

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 4—Views from Panel Attorneys and District Representatives

Judge Cardone: Good morning. It seems like afternoon, but it's still morning. Good morning and I want to thank all of you and I know we kept you waiting, but for those of you who were sitting in the back and it's probably going to happen to you too. We find that as we ask questions, every question leads to another question and we're really here to try to get as much information as we can. I appreciate your patience in waiting to testify. We're going to start again by each of you having the opportunity to make as brief an opening statement as you can because as you saw, we always have a lot of questions and then, we'll go into the questioning period.

Before we do that though, let me go along and express and identify this is "Views from CJA Panel Attorneys and District Representatives." We have James Broccoletti, a CJA District Rep from the Eastern District of Virginia; Pleasant Brodnax, a CJA District Representative from D.C.; Natalie Harmon, a CJA Administrator from the Federal Public Defender's in Western District of Washington; Jeffrey Lindy, a CJA District Rep from the Eastern District of Pennsylvania; Edward Rymysza?

Edward Rymysza: Correct.

Judge Cardone: A CJA Panel Attorney from the Middle District of Pennsylvania; and Mark Shea, CJA Panel Attorney from the District of Massachusetts. We'll start with you, Mr. Broccoletti.

James Broccoletti: Yes, ma'am. Thank you very much and I appreciate the opportunity to be here. We are talking a few minutes ago and I was saying that I doubt there's anything that I could say to you that you haven't already heard in your previous five to six different hearings but as a defense lawyer, we always have to have the last word, so I appreciate the opportunity. I've been in practice over thirty years and I've been taking criminal justice appointments for over thirty years from the federal courts. I've had the opportunity to have several judges be very understanding of the role that I play. They've authorized trips to Kabul, Afghanistan to represent Blackwater guards charged with killing Afghan civilians. They've authorized trips to Djibouti to represent Somali pirates. They've authorized trips to Guantanamo Bay, and I've had other judges that have not authorized travel trips thirty minutes to the local jail to meet with the client.

I guess the point that I'd like to make and will probably emphasize throughout the entire process is just the disparity and the differences and the randomness by which judges approve and don't approve things. We have a wheel system in which the next judge up is the next judge that gets the case.

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That determines so much of what a CJA lawyer can do and what opportunities they have to be able to see the client, work with the client, investigate the case and do the work that's necessary. I look forward to our discussion today and I look forward to hopefully providing some insight into our job and working in the trenches and how difficult it is.

Judge Cardone: Mr. Brodnax?

Pleasant Brodnax: Good morning, your Honor. Thank you for the opportunity to be here. I am the panel representative in the District of Columbia and in my district, AJ Kramer who is the federal defender, administers the appointment process, and reviews all of our vouchers for mathematical errors and reasonableness. I'm proud to say it appears from the AO report in numbers that in 2013, fiscal year 2013, our attorneys used experts in 40% of their cases. In fiscal year 2014, the number that we received is 25% although I don't think that's correct because I know we're always fighting over investigators and experts. So you get a big case and . . . to be an investigator in the District of Columbia is a full time job because there are not enough of them actually. Also, we like to talk about and take your questions with respect to compensation. I think the compensation of CJA lawyers particularly in Washington, maybe New York, Boston, San Francisco, places where the markets are big and a lot of attorneys are, is inadequate.

There is a case out of the D.C. Circuit that maybe Judge Walton is more familiar with than I am, the *Laffey* cases, an index in cost shifting cases like civil rights cases. Someone who's one to three year out of law school where the fees have been shifted. Their fee would be \$331 an hour, someone who's been out of law school for 20 years who's in \$700 or \$800 range. These are in civil cases where the U.S. attorneys have all . . . where fees have been shifted. I think that we need to raise the rate for panel attorneys. I think we also need to raise the minimum by which panel attorneys can exercise their judgment in hiring experts without having to go to the court and I look forward to taking your questions.

Judge Cardone: Miss Harmon.

Natalie Harmon: Thanks . . .

Judge Cardone: I'm sorry. Ms. Harmon.

Natalie Harmon: I'd like to thank the Committee just for inviting me here. It's not often that a mere mortal is sitting at the table addressing judges, and surrounded by attorneys, and I greatly am honored by that opportunity. I don't really have much to add that I'm sure you haven't heard, but I'm looking forward to the questions and to give you my perspective on what it is to administer the CJA.

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Judge Cardone: Mr. Lindy.

Jeffrey Lindy: Thank you for having me. I'm the CJA Panel Rep for this district. My comments will be very brief and somewhat philosophical because all the questions that you're going to ask me are going to be filtered through my personal philosophical background. We live in an unfair and an unjust country. I love this country, and I think it's the greatest country in the world. And I think our Constitution is the greatest, and I think we have the greatest criminal justice system, and it is greatly flawed. Clarence Darrow wrote decades ago that all crime is crime of poverty. That's somewhat of an exaggeration. If you want to know about real evil in the world, ask your criminal defense attorney. We see that with some of our clients, some real pathological individuals who have one place that they should be and that's in jail. But that is a small, small percentage. Most of the crime we deal with is crime of poverty.

Claude Brown in 1965, two years after *Gideon*, wrote about a permanent underclass in our society and of course, we know from *Gideon* that the Supreme Court said, "You can't have justice if you don't have a lawyer." It's a very small leap from that to say, "You can't have justice if there is imparity." Now, the problem is, is that we all live in a real world and we all live in this country in this day and age and it's impossible for there to be parity. I wish there would be and I think I will have some colleagues who will disagree with me but there will not be parity. In an unjust world, in an unjust society, how do we device a system where we get the maximum amount of justness? Okay. This is why I'm a CJA attorney. This is why I do criminal defense work. I used to be a prosecutor. There was no doubt in my life that I would end up on the defense side and this is why.

When I played football in high school, I used to . . . piling on was about the worst thing you could do as a little kid playing football. Why? Because it was unfair. There was a guy down and you piled on. That was all of the different fractions in football. When I was a kid that was the worst, because it was unfair. As a CJA attorney, that's where we're fighting against all the time. In my mind, every question that I hear is going to be . . . my answer will be, how do we get this system to be as fair as possible considering the context that we're in?

Judge Cardone: Mr. Rymsza.

Edward Rymsza: Thank you, Judge. Good morning everyone. My name is EJ Rymsza. I am a CJA attorney in the Middle District of Pennsylvania in Williamsport. I've been on the CJA panel for approximately twelve years. I'm also a member of the Panel Management Committee. I'm happy to say that for the most part, we've had in the Middle District, a good rapport with not only our judiciary but also the Federal Public Defender's Office which has been an enormous

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sense of assistance and help with those of us on the panel. The panel members where I hail from, in the middle district, is some thirty-three countries. It's an enormous area with three different vicintages. The panel members for the most part are all either solo practitioners or hail from very small offices.

The chief complaint I hear among other panel members is no surprise, I'm sure, the low compensation but also voucher cutting which I'm happy to say is not a frequent occurrence at least in our district but it does raise some attention, some concern among panel members and with that, I will yield my time and look forward to answering any of your questions.

Judge Cardone: Mr. Shea.

Mark Shea: I appreciate the opportunity to be here. Echo some of what Mr. Lindy was saying about it not being a just society. I was here for some of your earlier questioning and the issue of diversity came up and I have to say that within the last month, I sat in a room with a client of mine's family with his wife and their three children and one of the daughters is a honor student and a president of her class in a largely minority very poor community. When her mother was telling me about how her daughter was doing, I said to the daughter, I said, "Oh, you should become a lawyer." The daughter looked at me as if I had said, "she should walk on the moon." When you all were talking about the issue of diversity amongst lawyers, it struck me that that interaction came to me because there's so little justice in our society. There's no equality of opportunity anymore. We believe in the concept but none of us believe it's actually happening.

When we get to the idea of equal justice and I was at the panel last night listening, that seems to be the goal of what you're shooting for and it's etched in the Supreme Court building, I believe, but it isn't happening. Our clients, my clients aren't under any illusion and their families aren't under any illusion that it's happening and we shouldn't be. I went to school when you could find drugs on my dorm floor. I'd go back and visit my friends, I was at a state university, I go back and visit my friends at Harvard, there was drugs everywhere there too. But I didn't see any search warrants being executed there. I didn't see them subjected to mandatory sentencing.

We all know the reality. So, the courts, in terms of equal justice, you can't decide who gets prosecuted; you can't decide what gets made a misdemeanor and what gets made a felony in terms of when legislation is written. CJA and the federal defenders, we are the people who can still try and bring about justice and make these families feel that they have some human dignity and that people actually in the system care about them. To me, that's one of the most important roles for the lawyer. When CJA funding is under attack, to me, you're attacking the group that actually for your ideal of justice can bring

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it about or at least bring about the optics of it.

I'm not saying that I am able to bring about justice in every case I handle. I wish I could make such a claim, but if you really have any interest in justice and at least these families' feeling like there's any justice, that somebody cares about them or cares about their son or daughter, husband, brother, you really have to back us so that we can do that job. The last thing I will say is I'm on a board of directors for state bar advocates which are Massachusetts equivalent of CJA lawyers and I like to ask the lawyers there to run a test of would you let that lawyer represent a relative of yours? I can say that when I look at the Federal Defender's Office at least in Boston, I would let any of them represent a relative of mine.

When I first got on the CJA panel, I would put that number at about 90 to 95%, it's probably dropped to about 80% now. When I look at that board I'm on in the state, you're lucky to hit between 20 and 40% for state appointed people. Now, that can be your future or you can try and have quality. To me, that's what's at stake and I appreciate the opportunity to be here.

Judge Cardone: Thank you. All right, let's start with Judge Fischer.

Judge Fischer: Thank you all for being here and for the very difficult work that you do. I mentioned to a couple of you already but I want to ask this question of the panel. Obviously you know that many suggestions for independence—little “i,” medium “i,” big “I”—have been suggested and it's mostly coming in a more formal way from the CDOs and FPDs. As we were discussing, I'm not sure how that would impact the panel members and whether you would view that as a positive or a negative or a little bit of both. Assuming, and I think we can count on Ms. Clarke to do her best, to now start educating judges more about the fact that a dollar out of your budget doesn't mean that it's coming to us. The judges would then just figure out what it is you need reasonably to pursue your case.

If it became independent and either the FPD was overseeing that pot for your district or some other entity, local or national were overseeing that pot, it seems to me then that they would have their eye on the dollars as they would have to be as the FPDs do. Do you think there would be a sense then of individual CJA attorneys competing for those dollars when they go to ask for an expert or when their voucher is submitted and then, having whatever entity is looking at those vouchers and looking at those requests thinking, “Well, this lawyer is particularly inefficient, he or she has to go, or this request is on the cusp, or maybe this request has to wait until the next fiscal year because I know how many dollars I have left and there's just not enough.” Do you have thoughts on that particular issue? Then, what proposals of the different kinds of “i's” you would be in favor of? Mr. Broccoletti?

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James Broccoletti: If I could give an example in the state system in Virginia. We have fee caps for particular cases but there are waivers that are available for those caps depending upon the nature of the case. There's a pool of money that's available within the Commonwealth for that particular waiver. If that pool runs dry, it doesn't mean that the request is denied. It just is carried over to potentially the next fiscal year when more money could be available. Perhaps a circumstance like that not to deny or to compete because I don't see how you can judge and have—this expert is needed more than that one particular expert or this particular time is more valuable than that particular time—I don't think you could put a conflict in of that nature but just maybe perhaps some waiver, some sort of ability to carry it over until more money is available.

Judge Fischer: Does that mean your voucher isn't paid until the next fiscal year or your expert can't be hired until the next fiscal year?

James Broccoletti: Well, I think you'd have to probably work with the expert. You need the expert. You need the time. You can't continue the case because you need to try the case or to have the case resolved in some fashion. I'm not sure exactly how that would work. Or I know sometimes vouchers are delayed for whatever particular reason, they have to go up to the circuit, the chief of the circuit for that person to make a decision that takes time. So vouchers are delayed in a number of . . . and vouchers were certainly delayed during the sequestration for a period of time. We've been able to deal with that before.

Judge Fischer: Okay. Mr. Brodnax?

Pleasant Brodnax: Your Honor, is your question related more to experts or . . . I'm sorry. Maybe I don't understand.

Judge Fischer: It's related to, now you're going to have a specific amount, if it comes out of the judiciary, comes out of the system and you're going independently to get your budget from congress, now I assume some of the local districts like the FPD in that district is going to have its own budget for CJA and somebody's going to have to figure out whether to approve the vouchers, whether to approve expert requests and as it gets toward the end of that budget, what happens with that money?

Pleasant Brodnax: Well, I guess I don't know the answer to the question. What happens now when we get to the end of our budget if it's already exceeded or about to be exceeded when we are in the AO. If we're about to hit a cap, where does that money come from? I would presume that if we took that model and I guess I'm more in favor, if, of any of the "i's" probably of the little "i", something like the Sentencing Commission. I would presume that there would be some projections that would be based on past expenditures and maybe administered by a national office, not just a Federal Defender's Office so they can have a

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30,000 view of the picture. I would presume that if we reached a point where money was about to run out for a particular line item, that we could seek additional money from congress or from the AO or somewhere. That's in an area that I haven't really studied to be honest with you, but I think that if we were to have more independence or little "i" independence, I think that would be a good thing.

Judge Fischer: Ms. Harmon?

Natalie Harmon: I don't see how it can't have an impact when you're looking at the bottom of a bucket, that you are weighing apples and oranges. I don't really see how it can't have an impact. That being said, I think there are ways in which we could do a better job of managing the funds that we have like the process by which attorneys are paid. Right now, not waiting to the conclusion of a case for vouchers to come in and I definitely think there needs to be a cushion between . . . I am going to jump around a little bit here—I got a lot going on! There needs to be a cushion between the funding of experts, so that cases can move forward and defense can proceed and there shouldn't be that concern for . . . are we down to the bottom of the bucket and separate from that, how vouchers come in.

If vouchers came in on a more consistent and regular basis where we could monitor, there could be a better monitoring system for what is in the bucket and someone's projecting out way further in advance than what is currently happening and wages are adjusted, costs are adjusted and statutory maximums are adjusted and that bucket is adjusted as all of those things shift, that we could do a much better job with the funds that we have and know what's coming down the pike. And be better from a budgetary standpoint as far as our costs for CJA. Is that too you convoluted?

Judge Fischer: Mr. Lindy?

Jeffrey Lindy: I'm in favor of as much of the CJA function as possible being brought within FDOs and CDOs. We are extremely lucky in the Eastern District of Pennsylvania to have as our Chief Federal Defender, Leigh Skipper. Leigh filled big shoes when he took over for Maureen Rowley. So we have had decades of very, very good leadership but having gone around the nation with the national CJA annual programs, meeting other federal defenders, I am extraordinarily comfortable saying that I think as much of the CJA function is possible should be brought within the defender.

Judge Fischer: Well, if that's the model and then the defender will know . . . as they know what their own budget is, presumably they will know what the CJA budget is, do you not think that the panel members will feel some kind of tension as they're all submitting their own expert requests and as they do with their own employees, their lawyers?

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Jeffrey Lindy: No. No.

Judge Fischer: No. Not a problem?

Jeffrey Lindy: Not a problem.

Judge Fischer: Okay.

Edward Rymysza: Judge, I think I agree with Jeff. I think that certainly having . . . in our district, having the Federal Public Defender's Office control that fund would really be a positive thing. We've worked very well, very closely with the Federal Public Defender's Office. I guess again from what I've heard this morning and what I'm hearing here, we haven't, I haven't and certainly members of my panel haven't felt as big of a problem with this with our judges. My one concern that would come to mind would certainly be if there was a . . . with the Federal Public Defender's Office controlling the funding if there were issues regarding conflicts with cases. That's the first thing that comes to mind. I would have some concerns and some serious concerns about somebody being not only knowing about my defense strategy if they're representing competing interests but then ultimately approving funding for that. That would be the real concern I would have about that issue.

Judge Fischer: Thank you. Mr. Shea?

Mark Shea: Well, based on I was in here at the end of the last session and I believe it was Professor Gould pointed out the statistics were what, 5 to 28% of CJA attorneys were using experts, investigators, paralegals? Actually, there should be a surplus that we'll be turning back over if we keep at that numbers, right? To field it seriously, I would say that I would hope that there would be an understanding of . . . if we ran into difficulties with resources—the particular case I think it brings me here today and that I think is problematic is when the judges don't understand what it takes to try a case. I think the conviction rates skew people's thinking in terms of not understanding and so, I would say that if there was a scarcity and one was called upon to make that decision, it should be going to trial preparation, real trial preparation first because some cases are clearly going to be tried, the one I'm dealing with is one of those.

Then, I think there are other ways of ferreting out needs as budgets get tight, but I do think the trials should come at the front.

Judge Fischer: One more quick question, and Mr. Lindy mentioned in his written submission, that mega cases are hard for solo practitioners. E-Discovery is a big issue, but I want to ask, your other problem that you cited was dealing with case budgeting. So I'd like to start with Mr. Lindy but ask the rest of you as well, what your experience has been with the case budgeting

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attorneys. Do you think that's a good model maybe to shift to as an interim little "i" thing and what some people rave about it and it's fantastic and then, other people as you say, it is very difficult, complicated, time consuming, we don't get paid for it.

Jeffrey Lindy: Renee Edelman in our circuit is fantastic. I will again give you a little bit of my personal bias which is as much as I can field it off to somebody else, I'm going to because if it has to come with budgeting and all that sort of admin stuff that takes me away from my client, takes me away from my client's family, takes me away from my investigator, if there's somebody like Renee around and I'm in one of . . . I haven't had to use her yet, but if I'm in one of those cases, I am going to use her as much as I can. It seems to me and you guys know this far better than I because of your perspective, I don't know this. It seems to me that we have a patchwork developing around the country.

We have a CJA administrator here, we have a budgeting, that person Renee Edelman, there are CJA supervising people and it seems like if you really talk to all of them, a lot of them sort of do the same thing. It seems like different districts in different circuits are taking this patchwork approach and again, I just think that everything should go into the CDO and the FPD. The conflict issue is a real one. The local defenders deal with their local . . . in California, San Jose I think has a conflict counsel's office that works . . . I don't know if it's San Jose, but somewhere in California, that works with the local defender. They share the overhead, so they share the admin but they have set up walls to deal with the conflict. Lord knows, if a local system can do that where they're overrun with cases, the federal system can certainly do that.

Yeah, I think Renee is great. She and I have talked a fair amount and I know her job is hard and I know the attorneys are extremely happy to have her there to work with.

Judge Fischer: Okay. Mr. Rymsza?

Edward Rymsza: Judge, I've worked on some of these mega cases. It's been a while that I've had one in our district, but the one I can think of, it worked quite well. There were really no surprises, the judge had already labeled the case complex so we were getting, submitting interim billing and budgeting was not an issue. I think it's a good idea. I guess I will say this. I do have some concerns about having whether it's an attorney or another lay person assessing my bills in approving those vouchers in some of these cases. I think these are people often who may not know the intricacies, the details regarding our cases and what it's like to try a case. Certainly at a bare minimum, I've got a judge who hopefully at one point in time in their career tried a case and knows the realities and the concerns that we as defense counsel experienced.

In particular, you've got a judge who may . . . when they're seeing the

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motions, they're the ones who are actually participating in these hearings and they're listening to the testimony and they may understand some of the more complexities of the issues, it might be a lot easier to justify then the budgeting or the approving vouchers when they've actually seen it and they've experienced it. Again I think in my experience, the budgeting attorneys, the office in the middle district as well as in the Third Circuit have been very good and very responsive to our needs.

Judge Fischer: Thank you. Mr. Shea?

Mark Shea: Well, I would say that we just started with one in Boston and he's a former defense lawyer and he's a very pleasant individual to deal with. I would say that there is a kind of a chill in the air, not due to him particularly, but in Boston where we're being told in repeated public functions involving judges as well, that Boston is trying to get from the top tier of spenders down below that. This case is going to be looked at very closely and so, there are a lot of symbols being given to us and I will say I just had a case where there's very little distinction between what I am asking for and the prosecutor is asking for. It occurred to me, should I be doing a sentencing memo here or are they going to think that I shouldn't have done a sentencing memo here? Just the fact that that even enters my mind now is wrong.

That's one concern. It's not particular to the individual. The only push back I would have to is, is there a similar type of person from the prosecutor's office? Because when I get this complex case, usually if they'll tell me what they've got on my person, some of these complex cases aren't that complex. You tell me that my client's in this branch of the tree and he's below this guy and we've got them on video doing these four deals and here's the wire taps of the other three deals, I can figure out drug weight, I can sit with him and look at the video and it's not that complex.

My bill is not going to be that high, but if they won't tell me where it is until we're getting to a potential drug weight hearing or something, it does drive the bill as we all search for the needle in the hay stack. So, I do think that if the courts are more involved in asking the prosecutors and I know at least federal courts in Boston seemed loath to involve themselves in much discovery but I do think if we're getting that, if something on the prosecutorial side just with the idea that we all need to lower some of the cost, I think that could be helpful.

Judge Fischer: Thank you. Mr. Broccoletti?

James Broccoletti: The Fourth Circuit just appointed Larry Dash who was a Federal Defender for years. Larry is now the Case Budget Director and I think he's extraordinarily helpful to all of us. I think it's a wonderful tool for us to be able to use. Larry runs interference force. We submit the budgets to him on

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cases that exceed the statutory maximum, cases that are going to be complex. He works with the lawyers in determining how to best phrase it, so it's understood instead of just saying discovery review which drives people crazy, list the issues that you're reviewing and wiretaps or whatever the circumstance and then, I think it's much easier for him to go to the chief judge and to say, this is what they're doing and this is what they need. He's done a tremendous job in training us and training the panels so that it's much easier at the end of the game rather than fighting the battles. You've already set the tone and given the examples of what need to be done and I think that the case budgeting director is a great idea.

Judge Fischer: Mr. Brodnax?

Pleasant Brodnax: In D.C., we don't have a case budgeting attorney or a supervisor or a CJA attorney. We have a federal defender that administers the program. We do not submit budgets to the court in complex cases. What will generally happen is that the case will be declared complex by the court. We would submit interim vouchers through the Federal Defender's Office that I said before will review them for mathematical errors and reasonableness and perhaps it's just a function of the personality of our federal defender and the culture of our court but it seems to work very well. The judges I think rely very heavily on our federal defender to make sure that everything is appropriate. That may not work for every jurisdiction, but it seems to work for us. We don't have a problem with that.

Natalie Harmon: Being the individual in the Federal Defender Office who reads every single funding request and does a lot of the voucher review and approval, not judicial approval obviously, but on to the court, I heavily rely on the Ninth Circuit case management budgeting attorneys, Blair Perilman and Kristine Fox and they're great. They help in many, many ways and I can utilize my time doing other functions and support the panel in other ways, if they're assisting on a budgeting. They're great in their communication with me and understanding what is individual about our district and individual about the judges that they're working with and I strongly recommend the continued use of that and the patchwork system of having a local and having a circuit and the integration of the two and the communication, building better and stronger communication lines between what is local and what is regional.

Judge Fischer: Thank you. [INAUDIBLE].

Judge Cardone: All right. I'm going to go ahead and have Mr. Frensley. Mr. Frensley, you're up.

Chip Frensley: Miss Harmon, I want to ask you some questions. First of all, I apologize I don't recall from Jennifer's testimony and I don't remember seeing it. Are you an attorney?

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Natalie Harmon: I am not.

Chip Frensley: Okay. Do you feel like not being an attorney has any consequence or effect on either your ability to review vouchers or the perception of your ability to review vouchers?

Natalie Harmon: Well, I've been doing the job for twenty years.

Chip Frensley: Right.

Natalie Harmon: So, for a long time. Actually, that's not true. I've been with the Federal Defender's Office for twenty-two years and only doing CJA work since '98, but the long and the short of it is there are ways in which it does impact me. Dealing with, we have a very separate unit within the Federal Defender Office and getting privileged information from the U.S. Attorney's Office, our district is very early in, get counsel on board as early as possible and sometimes dealing with the U.S. Attorney's Office, the fact that I'm not an attorney, I have had some impact there.

But I think I've got the respect of both the judges in my district and panel attorneys and because I have been involved in the office for so long, I do really get the defense function and no, I've never tried a case. I don't know what it's like to try a case, but I'm like in the trenches with everybody else. I'm in staff meetings, I sit and listen. I'm kind of like the buck stops here. I get a lot of privileged information in from outside source that stops within my office, also within the Federal Defender Office, I get a lot of privileged information that stops with me.

Chip Frensley: Sure.

Natalie Harmon: I'm all ears. I'm listening and I'm taking it all in and I'm absorbing it and putting it into the work that I do.

Chip Frensley: Do you think if your position were to be created now and without that longevity and length of work in the office, do you think that it would make a difference whether the person acting in your capacity was an attorney or was not an attorney?

Natalie Harmon: It certainly couldn't hurt to be an attorney, but I think it's really about who that individual is, who that person is and their ability to understand the function that they're doing and be as subjective as possible.

Chip Frensley: Sure. Pleasant, you described the way that the panel is administered in D.C., does Mr. Kramer do the reasonableness reviews or is that delegated to a panel administrator like Ms. Harmon?

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Pleasant Brodnax: Mr. Kramer does the reasonableness review.

Chip Frensley: Okay.

Pleasant Brodnax: I'm also on the panel in the Eastern District of Virginia in Alexandria. In that court, clerks make the appointments and I presume the judges make the reasonableness review.

Chip Frensley: Okay. For the other attorneys on this panel, the system that's been described that Ms. Harmon works in in Washington, would that be something that would cause you concern as a lawyer having your vouchers reviewed by a non-lawyer versus the judge without that . . .

Jeffrey Lindy: I don't care who reviews my voucher. I just want somebody other than me to have to review it. All right? I have no time to do anything. I have me and my partner and we're keeping the lights on and by the way, we're pretty successful. We're not raking in millions but we're considered pretty successful lawyers, right? Keeping the lights on, keeping our secretary happy, figuring out all that stuff, taking client phone calls. If I can have somebody else deal with my vouchers, I will. So, please come to the Eastern District of PA.

Chip Frensley: What about anybody else?

Edward Rymsza: Yeah. I think it certainly helps knowing that Natalie actually works in the office. When I envisioned this notion of some third party layperson in some office sitting in some government office building reviewing this stuff that would give me a lot of pause, I think it would be and certainly it sounds like there are ways to eliminate any potential conflict given the set up in Washington. Again, I don't think that would not give me as much of a concern, particularly given the fact that there would be somebody who is in the trenches, so to speak who knows day in and day out what it's like to fight and to really fight for your clients and provide the best representation that you can. I wouldn't have a problem with that.

Having said that, again it hasn't been . . . in my experience, having judges approve vouchers has not been, at least in the middle district, Third Circuit is a different story, but at least in the middle district, that has not been a very onerous process. I can think of a handful of times where vouchers have been cut, but that has been very limited and getting money for experts, in my experience, has not been a problem.

Chip Frensley: Is there any . . . Oh, yeah. Go ahead, James.

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James Broccoletti: We don't have any sort of administrator in the eastern district. As Pleasant was saying, we have four districts...four divisions within the district, each of which are completely autonomous and the left hand doesn't know what the right hand is doing. I'm supposed to be the CJA panel rep for five years for the eastern district. I've never been to Alexandria to talk to anybody up there. I've never dealt with the clerk's office up there. I didn't even know that the position existed before I got appointed to it which is sad. In this particular where we are, if we could have somebody that would be as Natalie does that type of work, but I think that that person would have to be regional or localized so they could understand the nuances and the distinctions and differences that go on in our district as opposed to Alabama or Maine or whatever the case may be, I think number one, that's important.

I think it is important for them to be an attorney to be able to understand the job that we do and what we have to do. That's where I think the problem comes in, I was talking to Judge Fischer earlier, this is where the problem comes in with some judges that are well intentioned, good-hearted, want to do the best they can but they've never set foot in a criminal court or understand a criminal case and I think they get to be short sighted in respect to that because they just don't have the experience as to what we do and why we have to do things.

Again, I'd rather have somebody understand that I need to see a client five times to explain a case, spend that time and not have a voucher cut saying that I spent too much time and then have to turn around and try the case for two or three weeks because I didn't spend the time that was necessary and that's why I think an attorney who would be sitting in that position would have a much better understanding what our role would be and the difficulties that we have and why some things that we do are so important and they may not necessarily show up on paper.

Chip Frensley: Would you still feel that way about it needing to be an attorney or your preference being for it to be an attorney if it were someone whom had a long standing relationship or involvement in the defense function or indigent defense or something like that?

James Broccoletti: No. I think that possibly that could work. I just don't want you to pick somebody out of the air who just got out of a particular school and majored in finance and economics. They wouldn't have a clue as to what we were doing or what we were talking about.

Chip Frensley: Or like a judge?

Natalie Harmon: The same is true though of an attorney right out of school, you don't want to pluck an attorney right out of school [crosstalk 00:43:48].

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James Broccoletti: Correct. Yeah. You have to have some experience and some knowledge and some understanding of the world that we live in and what we do.

Mark Shea: To me, what's more important is what that person perceives as who they're reporting to and what their job is. If they perceive I am going to only get to keep this job if I locate cuts of 5 to 10%, that to me is more important than whether they're an attorney or not an attorney. It's really how they perceive the job, why they have the job, who they're reporting to and what the person they're reporting to expects because that will change things. In Boston, I haven't ever had problems with the bills being cut until I ran into this one particular case where it's not a bill being cut, I'm not being paid period but there, it seemed to work at times to me.

I used to think that the judges who approved my bills saw my hard work, saw the efforts I had done, saw the sentencing memos and approved the bills because it was clear to them I had done the work. That seemed fairly straight forward but honestly now, I am calling it into question in my current situation but I'm not sure that handing it off to someone who perceives their job as budgeting and getting budgets under control is going to be better for lawyers.

Chip Frensley: That's a great segue to my next question, Miss Harmon. And that is placement of someone in your capacity whether they . . . I guess we understand now the difference between a supervisory attorney and panel administrator but another one of the differences between the positions is that we find that panel administrators are more typically housed in and part of the defender function and the defender office whereas a supervisory attorney is more often an employee of the court clerk and I'm just wondering to what extent you have opinions about exactly what Mr. Shea was mentioning and perhaps pressures real or perceived that as a clerk's employee, a court employee versus a defender employee that those sort of pressures might be existing.

Natalie Harmon: Well, I'm a firm advocate for it being within the Federal Defender or Community Defender system. I think that it's most advantageous to the panel attorneys if the defender office or the community defender office is managing the panel and doing voucher review and budgeting components to it. That being said, if it's outside of the defender office, I think that there needs to be a much greater web across the nation of education for the people that are doing administrative work, be it as supervising attorney or as a CJA administrator. There's no training for this job. It's on, like fire to fire to fire and it's all on the job training.

When they have the national CJA representative get together where everyone gets together and talks about issues within their district and bringing up the level of representation and just making everyone aware and open and education at the same time, why not the CJA administrators there at

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the same time not only to participate in hearing some of what's going on with the attorneys because I think that awareness is hugely important, but also to exchange ideas and look at what's working and what's not working and to better monitor ourselves and there's no structure there. The little bit of structure that is there was self-created, there is an email blast group and that's essentially it.

Then, we have the hotline at defender services but not hugely helpful. All in all, I think being underneath the cover of the federal defender is the best way for the CJA panel attorneys because most cases, they get better education, they're better supported by the Federal Defender Office, the Defender Offices do tend to help with resources and whatnot. Certainly within my defender office, we house discovery. In large cases, we have a computer that's designated for a wiretap review and all that kind of thing for panel attorneys to come in and utilize and particularly with cloud discovery and that kind of thing. A lot of individual attorneys don't have the computer capability to get that discovery downloaded and readily accessible to them whereas the Federal Defender Office does have the servers and that kind of thing that could assist in that.

There are ways around a lot of the issues, I think, but you've got to have the funds and the resources even within the Federal Defender Office. I know that my team has been impacted by sequestration and when we have a loss of a full time employee and it hasn't come back and I don't know that it will.

Chip Frensley: Well, that is the next thing I wanted to inquire about and that is when you talk about this. A lot of times, the counter vailing argument is, "oh, we're creating another layer of bureaucracy," and some people think bureaucracy is bad just as a concept, but other people perceive cost connected to bureaucracy as being bad and some people of course see both of it that way. I am curious, do you have a sense of how many vouchers your office processes in a year?

Natalie Harmon: Well, it ranges greatly from month to month and you can tell when taxes are coming.

Chip Frensley: Sure. Right. When those quarterlies are due. I understand.

Natalie Harmon: Exactly.

Chip Frensley: I resemble that remark.

Natalie Harmon: I should have this number just like off the tip of my tongue.

Chip Frensley: That's okay. I think your written submission indicated that it's you and then, you have two, a paralegal and paralegal assistant. Do you feel like you have adequate staff to meet the needs of the district?

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Natalie Harmon: We have adequate staff to do just what we're doing. There are ways in which we could provide better support for the panel like I would love to see in-house paralegal that's designated for the panel attorneys. The difference between, for me, from looking at both sides being in the office and seeing what panel attorneys provide to their clients. And we have a great district. Our panel attorneys are really high caliber. I would have family members represented by pretty much everyone on our panel. The biggest difference, I think that the Federal Defender Office so often looks at clients from a best possible outcome and really a more comprehensive outcome. We have provided more social services and that kind of thing and trying to get this individual what they need, even if they're headed into prison, which they probably are headed into prison but looking long term, whereas the CJA attorneys don't have that kind of resource to them. In my experience, the attorneys that are more, I'll say social work focused, their bills tend to be more scrutinized by the court.

Chip Frensley: Yeah.

Natalie Harmon: I think that's a disservice to clients period. It's hand in hand for the funding for expert services.

Chip Frensley: I just have two other quick questions I want to ask. First of all is, is there a formula or work measurement or something like that that helps determine staffing for this function?

Natalie Harmon: No. I don't have firsthand knowledge of how that was worked out, but I know that it was, kind of like, we're not going to deal with that right now.

Chip Frensley: The last question, I know certainly in the context of case budgeting attorneys which have been alluded to throughout our hearings and we've heard from them as well. The FJC did a study of the pilot program of the case budgeting attorneys and one of the components of that was a determination that the functions they provided actually had cost savings and cost containment components to it and I'm just curious in your experience based upon the types of things that you do and the other folks doing that work in your office, do you believe that there are cost benefits of having the administrator position there for the panel and for the program as a whole?

Natalie Harmon: I do. I think that as much as it's another layer of bureaucracy in having to budget a case, there becomes a much greater awareness of what are the driving factors in this case. It gives judges an ability to say, "Okay. We've got some discovery problems here that are costing a lot of money," and it also gives CJA attorneys an awareness of where they're at and just a generalized awareness of what the case actually costs. I don't think that it's holding anybody up. It's certainly not within my district. It's not holding, like if a

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budget exists and they're exceeding what is originally budgeted, it's not stopping defense function and I think that just the overall awareness on a whole actually probably saves some money in the end.

Chip Frensley: Sure. Like most lawyers, I have one more question. That is, I am just curious, again, in terms of maybe, I think you go back to the beginning, so at the beginning of when your function started, was that a product of the defense community or the defender going to the court saying, "Hey, we've got this great idea. We want to help you. Let us help you," or did it come from the court and then, what was the buy in from the court like?

Natalie Harmon: I think I was already in the defender office and I think I was kind bugging the defender like, "I'm bored. I'm bored. I'm bored." No. It was my defender that went to the court and said, "This is something that we want to do," and the court readily said, "Please, take it."

Chip Frensley: Thanks.

Natalie Harmon: Yeah.

Chip Frensley: Thank you.

Judge Cardone: Professor Kerr?

Prof. Kerr: One of the benefits or drawbacks of going near the end is that most of my questions have been asked and very helpfully answered. I really just wanted to ask a clarifying question which is I heard a lot of support on the panel for the idea of ensuring that the CJA panels are administered within the defender's offices and I wanted to make sure, is that a unanimous view of everyone on the panel or is there any dissent from that because in our search for answers, unanimity is a rare and wonderful thing. If I can just make clear and understand that the group—at least here—is unanimous as to that recommendation that would be helpful to know.

James Broccoletti: Yes.

Pleasant Brodnax: Absolutely.

Edward Rymysza: Yes.

Mark Shea: Yes.

Natalie Harmon: Yes.

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Prof. Kerr: Very simple. Thank you.

Judge Cardone: Ms. Roe?

Katherian Roe: Thank you. Mr. Shea that was a weak yes.

Mark Shea: Well, it was more that prior to my experience with this *Veloz* case, I had found things to be all right under the judges, to be honest. In Boston anyway. It was a weak yes only because . . . I'm fine with it being with the federal defenders because I have such confidence in the office that I know well in Boston. But honestly, if I wasn't experiencing one particular case, I wasn't in the mood for change before that. That's why.

Katherian Roe: Well, I think sometimes that's why people change their opinion as to whether or not what's working is working.

Mark Shea: That's correct.

Katherian Roe: I want to ask you about that case because I assume that's the case you spoke about in your statement.

Mark Shea: Yes.

Katherian Roe: You had indicated to us in your statement that you're in the middle of a case where you had a highly contested suppression issue and then, shortly afterwards I believe the judge said that they were not . . . the judge said he or she was not going to pay your interim voucher.

Mark Shea: That's correct.

Katherian Roe: At this point, you're working on a case that's going to trial and you haven't been paid and not sure you will be paid.

Mark Shea: That's correct.

Katherian Roe: Can you tell us how that came about and what the effect is on you and your client and your future representation?

Mark Shea: Sure. I guess I'll start with my client because he's the most important person in the whole thing. When I first went to tell him that I wasn't being paid...actually he would not be considered an overall tearful person...he actually started to cry because he said, "Don't leave my case." Because he and I work together. He had a lawyer before, and I'm not here to cast dispersion on other counsel, but they hadn't seen eye-to-eye and that lawyer hadn't filed any suppression motions. That lawyer got paid. He was very concerned that I was going to leave because I wasn't getting paid. I assured

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him I wasn't going to leave because it's just not how I view my role. I guess what I found particularly troubling was and I still find troubling, I think the judge made errors in his rulings and so, at the same time that he's refusing to pay my bill and he's literally saying that I spent too much time on suppression issues, I am looking at his ruling and memorandum thinking that he's made errors and I need to challenge this.

That's where, for me, the rubber hit the road on there's a real ethical problem here. That's why eventually I filed the recusal motion and I did that because it took me . . . to be honest, it took me a minute to wrap my mind around what I was doing. I will tell you that when you submit a fairly substantial bill for a lot of work and you're told...no CJA guideline is followed, no particularly critique is given other than a few cryptic sentences that seem to chill your efforts. I wanted the money. Frankly, I wanted to get paid, I don't have a big operation. But honestly what I thought back to was now this is from my client and so, now I am going to flip this and we're going to play this the way it should be played, which is what's in the interest of my client. What's in the interest of my client is to set it up for appeal, to show the appellate courts what's going on and things like that.

That's why I filed the recusal. I have since filed a motion asking for clarification of counsel because the judge just denied my motion to recuse without any . . . it was just denied. I had requested he bring in my client to explain to him what was going on, no effort was made to even hold the hearing to bring in my client to explain what was going on. Frankly now, I'm in this weird situation where people are offering to go to the judge and see if they can talk to him, maybe they have a better relationship with him than I did. I didn't know I had a bad relationship with them until now.

Katherian Roe: Can I ask you how long you've been a panel member?

Mark Shea: Yeah, fifteen years. Over fifteen years. I've never had a bill even cut. My guesses that some of my bills run a little high because I tend to be one of those social work attorneys and I also . . . based on what Ms. Conrad was saying earlier, I'm one of those people that actually goes to the courthouse and digs through the prior convictions because I think that I'm going to find . . . that's where I started was in the state system. I want to be able to look at those records and identify stuff and knock out career offender predicates and things. But I'd always felt that that's what the judges wanted me to do and I never had any reason to think differently. This particular situation is particularly troubling and also, I did get approved some investigative money to go to New York for an investigation involving the case. Things started out all right, but then nothing. I had some computer money approved but there's over four computers, maybe five involved in the case and smart phones. I've been limited to the expert just for one computer.

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It's a huge case. It involves seven alleged kidnappings, four cooperating witnesses. My client, even if we plead guilty, our acceptance responsibility would have us off the chart based on the add ins that come with the kidnapping case. We're going to trial. There's no doubt that we're going to trial. We are the target, we're going to trial. That's what's mind blowing to me is that this is a case that I should be being told to do everything I can and to do a good job, and I am going to continue to do a good job because I like the work and I try and honor the work but I will tell you that I've had to do things like . . . I'm running a business too. I work on it at night, I work on it on the weekends. I try and make sure I'm getting enough bills in on things I actually am going to get paid on to keep things going. We are a small operation.

I am not going to cut back. I don't want to cut back on my efforts for my client but I do want to make an issue of it for the court.

Katherian Roe: Obviously it sounds like you're doubtful that you're going to get paid on this case in the future, but do you have concerns that you will not be appointed on other cases?

Mark Shea: I don't think so but I don't know. I feel like the other judges appreciate my work. I didn't know that this judge didn't until now. I don't mean to personalize it too much but it's an odd situation frankly.

Katherian Roe: Can I clarify? Do you know how long that judge has been on the bench?

Mark Shea: No, but he's been on for a while and I've been before him before . . .

Katherian Roe: That was my next question.

Mark Shea: And never had any difficulties. I am not sure exactly where we went off the rails here, but part of what I've been trying to do is get back in front of him to find out where we went off the rails and I can't seem to get there. To me though, you just play it as an opportunity for the client, at this point, and hope to get paid someday.

Katherian Roe: Mr. Rymsza.

Edward Rymsza: Yes?

Katherian Roe: Thank you. Let me ask you a question. You've made couple of references about in your district, that things are fine as far as voucher payment from the district court but not so much from your circuit court. Can you give us some more information about that?

Edward Rymsza: Certainly. Let me clarify. I think I might be in a little bit of the same position

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that Mark was in with response to . . .

Judge Cardone: Could you get a little closer?

Edward Rymysz: Sure. With response to the question from Professor Kerr, certainly if the mood is to centralize a CJA panel administrator, if that is indeed the case, I certainly wouldn't be opposed to that and certainly wouldn't have a problem. I think if there had to be a place where who would oversee it, it should be within the Federal Public Defender Organization or its equivalent. I only pause because again like Mark, I've not experienced some of the problems that my colleagues have had over the years. Certainly if it would be that it was moving in that direction, that's where I would like to see it go if it was changing.

Katherian Roe: Before you go on to the next thing, let me say something about that. I did notice that earlier before Professor Gould's question, you had said that you felt comfortable with the review being with the court and the reason that you gave was because the court has seen the hearings and the trial and been part of all that. What immediately came to mind when you were saying all of those things was that most of the cases, the overwhelming majority of the cases never have hearings in front of the district court judges. They don't have trials, they don't necessarily have hearings. They have a plea and a sentencing. I think we can all agree that if the case doesn't go to trial, there could be an incredible amount of work that's done. It has nothing to do with the judge observing you do it, it's all about what you're doing in the background, what you're doing with your client, what you're doing in an investigation, what's your legal research and writing that may never get to that judge.

I was just thinking that because you had said you had no problem with the review because the judge has seen so much more of the case, I was wondering where you were coming from with that.

Edward Rymysz: Sure. I think part of that is, it's certainly based I think in part, on each of the individual judges. But certainly in these multi-defendant drug cases for instance, that we often see, where I am getting multiple discs of discovery that I have to copy, that I have to go through, that I have to review in order to get to the point to determine whether or not the case is going to result in a plea or a trial. I think the judges are sympathetic. I think sometimes if I've been appointed where I might be the second or third attorney appointed in the case, the judge also knows that this is a difficult client, this is somebody who a great deal of time, has to be expended on client management. In my district as well, I might have a client who is an hour, hour and a half away, that may need their hand held, that may need a lot of work to develop that relationship, that trust and again in some of our districts where I'm at, it's a vast district.

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I might get from time to time an appointment out of the Scranton vicinage or the Harrisburg vicinage which is an hour and a half away one-way. Those things tend to add up. I think our judges get it. I think they understand that. With respect to the Third Circuit, I've had numerous vouchers denied. There is obviously a process to go through to provide for a supplemental explanation to the court. At this point, I think I've had probably three or four. I've taken the time, I have asked my colleagues what will move the court and we're not talking necessarily about a huge excess over the maximum cap. But to this day, I haven't had one approved and it's troubling. Particularly when I'm getting a case that I was not the trial court attorney, where I'm getting a case cold, I have to review transcripts, I have to meet with the client, I have to—who may not be local—and that takes a great deal of time. You have to reinvent the wheel to a certain degree.

Thankfully, it hasn't been often but it's been often enough in my view that it's a concern. It's a concern for some of my colleagues as well who've experienced the same problems I have.

Katherian Roe: It sounds like what you're referring to are bills for appellate work.

Edward Rymysz: That's correct.

Katherian Roe: What about the circuit when they review the excess compensation vouchers?

Edward Rymysz: From the district court?

Katherian Roe: Yes.

Edward Rymysz: I, myself have not had a problem there.

Katherian Roe: Have you heard of other folks in your district?

Edward Rymysz: No, I have not and I have asked. I will tell the panel that I did experience one personally. It's quite embarrassing. But it was a multi-defendant drug case that had vast amounts of discovery that I ended up taking the discs down to my local copy provider. I didn't specify whether or not I wanted colored copies. He made colored copies and it was an enormous amount of money—several thousand dollars. That I was embarrassed about. I told the judge, I indicated, I contacted our Federal Public Defender, got some advice from him, from Mr. Wade who you heard from earlier and steered me in the right direction. I believe I had to file a motion, I provided explanation. I did everything I could because the case was finished and the discovery was all the same so I contacted my colleagues right away to say, "Listen, don't go and get this stuff copied." I have copies. I removed the stuff that was pertinent to my client and then, tried to be as resourceful as possible to be able to save some expense, so they didn't experience the same thing.

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I'm happy to say that was approved. It went through the district court and ultimately was approved by the circuit and it was a lesson learned. It's something that I will never repeat again. But I haven't had experiences where other people did not inform me that they've had problems getting the circuit court to approve the district court bills.

Katherian Roe: Thank you. Mr. Lindy, you have been nodding your head a lot when Mr. Rymsza was talking about the circuit court. Can you tell me about your experience in your district or your district's experience as you know it with regard to whether or not there are voucher cuts, excess compensation of voucher cuts by your circuit and/or appellate work voucher cuts.

Jeffrey Lindy: Distinguishing between district court vouchers and then straight up Third Circuit work: I think the Third Circuit has been fine with excess compensation. I am particularly guilty for out of time requests, submitting bills out of time. I'm getting a little flack, but that's on me, that's my fault. But in terms of the excess compensation, that seems... that I have not heard complaints about that. There has been some complaints about cutting in the district. The Third Circuit that I was nodding my head when you were speaking [referring to Mr. Rymsza], our Third Circuit is . . . I'm not trying to be particularly pilot when saying this. We have really good judges, and it's a really top flight circuit. However, when it comes to CJA work, I just think they're way off the base. I think there is a Third Circuit panel that they keep secretly.

I found out about this, I've been doing this since 2006, It was probably 2011 before I found out there was a separate Third Circuit panel. I don't really know why they have the Third Circuit panel because people get cold appeals all the time and we don't and ask for them. I don't mind getting cold appeals, but the cap is almost always adhered to. When the cap was lower, so I think we're probably talking about 2000, 2002, 2003, when the cap was lower, I always exceeded the cap. I was always cut down to the cap. I would write a letter. It was the same letter every time, a very polite letter, "I like doing this work, but if I keep getting cuts, I don't know if I can stay on the panel." This was before I was the CJA panel rep, and I would always get another thousand dollars. Which was still much less than I, you know...

I had a conversation years ago with a Third Circuit judge who I loved, who passed away, and this was a friend, this was a friend of the defense. This was a guy who understood the guidelines and just how abhorrent the guidelines were. This is before obviously the guidelines became advisory and not mandatory. I had a conversation with him one time where we were talking about bills and vouchers and at first he said, "No judges like doing this," and I said, "Okay." Then, he said, "Why does this issue . . ." Then he talked about an issue, "Why does this take five hours? It takes me an hour."

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I said, “Judge, you’re brilliant, that’s why it takes you an hour! For us mere mortals it’s five, six, seven, eight hours on that,” and we shared a laugh. But this was a judge who’s on our side with stuff and the point is that when it comes to Third Circuit work, everyone on panel, almost to a person, the attorneys who do the trial work which they didn’t have to take the Third Circuit appointments. I think there should be not just the separate Third Circuit panel, the secretive panel for cold appeals, I think there should be a separate Third Circuit panel period. I think there would be enough attorneys who would say, “Yeah, I want to do it.” Enough trial attorneys, I wouldn’t be one of them, but enough trial attorneys who would say, “Yeah, I want to do that,” because right now, you have a lot of appeals being done that aren’t being done all that well, and just by trial attorneys trying to get it out and they will take whatever money comes in.

Katherian Roe: Is that because in your circuit, you require trial attorneys, trial attorneys are required once they file the notice of appeal, basically they are going to be . . . how can I say this?

Jeffrey Lindy: Stuck?

Katherian Roe: Yeah.

Jeffrey Lindy: Is that the word you’re looking for? Yeah. Yeah. Stuck.

Katherian Roe: I was trying not to say that, so thank you. With the appeal.

Jeffrey Lindy: What I do is I bring in attorneys who are very close friends and colleagues of mine who I know are really good at appeals. I’m not saying that I’m bad at appeals, I just don’t particularly like it. I’ve argued in the Third Circuit plenty of times and I think I do okay. I don’t really enjoy that. So I bring in guys who are really good and I end up paying them and I end up paying them regardless of whether I get paid or not. So I always, it is a cost of doing business for me, I always lose money. Always, 100% of the time, doing Third Circuit cases. But I staff the cases, so that my client can get a good appeal and get a brief done.

Katherian Roe: Just one more question.

Judge Cardone: Sure.

Katherian Roe: Mr. Shea, I have one more question for you. When you made your opening statement, you said that when you first got on the panel in the District of Massachusetts, that you would recommend almost any of the attorneys to someone in your family as far as representing them. Now, it’s probably about 80%. What do you attribute that difference to?

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Mark Shea: Honestly, I'm not sure in terms of how they're going about choosing people, I'm not involved.

Judge Cardone: Could you bring the microphone up, please?

Mark Shea: Sure. I'm sorry. I'm not really sure in terms of how they go about choosing people. I know that some of the newer people who have got on are very fine lawyers. I don't know if it's the . . . it appears that some people are leaving. The economics of doing this in Boston are pretty tough and so . . .

Katherian Roe: You're referring to the rate?

Mark Shea: Yeah. If you're also running into head winds and not the . . . criminal defense attorneys are used to not being appreciated but the level of the vow of poverty you are supposed to take now in Boston, it's kind of rough. I know a number of lawyers who are sharing offices, literally. These are some of the top criminal lawyers around and they're sharing literal offices, not office space, the office because of the square foot cost. If you're basically being told, here in Boston, we're going to start cutting the bills and you're looking at the cost and I just received my social security, you know how they send you and tell you, "This is what . . ." I think it was something like \$1700 a month if I worked until I was 70. Wow. Super.

You can see why people might think this is a bad idea. My office furniture I bought when, used from AIG. When we painted my last office, I had my mother helping me out painting. We're willing to take certain things that we have to do to do the work we love, but at a certain point, some people, that maybe have better financial sense than I do, take a walk. And the quality of representation is going to go down if that starts to happen.

Katherian Roe: Thank you.

Pleasant Brodnax: Judge Cardone, may I respond to the question?

Judge Cardone: Sure. Sure.

Pleasant Brodnax: In D.C., we have two panels. One for the circuit and one for the district court. Just because you're on the district court panel doesn't mean you're going to make it on the circuit panel. Mr. Kramer administers both panels. I know he's on the committee for both the circuit CJA committee and the D.C. committee. If I were to have a problem with the way things operate, it would be, sometimes, the timeliness of the excess voucher review at the circuit. Cuts are not generally a problem. Probably the best circuit designee we had in the D.C. Circuit to review and get vouchers out quickly was a guy named John Roberts. Okay?

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Judge Cardone: What's he doing now?

Pleasant Brodnax: I think he got a promotion or something like that. I think Judge Walton yesterday mentioned, or was questioning someone about whether it will be necessary, why is it necessary to go to the circuit once a district court judge who's seen the case, seen the trial has approved the matter? If a district court judge can find an active of congress unconstitutional, don't you think they would be qualified to sign a voucher of \$30,000? It would seem like that would make sense to me. I think we need to raise the statutory maximum. I think we need to give district judges more autonomy to get people paid quickly. The only time the circuit I can see, would need to get involved, is if the district court judge denies the voucher and the judge, the panel attorney, can then go to the circuit and say, "Look, I need some relief." That would be my thought.

Judge Cardone: Thank you. I have a question for you, Ms. Harmon about...you're sort of in this hybrid situation. I want to ask you...because we've heard a lot about CJA panel attorneys, how they get paid and the struggles they have to get paid. One of the questions I have for you has to do with do you find that a lot of the cases . . . the idea is that the public defenders or the federal defenders take those cases that come on and they take a certain number or percentage of the cases and then, the rest are distributed to the CJA panel attorneys whether it's because of conflicts or whatever, or too many cases. Oftentimes that happens because there are single defendants and those are the cases that get assigned to the defenders first.

Then, those more complex or conflicted cases go to the CJA panel attorneys. My first question has to do with, do you find . . . because we're talking about costs and the ability to go to a judge and ask for experts and to get help with these difficult cases. And yet, the defenders have a staff of a lot of people and yet, they are a lot of times representing single defendants or perhaps the person that may not be so . . . I don't mean to say so complex because sometimes they have the lead defendant but do you see that disparity? Do you see a disparity where a lot of times, the CJA panel attorneys have the mess to clean up but they don't have the funding to do that?

Natalie Harmon: The resource for it. I wouldn't really put it that way that they have the mess to clean up. Sometimes, like in . . . this is where it's great to be a panel administrator and to be doling cases out as well as doing the back end side of things. Because we don't always assign the federal public defender to defendant number one. Sometimes we would assign and then... it kind of depends on what rolls in and how defendants roll in. But I don't have a problem giving defendant number eight to the Federal Public Defender's Office and giving one, two, three or four, the rest, whatever out to the panel. Sometimes defendant number eight has way more clean up stuff, social

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service needs than defendant number one.

Judge Cardone: How do you determine that when you're just assigning cases?

Natalie Harmon: It's random. For the most part, it's random. It's just luck.

Judge Cardone: Okay.

Natalie Harmon: Because we don't know. One, two, three, four and five could wind up retaining counsel or you assign the federal defender to number one and two weeks later, they have retained counsel. There are so many variables in how much the Federal Defender Office can actually guide a case if they are involved and I would like to see within our district more use of actually, appointing a separate attorney to do more case coordination. It's similar to having a budgeting attorney or the CDAs that are out there doing discovery but more coordinated defense work on a large defendant cases or large discovery cases. In Mark's case, I would step in and I would talk to him and I would go to the judge and I would have behind closed doors conversation with the judge about what's going on here? Is there anything that I can do or anything that you need to see? Frankly, I think he needs second counsel on board and I think that there are some reins there that need to be loosened as far as the number of cases that actually have a second attorney appointed, I'm off of your question a little bit here.

Judge Cardone: No, that's fine.

Natalie Harmon: Most of the times the Federal Defender Office is sitting at trial with at least one other person from the Federal Defender Office, probably paralegal staff as well or an investigator and they are running, not very often does that occur for CJA and part of that is training CJA attorneys to ask, they're not asking and part of that is training the judges to grant those requests and to not have it be such a limited scope of cases that would qualify for a second attorney. I think that would make a huge difference to CJA counsel. Within those reins, I am just going to go here... like within lightening those reins, right now there's a \$800 cap that doesn't require authorization.

That's aggregate for the whole case, so if you have a case that's got an interpreter need, that money is like all on interpreters pretty much. We need to loosen that area, so the counsel can get going on their case, be it \$1500, be it \$2400 and they can utilize expert services that they need, paralegal, investigator primarily like those should be . . . those initial, they should be able to have those resources readily available to them. Then, if we're talking about psychologist and forensic experts and that thing, that's a whole different realm but there need to be some loosening there, so that panel attorneys can come to the table with equal resources without having to do some of the bureaucratic jump through the hoops.

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Judge Cardone: Okay. My follow up question to that has to do with the rest of you who are panel attorneys and my question is we heard, I believe it was Mr. Lindy talk about how he absorbs the cost when the appellate court won't pay all the amount that he needs and he's already gone out and gotten somebody to do the appeal. I know in my district, we have a lot of Spanish speakers and a lot of our attorneys either speak Spanish so they don't have to get interpreters which keeps the cost down or we have non-Spanish speaking and they have their secretaries or someone play that role and don't have to go out and get Spanish speakers at a cost to anyone.

My next question has to do with, we've heard about the use of experts, the low use of experts, if any of you absorb the cost of defense, could you give us examples of what you have to do? In other words, if you know you're not going to get paid for this or if you're not going to get a certain kind of expert or if you're not going to get an interpreter or whatever, those kinds of cost or if they're not going to pay over a certain amount, do you absorb any cost? I'll start with you, Mr. Broccoletti.

James Broccoletti: I think we do but it's in the context of staffing and the individuals that work with me, my paralegals, some other staff members, I have associates that will also be helping on cases of that nature. We absorb it in that particular way rather than going to the court to ask for an investigator or something, we'll just go ahead and just do the work ourselves. I think we have a lot of self-policing and I think that we have voucher cuts, we have problems with voucher cuts and because we have a history of voucher cuts, we have a number of lawyers that automatically just absorb those costs so they don't even have to run the gauntlet trying to get excess vouchers approved.

Judge Cardone: When you say that, what do you mean? You'll use your paralegal, etc., but you won't bill for it?

James Broccoletti: Correct. Just because it seems to be so much easier rather than trying to jump through all the hoops and have issues arise and problems arise and having to go to the circuit judge, the circuit judge from a very rural area who was not familiar with some of the things that we need to do which is where the budget director has been very helpful, has been able to try and educate him and have him understand the things that we have to do to be able to work the case properly. A lot of those things we will just absorb the cost and not even submit a bill for them. It just makes a lot easier.

Judge Cardone: Okay. How about you, Mr. Brodnax?

Pleasant Brodnax: Well, we don't have a problem with voucher cutting. I will tell you sometimes one of my investigators that I use is a Spanish speaking, so I'm killing two birds with one stone. Oh, am I speaking?

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Judge Cardone: I couldn't . . .

Pleasant Brodnax: Yes. We don't have a problem with voucher cutting but one of the investigators that I use is Spanish speaking, so I can cover two things at once. I will tell you over the course of my practice getting back again to something going to the circuit to wait a long time, if it's a close bill, I'm sure a couple of times I have just submitted whatever it was and just taking a couple of hundred dollars loss, so I wouldn't have to wait a month for the check. I was a business major in college, so I try not to lose money but that's an instance where I did. Yes.

Judge Cardone: All right. Mr. Lindy, anything other than the appellate work?

Jeffrey Lindy: Yes. First of all, let me clarify about it briefly. I don't bring in outside attorneys. These are colleagues of mine, I'm the lead attorney, so I lose a ton of money on Third Circuit briefs. I'm the lead attorney. We have just like a law firm, we have conferences, we talk about the case, we talk about issues. They might put down a first draft, I might put down a first draft but then, the brief goes through that. I lose thousands of dollars on Third Circuit cases and I just look at it as a cost of doing business. With regards to the district court cases, I always have a second attorney working with me and I learned from the defenders that two sets of eyes, two heads, two brains are always better than one. I don't believe in what the big firms do, fifteen brains aren't better than one, that's just generating bills for the client but nobody can get . . . except for the very, very most simple cases and those do come along.

The guy who comes in, you got appointed, he already started cooperating before you were appointed and that's a simple drug case and there are those cases. But by-and-large any case that has to be . . . whether or not it goes to trial, any case that has to be prepped for trial, I am fully convinced at this stage of my career that two heads are always better than one and I frequently don't bill for that second head because I think a lot of the judges would say, "Why do you need two attorneys on this?," so I just don't do it.

Judge Cardone: All right. Mr. Rymsza?

Edward Rymsza: I think I'm in the same boat as Mr. Broccoletti. With the small office, so I have some paralegals, I will use them and if I use them in such a manner, it's easier just to eat it rather than get approval and submit it. A lot of the work, I'll probably do myself and again in my experience, there's not a whole lot of voucher cutting in the district court but if it's just as easy to have a staff go and do it, then I just have them go and do it.

Judge Cardone: All right. Mr. Shea?

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- Mark Shea: I would say I eat a little bit of cost on paralegals, now and then. Then, as Mr. Lindy was referencing, my partner and I will go over a case and things. If she's doing something separate and distinct like writing a motion or something, then we do bill for that, but if we're overlapping and it's more brainstorming and things, we will not bill for that. We just absorb those costs.
- Judge Cardone: All right. Thank you.
- Mark Shea: Thank you.
- Judge Cardone: How about in the back? Do you have any questions?
- Judge Walton: Yeah. Of that . . .
- Judge Cardone: Yeah. Put the microphone on.
- Judge Walton: Of that meager \$129 that we're paying you, how much are you actually making? What's your overhead?
- James Broccoletti: \$139.
- Pleasant Brodnax: Mine would be much less because I have a virtual office but I think nationally, the number was about \$90 some for each lawyer per hour.
- Judge Walton: Overhead?
- Pleasant Brodnax: Yes. I think we did a survey several years ago, I think it was \$90 some. Yeah.
- Jeffrey Lindy: I wish I could tell you what my overhead is but I just keep an eye on my operating account and it seems in the last few years to just be going down a lot.
- Edward Rymysz: I think I'm in the same boat. I don't have the actual numbers but I think some of the benefit is certainly where I'm at, certainly the Middle District of Pennsylvania is not the Eastern District of Pennsylvania, it's not the Southern District of New York and it's certainly not the District of Massachusetts in Boston. I probably don't feel as big of a pinch as some of the others but I do have a number, it's a small office and certainly most, if not, all of the CJA panel in my district are all small, either solo practitioners or hale from very, very small offices, five attorneys or less.
- Mark Shea: Looking back on it, I would have benefited from a business course but I didn't take any. I don't know how to break it out exactly and I just know, my health care costs are pretty substantial. My office cost are pretty substantial.

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When I sit with my financial advisor and they tell me what I'm supposed to be setting aside for a time, I can very clearly say I am not meeting those goals and so, it's not easy. I will say I love the work but it is very fiscally difficult.

Judge Goldberg: Mr. Shea, have you written to the judge or filed a motion which cites the guidelines which mandate that you should get due process in your issue?

Mark Shea: I reread my recusal motion this morning. I'm not sure if I cited that particular thing. I did cite the CJA guidelines and to point out to him that he hadn't cited anything that I should respond to.

Judge Goldberg: They're not very strong, but there is clear language in there saying that you get due process.

Mark Shea: Yeah.

Judge Goldberg: Free legal advice.

Judge Walton: I do have a follow up question and I think it's admirable that you do what you do, but how can you afford to do it?

Jeffrey Lindy: My wife would agree with you.

James Broccoletti: I don't think that anybody takes CJA work to make a living solely. I think that it's a part in parcel, a very small parcel and some of us are fortunate to have a substantial retained clientele as well, but there's just no way that you can survive in taking these cases unless you have virtual office and a business degree like Pleasant has. Otherwise, it's just very, very difficult and I don't think that anybody takes it for that reason. They take it because they feel an obligation, because they enjoy the work, because they are dedicated lawyers, and they're committed to the client, and they enjoy the federal system, and I think they enjoy the work that comes with it. But it's certainly not a way to make a livelihood.

Pleasant Brodnax: Your retained work certainly supplements the CJA work, you couldn't do it without it.

Jeffrey Lindy: I would echo that. I know that there are attorneys on our panel who rely on CJA work to make a living and that's not optimal. Some of them are very good attorneys. Some of them are marginal attorneys, every three years when we go through, we weed them out. I don't see how anybody can make a living doing CJA and I don't think that's why you should do CJA work.

Edward Rymsza: I would agree with everything I heard.

Mark Shea: Yeah. Some retained work, but I will say in Boston, there's a lot of good

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criminal lawyers too. The retained work is somewhat tougher to come by if you're not hooked into a big firm. There's enough of it to keep going, but a lot of it is just being careful on what you spend money on.

Judge Walton: Thank you.

Judge Cardone: Who else in the back?

Prof. Gould: I've got one.

Judge Cardone: Okay. Go ahead.

Prof. Gould: I'm loath to keep my colleagues here from lunch, but I have one question. Mr. Broccoletti, I am a resident of the Eastern District of Virginia, this accent notwithstanding. If you had asked me to predict before this panel, which of the districts on this panel would have the lowest rate of use of service providers, I would never have predicted the Eastern District of Virginia. Never. Now, you've made a really good point about the fact that you and potentially some of your colleagues don't submit the vouchers for paralegals and potentially, you all do the investigations yourselves, but my understanding of the case load in the Eastern District of Virginia is that you've had other cases that we might otherwise expect to see experts on: the terrorism cases, some of the drug cases potentially. Is there some other explanation that you can help us with for why? By the way, you all aren't off the hook. It's just that I get to use my own district as the example. Why it is that the eastern district is so low on the use of experts or service providers?

James Broccoletti: No. I was shocked when I found that figure. It's just inexplicable. I certainly think that it could be a matter of education. It could be a matter that enough lawyers don't . . . for a particular reason aren't aware of what they can do and how much they can get and the circumstances under which that applies. Some of them, I just don't know. How could you define that figure of 5%? How could you explain that? It's certainly not acceptable at all.

Prof. Gould: What things would you recommend that defender services or others should be doing to try to get that figure out?

James Broccoletti: Well, both the eastern and western district federal defenders have been sponsoring a seminar or conference lately in Charlottesville over the past couple of years and that's been a wonderful thing and it's free. You have to pay for the hotel room and you have to pay to get there, but the conference itself is free and they bring in national speakers. That's been, I think very helpful in educating the CJA lawyers because 300 or 400 attend from the whole state and educating them on the use of experts, on the ability to get experts, how to write the necessary motions. Hopefully we'll see that number start to come up as we continue those educational efforts.

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Prof. Gould: If I may follow up, in the District of Columbia, you have a fairly high rate panel use of experts or service providers. What are you doing differently do you think than in Virginia?

Pleasant Brodnax: Well, I practice in Alexandria as well and perhaps . . .

Prof. Gould: Oh, the virtual office. I'm getting confused.

Pleasant Brodnax: Well, I practiced, I started on the panel in Alexandria first and I became a member of panel of D.C. in '93. I think it's a function really and I think Mr. Kamens, I don't know if he's in the room now but in D.C., we have the Federal Defender that helps us with a lot of things and maybe the Federal Defender in Eastern District of Virginia was in a similar situation to appoint lawyers, to oversee the panel, it might help. In Virginia too, it's a different culture. It's the rocket docket. You are appointed a case, I remember my first experience watching a judge whose father's name is on the courthouse have a trial and he said to the government, "How many witnesses do you have?" The prosecutor got up and said, "Your Honor, we have . . ." This is a drug case. "Your Honor, we have seven witnesses." He said, "You have seven witnesses? This is not a seven witness case. Pick your best three, first witness please."

James Broccoletti: I'm sorry. Go ahead.

Pleasant Brodnax: It's a different culture as well, so perhaps some lawyers in that district may feel, "I need to move quicker." Now, I don't think that's the same now as it was back in '91 but I think the culture still remains.

James Broccoletti: Just to follow up on that, our Federal Defender is very good in working with us on the panel. In a number of cases that I have had, I've worked in conjunction with them. We both represented the same defendant. Therefore, I wouldn't need to be making any application for experts such as using them because of their pool of experts and their resources, so that could account for some of the lower numbers but I agree with you, 5% is unacceptable.

Prof. Gould: Thank you all very much.

Judge Cardone: All right. Again, on behalf of the entire Committee, thank you so much for being here. We appreciate your time and your testimony. I want to say to all of you, if during today's testimony, we elicited something that you want to add or when you get home and you think of something, go back to your office or virtual office and you think of something, please feel free to add it because we really want all of the information we can garner. Get in touch

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with us, but again on behalf of the entire panel, thank you. We stand in recess and we will resume with our next panel at 2:30. Thank you.

Panelists: Thank you.