gotten letters from clients complaining this lawyer doesn't visit them, the lawyer is never prepared for guilty pleas. His client doesn't seem to have a clue as to what's going on.

Those are the kinds of information that we get that we can use to evaluate their performance. But on a supervisory basis such as the Federal Defender's provide for their attorneys I don't have any idea how that would work.

Reuben Cahn: Is that something you've made known to the panel so that they understand one of the things we're looking at when we decide whether you stay on the panel is how often you're visiting your clients, are you ready for your pleas, those sorts of things. Do they understand that quality matrix is part of the . . .

Judge Pollak: You know, I don't know. I think so. I think so, but I don't know. That's a very good question. Maybe it makes sense to be more up front and tell them that because that really is something that we take very seriously.

Reuben Cahn: Judge Gertner, I wanted to ask you one last question and then I'll turn over the mic. You mentioned something that I've often talked about, which is that there are no . . . it was in your written testimony . . . that there are no more one-inch files on the simple drug case. You've got three phone dumps, cell tower site data, pole cams, God knows what else is in your simple little drug case or gun case. I guess the question I have for you, is that realization something you came to while you were still on the bench or is it only something you've really come to understand since you retired and are participating in the CJA panel?

Judge Gertner: Well, you saw some of it because the very few cases that went to trial usually had an enormous amount of resources in them. But so much of that is buried in the plea. It's exactly facing that mountain of evidence that the person decides to plea. To some degree I've heard more of it now, and I think it's become much more substantial where the defendant would get a file of

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gigabytes of material in it and then rush to the judge for an expert to help them search it, some mechanism for reviewing the files with the client in the prison, which is an incredibly difficult thing to do. That's information I've learned about since from the complaints that I've heard. It would make sense because as I said the parallel on the civil side is emails, e-discovery, etc., and you would have expected that to some degree, even in street cases, on the criminal side and we should be as concerned about the disproportion of resources in one as in the other.

Reuben Cahn: Thanks.

Judge Cardone: All right. How about in the back? Any questions? None. All right. Professor.

Prof. Gould: Thank you. I have two questions. As Professor Kerr mentioned, the Committee has been quite interested in this question of the use of service providers across the various districts, and I want to clarify that these percentages that we talk about, for example your 19% in Maine, isn't just experts. That's paralegals and investigators, and other experts. This is a question that comes up regularly at the hearings, and I'm wondering Judge Gertner if you could help me with something. You have the trifecta of experience of private practice, the bench and now the most ivory of ivory towers. When I ask this question generally, and it always comes at the end of the hearing, about the percentage of cases where a service provider is used, I often times get one of two responses from attorneys. I either get, "I like to do the investigation myself. Why should I be hiring an investigator to do it?" Or, "The evidence in these cases is fairly clear. What am I going to need an expert for? The government has got my client on tape. There's not a whole lot else. I'm going to plead them out. You shouldn't be expecting me to be hiring a bunch of experts."

In your experience, what percentage of cases, if we're getting at least a Chevy if not a Cadillac representation, would you expect to see service providers used? What range should the Committee be expecting?

Judge Gertner: In my experience as a lawyer, my experience as a judge or my experience as a professor?

Prof. Gould: Yes.

Judge Gertner: Yes, thank you.

Judge Prado: Being the defendant is still there, but hopefully that won't come up.

Judge Gertner: I can't give you a particular percentage.

Prof. Gould: Can you give us a range?

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Judge Gertner: I really can't. I know that as a lawyer and that may have been a little crazy there were no easy cases. That is to say I thought that it was important to have resources in every case whether it's sentencing resources or jury selection resources in every case. I'm not sure that everyone is like that. It's hard to say. On the one hand, we encourage the government to bring big drug cases. The federal drug cases shouldn't be the hand to hand sales on the corner. B but big drug cases also mean that there was an investigative file over a period of time. It's very hard to know what a percentage would be because it does seem to me that there has to be some examination.

Prof. Gould: All right, let's let you have your former judge hat on. Is there a level at which if you looked at a district and saw the rate was below X you would start wondering what's going on?

Judge Gertner: I wouldn't have seen it system wide. I'd see it in a per case. This is actually a retained counsel. I would see an arson case where no motions were filed before the trial began, and then the first witness was the dog handler whose testimony was laughable. I suspended the jury, and turned to the lawyer . . . I asked the jury to leave, and I turned to the lawyer and said, "Are you going to challenge this?" That was retained counsel. I only know the merits. I can't give you the number. Maybe others can.

Prof. Gould: I'm curious whether the rest of you have an opinion on this. Because that's one of the things the Committee is struggling with. When you look at districts that have a rate of 50% and others at 2% and the Committee gets different answers from the lawyers around the country, how should the Committee be interpreting that testimony?

Judge Gertner: Can you get information about what the government is spending on these cases?

Prof. Gould: Generally not.

Judge Sorokin: I would be curious to know what percentage, I would have two thoughts. One is I don't have a specific answer to you except that it seems kind of low to be only one quarter or three percent of the cases which have a paralegal or an investigator or any sort of service provider when you include investigators in it, at a gut level I go, hmm. I would be curious about if the defenders know the answer for themselves what the data is for them because I think that would be a good benchmark and it would be somewhat district specific, or time specific. If you have a district where there may be a very high rate of 5Ks and the government may be more negotiable and you may see different responses from the defense compared to a district where say the government, this may not be happening presently but at least was true in our district some number of years ago, the government said no plea negotiation whatsoever,

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maximum charge, seek the maximum. Then you would expect the amount of investigation to go up in that district. That would be my thought.

Judge Pollak: Great idea. I have no sense of percentage. I do think the federal defenders probably does have that information. I would say that the mix of cases in a district may also impact that. If you have a lot of cases, as we do, that are capital cases, terrorist cases, mega securities cases, I think you're going to see a higher percentage of investigators, paralegals, associates being requested just because of the nature of the cases. I'm not really sure that across the board percentage would be possible.

Prof. Gould: I don't think I'm asking for a national standard. I'm asking for your learned advice on how the Committee should be seeing this. Moreover, how to interpret the responses of lawyers who say, "You're asking me to do something that you shouldn't be asking me to do." Which is to get an investigator or to get an expert. I think we've probably exhausted this. Let me just go to a last question that's for you Judge Pollak. You mentioned your former colleague Judge Gleeson who I think we've established is still with us, just not on the federal bench, but it reminded me that he testified before the Committee in Miami, and he gave some testimony, I just quickly found this that seems a little different than what you're saying about your panel and I'm hoping you can help us understand how to interpret the different perspectives out of New York Eastern. This is what he was saying with regard to the low hourly rate, "That rate attracts the wrong people, the bottom feeders who can't get paid work. We should be raising the rates to get the right people." He was referring to the Eastern District of New York when he said that. How should the Committee be interpreting the differences between what you had to say and what he said?

Judge Pollak: I read that. I strongly disagree with him. I think that we do not attract the bottom feeders. Are there some attorneys over the past fifteen years who should not have been on the panel? Absolutely. We have gotten them out over time. I think what he was trying to say is that in New York this is a really low hourly rate. It's less than half of what we give to low level civil attorneys in ARISA default cases. I don't know how else to say it. It's from my perspective, a sin that these criminal defense attorneys who really do what is incredibly important work to keep our system going, get paid at such a low rate. I'm not, at this point, sure what he meant, but I think he was trying to make a point. I don't think if here were today he would agree that the level of our panel attorneys are bottom feeders.

Prof. Gould: Thank you.

Judge Cardone: I have a follow-up question to his. Why do they do it? Why would anybody who can't really afford to do these cases at that cost, why do they do it?

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Judge Pollak: I think they like the work, and I think they are truly dedicated. That's what they are. To the extent that there's been discussion about pro bono service, I mean it really is pro bono in the sense that the rates they're getting paid are way below what they deserve to be paid.

Judge Cardone: Given these mega cases, gigabytes, etc., how can an attorney afford to do that and his firm not suffer, his private practice not suffer. We are not talking about the old kind of cases that took a week to look at. We're talking about cases that go on for months and months and months. You've said you have terrorism cases, security fraud cases. That's not pro bono work. Is it?

Judge Pollak: No, it's not. We have actually culled out separate panels for our capital cases and our terrorism cases and these are attorneys who are willing to do it. There are attorneys who struggle, particularly in the last year or so when the number of cases brought by our U.S. attorney has dropped dramatically. There was a discussion here about how many cases a year do you think a panel attorney should have? We've struggled with that because there has been such a drop in the number of cases filed and the number of cases that CJA attorneys get. I can only hope and pray that you guys are going to raise the rates so that we can keep our panel at the same quality.

Judge Cardone: We don't have the money.

Judge Pollak: Thank you.

Judge Cardone: On behalf of the entire Committee, I want to thank all of you for being here today. Again, I know you've traveled from long distances. You've had thoughtful comments, and we appreciate it. I want to encourage you if you think, I mean we've had some vigorous discussion here as Judge Torresen said, if you've thought of anything or think of anything that we didn't ask you or that you'd like to add, please feel free to submit it or get in contact with us because the more information we have the better we like it in some ways. Thank you very much on behalf of the entire Committee. We adjourn for tonight.