

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 6—Views from Federal Defenders

Judge Cardone: Good afternoon, everybody. We are on our last panel of the day. It's Panel 6, "Views from Federal Defenders." Before we get started, on behalf of the Committee I want to thank all of you for being here this afternoon. If you've sat through any of this, you realize that what we're trying to do is to hear from everyone and take advantage of the opportunity not only to hear about some of the issues and try to develop the issues but also ideas.

We appreciate you all being here. Just a bit of a ground rule, we have received submissions and we asked for those so that Committee can get prepared and ready to ask you questions. I'd ask you to make a brief opening statement just to summarize where you're at, and then give us the opportunity to ask you questions.

Before we get started, let me go ahead and introduce the panel. We have Christian Capece, the Federal Public Defender from the Southern District of West Virginia; Fred Hebllich Jr., the Senior Litigator from the Federal Public Defender's Office in the Western District of Virginia; Jeremy Kamens, the Federal Public Defender in the Eastern District of Virginia; Brian Kornbrath, from the Federal Public Defenders, the Northern District of West Virginia; and, A.J. Kramer, the Federal Public Defender from D.C.

With that being said, we'll start with you Mr. Capece.

Christian Capece: Thank you. Good afternoon your Honors and distinguished members of this Committee. Thank you for the opportunity to speak today on behalf of the Southern District of West Virginia in regards to the effectiveness of the CJA Program. As noted in my written submission, my sense of the overall health of indigent defense in our district is positive.

I am well aware however of the distrust that has grown between the defenders, CJA attorneys, and the AO, particularly during sequestration. When among other things, Federal Defender Organization suffered layoffs and furloughs, and the hourly payment given to panel members was lowered and then subsequently restored.

On the one hand, I think the CJA program in my district is faring well and on the other hand there is this national movement to achieve independence for defenders. Often, I feel like I'm driving a new car. It seems to be perfectly fine when suddenly the engine light has gone on. I'm unsure whether the car has a serious underlying expensive defect or perhaps the car simply has a faulty engine light indicator, a quick and inexpensive fix.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

I do think there is room to improve the structure of the CJA program as I've discussed in my written submission. I think there should be a national chief federal public defender position to serve as a dedicated advocate for the CJA program. Separate and apart from the AO and the judiciary, and whose focus is on substantive issues effecting the practice of criminal defense in federal courts.

I also think voucher review should be handled by the CJA supervising attorney within a district, along with support from, when appropriate, the defender, CJA panel representative, and the circuit budgeting attorney. As for complete independence, I am hesitant to support this laudable goal. I side with those defenders who are concerned about creating a completely separate federal bureaucracy and funding the same when it does not appear that the fiscal and political environment at this time would support such a plan.

In sum, I am grateful for the opportunity to participate in this process and I look forward to participating in the discussion here this afternoon.

Judge Cardone: Thank you. Mr. Hebllich?

Fred Hebllich: Thank you. I appreciate the opportunity to appear before the Committee and the seriousness with which this review is being undertaken. As a country lawyer, I'm not sure I can bring a lot to this discussion but I had fifteen years of experience as a CJA panel attorney before I joined the Federal Public Defender's Office.

I've had first-hand experience with all of the many challenges that you've probably heard about with going to judges for resources, and trying to get experts, and trying to get co-counsel when necessary, and so on. I've also seen it from the other side which is the defender's office which where we have resources that are built in, and we're able to represent people I think much more effectively than the CJA lawyers are able to do so.

When I prepared to come here, when I was thinking about this. Initially, it was from my own parochial view of my own district. I've read a lot of the submissions that were sent to the Committee, I've read some of the transcripts of the testimony. Reviewed some of the reports, the 1993 report and so on. I was prepared to come in and say, "Things are really pretty good in my district."

A lot of people said that, a lot of people said, "We had some problems but we were dealing with the problems and they're really not that bad and we think things can get better." After having read everything and seeing the difference from district to district, and even division to division with how the CJA program is administered and how it's handled. I just don't see how you never hope to have an infected program unless there's some uniformity and some

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

standardization.

It can't be just one district to district or division to division, and I don't see how you can have that kind of uniformity and that kind of standardization as long as the judges are involved in it. I just don't see how, either the judges are going to have to learn how the employee standard and uniform procedures and practices or else not be involved in it.

I just don't see how there's any alternative to removing the judges from it and having an independent defender service of some sort to administer the program.

Judge Cardone: Thank you. Mr. Kamens?

Jeremy Kamens: Thank you. I know this has been a long day for all of you and I want to thank you for your service. I'm sure the travel is difficult and sitting through these hearings is hard but it's a very important mission that you have. I come from the Eastern District of Virginia which has very large criminal docket.

Last year, we had about 2900 cases assigned to my office. There were almost 600 appointments to the CJA panel. We don't have much role in the administration of the panel. I want to start by telling you just a short anecdote that a district judge recently told me about a case that he had.

Fourteen defendants, capital charges, very difficult complex case, and he met with the federal defender at the time Michael Nachmanoff, who you've met, and he met with the case budgeting attorney from the Fourth Circuit, and they took the budgets from the twenty-eight lawyers, they reviewed them, and they came up with a proposal that everybody agreed upon.

They submitted it to the Fourth Circuit expecting that it would be accepted. It was not, it was slashed by half. It was a shock to the lawyers, it was a shock to the district judge. The district judge responded by writing a very detailed letter explaining why this was a reasonable request, why it was necessary for these lawyers to have these resources.

He wrote, "I think that the limits you imposed, with all due respect, constrain defense counsels function in a way that will irreparably impair preparation in defense of the case." Now, this is a success story because the chief judge reconsidered and he approved 99% of what the district judge had asked.

The problem is that the success depended upon the advocacy of this district judge. It's very possible that another district judge would say, "That's too bad." The success of the funding of indigent defense often depends upon the able advocacy of district judges but as my colleague Mr. Hebllich just said, it's not uniform.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

It's hard to hear the testimony of Mr. Shea the CJA lawyer from Boston earlier today, or read the written testimony of Steve Aisen and Dick Wolfe who will testify tomorrow, or to hear this story, and not think that there is some tension, some difficulty, with the placement and the administration of the CJA within the judiciary.

Now, all of that said, I'm realistic. I read after the . . . Judge Prado's report was issued, he wrote a law review article. In it he wrote "A sense of momentum has been achieved." There may be some debate about that. There were many positive things that came out of that report. CJA plans were reformed, updated, the Judicial Council adapted many of the recommendations.

Although, there is this debate that is ramping amongst fellow defenders about independence outside the judiciary and within the judiciary, and I have views on that. I'm also realistic about the practical results that will occur from what this Committee does. I hope and believe that the recommendations made by this Committee will have an important impact on the administration of justice in my district.

Judge Cardone: Thank you. Mr. Kornbrath?

Brian Kornbrath: Thank you, Judge Cardone, and Committee members. In preparation for . . .

Judge Cardone: Can I ask you to pull the mic?

Brian Kornbrath: Yes. In preparation for today's appearance, I spent quite some time looking at the archives, the written remarks already provided. I'll keep my opening remarks brief. I think anything I say is going to essentially mirror what other people have said to the Committee already.

I have been the Federal Public Defender since 2002, before that it was six and a half years as an Assistant Federal Public Defender. For about fourteen years now I've managed our defender office in the Northern District West Virginia as well as the CJA panel. I'm giving you a local snapshot, I don't think that the program is broken in our district, it operates quite well.

There's quality criminal defense representation readily available with the exception of sequestration in 2013. We see that funding and support has been fairly consistent. Nonetheless, I think changes in oversight and operations at the national and district levels might well be in order. That's up to this Committee to decide.

I think this Committee understands that the complexion of federal criminal defense has changed over the years. Prior to 2005 when we had a mandatory

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

guideline scheme, we were up against that Orwellian platitude, “greater fairness through uniformity,” and thankfully post-*Booker* that’s no longer the case. We have an adversarial system where we fight over guilt and innocence but we also have meaningful mitigation now where we can paint a true holistic picture of the person that’s before the court about to be sentenced.

We have drug courts, reentry courts, informal programs where we’re trying to lessen recidivism. So you’re leaving that adversarial battle, if you will, and you’re coming into a more collective cooperation system with the other court units trying to do what’s best for the client. On the front end, where you’re getting that variant sentence with re-integration into the community, and then with the supervised release cases where you’re trying to come up with something other than a return to federal prison.

I think now experienced, able, well-funded criminal practitioners are more important than ever. The prospects for continued success hinge on a symbiotic relationship between Federal Public Defender and Community Defender Offices. We’ve got to work closely with the CJA panel attorneys in the court. It’s going to require a proper balance, both nationally, and locally between necessary oversight and the independence needed to fully implement the defense function.

I will say I’m honored to be part of such a program and I welcome any questions that the Committee has. Thank you.

Judge Cardone: Thank you. Mr. Kramer?

A.J. Kramer: Thank you, Judge Cardone. It’s an honor to be before this Committee. I have the greatest respect for it and most notably your stamina on listening to so many people go over the same things. I think I should tell you something about how you can judge my credibility. Recently I had to speak at the court house at an event, and I was introduced by the chief judge.

They had checked the records, I had tried and lost more cases in the United States District Court for the District of Columbia than any other lawyer; I had argued and lost more appeals in the United States Court of Appeals for the District of Columbia than any other lawyer; and, I topped that off with a nine to nothing loss in the Supreme Court. You can judge my credibility from that

. I do feel compelled to say I admire the work of this Committee. I feel compelled to say at the beginning, the real shame in the criminal justice system in the United States is the quality of death penalty representation at the trial level at many state and local courts. I’m sorry as well as the funding for many state and local public defenders where you find out the people have 300 felony cases, including five death penalty cases.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

I'm sorry there's not a committee and a commission studying that and it receives very little attention for whatever reason, even though 90% of the cases are prosecuted in state courts. I know that this Committee has nothing to do with that, but I feel compelled to say that for my colleagues in far more unfortunate situations than we are.

You've heard about our district from Mr. Brodnax, and I don't really want to repeat anything he said. We administer the panel for both the district court and the court of appeals. There's no voucher cutting. The attitude of the courts of appeals, judges who are designated to review vouchers is that if it's good enough for the district court and they're the ones who know the case, how am I going to say anything different? That's good enough for me, so that works well.

We obtained for the District Court in D.C., which you heard about the Guantanamo habeas cases, we obtained federal defenders from all over the country to represent them so that Guantanamo detainees had incredibly high quality representation in the habeas cases. Not the military commission, but the habeas cases. Again, I can repeat, it seems to work well in our districts. The Federal Defender's, seem to me, I'm not aware of any claim that representation in a Federal Defender case has been hurt by a lack of resources.

I have much more question, and it seems to me, just like I said, the real question, the real problem in the criminal just system, is the state and local. The real problem in the federal criminal justice system, it seems to me to be the panel lawyers who are woefully underpaid. Why the circuit has any role in reviewing the district court vouchers is beyond me. I thought it was an appeal, but it's been interpreted that they can't increase the amount, they can only decrease, which seems to me to make no sense.

It's having to go for resources for investigators, and I'm happy to say that when I saw the figures, the District of Columbia was one of the highest, if not the highest, district for use of experts and other service providers. Of course there is problems with the structure, and the oversight, and the power that's exercised. But the real problem seems to me in the federal criminal system to be with the panel lawyers.

Thank you. And again, as with everybody else, I would welcome your questions.

Judge Cardone: Thank you. We'll start with Professor Kerr.

Prof. Kerr: Thank you all for your testimony both oral and written. A.J. Kramer, I want to start with you. You mentioned in your view that the panel attorneys are I think . . . the area needing the most reform in the federal system. I was

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

hoping you can say more about what specific reforms you would adopt. You mentioned the question of the role of circuit judges reviewing the district judge vouchers and those decisions. That's one area. Do you have broader views or anything in more detail about broader forms you would make? A lot of ideas have been on the table today about giving the defender certain roles and I guess in D.C. you take on a lot of those roles. Is that the right way to go? Are there other . . . go riff on changes you think would improve the system.

A.J. Kramer: I mean the hourly rate is clearly, and especially in a place like D.C. . . . the hourly rate, whatever the national average is, we heard ninety some odd dollars an hour, It is orders of magnitude higher than that in places like D.C., New York, Los Angeles, Chicago, San Francisco.

I'm not even clear how many . . . we're lucky in D.C., there's no . . . there are committees in both the court of appeals and district court that review the applicants. We have an incredibly high quality panel, I think, on both courts, including a number of lawyers from larger law firms. But I think I can give you an idea of the adequacy of the hourly rates.

There's a number of those lawyers from law firms that don't even submit vouchers. Because, I think they're thinking, I hate to say it this way, but it's almost more trouble to submit the voucher for that hourly rate than it is for them to just do it pro bono. That's a sad commentary on the system and unfair to CJA panel lawyers who need the money. So, I think the hourly rate is the first thing.

I think that the voucher cutting by district judges . . . we're fortunate in D.C. that I don't ever recall a voucher being cut just because of budget reasons or philosophy or whatever. There have been isolated instances, I can probably count them on one hand where vouchers have been reduced because the thought was that somebody, the amount claimed was not reasonable. Even then, the person has given an opportunity in writing or in person to appeal that, to tell the district judge why it should be justified. That's now advisory in the guidelines for the criminal and justice act. That seems to me that should clearly be mandatory that CJA lawyers should have an opportunity to be heard before a voucher is reduced for any reason at all. I don't understand why a judge can't spare a few minutes of their time for a CJA panel lawyer who's woefully underpaid to begin with.

I think we're very fortunate in D.C. because the attitude is the amount is way too low and we trust our panel lawyers. The panel lawyers have been screened by a committee. I honestly hear, and I've heard and don't doubt for one second the horror stories in other districts. I cannot understand how a judge cannot first of all, think that the amount of money . . . when the civil lawyers come in on cases and get \$800,000, \$900,000 an hour even at some

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

firms in D.C. They should be cutting several hours from a CJA voucher.

Also, I just think judges should trust their CJA lawyers or they shouldn't be on the panel. Especially when there's been a screening committee for a panel. I don't see that the court of appeals really has any role in reducing vouchers, or even reviewing vouchers for, as I said, where the district court who's the one who presided over it . . . fortunately that's been . . . I would . . . and that would require a statutory change, I think, most of the others would be within the CJA guidelines. Those are the ones I would start off with.

This is a big statutory change. Going to the judge for again, we're very fortunate in D.C., I don't ever recall an expert request being denied. Never. And it's done without even a memo, that CJA-21 is just submitted, the judge signs it, and it comes back.

Nobody has ever been refused an expert that I'm aware of. People have requested 30, 40, \$50,000 for experts and the judge might say take \$20,000 to start and then if you use that up we'll look at the next \$20,000. Nobody has ever been refused an expert. I don't understand why a judge would not trust the CJA lawyer who says, "I need an investigator."

To get to an earlier question that was asked, I don't think . . . 100% of our cases involve the use of an investigator or paralegal or some other person in their office. Go pull criminal records, go talk to witnesses, go see the person at the jail. It's just inconceivable to me that a lawyer could do a case without an investigator or paralegal.

Why judges should be questioning . . . I think the guideline language . . . absent a statutory change, the guidelines language should be changed to make it clear to judges that they should not be denying experts without asking either asking for more information or making clear their reasoning why. That would be a little difficult for me to conceive.

Prof. Kerr: Do you think there's any value in going maybe beyond that, suggesting a presumption that there should be an investigator hired, or is there enough consistency in cases to try to say more, "requests should not be denied."

A.J. Kramer: Yes. I think that's what happens in D.C. There's a presumption that you can't do a case without an investigator. Especially the high number of people in federal cases that are detained. Just to ask them . . . and you've heard all about electronic discovery. I won't repeat that . . . but to go sit with the person and review that discovery, you need an investigator. To talk to the person and say, "what to follow up?" You need an investigator.

The paralegal you need for sentencing, especially with the increased number of child sexual, either abuse cases or pornography or whatever, you need all

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

kinds of psychiatrists, psychologists. The one thing the judge wants to know is, is the person going to act on it and actually commit an act against a child, or what's the future going to hold for this person.

You can't do that by just looking at the person. You need experts to assess the person. I don't see why right, after the statutory change why the guidelines language shouldn't be: "we trust our panel lawyers and that they know their case. There should be a presumption that if a panel lawyer requests an expert that, that should be approved.

Prof. Kerr: That's helpful. On the broader question of whether to move towards independence for the defender function. I read your written testimony and I wasn't sure if you were saying it's a bad idea or you just haven't seen a good idea yet. I was hoping you could give us a little more of a sense of where you come out?

A.J. Kramer: I'm not sure myself, I'm conflicted. I live, I mean I work inside the beltway, so I'm all too familiar with how things work. Look, but I do live outside the beltway. We were told two years ago that sentencing reform was going to be reality very quickly. It's now been held up for two years in committee, not even in the senate. In committee. While there's a question of how many of the majority votes in committee you need to get the bill out of committee.

There's been so many amendments it looks nothing like the original version that went in. This is my fear. If you submit a bill to Congress first of all, I don't see this Congress as an opportune time to create a new . . . I've heard talk about new positions in every circuit in every district. That's a 110 new people and how many boards of governance, and . . .

To answer Mr. Frensey's earlier question, I don't like bureaucracy and I don't like the cost of bureaucracy. A lot of these plans have a lot of bureaucracy and I don't trust that Congress won't tinker with the bill, with a proposal that gets there and add all kinds of amendments that people are not going to be happy with. That the Congress people in their district aren't going to want to pick the federal defender in their district.

There are people in our office, and I know a number of people that work on the hill, who I think I put in my written submission, said well, "this would be committing suicide for your program," "this would be just plain stupid for your program," and "that we would go the way of legal services."

All you had to see was the smear campaign that was launched against Judge Jane Kelly when her name became public as a possible Supreme Court nominee. All these ads started running, that when she was a federal public defender she represented somebody and advocated for a lenient sentence and that person went out and killed a young child afterwards. How many

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

incidents do we think that that's going to take if we are this standalone agency? Incidents like that it's going to take before Congress starts to . . . things like that . . .

I'm not saying I'm right or wrong. I'm saying that's what worries me, let me put it that way. Because I don't think I know the answer, unfortunately. Luckily I'm not on this Committee, you're the ones that have to answer that. I don't think I know the answer but I'm very scared of it. I'm also as I told you very scared of the way things are.

It is interesting to me that the Prado Commission was twenty-three years ago and nobody thought that there needed to be any review of the system until sequester hit which was of course a congressional action. All of a sudden things took . . . and how that was handled within the AO . . . there's certainly different viewpoints, but it was a congressionally imposed action. Whether that's an anomaly . . .

All of a sudden, now we're in a situation where we're told we can't spend money fast enough. That we're going to have all this excess money and we should hire, and hire, and hire. I worry about both models and I don't think that I'm the one who has the answer.

Prof. Kerr: Let me open it up the other members of the panel whether you feel you have the answer or want to weigh in on either the question of broad independence or how to improve the role of the CJA panel system.

Brian Kornbrath: We manage the panel in our district. Suggestions would be, have the attorneys go to the district court judge before they reach the limit. In other words, educate the judge with, up front, why you need this cost rather than get a \$25,000 bill after the fact that is subject to being cut.

I think there should be some type of administrative appeal process, but I don't know the specifics. I think the case budgeting attorneys at the circuit level working with a similar position at the district level would add another level of review to the judicial decision; eVoucher's going online across the country as we speak, that information is readily available.

It's very easy to see whether a case is an outlier or not, based on the charges, the locality, things like that. I think some of the panel attorneys are worried about voicing their frustration. I'd love to see a national clearinghouse where they could report their instances of being gouged without having any repercussions. Those are some suggestions.

Jeremy Kamens: With respect to the CJA panel, we don't administer them. So I think it's a good idea to have CJA and AFPD participation in the selection of panel members. In my district, we have a committee in the Alexandria division that

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

I serve on. There are three judges and two CJA representatives that review a third of the panel every year, look at applications, and reduce the list.

That's not the case in the other two divisions. With respect to vouchers, we don't have any role to play in reviewing them at all. It gives me pause. I heard all of the CJA representative say that they would like for the review of vouchers to be housed within the Federal Defender.

Maybe that is the best way to do it. It makes me a little afraid given the number of cases that we have that would be significant. It would be a significant increase in the amount of work that we have if we had to review the vouchers from all of the CJA cases that are appointed. I do think that there should be some kind of independent review of vouchers either a case budgeting attorney or someone other than the district judge who's handling the case.

We do have that newly appointed person as the CJA panel rep from EDVA said, in the Fourth Circuit for cases that go above the \$9000 cap. The number of CJA lawyers in my district according to the most recent statistics who hire—this is not immigration cases, not capital cases—but who have investigators or experts, or paralegal assistance, is absurdly low. It's 5%.

I think that, that is probably not completely accurate but it may . . . because and I say that, because it doesn't seem to reflect the sort of anecdotal evidence that there are lot of good CJA lawyers in my district who wouldn't dream of representing a client in a sophisticated case without getting some assistance. Some kind of investigative assistance.

I will say that I think Professor Gould asked about, say a terrorism case, material support case, those types of cases as a general matter are either handled in my office or retained. If there is a codefendant, often our office will handle the expert fees. We share that and the Federal Defender pays for those experts.

Some sophisticated cases, for example we had a piracy prosecution, there was a lot of overseas travel, a lot of experts. A lot of those expenses, they were incurred by my office and not by the codefendants. I do think that there is a lot of self-cutting. That is, CJA lawyers who would prefer to submit a voucher that's under the cap and not ask for fees for expenses that they incur because they would rather get a prompt voucher than go through the process of having it denied, or cut, and perhaps the idea of reconsideration. I think a judge here asked that, said that, "you're entitled to due process."

Well, I don't know exactly what that means in the context of vouchers. Does that mean you got a chance to go back to the same judge and ask again? I think that might be it. I'm not sure that there's any other process. With

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

respect to independence briefly, I think you have to think about the question first: is this, as a normative matter, is this the system that we should have? That is, does it make sense for judges to decide the funding of one side of the adversarial system?

If you come out of that answer with “No,” then you have to think about “All right, what are the practical problems? What are the logistics of changing that system and that’s extraordinarily difficult and complicated as Mr. Kramer suggested. I think it’s unrealistic in the short term that there would be legislation that would have any hope of actually changing the present structure.

That doesn’t mean that it’s not important to say what the answer is. The answer I think is that we should have an independent system of indigent defense just as the executive branch, the prosecutors are independent from judicial scrutiny of their budget. I don’t think that there is much debate about what that normative answer is. The debate is about the practical difficulties that obviously are much harder.

Fred Hebllich: The compensation of panel attorneys is important but I think what’s more important is training for the CJA panel. At least in my district. In my district, maybe it’s unique, but most of the panel members are people who are either solo practitioners or they are in small partnerships or office sharing practices. I know a lot of them. Most of them do not have backgrounds either in a defender’s office, or a prosecutor’s office, or government agency, or a large law firm. Any sort of background where they would have received training, sort of training, professional training that one gets.

It’s a rural area, most of them are in small communities and most of their practice is a state court practice, it’s not federal practice. We’ve cut out, I think most of the dabblers, we don’t have real estate lawyers doing murder cases anymore.

I think a lot of the deficiencies in the panel is not for lack of ability, or lack of energy, but simply lack of knowledge. I’m an adjunct professor at the University of Virginia Law School, and I’ve been the director of the criminal defense clinic there for fifteen years. I take third year law students every year, each semester, and I train them to go into court and try cases.

I think a lot of the CJA lawyers . . . I would like to see there be standards, basic standards before they could be on the panel. Training courses . . . the defenders . . . when we hire a new defender they have to go to the baby defender training out in Santa Fe every year, which is a week-long. These are people who have had pretty significant legal experience before they come into the defenders office, but they are required to do that.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

Some defenders offices, I know in North Carolina I believe the Middle District in North Carolina or maybe the Western District. They are required, the court requires that the CJA lawyers, when they apply, that they take training courses from the defenders office. It seems to me that, really remedial, and maybe that sounds unkind, but often remedial training would be a benefit. Because their state experience which is mostly what they're doing, is just abominable.

The experience in Virginia is what you heard the military guys talking about. That they get no resources, and they have to go in and beg to the judge to get any resources whatsoever. Even in capital cases, they have to beg for resources. And they can't do it ex parte. They have to do it in front of the Commonwealth Attorney who opposes, always opposes.

They never get what they need; they never get what they asked for; they prejudice their case by even asking for the services; and they get told things like, "Why do you need an investigator?" They have an open file discovery policy, "Didn't they give you the discovery?" It's like, "Hey, Judge. Did you ever hear of the obligation to independently investigate your own defense case?"

That's what they're used to. This is why we get, I had the numbers just like Jeremy did. This is my district, I find this a huge embarrassment, this is since 2007. Since 2007 there have been a total number of thirty-five cases in which CJA panel attorney got an investigator. Thirty-five! I mean in the district they can't live without any investigator. Here, they don't even know how to ask for it.

We put on . . . his district [gestured to Jeremy Kamens] and my district put on a two day training session every year for CJA and defenders. We have had programs to specifically aimed at the panel members: here is how you ask for resources, here's how you get them, here's how you justify them to the judge, here are the forms, here's what you do.

If you have a problem, if you don't know how to do it, call us and we will help you do it. These numbers: thirty-five investigators, one psychologist, four psychiatrists, hundreds of cases. These are over the past ten years, in our district, I think as in many, if not most districts, the prosecutions have become more focused or complex serious cases.

I think that it's not just a matter of the resources not being given by judges. I don't hear those complaints because they're not asking for them. I think that that's a function of the panel attorneys not being educated as to what is available to them. It may cost some money but I think that is something . . .

The U.S. attorneys are forever going to the NAC [National Advocacy

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

Center], and forever going to training. You can hardly ever get a case scheduled because they're at training. Defenders have some training, and the defenders office provides training for the CJA attorneys. Our office makes every effort to tell them what's available but they have to do it. I don't know what else to do except to encourage them to do it, or to make, or to require. I think if it's required in order to be on the panel, I think they'll do it.

Judge Cardone: How would they pay for it?

Fred Hebllich: How do they pay for it?

Judge Cardone: Yeah. How do the CJA . . .

Fred Hebllich: We would put on training and we do that, that's free, what we do. I would think that the Defender Services puts on training. Those programs are free. The programs are free, and when I was in private practice I went to dozens of them all over the country. You could apply for money for travel, for scholarships. You would get . . . I went to death camp for a week. They're dying to have people go get the training, but it's not required.

Judge Cardone: I'm sorry to interrupt but there's over 10,000 panel attorneys. I live in El Paso, Texas, there's very few programs put on where I live. I understand what you're saying, one of the things we hear is that they need training but how do we get it to them?

Fred Hebllich: There's a lot of training that's available that's not been taken advantage of. I think that through the Defender Services that there could be more training. Like I said, I think if it were required . . . in some districts there's required training.

Again, it's district-to-district, division-to-division. If there were some uniformity and there was some training, I think that they would do it. I think it would lift all the boats, to be honest.

Christian Capece: We're in a similar situation in my district where the number of CJA panel attorneys making requests for investigators and experts is quite low. I think in 2015, there were twenty-five forms submitted to the CJA supervising attorney requesting experts or investigators, less than 10% of the cases. In our district, the CJA supervising attorney and I have a good relationship and we've discussed this issue.

We've discussed putting together training where the AFPDs in my office will present examples of where they've used an expert or one of our investigators was used. In fact in our office now, we now assign an investigator to each and every case that comes in, no matter how small it maybe, or how relatively simplistic it looks at first glance.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

We've also thought about putting together a database that is accessible only by the CJA panel members which would include a list and contact information for the various experts that we use. Of course, any of the CJA panel attorneys can always pick up the phone and call myself or one of the folks in my office, but they don't really do it as much as we would like.

I also wanted just to touch upon a point about the make-up of the CJA panel in my district. I think it's very similar to what is in the District of Virginia Western in terms of the make-up of the types of lawyers who are on the panel. There is a view that I think it's a good one, a helpful one, to try to bring on to the panel very successful, civil litigators.

Because they have, although they might not have the criminal background, they do understand and they use quite frequently experts. We're not seeing those folks from the larger firms serving on our panel. Part of that goes to the rate that, that is paid. I think particularly in a smaller district, a less diverse district like in Charleston, West Virginia where the rates that even senior partners charge or nowhere near what may be the case in Philadelphia or Chicago.

I think that when I was briefly on the panel for about two years, the problem for me was how long it took for a voucher to get approved. Particularly if your compensation at the firm is based on how much money you hand over to the firm, if that voucher isn't paid for many months, it can cause a problem. I think that certain attorneys just don't want to bother with it.

With the eVoucher system, that has been largely eliminated that delay and these vouchers are being turned around very, very quickly at the least at the district court level. I also would agree that the training shouldn't just be . . . and it appears to me that the focus on much of the training that the defenders put on for those in my office and CJA panel seems to be focused on sentencing. Which makes sense with the post-*Booker* environment.

It always bothered me when I was getting ready for trial as an AFDP and the prosecutor somehow disappeared for a week. They would go to this super-secret facility called the NAC. They never told me what they were going there for. To this day I don't know what they're doing. I get a sense that they're practicing to try the case that I'm about to try myself.

We don't have something similar to that for defenders and CJA panel attorney, so maybe we need to have a super-secret facility where we try and practice these cases. Again, these are issues that I do see in my district that we are trying to address them within the district.

Prof. Kerr

Thank you.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

Judge Cardone: Judge Prado?

Judge Prado: I'm tempted to say something about Mr. Kramer but I will not. Maybe one of the first things we got to do is change public defenders in D.C., his record is so bad.

Fred Hebllich: Yeah, don't ask the rest of us.

Judge Prado: We've heard a lot of testimony about problems that panel attorneys have. I think we're in agreement something has to be done about helping them out. But, community defenders and public defenders, separating the two. If any of you feel uncomfortable discussing it fine, but have any of you experienced any interference by judges or the courts in your particular offices that you feel independence is necessary from the courts?

I know that circuit court appoints the defenders and gives you staffing, and community defenders have their boards. Has anyone experienced in your particular offices, any interference from the courts with how you're handling your cases, or the docket, or things of that nature that you felt the judge might have been out of bounds in trying to suggest to you how you might run your office?

Jeremy Kamens: I don't think you're going to have a lot of people jumping up to respond to that question.

Judge Prado: You don't have to mention any details, I'm just curious if we have . . . how significant that problem is. We've heard some concerns in some districts. But I don't know if it's just some isolated districts, or overall, is there a problem with the way that judges are working with your offices?

Jeremy Kamens: I would say no, in my district we've had very supportive judges. I will say that Mr. Hebllich just had a trial, a trial that was in the Western District. It started out as a capital case and so they needed capital lawyers to handle a lot of the defendants. Some lawyers from my office were pointed to be involved in that case along with CJA lawyers. We had two lawyers from my office and there was also another lawyer who was appointed so that there was dual representation.

In the middle of jury instructions, the judge and this is not in my district but said, "I only appointed two lawyers to this case. I will not allow this second lawyer from the Federal Public Defender's Office to participate in the trial. She can sit outside the well, she can assist, but she won't be allowed to cross examine or participate in the testimony, do some testimony, or cross examining any of the witnesses."

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

Now, this is a case that started as capital case, it went to trial, there was a mistrial, it was continued for a year. These three lawyers had been working for couple of years on this case, and they had divided up the witnesses between the three lawyers. The three lawyers went down to two in the middle of jury selection. And I think the reason was that the judge felt that it was his job to determine how the resources were apportioned to the defense like he ordinarily would in a case involving CJA lawyers.

He viewed in this case, he had appointed two lawyers and felt I don't need to have another lawyer from the Federal Public Defender's Office there. My view is that in terms of those resource decisions, those are up to us as a general matter. Just as a judge wouldn't tell a prosecutor usually, you can't put that many resources to prosecute this particular case. As a general matter, a judge can't tell the Federal Defender how many resources they're going to put on a case.

Judge Prado: Was the judge notified about this ahead of time?

Jeremy Kamens: I'm sorry, notified, I mean it happened. I think there was shock, and then there was objection, and then there was a written. There was objection and there was discussion about this and the rulings too.

Fred Hebllich: The lawyer . . .

Jeremy Kamens: I wasn't there, Fred was there.

Fred Hebllich: I feel bad about this because I had asked, this was ten defendant RICO murder case with four capital defendants. I asked the district judge to appoint, to go to the Eastern District and bring over a lawyer. Because I didn't want to have to try the whole case myself which I knew would happen. I occasionally have to go, I go send over to the Eastern District where I have the judges eating out of my hand just like Jeremy does. We've done that, and so they agreed to do that and bring the . . .

Judge Prado: They agreed, you mean?

Fred Hebllich: The judge agreed to request that the defenders office from the Eastern District come over so that we had two defenders representing two capital defendants, so that as I said . . . the lawyer who he removed had made, she had been hired by their office. The case went to trial and there was a mistrial. Then when it came back during that time between the mistrial and when it was tried.

The other lawyer that was hired by their office and made an appearance was on record but had not done anything, hadn't appeared in court. They had

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

noted an appearance in the case and there had been no argument about that and no issue about it. In the middle of jury selection, when she got up to voir dire the jury this issue came up.

Judge Prado: Anyone else had any feelings were you think that judges might have interfered in how you run your office?

Christian Capece: Your Honor, on record, no. I am in a perhaps honeymoon period. I've been the defender for fifteen months. I would say that the judges are very supportive in the sense that they, I think are trying to take steps and make comments that elevate the practice in the district. And are in many ways very protective of the defendant in the case and ensure that the defendant, whether the defendant is represented by a Federal Public Defender, or CJA panel attorney, or a retained counsel are doing the best. In that sense, I and the folks who practice in the Southern District are very, very fortunate.

Brian Kornbrath: I think our judges are very supportive with our office, but it's a symbiotic relationship. We're responsive to the courts needs and it's vice versa. I mean if I could exaggerate to make a point, if tomorrow I become an anarchist with a briefcase and demand that my attorneys try every case, forget about acceptance, file frivolous motions, act unprofessionally with the other court units. I'm not getting reappointed in four years. The hand-writings on the wall. With that said, there's got to be a common sense cooperative effort for all parties involved otherwise it's not going to work.

Judge Prado: I guess along with Mr. Kramer's testimony about being concerned with changes, I'm wondering if in recommending changes because there's a problem. How big is the problem? Does the solution fit the problem? Are we going too far over with total independence, somewhere quasi-independence or where? Because my other question is where we're going, what are we going, what are we going to establish?

Is there any model in place that we can say, "Look it's worked here as an example of a situation that's worked and we should go to that model." Are we going to find ourselves recommending an unknown thing? We think this is better because it's got to be better than what we have but we're not sure what it's going to lead to.

I'm afraid we're going to get questions back while you're making the suggestion, how do you know it's going to work any better? We've heard possible problems with the system that's not been proven yet I guess in recommending something. I guess that's my concern is there needs to be a change but what is that change and is there some model that we can go to? We heard from the military, I don't know that that's going to work.

The D.C. defenders, their budget is so small. I think it just passes under the

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

radar. A Defender budget would be much larger. I think with helping panel attorneys, if we're going to give them what they really need, the budget is going to need to get much bigger. Would an independent board sell? And I guess that's my concern is, how bad is the problem and how big should the solution be? Does anybody have any ideas as to what would be a good model for us to look at that might be a solution to the problem?

Fred Hebllich: I think we just get rid of the current system and replace it with something really great.

Brian Kornbrath: Even the defenders can't agree among themselves about the perfect model.

Judge Cardone: Can you please speak to the microphone?

Brian Kornbrath: I'm sorry. We have disagreement among defenders about what the solution is. We're in Philadelphia. If you look at the Declaration of Independence, there were very discreet complaints that justified complete severance with England. I don't think it's reached that point. I think there are changes that can be made where you don't have to have that independent separate entity that's outside the judiciary. But, that's just one of many opinions.

A.J. Kramer: It was interesting to me Judge Prado, at the time of your committee there were these howls that the last thing in the world we want is a defender general. That would just be a horror story where we'd lose all kinds of autonomy in our offices and that's the last thing . . . the vote was overwhelmingly against any kind of thing like that amongst the defenders at the time.

We could never live with a defender general and now I hear defender general being proposed as a solution to the problem. I think that's why I'm so schizophrenic about the whole thing and I realize I may not be visionary enough but I think you have to combine vision with reality at some point. I think that's what you're asking about, I certainly don't feel like I have the answer to it.

Judge Prado: I think the situation is still there, that was there many years ago and we still need to do something. I'm not sure what it is and what will sell, and how far we should go in making a recommendation. In an ideal world, I think total independence is the way it go. In the real world . . . I guess we're looking for guidance. But you guys can't agree among yourselves as to what should be done.

The courts are slow to change and we have to make a presentation to the AO and the Judicial Conference and try to convince the judges that they haven't done a very good job of running the show. Maybe more independence is necessary, and how we go about in trying to convince my colleagues that a

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

change needs to be made is going to be a challenge for us. I'm looking for some sort of guidance to how we go about doing that.

Jeremy Kamens: The Public Defender Service model is probably the most closely analogous if the concern is the size of the program in the grand scheme of the federal budget. This is a one billion dollar program, relatively modest. If there were some guarantee that funding would be secured at that level or higher as a fraction of the budget of for example DOJ, then the concern about funding would be addressed. Because it would remain at that fraction as a matter of DOJ's budget in terms of calculating how much it would be.

A.J. Kramer: There's certainly a lot of talk in Washington recently about cutting DOJ's budget by a billion dollars or more so then what happens then we get reduced. Of course in theory, complete independence of course is, I don't see how anybody could frankly argue against it in theory. Reality intrudes at some point and there's . . . Congress isn't going to guarantee a level of funding.

What happens if DOJ's budget is cut then? It seems to me changes within the structure in the AO might be more readily accepted by the judiciary if it comes from this Committee then changes Congress might be required of Congress unless radical change by Congress. As I said, in my talks with people on the Hill and in the judiciary, I haven't detected any zeal in Congress for creating an agency.

It's now I think a billion and a half, and clearly with things that are being discussed it's going to go over two billion dollars I would assume. Any zeal to create such an agency. The Public Defender Service would be a good model if it wasn't just one office. We have however many offices, ninety offices, and are we going to agree that in this theoretical ideal world who's going to advocate for each individual office?

Actually, the Public Defender Service doesn't even include the budget for the CJA lawyers in the local courts in D.C. which are also . . . that comes under the courts budget in D.C. So, the courts advocate for the CJA lawyers budget in D.C. and the Public Defender Service advocates for its own budget. They have I think about a 130 lawyers right now, so their budget I believe . . .

Every time I see, they're literally right next door to us, so I see the director all the time. They go lurch from year to year and never sure of their funding and scared to death that they're going to be cut. They've been okay the past few years. They think it's very good that they get to advocate, but their budget went through a different system. It went through the mayor's office before they were allowed to advocate themselves.

They were afraid it was getting all tied up in politics at various times. They

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

welcome the independence of being able to advocate for their own budget. I would love the independence of being able to advocate for my own office's budget. Obviously, I'm sure all of us would but you have this large institution.

The D.C. Public Defender, yeah it's great for them but it's also fraught with danger for them. They change their hiring plans all the time based on what they think they will or will not get. It goes through a completely different committee in Congress.

Judge Prado: Is everyone in agreement though that some change from what we have now should take place? I mean we have a committee Defender Services of nothing but judges and there's no defender voice on that committee. It's part of the administrative office, so either having from as little as having representation on the committee to making it an independent board like the Sentencing Commission or the FJC.

Everybody is in agreement that some change needs to be made. Is there consensus at least to that?

Panelists: Yes.

Brian Kornbrath: Yes. As well as panel attorney representation too. The Federal Defender and panel attorney representation.

Fred Hebllich: A question that I have and this is basically with judges that are reviewing vouchers, but I think it goes much broader than this is what information did the judges rely on when they're evaluating the CJA lawyers as to the amount of work that they'd put in to a case, and whether it's necessary, and whether it's quality, I don't . . .

Brian Kornbrath: You don't know but once we put our robe on, our IQ goes up quite a bit.

Fred Hebllich: That was what I'd suspected.

Judge Cardone: Judge Gerrard?

Judge Gerrard: I do want to ask a couple of process questions before getting into structure. After hearing the experience in, what was it in Virginia or West Virginia?

Brian Kornbrath: Western District of Virginia.

Judge Gerrard: Western District of Virginia of having a lawyer removed at the time of jury selection on a capital case. These questions may sound rather mundane but I do want to ask them. As I understand Mr. Capece and Mr. Hebllich, and Mr. Kamens you do not manage your CJA panel is that correct?

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

Mr. Kamens: That's correct.

Christian Capece: That's correct.

Fred Hebllich: No, we . . .

Judge Gerrard: You do and?

Fred Hebllich: We do.

Judge Gerrard: Okay, that Mr. Kamens and Mr. Capece . . .

Fred Hebllich: It's selection.

Judge Gerrard: Do you manage to panel itself?

Fred Hebllich: We have a selection committee, a magistrate judge is a member of the committee. Ultimately, the decisions are reviewed by the chief judge. We are very influential in this selection.

Judge Gerrard: Okay. My question is . . .

Judge Cardone: You need to speak in the microphone everybody.

Judge Gerrard: My question is, is this in at least two if not three of your districts, there's been at least an under-utilization of experts and investigators and I'm wondering if that has anything to do with the fact that either you don't manage or the clerk assigns in your particular district?

Christian Capece: Yes, your Honor. We have a CJA supervising attorney. That was a position created about four years ago. The CJA supervising attorney is acutely aware of the need to increase the number of resources. Again, as I previously stated, we're working together to make that happen. She actually manages the CJA panel and she is the one who processes the vouchers but I am part of the selection committee.

Judge Gerrard: Mr. Hebllich, I think you said in your written testimony that there's a failure to utilize some of those resources but not a failure of availability. I'm wondering is that education locally, is that education nationally? What do you see as the problem?

Fred Hebllich: Certainly it's locally education, but as I see, as I learn what's going on in other districts, I didn't know that the Eastern District was having the same problem. I think it's probably a broader problem than I would have suspected, the under-utilization of resources.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

- Judge Gerrard: What do you assess that or what do you assign that to?
- Fred Hebllich: I think basically it's lawyers not being aware of the availability of the resources. I just don't have any other information as to the judges denying request.
- Judge Gerrard: That was going to be my follow up question, are there other issues? Are there denials of request? Is it cultural?
- Judge Gerrard: Mr. Kamens, will you explain?
- Jeremy Kamens: We just had an assessment from DSO where they conducted a survey of our CJA lawyers. The person from DSO said approximately 20% of the CJA lawyers said that they've had problems with vouchers. He said that was actually a pretty good number, meaning 80% didn't. I certainly had in preparing for today, I had CJA lawyers say that they've never had a penny cut from their vouchers but it's judge-by-judge, it's case-by-case.
- The CJA panel representative, James Broccoletti, who testified earlier today. He said with one judge, he had a case where he had to travel, involving our office as well with a codefender, had to travel to Afghanistan, and the judge approved every voucher. He had a case where it was a simple drug case and he had to meet with the client five times and the same judge cut it.
- I think that there probably is some concern among CJA lawyers that because of their fear of not having resources approved, they simply would rather handle the case either without submitting a voucher for work that's done, or simply by doing a case themselves. There is somewhat of an apples and oranges comparison between our office and CJA lawyers. Our attorneys handle 80 to 100 cases per year and the CJA lawyers on the panel depending on how many cases they get, it could be four, five, a relatively modest number.
- At any one time if they're only handling one federal case, the resources that we have, the reason that we immediately put an investigator on a case is because we're trying to lower the work load for that assistant who has a number of other federal cases. It may be that a lot of CJA lawyers don't have that case load, but it is something where I think if the vouchers were reviewed by someone other than the judge handling the case, either in our office, or a person in the clerk's office, where there was confidence, I think as in the District of Columbia, that reasonable requests, appropriate requests are going to be accepted, I think that would certainly increase the number of lawyers who use investigators, and experts, and the paralegals.
- Judge Gerrard: Along the lines of resources, Mr. Kornbrath I think you had mentioned in your written testimony that there was some issues with computer assisted

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

legal research. What issues did you have in West Virginia?

Brian Kornbrath: I just want the Committee to understand that a Federal Public Defender attorney has unlimited access to legal research. It's an invaluable tool.

Judge Gerrard: And CJA?

Brian Kornbrath: They're either going to avoid the use of it altogether or they're going to put the research time on their CJA-20 voucher. I just think it would make perfect sense to use the national contract, let the panel attorney access the same legal research because they're doing the same work. It's going to increase the quality to work product.

Judge Gerrard: I'm asking out of curiosity now, is there a reason that the national contract is not utilized?

Brian Kornbrath: I've been asking for years at the conferences we go to, "Why can't we just get a rider so panel attorneys can use the same system?"

Judge Gerrard: The answer?

Brian Kornbrath: There's been no answer that I know of.

A.J. Kramer: I think it's the provider of the Westlaw System and Lexus. They're okay with offering it to defenders as part of the judiciary contract but I don't think they want to open it up to 10,000 lawyers. They do get a reduced rate but I don't think they want to open it up for free to 10,000 lawyers whether that's right or wrong, you know it's a commercial business.

Judge Gerrard: Okay, very well. I think that's all I have for now.

Judge Cardone: All right. Dr. Rucker?

Dr. Rucker: Thank you, Judge Cardone and thank all of you for being here. I have just a few questions, some of them are just fairly simple but I'd like to start with: would any of you like to make an argument for why the court of appeals judges should be involved with approving excess vouchers?

Jeremy Kamens: I mean the argument I think is that, that there has to be cost containment. There has to be some measure in the system that prevents . . . we don't have an unlimited pool of money. So the question is, how do we devise the best system for cost containment? The system that we have is approval from again, I think the removal of the approval at the district court level I don't think makes a tremendous amount of sense. Because, at the circuit level there's less understanding of what's going on in the court room on the ground. But, I think the argument for it is this is a measure of uniformly

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

trying to contain costs in the circuit. I'm not advocating for that, I'm just saying I think that's it . . .

Dr. Rucker: That's what we want to know, would any of you really support that? I mean that's the position we're in right now. As we've held these hearings around the country, we've heard a number of complaints about the court of appeals having to do this. Judges really don't have any knowledge of the case and yet sometimes they're cutting vouchers, sometimes significantly.

I just want to know if any of you thought there's any value added to having the court of appeals judges review those vouchers?

Christian Capece: I think there has to be some oversight. I know that there have been problems around the country at the state level where you have an attorney who's billing twenty-six hours in one day and crazy stories like that. Perhaps an audit team from DSO, maybe the price of membership on the panel is that from time to time, you may be audited to make sure that you're billing properly. Again, I think it doesn't make sense to have the cutting take place two levels or a level above the trial court.

Dr. Rucker: Okay. Another I hope fairly simple question, that we've asked even earlier today of some of the defenders who were before us and that we've asked before: How often do you have service providers on your cases? Some of you talked about that this within last minute, and the response we got before was most of the defenders have an investigator and a paralegal basically assigned on every case.

Why should we not be doing that for the CJA attorneys? I know one of the responses was that their case load may not be quite as high, but are there any other reasons why we shouldn't be doing that and expecting them to request those?

Brian Kornbrath: The only reason we have had experts denied in our district is because the district court judge just didn't feel he or she had enough information to make a decision. All they want is what your theory of defense, what's the relevance, how can this expert help you out when that information is provided, it's readily agreed upon, there's really no push back.

They just want that information. If I say, "I need a forensic psychiatrist for \$15,000" and that's all I say, it's hard to evaluate whether that's going to be worthwhile or not. The more information the judges have, the easier it is to get those approvals. The same with the investigators, how many witnesses do you have to talk to, why and where you see the case going?

We're getting no push back from the judges as long as they have the

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

information to justify. That's at the circuit level too.

Dr. Rucker: In your district Mr. Kornbrath, the usage rate this about 11%, so it's one in nine cases? Do you think that's what they should be doing?

Brian Kornbrath: Like I said in my written remarks, every district is different. When I was an assistant defender down in the Southern District of West Virginia, plea agreements were extremely open ended. You had no idea what relevant conduct was, what the Sentencing Guideline calculations were going to be.

You went in there with question marks. You had to go out investigate historical relevant conduct witnesses, guideline increases. In my district, the prosecutors have very specific plea agreements where you know exactly what the drug weight is. In many cases it's what was seized, measured, tested. There's no ghost stories as our clients call them.

In those types of cases where you have three controlled buys on tape, and that's the only drugs were using against you, perhaps you don't need an investigator. Our office takes most of the cases that require a forensic psychiatrist and psychologist, the child porn cases. There's usually not a conflict where you have to farm the case out so it's handled in-house. I don't see our panel attorneys getting many of the same types of cases we get.

I think that might be one explanation for why it's not as prevalent. Training matters too. They've got to know the money is there, they've got to know the process to ask for it and they have to understand that they'll be met by a receptive audience.

Dr. Rucker: Do you think this is possibly part of the training issue that Mr. Hebllich was talking about?

Brian Kornbrath: Definitely, that's part of the mix.

Dr. Rucker: Let me follow up with this and Mr. Kamens in your written testimony you mentioned self-cutting and that, that was at least somewhat prevalent within your district. We've heard about this before. I'd like to ask you to comment on that and then I'd like the rest of you to comment how prevalent that is you think in your districts?

Jeremy Kamens: In talking to CJA lawyers, they've told me that they do that. I also heard an interesting story from a CJA lawyer who said, and I'm not sure I put this in the written statement, that they had a case, they submitted a voucher, and then they had reservations. They thought they had . . . it wasn't that they had asked for amounts that weren't due, but they thought that the judge might think it was too expensive.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

They revised the voucher and brought it down. The judge actually gave the higher amount from the unrevised voucher. The judge thought that was a reasonable amount. It was the amount that the lawyer had requested. That same lawyer told me in another case that it was an expensive case. It was a case that there were hearings, there were experts that came to the hearing.

Because of how much money was being asked in the case that the lawyer was aggressively trying to appear reasonable. It was over the cap and gave an expert fee which was something \$2800 for a mental health expert from UVA to travel to Richmond. He didn't have the money to pay for the mileage to come to the court. I think it is something that happens on a basis where if a lawyer believes that the lawyer is going to cut.

If the lawyer believes the judge is going to look and askance at the amount of money that's being requested then they're going to moderate the amount of money that they are requesting. If they feel like they have a judge who's going to be receptive to reasonable amounts then they won't self-cut.

Dr. Rucker: Let me just follow up on that before I ask the rest of you to respond to that. That person was doing that in response to the cap? Although you said they were over the cap, did they cut it down under the cap or . . .

Jeremy Kamens: Two different cases. There are certainly cases where, and I think the CJA panel rep Mr. Broccoletti may have mentioned this, if he didn't he told it to me: if a lawyer has a case, that is near the cap or just over the cap then they will often reduce the amount of the request under the cap so that they don't have to deal with the added bureaucratic hurdle of being over the cap.

I think that again, as lawyers tell me who are on the CJA panel, this isn't often a tremendous money making proposition. They're doing this part of their work because they want to do it. I mean you heard from the CJA lawyers here today, they don't make a tremendous amount of money. They have to have part of their practice be in private practice, but they do this because they want to do this type of work.

It's not about scratching and getting every penny that they may have expended in a particular case. The amounts, the caps are absurdly low, we all know that. I think that we should try to devise a system that adequately provides money for CJA lawyers who are doing this work in a reasonable way.

That's obviously not what the market would pay, but doesn't penalize lawyers for engaging in this type of work, and doesn't create incentives for them to cut the amount of money that they're requesting to extraordinarily low levels. I think it affects the quality of the panel.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

- Dr. Rucker: All right, thank you. Would the rest of you like to comment? Are you seeing self-cutting?
- Fred Hebllich: We see a little bit of it. Our district . . . some of the CJA lawyers have told me that they've done it, that they've cut back to the cap so they don't have to wait to get paid and go through the excess compensation in system. Jeremy mentioned about the case budgeting lawyer in the Fourth Circuit, this is something new.
- In my information that I've gotten from the CJA lawyers is that ever since the case budgeting lawyer has come on board on the Fourth Circuit that, that has really improved things for the CJA lawyers. The guy is, Larry Dash, he was in Jeremy's office. He came out of the defender's office and so he has a lot of experience.
- I think he's really been able to, not that it was needed, perhaps maybe educated some people as to what lawyers might actually need to do in some circumstances, and has been helpful to the lawyers getting their cases budgeted and getting more expert requests approved, and in dealing with excess compensation requests.
- In looking at it, there's things that might help. I think that, that is certainly one of them. Having somebody there whose function is to deal with those issues and has the background and experience to make it work.
- Brian Kornbrath: No self-cutting in our district, but again in our district the judges require them to come for pre-authorization, "Let me know when you're at \$15,000. Let me know when you're at \$20,000." Again it avoids sticker shock.
- Christian Capece: I only personally know of one instance but that's not to say that it doesn't happen more often. It just hasn't come to my attention.
- A.J. Kramer: I don't think there's any, other than what Mr. Brodnax said, that limit is now \$10,000. If the voucher is \$10,100 or \$10,200 the lawyer might say, "Just give me the \$10,000. If it's \$10,800, or \$11,000 they're not doing that." I've never seen anyone reduce it more than \$100 or \$200, and there's certainly no, that I know of, no other kind of self-reduction in the vouchers.
- Fred Hebllich: In complex cases, some of the judges will require interim vouchers to be submitted every thirty days or sixty days to keep a handle on it and that seems to help.
- Dr. Rucker: Just one last quick question, a comment was made that the \$10,000 cap is too low. Any suggestions on what that cap should be raised too?
- A.J. Kramer: I would say at least \$15,000 if not \$20,000. That cap is old and it hasn't gone

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

up, at least not proportionally to the rates. I think it went up a \$100 the most recent time. I would say \$15,000 and possibly \$20,000.

Dr. Rucker: Anybody else?

Brian Kornbrath: I think it would be easier as . . . again eVoucher is going to be online, you're going to see what cases are getting billed at. You might be able to use that data to come up with another figure. I don't know what that figure is but it certainly should go up.

Dr. Rucker: All right. Thank you, Judge Cardone.

Judge Cardone: Thank you. I have a question based on I guess sort of a theme that I kept hearing which is training, training, training for the CJA attorneys and particularly in the use of investigators. I'm a little perplexed because you guys are all defenders and it's my understanding locally you're responsible for training and the idea of the local CJA panel of attorneys get training by you and learn how to use investigators. If they're not getting trained, isn't your fault?

Fred Hebllich: In my district, it's not a responsibility.

Judge Cardone: You don't get any funding from DSO to do training locally?

Fred Hebllich: We pay for that. Do we pay for the . . .

Jeremy Kamens: We do. I mean it is . . . I think it is part of our responsibility.

Judge Gerrard: That's why I said management of panel. Who's managing the panels? I guess that was my question.

Jeremy Kamens: Right. I mean we don't manage the panel in terms of assignment of cases or reviewing vouchers or anything like that. It is a responsibility I think of the defender to assist in providing training. The question is, is there going to be some level of training that should be required before someone is on a panel?

I think it varies by district, it varies by CJA plan. The selection of who's on the CJA panel for example in my district it's completely opaque in a couple of the divisions. You're absolutely right, part of our responsibility is to provide training for the panel. In our district, we try to make sure that we provide at least twelve hours of training for the CJA panel a year.

Part of it is an eight hour course that we do over two days with the Western District, once a year. We also do a four hour course in the fall. A lot of the training that we do is substantive. It's not specifically with respect to the

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

meta issue of “here’s how you should apply for this amount of money for this work that you’ve done.” We have had Larry Dash who was newly appointed from the Fourth Circuit come to talk, I think, last year. I mean he’s only been on the job for a year and a half or so.

Judge Gerrard: Isn’t the use of experts, and investigators, staff, and [INAUDIBLE], doesn’t that go to the substantive issues?

Jeremy Kamens: Absolutely and we have substantive training on that. I think it’s one of those things where individual lawyers absolutely need training. I’m not sure there’s any debate about that, we should all be responsible for helping to assist and train the panel. Is that an issue for the commission? I don’t know. I mean it’s something that we should be responsible for and do, and should focus on.

Christian Capece: It’s part of our mission statement. Brian and I put on a comprehensive training every year; we take turns hosting. I think, we discussed this earlier your Honor, it’s I think a cultural issue. When the folks from the military spoke, they talked about how difficult it is to get experts and how you have to lay your case out. I can tell you, having been in a similar situation and served on active duty.

Were constantly asking for, or we were constantly asking for experts. We were aware of the value of experts. If we didn’t ask for an expert, our boss the Chief Defense Counsel would say, “Why are you not asking for an expert?” Certainly, in the Defender’s Office, I think that that’s also a question when we have our Friday meetings where we discuss our cases, it’s time to get an expert on a case and it will be brought to my attention as the defender to approve it.

Why the panel of attorneys are not using experts remains I think to a certain degree a mystery. I do think there is a cultural issue there as well as an issue with regard to the cutting of the vouchers or the approval process that perhaps they’re hesitant to ask for an expert that costs \$10,000 or \$15,000 when the bill that they’re going to submit may be much less than that.

Judge Cardone: I’m going to express a bit of frustration here because we have heard about the lack of use of experts. We’ve had both the FPDs and the CJA reps who . . . I mean if you guys aren’t advocating then who is supposed to do it? I’m a judge, am I supposed to advocate for you guys to use experts?

I mean I understand, and if you can tell me that you guys are applying for experts and I as a judge were saying, “No.” That’s a different issue. If you guys aren’t asking because you’re afraid, or if you’re not asking because you’re not trained, why should we even care about that? You guys got to ask, or you got to give us some reason why it’s not being done.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

It's like we're going in a circle here and I really am trying to understand. I want you to understand this Committee is charged with trying to come up with a better system. You guys can't just say "It's a problem, it's a problem, it's a problem," and nobody takes any responsibility. Any thoughts?

Jeremy Kamens: One of the advantages that we all have is that if we need to have an expert in a case, we don't have to ask you.

Judge Cardone: Right.

Jeremy Kamens: We have a budget for it and we can decide whether it's an expert that might be helpful in the case. I think the question that you ask is a good one. Why aren't CJA lawyers asking for more assistance in the cases that they have? I think there's a variety of reasons for that, but one of the structural questions is: should that question go to you in a case?

Should there be, even if it should go to you because you are the judge that's handling that case and have a great deal of knowledge about that particular case, and can have a good independent view of what experts are going to be required, should there be potentially some additional information from an objective source from a defender, or from CJA lawyers that could help the court decide whether to approve that request?

I don't know. Should that request at all go to the judiciary? That's the structural question, I guess. The other questions about maybe, "Hey, maybe these lawyers should be better lawyers?" I'm not sure that you guys can answer that question. I mean that is something that is a different ball of wax.

Judge Gerrard: There's a legitimate structural question there but when the utilization of experts are somewhere in the neighborhood of 8 or 10% or whatever and we're asking "Have you been denied?" The answer is 'no,' I'm not sure that it is a . . . I mean ultimately it will be a structural question that we'll have to answer. But it's a little bit bothersome when the question is being asked, "have you asked and been refused or anything," and the answer is 'no'. Where do we go?

A.J. Kramer: I'll take responsibility. I think it's the defender's responsibility to get that information out to their panel lawyers and frankly nobody else's almost. Other people may help or aide in that, but if the defender is not telling their panel lawyers these resources are available and you should be asking for them and especially with the e-discovery cases and the resources out there.

I'm not satisfied. I'm glad that our district has one of the higher, if not the highest use of expert service providers. I still think it's way too low. I'll emphasize that when I get back. I think it's absolutely the defender's responsibility to get that information out to the panel. I don't know how

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

anybody could disagree with that. I'm sorry to say that.

Whether you administer the panel or not, we have the e-mail list. We send more than one e-mail a day to the panel about various legal, substantive procedural issues that they should be aware of. You can't do anything if they're going to not do anything with that information. If you're not getting the information out to them, that's absolutely the defender's fault.

Katherian Roe: Judge Cardone, can I jump in here for a minute?

Judge Cardone: Okay, go ahead real quick. Sorry, because I had a follow up question but go ahead.

Katherian Roe: I think the question in some ways that we're trying to ask is based on the fact that in some districts what we've heard is that folks on the panel are not asking for experts for a number of different reasons. One maybe because they've asked a number of times for an expert and been denied. Another maybe because they have to outline the theory of the defense or tell the judge something that they don't want the judge to know in order to obtain an expert.

Another maybe because it increased the cost of the case, and when the judge makes a decision about how much that lawyer should get paid. They factor in the amount that the case has cost for an expert whether it be a psychologist, an investigator, or even something more expensive like a forensic accountant. I think what we're really trying to get down to I mean obviously, there may be an issue of training, and then they also will be financial.

We don't really have to discuss that, but let's remember that when we go to training as federal defenders or as assistant federal defenders we get paid, we have a salary. Somebody pays us every day that we're there, they fly us there, they pay for our per diem, they pay for our hotels. We are not losing money which is the private attorneys are when they go to training, so let's leave that aside.

What we're trying to figure out is that if you're aware of any issues in your district in which folks may not be asking for these experts, especially the districts where the number of people are requesting are very low because of any of these issues.

Jeremy Kamens: I think I provided an example in my written testimony of a request for an expert that was very much below the market and the approval was further much below that. I think that there is a category of lawyers who are affected by the approval process for experts that results in them not asking for the assistance that they should have in a particular case.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

Now, there are certainly other issues but there is a subset of lawyers here who either because of their view that the request will be denied, or there view that they can't find an expert for the amount that the judge will approve, don't ask for the assistant that they need.

Judge Cardone: I guess I have a follow up to that because then I heard Mr. Kramer talk about his district and his judges. I have to say, I come from a very heavy criminal docket. I have never seen a request . . . well, I'm not sure, but \$20,000 for an expert in my district, there would be some shock and awe.

It seems to me that it's sort of this inbred, cultural, "I'm not going to ask because I know it's going to be too much," "I'm not going to ask because it's affecting my voucher." Or, "I live in a great place where the judges get this concept and they're not going to quash my request." Can any of you speak to that?

Because I really have a concern that it's much deeper than just the lack of education. I have a concern that people sort of self-regulate because they know their judges, and maybe I'm wrong here but I want to hear it from you. Because if I lived where you live, I'd be asking for experts everyday if I could get \$20,000 to help me on a case.

If I lived where some of the other ones and we've been around the country, I would never ask because that judge is going to think I'm a troublemaker. Any sense of that?

A.J. Kramer: Can I just go back, it's answering this. Earlier, there was about training for judges. There used to be a baby judges school half a day devoted to CJA issues. I know that simply because I used to do it and please believe me it's not anything about the quality. I'm free, when the trainings were in D.C., I'm available and I'm free.

They stopped doing that and I asked them why and the answer was that they shortened the baby judges school because of budget issues. One of the things they cut out was the half day for CJA, and that cut all half day. The judges are not getting the training they need. There used to be a series of criminal justice management seminars. They were two and a half days, two, or two and a half days.

I used to go to those and they were all over the country. There were about twenty judges and I was there for the whole two and a half days giving them the viewpoint from the CJA and why an expert would be needed. Those seminars went by the wayside about eight or ten years ago when the budget cuts were made. I do think that the judiciary itself bear some responsibility for educating judges about the need for these.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

That was happening for a while and that felt t the wayside for various reasons and never came back. I think you're absolutely right, there's the difference in culture is astonishing to me all over the country and disturbing all over the country how those requests are treated differently and the way the panels are treated differently in some districts. I think the judiciary bears some responsibility and that the CJA guidelines ought to be a lot stronger in telling judges that they . . .

As I discussed earlier, a presumption . . . a lawyer who is worthy to be on the CJA panel is worthy to be trusted and worthy to be trusted in how they're defending their case. The presumption ought to be that it's approved and if not stronger. I mean, yeah you can't just blanket approve everything. But it's partly the judiciary's fault too. I think it's partly the CJA lawyers fault, it's partly the defenders fault, but I think it's also partly the judiciary's fault.

Judge Cardone: Any other thoughts?

Fred Hebllich: Something that might help, I haven't looked at the rates recently. It used to be that there was a \$300 default thing on experts that you could incur without prior approval. The cap was I think \$7000 or maybe it was lower than that, that the district court could approve. Everything else for experts had to go to the circuit court. Is that number right, \$300?

Brian Kornbrath: It's \$800 now.

Fred Hebllich: If it were, maybe more substantial than that. You really can't get much for your money. I think if they got used it, I think it is cultural more, at least in my area. Because they're used to state practice, where . . . Virginia pays, I think they're 49th in compensation for court appointed lawyers. I mean they're down there. A lot of these lawyers are doing for, a \$120 for a misdemeanor, \$500 for a manslaughter trial or whatever, they don't do much.

They just absolutely don't. They read whatever discovery the commonwealth provides and then they read the pre-sentence report. It's really like that. That is I think what they're used to and . . .

Judge Cardone: Can I ask you to lean forward?

Fred Hebllich: When they come into the federal cases, unless really you rub their nose in it and say, "No, no, no, this is all available," it's hard to get them to change what they do. They simply don't realize that even if their client's going to get convicted, and of course 99% of them are, that it's still very worthwhile to have somebody doing investigative work for mitigation work.

They're used to just relying on the probation officers pre-sentence report. You can't just rely on the government's discovery, and just rely on the pre-

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders

sentence report. You have to do your own investigation. I think they're just not used to it. Maybe if those numbers were raised a little bit, maybe that would help encourage them to in every case, or almost every case, go out and get it.

They're not used to working. Most of them I think have never had an investigator work on a case. I would guess 90% of them have never had an investigator work on a case. They don't know one, we can find them for them, but they don't know people, and they don't know how to use them. I mean that sort of criminal defense 101.

Brian Kornbrath: Keep the information flowing from the national level to the districts. I mean once a year both the district representative and the defender should get those numbers and see where they are. See whether they're rising and falling overtime. I think back five or ten years ago as the defender, I didn't have access to that data the way I do now.

It seems to be more recent where you're getting percentages of investigators and experts. That's very beneficial. Christian and I, last year we had a whole block dedicated to CJA billing issues. I mean we would read a CJA-26 memo we were trying to justify going over the voucher amount. Read one that's terse and not very informative and one which just jumps off the page. It's compelling and it's necessary.

You're trying to educate your panel. And you're going to get paid if you take that track if you will. It's an educational issue. We need the information to prod the panel attorneys to increase the numbers.

Christian Capece: Your Honor, I had no idea that this was an issue until fortunately I think this Committee brought the issue to the surface. I know that the CJA panel representative from my district came back from San Francisco and one of the first things he told me was our district has a very low rate of using experts and that prompted the discussion with CJA supervising attorney.

At this point, my opinion as to why they're not using experts is based on my observations as opposed to having spoken to the panel and that is something I certainly would like to explore and will.

Judge Cardone: Thank you. Anybody have any questions? Professor?

Prof. Kerr: I think we've actually covered what I was going to question about.

Judge Cardone: All right. On behalf of the entire Committee, thank you very much for your time. Again, every time we do this we learn a little bit more. When you guys go back, if you get anymore information regarding these issues please feel free to submit it because we really do appreciate the information. Thank you.

Transcript (Philadelphia, PA): Panel 6 – Views from Federal Defenders