

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 9—Views from CJA District Representatives

Judge Cardone: Welcome to our hearing this afternoon. I want to thank all of the witnesses for being here. We're getting started a little bit late, but it takes us a whole lot with the size of this Committee to get us all—herding cats is the way I like to put it—get us all in the same place at the same time. On behalf of the Committee, thank you for being here. I'm going to remind people to silence their cellphones. If you have a cellphone, please just keep it away from the mics because it tends to interfere with our . . . it makes crinkling noises.

Before we get started, let me just say what I'd ask each of you to do. We've received your written submissions. If you would go ahead and just make a brief opening statement, and that way we'll be able to ask the questions, but everybody, all the Committee members have had the opportunity to review your submissions. We would like the opportunity to be able to ask questions. If you make a brief opening statement, and then we'll get into the questioning.

This panel is the view from CJA district panel reps, and we have with us Jessica Hedges who's a CJA Board Chair in the District of Massachusetts; Patrick Livingston, CJA District Panel Rep from the Western District of Pennsylvania; Anthony Ricco, CJA District Panel Rep from the Eastern District of New York; and Bobbi Sternheim, CJA District Panel Rep from the Southern District of New York. We'll start with you, Ms. Hedges with your opening.

Jessica Hedges: Thank you, Judge. My name is Jessica Hedges. I am a CJA Panel Attorney. I am also the Chair of the CJA Board in Massachusetts. By that I mean, we have a Board of Attorneys who advise the district court on things like Panel Selections. We help to navigate challenges with panel members, challenges that panel members may have with the court. We help with training. I have been the Chair of that board since last summer.

When I think about the questions that this Committee is asking, I frame the question like this. How do we envision and maintain a system wherein CJA panel attorneys have the skill, the high level of skill and the resources that they need to meaningfully respond to the skill and the resources being deployed by the prosecution. When my clients come to me, they come to me after having, most of them, after having been ill-served by many institutions in their lives.

The question for me both as a panel attorney and as CJA Board Chair is after that series of institutional failings, do I participate in a system which

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once again fails them in this vulnerable moment in their lives or am I a part of a system which helps them to create a new narrative around structures of power. I think we do many things right in Massachusetts, and I think that there's room for improvement, and I'm happy to answer questions about that.

Judge Cardone: Thank you. Mr. Livingston.

Patrick Livingston: Thank you, Judge Cardone. I have been thinking over the last few weeks about the issues that I didn't talk about in my written statement. It occurred to me that the study that you all are undertaking occurs in the context of subtle, but very significant changes in the criminal justice process generally. In the '60s, the last time there was a revolution in criminal justice, there were sweeping appellate decisions and some legislation including the criminal justice act.

The revolution that we're living through now is not as well publicized, but I would suggest is every bit as historical where I live and I think where everybody lives in the state courts, and to some degree in the federal courts. There are specialized courts now collaborative efforts targeting specific demographics. A little piece of the adversary system dies when that happens. I'm not entirely critical about the process, but a little piece of the adversary system dies when that happens.

There are other examples where little pieces of adversary systems die as a result of decisions. The other one that comes readily to mind, and I think there are a host of them are forced appellate waivers where a little piece of the appellate process, the adversary appellate process dies. I think in a real sense and I will be brief about it, one of the questions that you're faced with is or one of what's going on in your study is whether we're talking about is one of the last battlegrounds in the adversary system of justice.

I hope the answer is no. It's pretty much the only thing that our clients have to go on in many cases. I'm happy to answer all the questions. There are a whole host of other issues to discuss, but I just thought that it was meaningful to put that historical perspective on it as we go forward.

Judge Cardone: Thank you. Mr. Ricco.

Anthony Ricco: Yes. Good afternoon, Judge Cardone. I also thought a long time about what I wanted to say to the Committee. I've reduced it down to I have a certain insight and perspective about the work that we do. That comes from a lawyer who came out of a state court system, a state court system that did not encourage any high level of representation of defendants. Motions were boilerplate, judges didn't expect memorandum. I made a transition from that type of state court system into the federal system and it's night and

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day.

The person sitting to my left was someone that I initially met when I started doing federal work, and she was a terrific role model and mentor for what it meant to be a lawyer practicing in federal court with the enormous sentences faced by federal defendants. I've participated now in the CJA program for about twenty-six years on a lot of different levels. I've also participated in the Defender Services Advisory Group, and as a result of that, I've had an opportunity to meet many people, several here this afternoon, and to share with them the experiences of being a CJA lawyer in the demands.

What I've come to find is that it's different. The experiences of the lawyers in the Eastern Southern District of New York are sometimes very different than experiences elsewhere. The idea that there's one size that fits all just does not exist. I think that what I bring is a sense of a commitment to the program, and having been part of a system that's terrible, that interferes with the defense process to the extent that no expectations are there for the lawyers, and to see how really terrific lawyers are destroyed because of it and not inspired. Yet this program is a fabulous program, and a great deal of attention goes into it, and a great deal of work goes into it. If I can say anything to help continue that level of commitment, that's why I'm here. Thank you.

Judge Cardone: Thank you. Ms. Sternheim.

Bobbi Sternheim: Good afternoon. I'm Bobbi Sternheim. I am the representative from the Southern District of New York. I serve on its panel review committee.

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

Bobbi Sternheim: Sure. I serve many different roles within the defense community in the Southern District of New York. I too have an interesting historical perspective having joined or been invited on the panel when there were no guidelines, serving on the panel when the guidelines were mandatory, and of course now, their advisory. The issues that you have before you are whether a big change should be on the horizon, and I think that the guidelines themselves show that big changes can be made, and then sometimes need to be adjusted, but it doesn't mean that change should not occur.

Being a panel attorney has been a privilege, but when I started, it was certainly nowhere near the full-time obligation that it has become. When I started, there were no capital prosecutions. There was no mandatory minimums. There were less sentences of life without possibility of release. These have become daily occurrences in my realm of practice. These cases

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demand many, many kinds of services.

When a judge denies those services, it really makes the light bulb go off to say that the playing field is just not fair, and the person who we look to, to make it a little fairer may not be doing their job. Now by enlarge, the system works well in the Southern District of New York. We don't have a lot of the issues that are nationwide. Cutting of vouchers is not the norm, and service is of a level where to be on our panel, you almost have to be terrorist-case ready.

We don't have panels that are striated. You have to be ready to take the most serious case when your day comes. With those serious cases in the Southern District of New York are the need for services that aren't always provided. I know that Judge Prado earlier today invited the horror stories, and I just wanted to say that it reminded me of jury selection in New York when a judge will say, "Has anyone here been a victim of a crime?" and no hands go up.

Then the judge will say, "Has anyone had their car stolen?" The hands go up. Car broken into, the hands go up. What may seem like a horror really gets tamped down when it happens over and over and over again, and so many of us have had to accommodate what we know we won't get. That isn't a reason to assume that what we need should not be made available to us. I invite all the questions that you will post later on.

Judge Cardone: All right. Thank you very much. Let's start with you, Mr. Frensley.

Chip Frensley: Thank you. First of all, thank you all so much for being here. I understand what a commitment it is to take away from your practice and also to do the preparation for this, and appreciate so much the work that you do. Tony, I wanted to start with you. I know in your capacity as learned counsel, you have a unique experience of traveling into different jurisdictions to participate in capital trials which are in fact often some of the most expensive and complex litigation that occurs under the criminal justice act, and an area where the use of experts and other service providers is absolutely critical to the defense function.

I was hoping you could talk a little bit to the Committee about some of the differences that you encounter in various jurisdictions and how those differences are influenced number one, by the role of judges in the performance of voucher review, approving budgets, and approving service providers. Number two, talk about the implications of that on the representation that the clients receive.

Anthony Ricco: Thank you. I have over the course of my career had the opportunity to appear before district court judges in various districts in the country on

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capital cases in this very building and other places. I think one of the things that immediately strikes you is that local counsel always tells you what can't do in connection with the cases, and that the judges are not going to approve this, and they're not going to approve that. That's an experience that we often have. Only to find out from making those applications and talking to the judges, the judges are generally very open to providing those services. It goes back to something Bobbi had said, and that is that you develop a culture where people don't request.

The capital cases require, it's reversible however not to give it, so the judges are more sensitive to it, but what comes out of it is an educational opportunity. The judges get to learn from lawyers about what it takes to develop and present a capital defense and all of the services that go along with it. I have found that throughout the country, judges are open to it. Particularly, if you have opportunity to meet with them in chambers, not in the courtroom, judges seem more interested in a frank discussion with you about what is needed. Though there's always this sense present that services will not be permitted.

Chip Frensley: How much of that do you attribute to the saying that death is different? I mean, do you get the sense that if it wasn't a death case and you were going in saying, "I need this expert and that expert," that you would have the same reception that you receive and that you talk about the judges?

Anthony Ricco: I don't know. I mean, I would like to say one way or another. That I don't know. I do find that you get a sense of when interest is genuine. I have often found that judiciary's interest and how it is we go about presenting what we need is genuine. I would like to think that that same mindset would be present in non-capital cases.

In the Eastern and Southern District, there are some judges who are difficult with providing services, and cases where defendants are facing life sentences. It takes a certain effort to get those judges on board to help develop a defense. With your question, from serving this capital counsel from outside the district and coming into a foreign district, it is always very challenging. I found that the judges are generally very welcoming. They're really generally interested, but there's always an education process because many of the judges that not have capital experience, in their backgrounds, many were not defense lawyers, and many of them have heard horror stories about the expensive capital cases, and from a dialog, we're able to bridge those gaps.

Chip Frensley: I'll take part of your answer and open it up to the panel a little bit, and that is when you were talking about the experience how some judges require more persuading or more difficult with respect to request for expert and other services. I guess I'll first ask and maybe Bobbi, if you want to start,

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do you think it's fair that, well, I'll ask it from the perspective of the client. Do you think it's fair to the client that if they happen to have an appointed counsel who's a panel attorney that the panel attorney and their ability to obtain an expert service depends upon their persuasiveness compared if they're represented by a public defender who has the resources and doesn't require that extra step of convincing the judge, if you will?

Bobbi Sternheim: I suppose the answer is whenever your lawyer has access to the most amount of services, then you are perhaps a little more fortunate. That being said, there still is the opportunity to try and get those services. As Tony spoke, you have to be very creative at times. You have to really lay it out. Laying it out and being creative is time-consuming, time-consuming for which we may not get compensated, and that goes back to a whole other issue of whether we bill for what we do or are we mindful to ask for things that we're not necessarily going to bill for.

I think it is always very simply going back to a client with federal defenders. In the jails in New York, there's a "bat phone," a phone that they can pick up and they can speak to their lawyer. If you're a CJA client, you do not have access to that. It starts at that very beginning. I must say in my experience, I have never had a client ever say, "I wish I was represented by the federal defender," because going back to what Tony said, at least in state court, the federal defender is legal aid which is not a real lawyer or works for the government.

We both share the problem of the perception that we are on the government side. That is something that we have to explain, but at least from the point of view of being a CJA attorney, I can start off my conversation and say that I am a private independent practitioner with no connection to the court other than to provide service to you.

Chip Frensley: Right, which at best, is part of the value of the high-bred system that we have. Patrick, just to follow up with that, I mean, do you share Bobbi's thoughts with respect to the additional hurdles and things that the panel attorneys have to go through to get those services? Do you think that those hurdles have a chilling effect on lawyers' ability, desire or efforts to obtain those services?

Patrick Livingston: I think it depends upon what kind of consultant you're talking about. It is problematic to have to present a prima facie case to a judge in order to get something as simple as an investigator, particularly when the investigator is investigating defenses, trial defenses as supposed to mitigation at sentencing. I've noticed recently that asking for other types of experts used to be as easy as just filling in that 144 character box on CJA-21 but now I think just about every judge wants at least a couple of paragraphs in a letter.

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Chip Frensley: Do you get any sense for why that is? Why the heightened scrutiny now as supposed to the way it was before?

Patrick Livingston: I have a feeling that it has a lot to do with what you talked about with those three retired fellows this morning. In my district, I've said repeatedly, I wanted to stress the point that these issues are not prevalent, but they are a trend, an undue concern with finances, but I think that it has even the judges who I would characterize as reasonable on guard. Everybody is... these days jumping through hoops.

Chip Frensley: That's a great segue to the question I wanted to ask you, Jessica, which is that obviously, there is some perception, I don't know why or from where that the District of Massachusetts is the boutique law firm of the United States, and that everybody has these small case-loads and all the stuff that happens in Massachusetts. I'm wondering, and I think that's a fairly well-known or well-held perception in some circles, and I wonder if you sense that there's been any reaction to that from your court that might explain some of the things you talk about in your written submission.

Jessica Hedges: I think that there has been a reaction, and the reaction has been manifested in real concerns about cost containment, and in real reluctance to or scrutiny of request for expert funds. To answer, to turn to your question, is it fair in Massachusetts or is it fair anywhere, that scrutiny I would say no. It's not fair and it's not fair because we have . . . there are serious conflict issues that come in to play when we're requesting funds from judges, when we have to justify certain experts, when we have to justify our bills and those kinds of things.

It's not fair to our clients because for two reasons. Number one, our time in justifying those experts is time that we could be actually working on their cases. For instance, I have a case right now where I just received almost three terabytes of data. My time can be spent on trying to figure out how to manage and review three terabytes of data or and explaining to a judge what a terabyte is, right?

I think that I've listened to some of the testimony here, and I think that systems where you have someone very familiar with the defense function making those determinations. I may still have to go to a person to ask for expert funds. I may still have to say, "Here's why I need this expert with this particular specialty." That person is going to know who the experts are. That person is going to know who other expert, who other attorneys in the district have used to get funds. That person is going to know what a reasonable fee is, and I don't have to explain to that person what a terabyte is. I can work on reviewing the terabytes of data instead.

Chip Frensley: Sure. Thank you. I want to ask the question to Patrick and Tony and Bobbi,

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all of you, since you as district panel representatives, you have been going for a long time to the district panel conferences, and one of the great things about that is the opportunity to mix and mingle and hear from folks in other districts and find out what's good in their districts, what things they do well, but at the same time, we also hear the things that are bad in other districts.

Sometimes we feel like that a problem has to reach a certain level of prevalence that it has to be a national problem before we make a national solution. I'm just wondering what your perspectives are based upon the fact that you have this experience and have heard from so many people in so many different districts and seen where you may not have a predictable problem or there might not be a problem in this district, there are problems in other districts. I guess ultimately, the question is do you perceive there to be a big enough problem with these issues that they deserve a national solution?

Bobbi Sternheim: If I may?

Chip Frensley: Sure.

Bobbi Sternheim: I say yes because just because it hasn't happened yet doesn't mean it's not going to happen. It has been extremely helpful to meet panel reps across the nation. Issues that they have had experienced with can streamline something that we need to do in the Southern District of New York and vice-versa. That's been very helpful. On the other end, when I'll get a complaint from a panel member, I at least have something in my back pocket to say, "Just realize how lucky you are because if you are in X District, you wouldn't get anything." It puts things in a bit of a perspective, and I think that's very important. I don't think just because everyone of the ninety-four districts has not experienced the same problems means that the time is not right to address it.

Patrick Livingston: I would say, Judge Cardone, when you spoke at the panel rep conference in San Francisco a month or so ago, you asked rhetorically, at least I think it was rhetorical, "When you have one or two judges in a district, what are you supposed to do?" That one or two judges is the case in my district, maybe two and a half. When you have one or two judges in thirty or forty districts that seems to me to be when you start to cross the line from individual problems to systemic problems. That's why I think the language that I used in my written statement was in the climate we have. I think one of the things that it seems like this committee is doing is starting to piece together the puzzle of how, what has been happening at a national level has filtered down to the local level. That I think is we're making at least a preponderance of the evidence case for a systemic change.

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Anthony Ricco: Chip, I remember when I first went to CJA rep conference, I didn't know what to do, I didn't know what to expect. It was a little intimidating.

Chip Frensley: I think that was when I was skinny and had hair.

Anthony Ricco: That's right. I had hair too. I really just listened. I didn't know what to expect. I didn't have a sense of the National Defender Services Program. I think that feeling stayed with me for a couple of other conferences I went to. Now years later looking back, I think that the national conferences are absolutely essential to the success of this program because what happens is that the lawyers get together and find a common ground with their experiences.

Lawyers in smaller districts get good ideas from lawyers from the big city districts, and the lawyers from the big city districts get good ideas from the lawyers from the smaller districts. The beneficiary of it of this is the people we represent, and the improvement of the program. That kind of exchange would never take place if we didn't at least get together once a year to discuss the issues that we confront.

Now with respect to national issues having to raise at national level, I think with some issues for example, an issue with diversity, I think that we would be talking about that issue for another fifty years on a national level enough that it would be done. I think what is beginning to happen is that from some other districts taking on this issue with structured programs, they are developing models locally that can be used on a national level. That exchange takes place at this CJA conference because people get to hear programs and they tweak them and they say, "Hey, I could take this back home. This can work in my district." We need to do this, we want to do this, we just don't see a way to do it and the conference allows that exchange to happen.

Chip Frensley: I want to let everyone ask some more questions, but just briefly since you brought it up, I would like for you to talk a little bit about the mentoring program that you'd all developed in your district, Tony, because it's obviously a model for the United States, and through the conference quite frankly, a number of panel reps have taken back to their districts and adopted that program. If you could just briefly share that with the Committee so they know a little bit about it.

Anthony Ricco: This mentoring program was developed by myself, Bobbi Sternheim, other lawyers in the Southern District wanting to take the lack of diversity that we have in New York, and change the landscape, and to give deserving lawyers the opportunity to participate in a fabulous program. It took a long time to develop it, more than ten years, but we finally have the program in place. It's a mentoring program. It's a part of our CJA plan. Our board of

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judges adopted it. The development of it started with the lawyers, but we had input from the court, input from the Office of Defender Services, and we have a working model.

The program is designed to increase diversity, but it's open to everyone. We've had seven years now of the program. We've had nineteen individuals who are now on the CJA panel who've participated. They are from diverse backgrounds, there are some of everybody there, and we think that they've had success. They have met with the high standards and approval of the court, and that's been the measure. The idea to do it was present, always attending the conferences, but it was a difficult thing to accomplish on a national level.

The idea was how can we get it done locally with a view towards other districts picking up on it. That has happened and also, we having to work a mentoring program to increase diversity and capital representation which is also an area that lawyers should have an opportunity to participate in.

Chip Frensley: Great. Thank you.

Judge Cardone: Judge Walton.

Judge Walton: I have some idea about the cost of the living in Pittsburgh having grown up in that area . . .

Patrick Livingston: We want you back, Judge.

Judge Walton: but I know Boston and New York are very high cost of living areas. The amount of money that we pay you all to do what you do, I think is woefully inadequate. What would an appropriate hourly rate be to fairly and reasonably compensate you for the work that you do...considering that we are talking about public funds?

Patrick Livingston: I'll take the first stab with that. We'd obviously like to make gobs of money, but I saw an ABA study. Chip, I think you put it out a while back that referred to something like \$162 an hour as reasonable based on what overhead is. The judge who heads the Defender Services Committee, I draw a blank on her name right now, but . . .

Judge Cardone: Blake?

Patrick Livingston: Judge Blake, she testified here the other day that she was completely focused on \$148 which is entirely understandable, but the ABA standard I think if in fact it was a standard, \$162 was the rate that I saw. I think it's plenty reasonable. What I see in my district is almost every lawyer is a sole practitioner or in a small firm. We have some big firm people, but

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everybody is finding some way to cut overhead. Whether that means I don't have a Westlaw Subscription, I think there's an increasing trend for lawyers to work out of home offices instead of in central locations.

The \$129 in Pittsburgh, Judge Walton, I think there are paralegals who make more money than that or who bill at higher rates than that. In the days before stricter scrutiny of vouchers, I had said that you're not going to get rich on a CJA income, but you can make a living. That gets harder and harder every day that we are at those kinds of low rates.

Jessica Hedges: I strongly believe that in order to keep skilled attorneys on the panel that you need to pay them a competitive rate. I think that that rate needs to be adjusted for . . . there needs to be a cost of living adjustment for areas in the country that are much more expensive, San Francisco, New York, Boston. I believe that there's such an adjustment for public defenders. I believe that there's such an adjustment for U.S. attorneys, for probation officers. In order for CJA attorneys to be able to just maintain, there needs to be such an adjustment for CJA attorneys.

If we were to start at a base rate of \$170 across the country, and then adjust upward according to the cost of living in particular places, that would be a big step forward. I think if we want equal representation for poor people, we need to be prepared to pay lawyers appropriately competitively to do it. The work now is that it requires a very high level of expertise. It requires people to specialize in a sustained way in order to do it well. We want people with deep experience doing the work, and we want people who like I have recently, I have in my firm we have a RICO case, we have a terrorism case, we have several big multi-defendant drug cases, we have a civil practice.

I've made a choice just not because I have any good business sense, but I've made a choice to turn away good civil cases recently because I have to focus on these cases right now because the stakes are incredibly high. I am losing a lot of money on making that choice.

Patrick Livingston: The people that I see doing this business are, and I think there's some confusion about this somewhere. We're not mercenaries. We are committed to the cause of justice. I can't think of anybody on my panel, and I think there are different levels of skills and talents on my panel, but I don't know anybody on my panel who is not committed to getting justice done. The idea that if we pay them too much, we're fostering rebellion or whatever it is, it's just not there. These are people who are committed to the cause of justice.

Bobbi Sternheim: I feel somewhat uncomfortable coming out with a number. My first job I was asked, "How much do you want?" I thought I was being reasonable,

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and that's what I got. I think when you look at the current capital rate that should be a starting point because it's something that already exists. The issue is one that makes attorneys feel very demoralized.

Judge Goldberg: Excuse me. What's the current capital rate? \$183?

Bobbi Sternheim: \$178.

Dr. Rucker: \$183.

Bobbi Sternheim: Oh, \$183? I haven't put in a bill recently. We are doing this kind of work full time. I spent the last three years working on a terrorism case. It was a historical case going back to 1998. I had to devote most of my time to that which means I can't take on other things lest it takes away from the focus that that case needs. Are attorneys going to stop practicing because the rate is what it is? I don't believe so. Look, I've seen the rate stay, go up, go down, be frozen, payments delayed, and we haven't had a rush to exit from the panel.

What concerns me is the reaction that people have. Well, if they'll do it for that amount, why give them an increase? Fairness is fairness. Judges should get an increase too, but we have to pay for our rent, our insurance, all of our overhead, our transportation. None of this is built in and all of that comes out of \$129. In New York, there's not much left.

Judge Walton: What's your net?

Bobbi Sternheim: What's my net?

Judge Walton: I'm not asking personally, but I mean, with the overhead, how much are you talking about clearing?

Bobbi Sternheim: I think 50% sometimes. There's only so many cases that you can take and service your clients well. I made a decision when I came on the panel to get off state panels that I was on because the nature of federal practice made me have to be "at the ready." I have never taken so many clients that I couldn't accommodate and serve all of my clients, but all that means is that I get less compensation. A view towards raising the hourly rate is something that has been talked about for the last thirty years that I have been on the panel, and it will always be talked about. It will never be a competitive wage to the private sector, and people like us who have done this for upwards of thirty years compared to somebody who's done it for five years, it's always going to be the same rate. The rate needs to be something that is not laughable, but is very much livable.

Judge Walton: I find it admirable that you all do the work that you do. It's critical to our

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system of justice, and it's amazing that there are people like you willing to do it, so I do commend you for that. In reference to, I'm sure all of you have experienced situations where judges have refused to authorize services you requested. Is it your perception that that's based upon a concern about cost containment or is it just by some judges and indifference to the rights of people accused of crimes?

Bobbi Sternheim: If I could just quickly state something.

Judge Cardone: Microphone.

Bobbi Sternheim: Oh, I'm so sorry about that.

Judge Cardone: That's okay. Don't worry.

Bobbi Sternheim: In the case that I am now on but I wasn't on at the time this happened, my co-counsel requested an investigator. The response was, "You don't have the discovery. You don't need an investigator." There are cases where you need associate counsel. I'm about to begin a ten-week trial where I have to relocate to another city. That kind of request is denied. There is a practicality that I think sometimes judges are not aware of. I would not like to think that judges are indifferent, but I think that they are certainly insensitive, and many of them do not have the experience of even being in private practice, let alone being a defense attorney.

They've not run an office, they've not had to put together a defense team to adequately represent somebody who is facing tremendous time. Some I think are more knowledgeable than others, but I think that there are some judges who you really have to stand on your head to get anywhere near what you need.

Anthony Ricco: It's a little bit of both. Our districts, we don't see it as much, but we do have a particular judge in the Eastern district who says, "I don't appoint investigators," and how he has been able to do that with the circuit not weighing in on that is phenomenal to me. It's been said on open court on the record, on cases where defendants are facing a life imprisonment.

Judge Walton: Had there been challenges to the circuit on that issue?

Anthony Ricco: Not on that issue. There's a reason for it. I mean, it doesn't happen on direct. It's § 2255. It becomes complicated to do it. My experience has been that when the judge does not have a background of training and the experience in defense work, the judge just doesn't have the insight to understand what a lawyer needs to develop a case. Some judges are indifferent to it. I mean, they're not interested in it. Other judges raise issues of reasonableness. They'll say to a lawyer, "Well, give me some

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explanation as to why you need it,” and in the most part when those explanations are given, the judges will come around.

We are beginning to see something that Patrick eluded to. Something Reuben had said when we were out in California was interesting because we have several young lawyers who called the panel reps and talked to us about their experience, particularly with a lot of new judges who have given them difficult time for the appointment of experts, questioning the amount of time that they’re spending with defendants that they don’t see that time as being necessary. That board is to me on indifference.

I on one hand, I welcome an inquiry from the court, but I can always tell when the inquiry is not an inquiry, but it’s really about something else. I think that what we have to be on guard for is developing a dialog with the bench about who we put in on the panels, what type of training they’re getting, and how they do their jobs well.

I think that what we want to do is encourage the lawyers to do the work, encourage the lawyers to develop the defense, not create obstacles for lawyers to do their work. I came out of a state system where lawyers just don’t do it. They don’t visit their clients. The judges don’t pay. They don’t file motions. The judges don’t want to see them. Over a period of years, a system is developed that’s bankrupt and does not serve the defendants, and you can supermarket grind them up level of representation.

As a person who’s participated in the federal system, I’m on guard for that. My eyes are open for that. I think that we need to be aware of that to ensure that this terrific Defender Services Program we have continues. The way it does it is to address where people have these issues.

Judge Walton: I know you’re making a differentiation between what happens in federal court and state court, but do you think some of what you just explained about what happens in a state court at least on some level happens in federal court also?

Anthony Ricco: Yes.

Jessica Hedges: Supposedly, I come from the land of boutique law firm, but we have a hard time as well. We have a situation right now where there’s a very large multi-defendant case. Many of the defendants in that case have no criminal record. There are multiple murders charged, and there was a discovery coordinator appointed in that particular case that there was a discovery vendor who was hired to help manage the discovery, and trial is coming up in a few months. On what feels like the eve of trial for those lawyers, they received a word that the judge didn’t want to pay for that discovery management software anymore.

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Do I think that that judge is indifferent? No. Do I think that that judge doesn't have the knowledge or the skill to make that determination and nor should that judge actually be expected to be? Yes. Do I think it matters one way or the other for those people who are on trial for their lives? No. The fact is, is that if that software is taken away, those attorneys have come to me and said, "We can't try this case. There are millions of documents in this case. If on the eve of trial the software to manage those documents is taken away from us, we are very experienced attorneys, but there is no way that we can do that."

Judge Walton: Has the judge been told that?

Jessica Hedges: I believe that something has been filed in response, and I believe that a conversation is happening as we speak. The fact is it feels a bit like district court judges when it comes to issues of expert funds and issues of voucher reviews are being treated a bit like middle management. It often has to, they have to manage the budget. Their management is reviewed by the circuit, and their management in a way that they can't even really have an open dialog with the people that they're managing. They can't just call us up on the phone and say, "What is this about? Tell me about this expert? Why do you need this expert?" and have a real heart-to-heart conversation.

If someone else was doing that job who was familiar with the defense function, yes, they're interested in cost containment, they want to contain cost that other person, but they're able to have a frank conversation about that software system for instance or that particular expert in a particular case, then there can be real managing going on. Then perhaps even more cost containment going on if you have someone with the skills and the knowledge and the ability to have a real conversation.

Patrick Livingston: Judge, this might be the only area where I come to the aid of my judges because I don't think I've seen that problem on the front end in my district where lawyers seek the use of an expert and an expert is denied. We have seen voucher cutting on the backend that I'm aware of when an expert submits a bill. Frankly, a judge sort-of "nitpicks" the bill. I think that has had in some cases a chilling effect on some lawyers desire to "go back to the well" in other cases or in the same case.

I would also say that I think that in my district, the use of services numbers came in pretty low. I don't remember exactly what it was but it was pretty low. Some of that I think relates to the panel, the lawyers on the panel not having an understanding of the act, the criminal justice act as a tool to accomplish results.

Now, here's where I'm not going to be so friendly to my judges. I don't think that that's . . . I would like to say that everybody on my panel sits

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down and studies the act now like I do, but I don't think that really happens. I know that in the CLE that we've had about the CJA it's always about, "This is what you should do, this is what it should say, this is what it shouldn't say," and it's not conducted by a lawyer like me, at least not yet who looks at the act as a resource for leveling the playing field.

If I could get my whole panel on board with that idea, I think judges would get bombarded with requests for experts. I would venture to guess that . . . We did this study I guess about use of experts. Bobbi suggested another study and I was thinking about if you look at the number of times that lawyers made requests for approval for ancillary representations in cases, it would probably be even lower because I'm pretty sure that there's not too many people on my panel who even knows that the concept of the ancillary representation even exist.

Judge Walton: Just one other area regarding diversity, and I think diversity is very important on a diverse society, especially when you consider the makeup of the individuals who use the system. You said that you felt that it was something that wasn't accomplishable on a national level. Why do you say that?

Anthony Ricco: Because you attend annual conference for sixteen years and it's the same conversation every year. People talking about, it's almost like, "Okay. Time for the diversity plenary session," and there's a discussion about it, and that's it. That's not a criticism. I think that the takeaway for myself and other lawyers was this is something that we have to accomplish on a local level first because what we want to do nationally just has too many parts. From attending the conferences, looking for direction from colleagues, and ideas from colleagues, you come up with the idea that this is something that we do locally, we do with the local bar associations, with our state court judges who help us recognize young lawyers who could be interested in federal work.

From a national program came the realization that we have to accomplish this on a local level, and then turn around and invite other people on a national level to participate. We've had seven years, thank God of success with it. It's a positive, not necessarily a negative. I mean, we weren't able to implement the program on a national level but from a national dialog came a way to accomplish it, and that was on a local level.

We've been very encouraged by the success. The judges have really supported it. The judges in our districts have said to us, "Let us know what you need us to do to make this work." From that, we've so far developed a terrific program that we tweak and discuss all the time because there's a tremendous interest for it to be a success from the lawyers, from the judiciary. That's my response.

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Judge Walton: Thank you.

Judge Cardone: I just have a quick follow-up question to you, Ms. Hedges. When you were talking about that software that was needed that the funding was cut off . . .

Jessica Hedges: Just to be clear, it wasn't cut off, there was push back, there was a threat of cutting it off. I don't know that it's been cut off.

Judge Cardone: I guess my question is do you know why? I mean, the funding doesn't come or do you know where the funding is coming from because my understanding is that would come from Defender Services Office or from some . . . it's not out of the judge's pocket. Was the judge not able to fund it somehow or do you know what the concern was with it?

Jessica Hedges: I don't know why, and I think that that's what the attorneys who were trying to figure out what to do or trying to figure out now, and trying to come up with a solution. Again, I think that this is a situation where if someone were making those decisions who could have a dialog with the attorneys in a really open way without the attorneys feeling like they were going to divulge think they shouldn't be divulging, then the whole issue could be avoided. Money is being spent at billable hours. There's some big firms involved in this particular case. There are lots of attorneys involved. Lots of hours are being billed on this particular issue at this point. It's really an issue that just could be avoided if judges weren't put in the uncomfortable position of having to make these determinations. It's understandable why they want to contain cost, and it's laudable in many ways.

Judge Cardone: I guess my question, Ms. Hedges, is it because the judge wants to contain cost or is it because, I mean, let's say that you're given a pocket of money for a budget, and that money has run out, and so now the judge doesn't have a source of money. I mean, that's what I'm trying to get to. Does anybody have any sense of was it because there was no more money in whatever budget this was coming from? Is it because the judges thought it was getting too expensive? Do you know or if you don't know, is there a way you could find out for us?

Jessica Hedges: I can find out. I don't know the answer to why the judge is inclined to make that determination, but I'm happy to find out.

Judge Cardone: Thank you. Thank you. Ms. Roe.

Katherian Roe: Thank you. Mr. Livingston, I want to start with you. You had made some references in your statement about the changing climate that's happening in your district in the last three years. A few of the things that you mentioned were the judges looking very hard at the bills with a different lens perhaps.

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Patrick Livingston: I called it stricter scrutiny [CROSSTALK]

Katherian Roe: Stricter scrutiny, good term. In doing that, you said that some of the things they were looking at were codefendant cases. They were comparing bills, and then preferring the bill that was smaller versus the bill that was larger because if Attorney X can do it for this price, then if you did this research and file this motion, well, you could have done it for that same price. A few minutes ago when we were talking about the expert vouchers and whether or not judges were approving them, and Judge Walton said to I think to Mr. Ricco, he said, “Do you think it’s a cost containment issue or an indifference?”

I thought that there might be another option there, and it sounded to me to some extent that what’s happening in your district could be some of that other option, and that is it’s a substitution of judgment that the judge is deciding what’s appropriate whether it’s how many motions should be filed, how many memorandums should be filed in support of these motions or what should be done or whether or not you really need an investigator or whether or not you really need a psychologist in this case. Whether it’s cutting at the front end or cutting at the backend, isn’t it possible that it’s more substitution of judgment than indifference?

Patrick Livingston: I would totally agree with that, and in my statement two pages later, I think I talked about how for my money the word reasonable in the act when it refers to out-of-court time should be applied deferentially to lawyers. Somebody at the panel rep conference, I forget what language he used to define what the standard should be, but there should be the same discretionary . . .

Katherian: Presumption of reasonableness?

Patrick Livingston: I think that’s what the lawyer said at the panel conference, but I think it’s more along the lines of abusive discretion so there’s not that Monday morning quarterbacking. One of the cases that I became aware of in my district involved a lawyer who had done something minimally was discharged in favor of another lawyer, and I don’t know the full details of it. The other lawyer came in late in the case, and worked the file, his wiretaps, and he studied and he studied and he studied. Then in two months time, he got all the wiretaps reviewed and analyzed, and then he put in an interim payment, and that was one of the cases in which the judge compared what he did to what the terminated lawyer did.

When I heard about it, I just scratched my head. I couldn’t understand it, but the danger of . . . I think you’re right. It’s substituting a judgment, but the danger is that it’s setting presumptive rates, but it’s a moving target

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presumptive rate. It changes in every case. Yes, I agree.

Katherian Roe: Okay. Ms. Hedges, I wanted to ask you a question about training. In your statement, you talked a lot about training for panel attorneys. We heard a lot yesterday during the hearing about panel attorneys and how some folks were saying that they weren't as well trained as some of the other attorneys that appear before the federal courts. Could you tell some of your ideas about why that may be true if it is true in some situations? If it is true, what could we do or what could we recommend to improve that?

Jessica Hedges: I think number one I think that the trainings that the Defender Services Office sponsors are great. I think that those training is one thing that could be nationalized, and that those trainings should be funded, number one. In order for those trainings happen around the country, there are four or five, maybe six a year depending on funding, I think. I've been to many of those trainings. They probably save billable hours because I learned so much. I don't have to research things, but I have to pay to go to those trainings. I have to pay for the hotel when I go to those trainings. I have to take time away from my cases and not bill on my cases when I go to those trainings.

Most people don't go to those trainings because they just simply can't afford to take the time away and simply financially afford to go to those trainings. Number one, I think that training should be localized where possible. Perhaps, funding could go directly to the federal defenders and the defenders more funding to do training and that training should be mandatory, that there should be some core competencies that are maybe it's six hours of training a year for CJA attorneys on some core competencies, and then maybe it's twelve hours a year, up to twelve hours a year of training is funded for CJA attorneys.

There is some baseline uniformed training. We make sure that everyone gets the updates that they need to, that they know what they need to know about Johnson, for instance. They know what they need to know about so that they can protect their clients' rights. U.S. attorneys have such trainings. Probation officers have such trainings. Federal defenders have such trainings, but CJA attorneys don't. It should be mandatory a certain number of hours, and it should be funded.

Katherian Roe: Thank you. Ms. Sternheim, I was hoping to ask you a question also.

Bobbi Sternheim: I look forward to it.

Katherian Roe: Okay. It wasn't that long ago that someone asked you this question, I think I could remember, but you were addressing the issue of whether the time is right for a systemic approach.

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Bobbi Sternheim: I think the time is right.

Katherian Roe : Okay. That's not my question.

Bobbi Sternheim: Okay.

Katherian Roe: I'm getting you to the right place.

Bobbi Sternheim: I just thought it was very good cross-examination.

Katherian Roe : Okay. We could do that, but that's not where I want to go with this.

Bobbi Sternheim: Okay.

Katherian Roe: What I want to ask you about is we've heard a lot about the panel in New York, whether it be from the federal defender, whether it be from Mr. Ricco, from you, and even other folks just about how strong the panel is, just what a great panel it is, and how in New York there are not a lot of problems like we've heard from other places. Some problems clearly, but not as many. I guess my question is I understand what you're saying is that if there are problems somewhere and you've heard about these places that there are issues that it must be time for a systemic approach. My question is, is why total independence? You recommend total independence in your statement and my question is if things are so good in your district, even if it's time for some change, why total change?

Bobbi Sternheim: Well, if you don't ask, you don't get. My approach was to go all the way because I think if we start the topic as independence, then we could move it back a little, whether it's independence with a firewall that remains within the judiciary. It still has to be an entity independent of judges making decisions or as you said, substitution of judgment. A judge will not give you a pre-ruling with regard to whether you should make this motion and how you will fail, but to pre-rule whether you need a service or not, I think it's where the conflict lies.

If you make a motion and it is disfavored by the judge, is that going to affect your compensation at the end? Now that we have electronic billing, we're required to put in the Bates pages that we read. If I need to read that again or maybe three times, am I going to be subject to scrutiny as to, "Come on, Bobbi. You read it once. Why do you have to read it three times?" I think that there needs to be separation because of the roles that we all play.

Now, in addition to being an advocate and adversary and an officer of a court, we are also counselors to our clients, concierge people who have to negotiate their times in jail, and administrators of our own practice. We are

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juggling so much and then when we ask the judge for something, they may not approve it.

Now, I don't know where that is coming from, but I think that not having a judge be involved in that is the way to go and the way to make it conflict-free. I'm not sure judges welcome the role that they are forced to undertake anyway, at least I hear, it's just another burden that they have on their docket, but if you explain this to people who aren't involved in it, they scratch their head and say, "You mean the judge who just yelled at you is the one who's going to say whether you should be compensated or not?" There's no arm's length between it. That's why I believe that setting up an independent structure, difficult as it may be, is certainly a model that we should strive for. See how it looks, take it for a test drive, and we'll decide where it needs to be tweaked and where it needs to stay the same.

Katherian Roe: Thank you. Mr. Ricco, let me ask you about that because one of the things we hear especially from judges is that there has to be some oversight. They appoint counsel as they say. They appoint counsel to these cases, and so there has to be some oversight so they can make sure that the money is not being misspent. There has to be oversight as to whether they have experts, whether that's appropriate in their situations, and as to how much they get paid.

Anthony Ricco: This issue is not an easy issue for me, and that's because I practice primarily in a district where there is an excellent relationship between the judiciary and the Defender Services Program where the judges are very much involved and very much aware of the challenges we face. I'm an old-school person. If it's not broke, don't fix it. I also recognize from attending the national programs that there's a problem in other places, and because there's a problem in other places, a defendant who's poor and is in front of the district court in one part of the country, they should have the same level of representation that a defendant has in another part of the country, free of influences that are indifferent, I'm going to stick with that word, to the defense function.

If getting that person in the other district means we have to change what's comfortable in another place, then we ought to change it because it's the person who's not getting the services that we need to be concerned with.

Now, I don't necessarily know that you have to change the whole system, but I definitely see as a defense lawyer that there are areas of what we do that judges don't and shouldn't get. There are things that judges do and discuss amongst themselves that they don't discuss and share with us about their rulings and about what they do, and there's a healthy respect for that.

Judge Stanton in Southern District once was telling a younger judge at a

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Defender Services Committee meeting where this judge wanted all the CJA lawyers on each case to put in a report on every case of what they did so that when their term is up, the judges will have a dossier to read on each case. Judge Stanton said to this judge, he said, “Set a name, but what you don’t understand is you don’t get to see what our lawyers do. You don’t get to see what they do in the jails. You don’t get to see how they convince a twenty-year-old to plead guilty to thirty-five years in prison.” We don’t have a way of that value.

My sense is I think it really is about who the individuals are. Where you have people who are interested, people who have the best interest of protecting the constitutional rights of the defendant’s state, people who are concerned with the budget and the public expense, people who understand the function when they’re involved, we’re going to have good results. We could be independent. Who’s going to pick the people who run it? Who’s going to run it? They’re going to run it, what’s the image of it? Are we going to have the same kinds of issues there?

We don’t know, but for the people who are not getting services, who are running up against substitution of judgment, nice work, indifference, maybe not as nice work, people are going to prison, and have to serve those prison sentences. Perhaps it’s time for a change. Sometimes change comes about with people who are in a good situation, have to change that, and then redevelop something different.

I do want to say this. I wrote about in my comments or foot note about Bruce McIntyre who is a CJA lawyer that most people would never know and Bruce died preparing for a trial. That’s how committed Bruce was. What’s the value of that to the program? How do you value Bruce’s commitment? How? We don’t even know who Bruce McIntyre was. There’s no insurance for CJA lawyers. He didn’t have a healthcare. A national debate over Obama Care didn’t end in enough time to help Bruce, but he was a very committed lawyer.

There’s so much of what we do in this work that judges never see that relates to the quality that happens in the courtroom. I believe that even if we’re not independent, judges need to be out of certain aspects of this. Some circuits now, I forget the number, but we have quite a few budget attorneys now. There’s the proposal that talked about CJA commissioners that work with budget attorneys, but I’ll request, I don’t have a problem with oversight. I mean, somebody signs a check needs to have some influence, but I think that an issue dialog should be taking place with someone other than the judge.

I mean, I don’t mind doing it but it’s uncomfortable. I think it puts the judge in a difficult situation. What’s the judge to say? Oftentimes, we

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know that the defense that we ultimately present is a far cry from where we started, and that one door leads to a next, and that kind of thing. I'm not a person who's sure that we should be independent, but when a lot of smart people who have been this for a long time says it's time to go, maybe it's time to go.

Katherian Roe: Tell me about the case budgeting attorney in New York. We've heard from some folks that they think that that has been very successful. What's your position on that?

Anthony Ricco: I could tell you that the first day that the case budgeting attorney showed up with Judge Gleeson for a meeting, and he got almost got thrown out of the courtroom by the lawyers. I mean, folks were like, "You got to be kidding me," et cetera, et cetera. What we found from change is that it's excellent. Case budgeting attorney works with the lawyers around issues that we've just discussed. The software issue was one that was recent resolved in our district, and the judge's concern in that particular case was that, "Gee! I'm seeing bills for computer experts that are four times the amount of the interim vouchers that the lawyers have put in. Why is this happening?"

There was a dialog with the budget attorney about why it was happening. The budget attorney got us in touch with someone from Defender Services, Sean Broderick, and we sat down with Sean Broderick, and the budgeting attorney had found a solution to it that was acceptable to the court, but I would think it would have been improper for us as lawyers to be having a round table discussion with Judge Prado about what we think we're doing with the software. I mean, it would just seem to me that the Judge would say to me, "How did you guys work that out and come to me with something that works?" That's what you should be doing. In one particular case, that's why there was an issue to say, "I'm not going to sign any more of these software requests until this issue is resolved."

Katherian Roe: I'm going to . . .

Judge Cardone: Judge Goldberg.

Katherian Roe: send it over to my colleague because I'm taking more than my time.

Judge Goldberg: Thank you for your time, and really insightful ideas. As you're speaking to us now, you're not attending to your clients. You're not billing for that.

Patrick Livingston: I'm getting texts, Judge.

Judge Goldberg: I wonder how you're going to voucher that. You're getting texts . . . ".3".

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Patrick Livingston: Speaking with Judge Goldberg . . .

Judge Goldberg: We haven't as a group had "close the door... bell, lock the door deliberation", but all these sessions have really helped me get comfortable with certain, certain things. One thing that I'll reveal, I mean, I'm getting more comfortable we haven't made the decision, we have a lot more work to do is this idea of an administrator to deal with expenses. I'll use the word administrator in a broad term expenses, voucher review, experts, investigators, those type of things. We heard a model in San Francisco about that, and everyone loved it. It seemed to me everyone loved it.

You had the necessary separation from the judge, although the hearings sort of blend together, so I'm not sure if I get this right or not, but I think ultimately if there is a dispute, it may eventually make its way to the judge, but it didn't seem to be a big problem about that. You have the separation. They had someone very experienced in federal criminal defense, so that worked, so they understood the case, the concept of the federal case. They weren't in the courtroom like the trial judge which is an argument to have the trial judge do the expenses, but they had someone very experienced who could understand the case.

There's no uncomfortableness of going to the person who's going to say yes or no to the expenses and lay out your case. We heard yesterday, I don't know where this concept grew out of but a military system the defense to get expenses has to lay out their case of prosecution. Go figure. Then you have a confidential dialog. Everything seems to line up and make sense to me, but here's one little thing that that's gnawing at me a little bit. My observation most of my experience in the federal criminal defense was this AUSA and federal judge a little bit in private practice, not so much.

I observed that the defense bar is very close knit. When you're co-counsel with a case, in a case with someone for ten weeks, I mean, you're bonded with that person. It's I think a lot more close knit than the AUSA group. You're parties are a lot more fun than ours used to be, I can tell you that. What concerns me is this. Each of you can comment on this as honestly as you possibly can. Let's say hypothetically one of you were picked as this administrator. All of you have this incredible experience, and you're picked as this administrator and there is an expense that's requested that you believe is out of line, and that happens.

Let's say there's a voucher that comes in front of you that you believe is, I'm going to pick a big number, \$20,000-\$30,000 completely off the reservation. Are you going to be able to turn to someone who you're very close with, and are you going to be able to say, "No. I can't do it. I'm not going to do it." That goes to Mr., is it pronounced Ricco?

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- Anthony Ricco: Yes.
- Judge Goldberg: Mr. Ricco's comment, he said, "Generally, I have no problem with oversight," but in this model, the San Francisco model, how do we deal with that issue because some people would say, "Well, okay. Give it to the judge." The judge is not going to be friends with this person or shouldn't be friends with this person. It's easier for the judge to say no. Could you all comment on that, a little problem that's gnawing at me a little bit?
- Bobbi Sternheim: I'll start.
- Judge Goldberg: Sure.
- Bobbi Sternheim: I think oversight . . .
- Judge Cardone: Microphone.
- Bobbi Sternheim: I think I have to remember this microphone. I think oversight can be built in whether it's a board which federal defenders have and other entities have. I don't think creating oversight is going to be a big issue.
- Judge Goldberg: Explain the board. How does the board work? Doesn't that add in an extra layer? If we have five criminal defense attorneys on the board now, haven't we added in layers of bureaucracy and delay now if we do it that way?
- Bobbi Sternheim: Well, there could be, but then again, there might not be. Certainly, if you have people who are highly experienced, they're going to know from the get-go. You asked before whether I or any of us would be able to say no. The answer is of course. I'll give you an example. A colleague came up to me so excited that a judge approved an investigator to go to South America to get some documents. I said, "I can't believe you got approval for that. It's such a waste of money. You could have gotten an investigator in that country to go over to get the document, to get it notarized, and send it back to you." I would never have authorized that.
- Judge Goldberg: You were commenting on that as supposed to actually saying no and impacting that lawyer's ability to earn a living by way of my example, you're going to cut a voucher \$20,000. I think that's a big difference.
- Bobbi Sternheim: If any one of us in that position would even consider cutting a voucher \$20,000, I think we would all believe that there's \$20,000 worth of fat here and why is that here. You have a discussion, you'd go through it. Look, the more experienced you are I believe, you can evaluate a case very early on. As the case progresses, know what you need to do and what you don't need to do.

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Judge Goldberg: I'm not questioning your ability to do that. I'm questioning, not disagreeing, just thinking it through with you, folks, questioning whether you would do it given how close knit this community is.

Bobbi Sternheim: Yes. I don't have a problem with that. It may feel like sand in the bathing suit but it would get done.

Anthony Ricco: I would like to say yes. Bobbi Sternheim and I talk interchangeably because in New York, the separation between the Eastern District and the Southern District is a subway ride. We serve on a panel review committee, and I could tell you the most difficult thing for us to do is colleagues who've been on the panel for many, many years and we're getting reports from the judges that did not cutting it, and then we have to get together. One of the most difficult things to decide is to say, "We're not going to reapprove a very revered attorney to continue serving." We make those decisions, and they can be made.

The participation on the panel review committee has given me that insight that it can be done. If I didn't do that, if I didn't have that experience, I would question exactly the way you had, Judge Goldberg. I would be saying, "Will it be done?" I've seen that done over the years, and it's difficult, but I think that again, you go back to the individuals. If you pick the right individuals, you're picking the people who have the program at stake and not the relationship, and you start it with the mentoring program of the new lawyers and you encourage it, and you keep a good system going. I think that whether you call it an administrator or a commissioner or a budgeter somebody, how that person is selected probably is going to be selected with the influence of the judiciary.

Judge Goldberg: Full circle. Here we are again.

Anthony Ricco: My sense is that the person who's going to be selected is somebody who has those qualifications . . .

Judge Goldberg: The folks in San Francisco said what you just said which is the key to that issue, the one we're talking about is to pick the right person.

Anthony Ricco: To me, that person, it's a person that has to have in addition to that experience, has to have leadership skills, has to be a leader. He or she has to be a person who has those leadership skills. We have a terrific budget, case budget attorneys in the second circuit, and we have a lot of lawyers who like to take swing at him. It's not that the person is loved, he's just respected, and that makes the difference.

Judge Goldberg: I think as you said, if there's a dispute there, the due process is the committee I think one of the two you just suggested, and then if that can't

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be resolved on the committee, then the judge, but there's so many layers now. It really takes the judge so far out.

Anthony Ricco: In today's world, we have a lot of . . .

Judge Goldberg: Use the microphone . . .

Judge Cardone: Could you get on the microphone?

Anthony Ricco: Oh, I'm sorry. Excuse me. In today's world, it doesn't take a lot of time to get things done. We find lawyers who've been on the panel for a lot of years would love to serve in that type of role, like a review group who assist the administrator in making an assessment. If I'm the administrator, I may not want to make the call by myself.

Judge Goldberg: In finding the right person, I mean, I could tell you reviewing vouchers is not top of my list of things I love about being a federal judge. Let me hear from them, Ms. Hedges and Mr. Livingston about my concerns.

Patrick Livingston: Judge Goldberg, I learned very early on in my practice that sometimes I do my best work when I keep my mouth shut, and I couldn't have said it better than the way that Tony said it. I would have, here I go, that I think Judge Bissoon was here the other day, and she talked a little bit about our aging panel. We're not that old, but I could identify probably two or three people on my panel right now who I think would fit really well into that role, elder states people of the bar who are probably looking for a way to slow down but stay active.

I think it's the slight shade of difference that I have with what Tony said is that I think that the review process of actually knocking somebody off is way harder than cutting a voucher. I guess this happens to all of us. I've been getting at least weekly, sometimes daily calls from panel lawyers, "Look what happened in this case." Every now and then, I do get one more. I told the panel here, "Take your lumps. Worry about it the next time," and that's an advisory opinion, but I think it's because I've worked at pulling up these relationships with the people on my panel that I'm comfortable in saying that.

Jessica Hedges: I would respond that the person in that position if that person were a true believer, criminal defense attorney, what that person is going to be thinking about is the clients that are being served. That person despite their loyalty to other criminal defense, to the bar, is going to be thinking about, "Okay. If I pay this attorney for work that I question or if I pay for an expert, then there's another defendant who is not getting that money who may need that money or another defense another who is going to need to spend that, to use those \$20,000 worth of hours." I think a good analog is at the Federal

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Defender's Offices in Boston, Miriam Conrad is the Federal Defender, and her employees who she's incredibly loyal to do have to sometimes make a pitch to her about expert funds, and do have to sometimes say and she has to sometimes say no to them.

She's able to do that to them because she's thinking about the big picture. If we have someone in that position who is thinking about the big picture about our clients being served, and are they being served well, and are we using the budget that we have to serve everyone as well as we can, then I don't think there's any question that that person would be able to do that.

Judge Goldberg: Quick different topic. The hourly rate, we're going to have to give numbers I think when we give our reports. I have \$183, you recommend \$183, that's a capital rate. Someone the ABA rate, someone said \$ 168 or \$170. Which is the ABA rate?

Patrick Livingston: I thought it was \$162.

Judge Goldberg: \$162, and whose suggestion was that?

Patrick Livingston: Well, and Chip's actually.

Judge Goldberg: Chip Frensley. Someone said \$170.

Jessica Hedges: I stole that number from Chip, and I said that that should be adjusted according to region.

Judge Goldberg: Two people have an enough fair number, but it's okay. What I want to ask about those numbers is, what's the basis, and then the ABA is a basis. I know Sternheim, you said that's the capital rate but for a regular case. We're still going to have to say in our recommendation because, so where you coming up with these numbers? Give us some more guidance please, if you have any.

Bobbi Sternheim: I put out that number because it's a number that has already been swallowed, and it wouldn't be something unfamiliar. Now, the fact that somebody represents someone in the capital case doesn't always mean that the person who's representing someone in the non-capital case is not working as hard. I know that there sometimes is friction between people who are getting the capital rate. They could be on the same case with somebody whose client is not authorized or is not facing a capital offense but is working equally hard.

I put that out as a number because I think that it's as a bare minimum, it's certainly doable, and I can tell you it makes a tremendous difference when you get that rate as supposed to the regular rate. Proposing \$250 which I

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think would be far better is something that would never fly, but I think that whatever formula went into the \$183 is something that should be the starting point for all criminal justice act attorneys.

Judge Goldberg: Why wouldn't it fly? If you have a sophisticated money laundering case, it's going to take you eight weeks to try in a client who can pay you and retain you. May I ask how much you generally would charge that client, \$250 at least an hour?

Bobbi Sternheim: Absolutely.

Judge Goldberg: Why wouldn't that fly for a CJA lawyer trying the same case? Why giving up on that so easy?

Bobbi Sternheim: I'm just being realistic. I've been doing this since the rate was \$65, and then at \$129 30 years later, I don't think the jump is going to go to \$250. I'm trying to start with something that is doable. Two hundred and fifty dollars isn't competitive in New York. Are we talking about different districts because if we are . . .

Judge Goldberg: Think about \$127 for the bottom rate. I mean, the last time I was in New York, I had two Stellas, it was \$127.

Bobbi Sternheim: I understand, but we're still here nonetheless, and that's where the tension comes in. We're dedicated even at a low \$120 something figure, but it's demoralizing. Many times the ancillary services people get the same as what the lawyer gets.

Judge Goldberg: Let me just ask the other people that I'm consolidating the mic I'll turn it over, but let's just average the numbers out. Let's say we recommend \$170 because, how do you get to that number? What's the basis of your number aside from ABA and what Ms. Sternheim said. Any other?

Jessica Hedges: My basis is also just it's rooted in practicality of what I think. I mean, I do think my initial thinking on this before I open my mouth on it was that a rate of \$250 is from what all of our cases are complex and discover-intensive, and require a high level of expertise is a fair rate, and it's not the rate that we would even necessarily charge in a private case, and it would be enough to not feel like I'm losing money when I'm working on these cases in a sustained way, in a way that I need to.

I think that like Bobbi said it's a big jump, so I'm trying to be practical. I want to be clear that I think that rate of \$170 is too low in a place like New York, Boston, San Francisco where the cost of living is way out of line with the rest of the country.

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Patrick Livingston: The only thing that I would add, Judge Goldberg, I think in the chief cook and bottle washer world that all of us live in, it's hard to track what percentage of overhead is in all these numbers. I do think the ABA study, Chip, if I recall correctly did have some analysis in it about that. I said \$162 because I thought they had it right back in the old days when I used to work in a firm. I think I remember the administrators talking about the rule of threes that a third went to overhead, a third went to salary, and a third went to profit.

Judge Goldberg: What was the ABA's study you're talking? Do you know how long ago?

Chip Frenley: I don't recall.

Patrick Livingston: I probably still have your e-mail so I can find that and I can . . .

Judge Cardone: Can I add something here? We're in the process of looking it up, but I believe there was a study done by DSO that said overhead cost for CJA panel attorneys is \$90 an hour. If that's correct, if that is what the study says that you are each spending \$90 per hour and we have New York and Western Pennsylvania, and I'm from El Paso, Texas, so I'm sure there's some variables, but let's assume for Judge Goldberg's question that it's \$90 an hour and you're getting paid \$127, is \$182 enough? Is \$165 . . . you're taking home essentially \$30 an hour now. Any thoughts?

Jessica Hedges: I think this is one of those areas where we've been accustomed to the horrors, right? For instance, right now, we moved office spaces. In my firm, we're a firm of four lawyers. I made the decision because I'm in court a lot, and because I need to save money to share an office, not office space, but literally share an office with another very experienced attorney and who is also in court a lot.

I'm one of the CJA attorneys who's doing well right here in Boston. We love the work, we're committed to the work, and we do it, but really, I shouldn't be sharing an office at this point of my career. I shouldn't be forced into that position. It's not enough what we're getting now, and frankly, I don't think that those high, the \$170 number given those overhead costs would be enough.

Chip Frenley: Judge, may I ask a question, please?

Judge Cardone: Sure, sure.

Chip Frenley: Thank you. I want to ask Tony and Bobbie this question. It came to mind when Judge Goldberg was asking about experts, and one thing I was wondering is if you could talk a little bit about the difference in the process between when you are budgeting a case with Jerry Tritz, and you're talking

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to Jerry about experts and who you're going to use and why you're going to use them, and I assume there's back and forth of what not, and how that impacts number one, your ability to obtain the right experts, and number two, your ability to achieve savings annotating those experts as compared to when you're working with a judge and what that process is like and those similar consequences?

Bobbi Sternheim: I'll start by saying even budgeting though it can be very helpful is very difficult. What we need to do is upfront to a lot of things. I assume I might need an expert, so I have to get that into the budget as supposed to the other type of case where I know I need a budget and now I'm asking for it. What goes into it is if I've had a case like this before or I have a colleague who's had a case like this, and I know that the government probably is putting forth such and such type of evidence, I'm going to need an expert to defend against that.

It doesn't mean I'm always going to actually engage the expert, but if I don't put it in, then I have to go through getting a supplemental budget. Many times, there are upfront costs that at the end of day are not even used. That is one of the differences, but budgeting does help. There's an aspect to it that should be probably used in all cases, but it's hard and it's time-consuming. Sitting down with Jerry makes it somewhat easier because he's had the experience that many of us have had as a panel member for so many years. Even with that, we'll sometimes say, "I think I might need it." Well, if you think you might need it, then you put it in.

Anthony Ricco: I think the short of it is that when you're sitting down with the case budgeting attorney is feedback. It's give and take. Jerry will suggest a different vendor. Jerry would suggest using a different investigator. That would be very unusual to get that from a member of the judiciary for a judge to say, "Well, have you considered Dr. So and So?" The informality of being able to sit there with an experienced person around budgeting issues, there's a great benefit to the CJA lawyer. I mean, the lawyer learns from Jerry and his district from Jerry. That's a great benefit to the defendant.

I don't think that the defendant would want to have that type of informal conversation with the bench. The two-way street aspect of it is the greatest plus that you get from sitting down with Jerry versus going into explain to a judge why you need . . .

Chip Frensley: Do you find that there's also . . . you're talking about the benefit of the client. Is there also a benefit from a cost standpoint to that process over the judge's process?

Anthony Ricco: Definitely. Definitely, and the case budgeting relationship be it either with

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an administrator or someone who's wearing a hat as a case budget attorney. It should be encouraged in all of the cases that we work on. What we've gotten out of case budgeting is that case budgeting helps the lawyer establish a roadmap for the case. On the roadmap, you know where the stops are going to be, you know what they're going to cost. When you have an experienced person to sit down and talk to that about like Pat was saying, a lot of offices people by themselves, they benefit from it. They learn.

Chip Frensley: Thanks.

Judge Fischer: Quick question because you're talking about what rate you might charge private clients. Is it now the norm to charge private clients by the hour or "a flat rate" or a flat rate through trial, and then if it goes to trial, another rate? Which is . . . ?

Bobbi Sternheim: To both.

Judge Fischer: Both.

Patrick Livingston: I try in private cases, I try not to bill hourly. Again, when you're trying to allocate hours in a day if you can afford that timekeeping role in the middle or the end of the day, it's easier. I think that most private clients respect that because they know if you give them a flat number, you're obviously capping yourself, and they know what the whole damage is going to be.

Judge Fischer: Certainly.

Bobbi Sternheim: It also takes away the friction of, "I guess I won't call you anymore because you're going to bill me."

Judge Fischer: Right. Another quick question, if putting aside some district where the judges say, "It's my job to cut cost," and the attorneys have fear that if they bill too much they're not going to get any more cases. If there was an independent body, whether it goes through the FPD or a separate body and you know now what the budget is for I presume your district or your circuit. Unlike me, I have no idea what the overall budget is for CJA or how much is left at any point in time, and I'm not trying to evaluate that in any way when I get any request, and we have a CJA attorney anyway, but forget that.

Now, we're in a situation where like the FPD who I think you said evaluates each request as it comes in, now like the FPD, the CJA lawyers as a group of independent sole practitioners have somebody they need to go to but that person now knows how much is in that budget and then which lawyers are bill... and then there's a range of reasonableness, right?

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There's not one single dollar I'm after. Are you comfortable with that person now saying, "I know what's going on in this district. I know what cases there are. Maybe you're on the high end of reasonableness all the time. Maybe you shouldn't be on the panel because I got an equally good lawyer who's always on the low end of reasonableness and that's the better way to give all the clients everything they need." Do you have any concerns about that problem? I mean, maybe you're switching one set of problems for a different . . .

Patrick Livingston: It's an issue. It's an issue in my district, Judge, because in our new local policies and procedures, there's a provision for removing people from the panel if their numbers are too high. I'd be surprised if it's invoked. I think I mentioned that in my statement, but it's in black and white, and I'm afraid that if nothing else, it has a chilling effect on lawyers.

Judge Fischer: Ms. Hedges, any comments?

Jessica Hedges: I don't have too many concerns about that because I think that it's helpful for that person to have the big picture. I think again if you pick someone who is a defense attorney who is committed to the service of indigent defendants, we're going to be trusting that that person has . . . if someone like the federal defender, Miriam Conrad, were in that position, I wouldn't have those concerns because her concerns fundamentally, morally, constitutionally are my concerns. I would trust that she's going to do the right thing to figure out what is reasonable.

Judge Fischer: Comments? Do you have a comment?

Bobbi Sternheim: I would just agree with that, and I think it also would be very helpful in a situation like that to have a talk which Jerry sometimes has to have with the attorney whose billings are just off the chart to say that if we had to compare it to someone who's within the chart, and I also have concerns with people who bill too low. You just want the Goldilocks just right measure, but at least it's somebody who could have a discussion with that person, and that individual may reevaluate practices, and that could be helpful across the board.

Judge Fischer: Thank you. Thank you, Judge Cardone.

Judge Cardone: Judge Prado, anybody back there?

Judge Prado: No.

Judge Cardone: Dr. Rucker?

Dr. Rucker: Maybe just one or two quick questions. Ms. Sternheim, you just talked

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about it might be a concern if somebody is billing too low. Would they be billing too low because they're doing self-cutting or they be billing too low because they're not doing the quality of work that they should be or is there some other reasons?

Bobbi Sternheim: I don't think the billing too low would be because they're self-cutting. I think that if self-cutting gets you more in the middle. I think the billing too low is I never thought about that. Maybe that service would have really been helpful or maybe the defense would have been better if I had called an expert. I think sometimes there just isn't the same degree of intensity put into certain cases. That is not a typical thing, but it certainly is something that you would contrast in the same case.

Now, if somebody had one overt act as compared to being involved in a conspiracy for ten years, there would be a difference like that, but sometimes it's because people aren't on their game.

Dr. Rucker: Let me switch topics if I might. We were talking about raising the hourly rate just a couple of minutes ago. Sort of a corollary event then is a statutory of maximums. If we had a \$250 an hour rate or even \$183, you want to get to the statutory of max much quicker that way. What should the statutory of maximum be?

Bobbi Sternheim: I could say that in the Southern District, the large majority of cases will always exceed the statutory of maximum just by the nature of the case. Whoever is in charge of reevaluating that that has to be re-evaluated. It just does not make sense given the type of cases and the electronic nature of cases, and the breadth of cases. I would think that that would have to be adjusted because you would be exceeding it very quickly.

Dr. Rucker: Can you give me some numbers because that's one of the things we're going to have to come up with as well?

Bobbi Sternheim: I will gladly submit something to you. I find as I said earlier the number is very uncomfortable. For the record, when I said \$183, I don't think that that is fair. I just think that's something that might be achievable. If you want us to discuss what's fair, we're going to talk about numbers that are never going to be realized. With regard to the statutory of maximum, I would submit something to you. I'm not prepared right now to pull out a number.

Dr. Rucker: Does anybody else want to give a shot or maybe submit something later?

Patrick Livingston: I wouldn't venture to do that. I would address the concern, and I think Judge Goldberg, this also goes back to your question that and maybe this might be why I think we are all trying to stay reasonable. My fear in a

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voucher cutting climate, in stricter scrutiny that if the rate gets too high, judges will feel even more free to cut, and that's why to me, the fundamental question remains like what Judge Restrepo was talking about the other day.

I think we all need to get on the same page about what the act is before we can fairly start talking about big, big, big number. It does seem, I mean, I get the sense that there's tension at a much higher level than this Committee about really what that act is, and maybe at the bottom line, it comes down to an understanding of whether or not we are supposed to be pro bono. I took a pretty strong position in my written statement about that, and it echoes what Judge Restrepo had said.

If we are not marching in lockstep, if we're going to stay interdependent, and we're not marching in lockstep about what the act is, I think we're just moving the candy around in the dish.

Jessica Hedges: I would agree. I think that that's well-stated. I think the statutory in our district, I mean, in nearly every case, maybe there's some exceptions, a few illegal cases people are going over. Again, they're having to write motions to justify going over, it slows down the time. I know many stories of people billing under because they need the money right now so that they can get paid billing a few hundred dollars under, but the statutory of maximums as they are don't make sense.

On that issue, the purpose of the act, I watched some of the testimony yesterday. Several of the CJA attorneys said there's no way to do this work unless you cultivate a retained practice, unless you have a lot of retained clients and while I agree that it's important to diversify, it's helpful from a business perspective to diversify. Someone who's about to go into an eight-week trial or someone who is taking on a terrorism case needs to be able to live and do that work for a long time in a way that is singularly focused for at least that period of time, and needs to be able to say, "No. I'm not going to take that client just because they can pay me more."

Dr. Rucker: Thank you.

Judge Cardone: All right. On behalf of . . .

Reuben Cahn: Judge, can I actually . . .

Judge Cardone: See, I knew you . . .

Reuben Cahn: [CROSSTALK] prompted a question.

Judge Cardone: Go ahead.

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Reuben Cahn: I just like to ask you, he asked, Dr. Rucker asked the question about looking at bills that are too low, and it prompted me to think about my office, and my office we have a practice of supervisors reviewing closed files, and reviewing case notes, and looking for things that may have been missed, avenues that should have been explored that possibly weren't. This is a quality assurance mechanism, and one of the things we're supposed to be looking at is quality. Could you envision an administrator, an experienced defense attorney who's moved into that role engaging in that with your colleagues accept somebody engaging in that kind of exercise questioning why they didn't follow certain routes, why they didn't examine certain areas in a case?

Patrick Livingston: I would like to go the other direction. I think if we follow that direction, we would be replacing one oppressive overseer with another. The thought that occurred to me over the last couple of days as I was watching hearings is that maybe it would be a good idea especially for newer panel lawyers to be associated, you can call it a mentor or whatever you want to call it with somebody else on the front end so that they in any case, they have somebody to bounce strategic and research ideas, and things off of . . .

It's hard to do this work in sole practice. I'm lucky because my hair is gray, and I have a lot of contacts, and I can call and bounce ideas off of people, but if you're younger, and you're just getting started into this and your experience is in state court or maybe as a DA or something like that, being able to just pick up the phone and call somebody isn't easy. I like the idea. It's something just occurred to me like I said over the last couple of days that the mentoring program should be broader and it should be more like a buddy program.

Reuben Cahn : Anyone else want to comment?

Jessica Hedges: I disagree with that. I mean, I actually . . .

Judge Cardone: Microphone.

Jessica Hedges: anything we do in society where we're trying to do it well, most people are evaluated and most people, there are some best practices that has been articulated. One of the things I suggest is that every district be asked to articulate best practices in that district. I think that attorneys practicing in the district should be evaluated every three years, every five years to make sure and to give them guidance where they're not. I think that that person, that court administrator assuming that they're a defense attorney would be an ideal person to figure out what kind of evaluative tool to use and to implement that.

Bobbi Sternheim: I think some attorneys would welcome it. If it's done constructively and

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not just as a criticism that you failed your client, but rather a discussion about, “Did you consider this? It would be helpful,” I think most people would be open-minded to that.

Anthony Ricco: I would say I think that’s so because informally it happens now anyway. Lawyers reach out, they call, they want advice, and it should be encouraged. If that function is also going to be served by this administrator in that way, I think it would be welcomed.

Reuben Cahn: Thank you.

Anthony Ricco: Thank you.

Judge Cardone: On behalf of the Committee, thank you very much for your time. Again, we’ve run over. We never seem to not do that, but this is all very important. I want to tell all of you, if you think of something that you’d like to add and or testimony or and Ms. Hedges, I think I asked you to follow up with something, but if there is something that when you get back you thought, “Oh, I should have said this,” please feel free to submit anything you’d like or contact our staff because we do want to hear from you. Thank you very much. Appreciate it.

Jessica Hedges: Thank you.

Anthony Ricco: Thank you. Thank you.

Judge Cardone: We’ll take about a ten-minute break. Get ready for the next panel.