Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing # 3–Portland, Oregon
February 3-4, 2016

Transcript: Panel 1—Views from a Mixed Panel

Judge Cardone: I'm going to introduce first our first panel. We have as panel participants, Professor, how do you say it?

Prof. Boruchowitz: Boruchowitz.

Judge Cardone: Boruchowitz from Seattle University School of Law; Dr. Linda Grounds, Clinical & Forensic Psychologist; Thomas Hillier, Former FPD for Western District of Washington; and Steve Wax, from Oregon Innocence Project. We'll start with you, Mr. Hillier. You're on the far left, so if you'd go ahead and make a brief opening statement.

Thomas Hillier: Thank you, your Honor. I've been accused of being on the far left for much of my life. Thank you very much, Judge Cardone and Committee members for this opportunity. My written comments focused on the question of independence even though the focus of this particular panel, or hearing is on the quality of CJA representation and . . . or representation in general, but CJA administration.

In particular, I think there is just a direct correlation between those subjects and independence, so I'm going to even in my oral presentation focus on that. I was a member of the Prado Committee and in the aftermath of that, our work on the committee as you know, there was basically, the golden ages of public defense because of attitudinal swings that occurred when we reported out some of the issues that were involved in operation of the Criminal Justice Act.

It was with great gratification that then director of the AO, Leonidas Mecham, announced that the Defender Services Committee, which oversees the function of the defender officers and the panel. He recognized their unique importance and recognized that the importance not only of the function, but the nature of the work and elevated DSC and the Officer of Defender Services to a distinct high level status within the judiciary, in order to provide judicial input that was deferential to the needs of the defender community.

A few years ago, when the reorganization of the AO occurred in 2012 and '13, and Defender Services was stripped of its authority to deal with our budgets directly and ODS was basically demoted, I was shocked, given what had been promised us by the judiciary following Prado. I personally felt because I worked on the committee betrayed and disrespected and I was angry. When I was preparing for this Committee meeting, I was

wondering if I'm kind of an outlier on all of that; reading some of the testimonies it seems perhaps I'm not. A former rock star of our community then known as Kathy Williams, now Judge Kathleen Williams, said in her typically diplomatic and eloquent style that she never became accustomed to this sort of disconnect between the judiciary and defenders. Not the judiciary, really the administrators of that criminal justice program. She didn't feel that they really felt the . . . that she felt they understood the importance of what we do or the inherent capability of the people who do what we do.

She went on to say that despite input, despite one committee or one study after another, which show that the organizations were running well, that people remained as she said, resolute in their misapprehension and mistrust of the information regarding the program's success. I think that disconnect is really at the heart of what our problem is. I don't think the disconnect is too much at the ground level.

The judges who have served on the Defender Services Committee through the years came in oftentimes without a lot of knowledge about what happened with defenders and CJA, but left uniformly with a great deal of respect and zeal in terms of their support of what we do. I think the issue is as you said Judge Cardone, what happens at the Judicial Conference level and how is it that the Judicial Conference can be brought up to speed on where we need to do.

As Judge Williams indicated, she said, "We need to adopt policies that confirm the judiciary's commitment to our function and our independence, but also recognize that it's really sort of awkward to be in a situation like we are right now where judges dictate basically the funding of not only the program, but individual cases." So I think there needs to be an attitude change and is that something really that the court should be involved with at all.

I think Bob Boruchowitz, Professor Boruchowitz said it in a couple of words. There should be a commitment to a culture of excellence. We need to get behind this idea of doing, funding and overseeing a program with the idea of making sure that we do our job as best as we can possibly do. And I don't think that's going to be easy for the same reasons that Judge Williams explained. I think part of it is trying to get judges to understand or the people who work in the Administrative Office and make decisions that defenders are capable of managing our officers.

I think exhibit A and B are here on your panel, you know Reuben and Katherine, and they aren't necessarily typical defenders. They're as good as they get, but there is a whole lot of people that run offices, multimillion dollar offices without any reason to distrust or believe that they can't do it

well. The same, is same is true of the CJA lawyers. CJA lawyers aren't out to gouge the system and their billings. It's really the opposite.

CJA lawyers aren't in it for the money. They're in it because they recognize that the CJA, the Criminal Justice Act, is a corrective statute and that it asks sacrifice in order to correct an historic injustice. That people have been unrepresented or underrepresented for so many years. That sacrifice isn't just in terms of money, but it's in terms of the emotional outlay that's involved in representing our people, but we do it because we recognize that our representations are short, privileged pieces of human experience, where we encounter people during the most difficult of times.

These are people who have no reason to confess to us all that they have survived. I think we have to enter these representations with a degree of humility, which means that we don't say, "How could you have done something like this?" Because we have no way to understand how they came to be where they are. Unless, we take some time to be with them, because these same people, despite their reticence sometimes to trust us, depend on us, to understand why they are where they are and to champion their causes.

How do we do that? We do it by listening, by sitting with them and learning about who they are, what their needs are, identifying issues and potential defenses and mitigators for sentencing. We rely on staff and experts and investigators to do that, but this process of proximity allows us to do what we need to do and to represent these people fully.

That is met as Rachel Brill's written testimony suggests and I've read it somewhat amazed, how forceful it was at times with resistance and delay when CJA lawyers ask for help and payment in doing what they're doing. Words she used include, oppressive process, bureaucratic excuses, onerous. I think that those comments are difficult to take. It's hard reading, but it says something. I think Rachel isn't the only one that feels that way, but she was courageous enough to speak out.

It manifests itself in hundreds of different iterations. I'm a rookie as a CJA lawyer. I'm on the panel now in Seattle. Took quite a while to get there because of their screening process, but I made it and I had my first case. As you know Judge Cardone, I wasn't coming to this hearing because I was on trial track February 1st. I made a request in that case for an investigator because the government added a charge that exploded the indictment.

I sat and I waited and I waited and I waited for two weeks until I was authorized an investigator to get after this extra count. After I got the investigator, the count was toxic basically and we settled the case, which

suggests that, when this operates quickly and effectively, we save time, we save money. I was a little ticked off frankly by having to wait, but Steve and I saw sort of an example of a disconnect with what we are doing and the judicial involvement in that function a few years ago at a national conference where a really good judge, a fine judge, a fine person, a very supportive of defender judge, commented with some irritation about having been submitted by an AF . . . having an AFPD submit to him a sentencing memo that was fifteen pages long in a case that he said was a slam dunk for probation.

Why do I got to read fifteen pages of this stuff in order . . . when this is just sort of a foregone conclusion? You know, I understand why he might say that, but really what it said is that . . . what the judge didn't take into account is that this person isn't working for you. This lawyer is working for the client and by giving her all and laying out in writing what her client is all about, she dignified that client. She showed that client respect and energy that is designed to make her feel better about her interaction with the criminal justice system and hopefully not come back again. In the same way that your sentences are designed to fulfill sentencing purposes that you hope will result in the person not coming back again. Saving money, saving resources, doing what we got to do.

Judge Cardone: Mr. Hillier I'm going to ask you to wrap it up within the next minute so we can get . . .

Thomas Hillier: Okay, I'm sorry.

Judge Cardone: That's okay.

Thomas Hillier: I guess what I would like to see out of this, the challenge that you have is, I think a lot of the problems are that in that CJA micro-level is that, that's seen as social work and we hear these phrases that are really sort of derogatory. It's not. It's the heart of what we do and why we do and it takes time. For lawyers to do what they've got to do correctly, they've got to feel respected. If you're afraid of asking for that funding, then you fail to act. There's really no greater failure than the fail to act.

My hope is that the Committee will embrace what we do and convince the Judicial Conference of its importance and work toward resolving the conflict that's inherent in the situation that we have today, and recognize that there are people out there in the defense community that can do this function without the concerns that have been raised by so many of the witnesses we've seen so far.

Judge Cardone: All right, thank you. Mr. Wax.

Steve Wax: Thank you very much. I appreciate you taking the time. Apologies again for walking in while you were sitting here. I'm introduced as the Legal Director of the Oregon Innocence Project. I think I'm here to say I spent thirty-one years, two months, four hours, seven minutes and fourteen seconds, as the federal defender here in Oregon. I am speaking to you based on that knowledge. As with brother Hillier, I am also now taking some CJA assignments and even one bloody retained case. Very fascinating, fascinating thing to do.

Five points I want to make in this oral testimony. First, significant change is needed. I think that you have been hearing that from a number of people and I hope that you take that as a given. Why it's needed? I don't want to repeat and belabor what Tom has just said. There was a sea change within the administrative office and the judicial conference over the last, not just the sequester three year period, but I would say probably going back five to seven years.

That sea change has significantly reduced the independence of the defense function, within the administrative office, within the judicial conference and at the local level. As the changes emanating from Washington have trickled down to, spread out to the individual districts and to many of the judges who are reviewing the work of the CJA panel attorneys and now the federal defenders through the budgeting process.

A process that I think you all should take very seriously as an awful impingement on the independence of the defense function and the ability of the defenders to run their offices and manage the resources that are untrusted to them. Second point, the decentralization that was built into the Criminal Justice Act, I think is often overlooked. As you consider the different proposals for change that are being presented to you—the Prado model, independent, but not independent, just re-energize the Defender Services Division within the Administrative Office—I'd encourage you to reflect on what the Congress did back in 1963, '64, when the CJA was passed. Decentralization, the Administrative Office, the director of the Administrative Office was given limited responsibility over the defender program. Some fiscal responsibility, placed in the Administrative Office director. It's not clear to me that the Judicial Conference has any proper statutory role. It certainly, as I see it, does not have the role that it has assumed.

Particularly, since it stripped the authority from the CJA Committee. The circuits were given a different power and I think that the way in which the statute was constructed was quite intentional and brilliant. Circuits were given the authority to appoint, reappoint and to set the staffing of the attorneys within each defender office, but that's it. They can't fire a

defender without cause for that four year period and that four year period was critical and put into the statute to provide independence.

It's a different type of independence than the community defenders such as Rueben, who runs an office have, but it's powerful. A statement from Congress, leave those defenders alone, unless basically we lie, cheat or steal. But the circuits were not given all the power either. The district courts were given a different power. The district courts were given some of the day-to-day authority.

I think that as you consider in writing a report at the end of this process, what you're going to say that it is critical to focus on the importance of this dispersal of power, so that there is no one entity that has or believes it has the authority to dictate what any individual lawyer does in representing his or her client.

Third point, over the thirty-one years that I worked in the system and spent a great deal of time working with the administrative office, the Defender Services Division and my fellow defenders around the country, I came away with the sense that every district believes that it's doing a good job. Every judge, every defender thinks, wow, the way we do it is really the way it should be done. Now maybe that's true given the incredible variation in the cultures that exist in the fifty states of this great nation.

My perception however is that those variations include a tremendous disparity in the quality of the representation that's provided. I think that, that is an elephant that sometimes is sitting in the room as judges and defenders talk about the work that we each do in our respective arenas. We don't want to recognize that. There are some judges who are just far more intrusive than others.

There are some judges who just don't believe in the defense function and there are some defenders who are too afraid to stand up and tell the judges what they think. Now, I've been fortunate because I practiced here in the district of Oregon where the judges as I've seen it for the thirty-one years, understood and respected the defense function and in the Ninth Circuit which has been generally supportive. I didn't have to practice in some of the other circuits, where I've heard from my colleagues that things aren't quite as peachy keen.

I might not have survived as a defender in some of the other districts, I recognize that. But I think that unless all of us who are looking at this problem recognize that there is a tendency to drive down the quality to the lowest common denominator, we're not going to get to an improvement in the system.

The tendency to drive the quality down to the lowest common denominator, I think is in part driven by the fact that you're not going to find a judge or many judges anywhere in this country who say, "Geez, I'm dealing with a bunch of bozos coming in, in the defense function." If you can handle a case in X district for $2000 or for 4 hours, why are people wasting the resources when they're spending 20 hours and $20,000, we're not going to be able to get to a positive resolution. Fourth point, governance.

Now, of course here I'm making the same mistake that I just said we're all making. I think here in Oregon we did it right. Now I don't know if we did or not, but what I know is that in the time that I was practicing as the head of the defender office here, we had more involvement in running the Criminal Justice Act matters and what happens with our CJA panel than virtually any other office or district in the country.

And that I think was critical to the development of a culture here with our CJA lawyers, to actually get into court and fight and fight with the resources that at least in my judgment, as ratified in case after case over thirty-one years by all of the judges of this court, you can't provide quality representation without resources. Yes, Oregon spends somewhat more money than other districts, but I think that we do it right.

I don't think that we have wasted money. I think that we have provided the clients that Tom talks so eloquently about, with the representation to which they are entitled and that they need. I believe that the role that the defender office played as a buffer between the court and the panel attorneys, as counsel to the court. I had a very, very unusual role here with the judges repeatedly picking up the phone and calling me and saying, "Steve, what do you think? Should the person get this? You know, I know you signed off," because I signed off on every single request for resources for the CJA lawyers.

They submitted their motions to the Federal Defender Office and yes the conflict issues and some of my colleagues think that that's wrong, but the U.S. attorney and the judges here accepted that we would perform that function with integrity and maintain the necessary barriers within the office, so that there was a defense attorney reviewing the request for expenditures and then reviewing the vouchers that were submitted by people such as Dr. Grounds.

And I would be the one who would call up a lawyer and say, "You know, this may not be necessary. This may not be reasonable." Or I would be the one who would be able to say to the judge on behalf of the lawyer, who would not have the position, the relationships, or the courage as an independent practitioner, to say to a judge, "Judge, this is ridiculous. Of

course I need this money." Now I never use that phrase, well, I probably did use that phrase in talking to judges on occasion, but that was part of the role.

Final point, in terms of the costs and the concerns that some judges have, what's going on. The change in the nature of the practice that I saw in the thirty-one years, night and day. Federal criminal defense today is incredibly complex. A little bank robbery that used to come to us with fifty pages of FBI 302s, now comes to us with cellphone records and computer records. The volume of material that we have to deal with, in even what appear to be the most simple cases is so far, far beyond what it used to be.

And I don't think that it is recognized across the board that it just takes time and money to wade through that. If the U.S. attorneys are going to be processing the cases in that way with the resources that they have at their disposal, the defense needs it too. Thank you, I will be quiet so you can hear from the other two panel members and I eagerly await your questions.

Judge Cardone: Dr. Grounds.

Dr. Grounds: Thank you. First of all, like everyone else I'm very pleased and quite honored to appear before this Committee and share my experiences. What I'm going to do is try to talk with you about what forensic psychologists do and the role that that plays in particular federal proceedings based on my experience.

Judge Cardone: Dr. Grounds, you have a softer voice than the other two gentlemen. Can you pull that mic a little closer to you?

Dr. Grounds: I don't think anyone's ever said that to me Judge Cardone.

Judge Cardone: Go ahead.

Dr. Grounds: Okay, is that better?

Judge Cardone: That's much better, thank you.

Dr. Grounds: Okay. By way of let's say nonprofessional introduction to myself, I think that I began practicing as a psychologist at about the age of eight, when I inquired of my mother what this particular doctor did on TV she said that he cut on brains to try to figure out what was wrong with them. I said, "I don't want to do that. What else do people do with brains, to study brains?" She said, "There's this guy named Freud and he talks to people in order to understand them." I said, "Oh, good. I want to be Freud."

So I think from that time quite truly, my fascination has been with the exploration and understanding of human nature. That led to a relinquishment of my passion for Shakespearean literature and a doctorate in clinical psychology. I've been practicing clinical psychology for a shocking number of years in my own mind. At some point about fifteen years ago, I began also practicing, studying first and practicing forensic psychology.

I did so, because I was exposed to the role that psychology had begun to play in judicial proceedings. At this point, I've probably . . . well, I certainly have done hundreds of evaluations in criminal matters, in both state and federal court. While I enjoy my clinical work and I love the teaching that I do, it is without question my work in judicial matters, that is the most compelling, stimulating and meaningful for me.

That's part of why I am honored to be here. I'm also very blessed to be in the District of Oregon and in the Ninth Circuit, because in my district, all of the stakeholders in the process that I participate in are sophisticated, aware, interested in how psychology can humanize the defendant whom they're seeing, at various stages in the judicial process.

Oftentimes, a CJA panel attorney . . . and I should say that, I think that most of my work, the majority of my work is in federal matters, though I also do state matters. Among those, I'm sure that I've done well over 100 cases with CJA attorneys, just in this district. They come to me; both CJA attorneys and panel attorneys come to me because there's something about their client that raises questions or concerns that they cannot answer themselves.

Mr. Hillier referred to the time that is necessary to spend with a defendant by attorneys and investigators, in order to understand them fully or in order to understand them well, but even then in some cases there are facets of the defendant that don't make sense to them, facets of the way that they're thinking or not thinking well, the way that they are processing information or as described in U.S.C. § 3553, the nature and circumstances of the individual including their histories and the characteristics of their personalities. So sometimes, less often in federal cases, the attorney will come to me and say, "Look, I don't know what's up with my client. Take a look at him or her and tell me what's going on." Now, that's a fairly generic question and of course it's not as specific as, is my client competent? Is there an affirmative defense here as it relates to insanity?

The vast majority of cases that I do are ones in which the attorney is asking to understand their human client at levels that they cannot, for the specific purpose of providing that information to other participants in the

judicial process—the U.S. attorney, the presentence investigation writer, the probation officer, and ultimately the judge—in order to inform them about the characteristics of the individual in such a way that is accurate and relevant to the judicial proceedings. In years past, when forensic psychology was in its early days, the psychologist would often say, write a report and say the client has a psychotic spectrum disorder, or the client has a history of abuse and neglect, or the client has low IQ, and they would stop there.

The current practice of forensic psychology goes much further. It's not enough to say, "here's what's wrong with your client." We must be able to say or must try to say, "Here's what I think is going on with your client with how they think, the quality of their information processing, the quality of their intellect, their historical experiences almost always with features of neglect, abuse, exposure to domestic violence, their psychological functioning, many times major mental illness such as a psychotic disorder, manic depressive disorder, of course substance abuse and increasingly post-traumatic stress disorder."

So we attempt to articulate those factors and then do our best to either hypothesis or strongly opine about how each of those factors likely affected their offense behavior. And we then, I certainly then try to go beyond that to say, and this is particularly useful for the presentence investigation writer and the judge to say, and here's how's I think these factors will affect their, are likely to affect their future behavior, their response to incarceration, their response to rehabilitation and then to identify the factors that will affect both positively and potentially adversely, their risk for recidivism.

Always bearing in mind the other features of § 3553 which have to do with the needs for rehabilitation, the appropriateness of punishment and in particular the impact of the defendants past and more importantly future behavior on the community. To the extent possible being able to define strategies coming out of the evaluation process itself, make recommendations to the court to effectively rehabilitate the defendant and to reduce his or her risk for recidivism.

If the committee wishes to ask me exactly what we do, I'm happy to describe that. I planned to take the time to do that, but I won't now. I will say that one of the important facts to be remembered is that the presence of major cognitive impairments, major mental illness and histories of trauma are present; the estimates range from 60% to 80% of all incarcerated individuals.

Once again as I side bar, it's not enough to say this person had a childhood characterized by neglect, abuse and exposure to domestic violence and

substance abuse. That characterizes virtually all of or at least good majority of the defendants we see. It's much more important to say, really, what was that? What was that like? In one case the child lived in a kind of communal home, ill-kept in which every member of his family smoked crack cocaine every day. In which there was very little food and he described smoke filled rooms, we think of back-room cigar smoke filled rooms, these are rooms filled with the smoke of crack cocaine. That is also critical and I'm going to just explain what I mean here because in doing forensic psychological evaluations, we all also try to identify relevant cultural variables. That happened to be an example of an African American defendant.

In our district, we have Native American reservations and crimes committed on reservations go both to the tribal court and to federal court. There are special factors to be considered there including the incidence of substance abuse, parental substance abuse, domestic violence and violence among both male and female residents of reservations. Finally as an example, we live in an area where sex trafficking is a huge problem.

The psychological issues there often have to do with the selection, grooming, and exploitation and coercion of young girls and women into the sex trade. Judges consider, in my jurisdiction, judges consider the actual data about that, as they reach conclusions about the young woman's relative capability in the charges compared to other, typically, codefendants. Again in my jurisdiction I'm blessed because the stakeholders are all interested in and sophisticated about the information that I provide, and with respect to the overarching question of quality of representation, I have to say that I can think of only a few items when I was requested to do an evaluation by CJA or FPD attorney in which I said, based on what you tell me and what I see in the discovery, I'm not sure that, that would be helpful. Of course I'm not asked to do an evaluation in close to the majority of cases; the selection process that the attorneys, the CJA panel attorneys and defenders engage in is very astute and conservative.

Judge Cardone: May I ask you to wrap it in a few minutes.

Dr. Grounds: As a unique voice of a different stakeholder, the one that sits in aid to the judicial process, the importance of the function of CJA attorneys is immeasurable in my view and their delivery of that service highly sophisticated.

Judge Cardone: All right. Professor Boruchowitz.

Prof. Boruchowitz: Thanks judge, members of the Committee. Thank you very much for the opportunity to testify here today. I offer my perspective as a criminal

defense attorney for forty-two years in my experience assessing public defense services across the country. I would like to emphasize a few key points: the need for independence, the need for adequate resources, including fair compensation, and the importance of restoring the Office of Defender Services to a higher level in the Administrative Office of the Courts until such time as a more definitive change can be made, preferably the establishment of a center for federal defense services. I would like to discuss these in the context of what I call a culture of excellence, one in which all the participants and the criminal justice system, the judges, the prosecutors, the defendants themselves, the police, the probation officers, the jailers, expect that the defenders will provide excellent representation for all of their clients. When this exists, judges do not get upset when defense lawyers file motions for expert witnesses or submit invoices for extra time they spend with their clients. Prosecutors do not despair when defenders are affirming their advocacy for their clients. And defenders themselves do not become mired in excessive caseloads without needed investigation resources. In my experience, Seattle's Western District of Washington has such a culture of excellence. It is as a result of a combination of factors, including more than forty years of outstanding leadership in the Federal Defender Office, the judiciary that respects the role of the defender, and a professional U.S. Attorney's Office, which in while disagreeing often on policy issues, respects the federal defenders role and the people in the office.

I have been privileged to know and work with many of the federal defender staff, as many of them originally worked for me at the defender association when I was director there. I've worked with some of the U.S. attorneys on various committees and as co-faculty at Seattle U. The commitment of the court to excellent public defense was expressed in a different context when Judge Robert Lasnik issued his opinion in the *Wilbur* case, a lawsuit challenging the system of public defense in two Washington cities. I quoted part of his opinion in my letter to the Committee. His recognition of the importance of comprehensive representation then includes investigation and the use of expert witnesses is a reflection of what I believe is a representative view of the Western District judges that contributes to the culture of excellence.

I am struck by the importance of that culture of excellence when I reflect on some of the problems identified in the testimony I've read that has been given to your Committee. Among the key issues is parody of resources. While I recognize that a strict 1:1 ratio of AUSAs to federal defenders is not necessarily what is required, to have it routinely be 2:1, 3:1 or 4:1 is not adequate.

In addition to the Miami example in my letter, I note that Idaho is about 2.5:1 and Guam is about 3:1. The CJA lawyers need to be able to have two

lawyers in trial, when the U.S. attorney has two lawyers in trial. I think of some of the state court jurisdictions I visited in states around the country where the culture does not foster excellence. I visited places where the defenders are overwhelmed by caseload, where they never seek investigation or expert services, where they are so poorly paid that they struggle to make ends meet, and where the judges do not respect the importance of their work. On the independence element, I've seen places where the prosecutors actually pick the defenders and other places where the judge's grip on the selection of the defender affects the defenders willingness to challenge the court.

In all of those places with what I would call a broken culture of justice, the people who really suffer are the accused persons and their families. And really the entire community suffers when the perception and the reality of the justice system is that it is unfair and that individual accused persons have no chance. It is time in light of the developments that are presented to you by a variety of witnesses, to reassess the main conclusion of the Prado report: the establishment of an independent center for federal defense services. Federal defenders and CJA lawyers should be independent of judicial control and they should have the resources they need to provide effective representation, to be able to match the level of advocacy available to the government. In the meantime, the office of Defender Services should be elevated in stature and the various districts should have more autonomy so that decisions on staffing, selection and funding of CJA attorneys, and funding for investigation and expert witnesses, are made with more distance from the judges themselves, providing both the perception and the reality that lawyers can be zealous in their representation without fear of adverse consequences for themselves or their clients. Thank you.

Judge Cardone: All right. We're going to begin with questioning. Judge Fisher, if you'd like to start.

Judge Fischer: Thank you and thank you all for being here. I'd like to start with Mr. Hillier because you mentioned something on a topic I know is very current and that's the Clemency Project. You said that the AO decided, the FPD couldn't fully participate in the Clemency Project. As I understand it, that was a legal opinion that it wasn't authorized under the statute and that's why FPD couldn't do it although they could screen for their clients.

I'd like to take that and then ask the broader question, how do you think this would be different with an independent organization or did you disagree with that legal opinion that it wasn't authorized by statute so . . . did you disagree with the opinion? Would it require a legislative change to broaden the authority of the FPD and if so can we do that within the

structure that we have or do we just need to throw out that legislation and make it completely separate?

Thomas Hillier: That's a great question. Your Honor, I think if you read the NACDL report on the decision itself, it states that, you can defend this decision in a very therapeutic, sterile sort of way that this doesn't fit the statute, but there are two problems. We weren't asked about whether we should be involved with that function and we should have been. I mean, these are our clients and they're clients who are being treated unfairly, that everybody knows.

Secondly it just, it showed to me that without our input, the decision was made without regard to what's at stake here, what's it all about. The big picture, not whether this fits within the CJA and I think in making its decision, if I had a legal difference and I haven't studied or briefed it, but it's the notion that you guys are part of the judiciary and this is an executive function so you can't do that.

Well, we don't feel that we're part of the judiciary, we work for our clients and these were the people who were impacted by that opinion that limited involvement and as I noted in my paper, the bottom-line is that there's no real infrastructure for that massive undertaking and there's just people that are on the sidelines. So whether you can defend it or not, it's sort of nearly irrelevant to me given what's at stake and what happened.

Judge Fischer: Just let me ask you briefly. Now that you have done some panel work, you said you waited two weeks for an investigator which I think you'll agree some of our lawyers would have said, "Wow, you got an investigator in two weeks. That's fabulous." Do you know why it took two weeks? Was it going to the circuit that slowed it down? Was it . . .

Thomas Hillier: That was all done locally and I don't know, but I kept calling our CJA administrator asking what's happening here and she courageously needled the judge a little bit and it got done. I have no idea how and why and like Steve and those of us on this panel, we sort of live in a bubble compared to other districts I think and you're right, a two week delay would be seen as a miracle of expediency in some places probably.

To me what the bottom line is that efficiency at that end creates efficiencies at the other too. Lots of money was saved once we got that investigator can show look, we can settle this case at a different level.

Judge Cardone: Again, I'm going to ask you again. These microphones are very direct so try to, everyone try to speak into them.

Judge Fischer: Mr. Wax, I want to move on to you, but Mr. Hillier may have a thought on this too and I'm not incredibly familiar with how ODS or DSO or the Committee worked previously. Would the return of the authority to the Defender Services Committee and the DSO solve most of our problems at least as to funding or is that just at best a stopgap measure and we need to move on to something else? How helpful would it actually be now if we could go back to that prior state of affairs?

Steve Wax: I believe it would be very helpful. Would it solve the problem? To some extent. Is it the best solution? I'm not sure. I think that the point that Tom made about the members of the Defender Services Committee that we both had the pleasure of working with over the years, is worth reflecting on. Many of those judges came in with either a neutral and sometimes an antagonistic view to the defense function. Many came in with virtually no experience.

None had practiced . . . many had not practiced criminal defense, had not been prosecutors and were . . . needed to learn. By the time they left the committee, virtually all of them had come to a very different understanding about who we defenders are. In some instances it was just a question of getting to know us as human beings rather than whatever stereotype of the wild-eyed crazy or drunk defense attorneys that they were used to dealing with.

So I think that reinvigorating by returning the authority over the defense budgets to the Defender Services Committee will be a tremendous step in the right direction. Same is true within the Administrative Office. Tom mentioned Director Mecham. A man of his background wouldn't necessarily be expected to end up as a friend of the defense function, but he got it. He got it. I didn't have much personal experience with his successors.

I don't know if it was the directors of the AO or whether it was the second, third or fourth tier that brought about the changes, but I watched the pain on Ted Lidz and Steve Asin's faces as they struggled to try to retain the position that they had earned within the AO. And when Cait Clark came in and, you know, two weeks after she was hired, gets demoted—what an outrage. What a terrible, terrible outrage that was, and yeah, it needs to happen.

I'd like to make if I can one additional point about your clemency question. I researched it. I asked our judge here to assign the federal defender in Oregon to handle clemency petitions and she did it. My view is, without ever having spoken directly with the people in the Office of Legal Counsel within the AO who came up with the opinion is, the opinion it was driven by fiscal concerns and that's wrong. And to the

extent that there was pressure brought to bear, whether external or internal, to offer a legal opinion about the scope of representation based on the fact that it was going to cost the system a lot of money to provide a type of representation that was necessary and that was being invited by the President of the United States and the Attorney General, seems to me to be a perfect example of the problems that exist today.

Reasonable people of course always disagree about what the law says. I don't think that there should be a question however, but that there is a reasonable interpretation of the Criminal Justice Act that would have authorized those expenditures. We're allowed to appear in congressional hearings, in administrative hearings in other administrative matters, parole hearings, and we are authorized to handle ancillary representations, the letter that I put together for our Chief Judge outlined some of that. Not in a tremendous amount of detail because I didn't need to. I just wanted to make the point. Thank you.

Judge Fischer: Thank you. Let me ask because you said you fell into your own trap and said the way you do it here is best, which came first, the chicken or the egg? Did the CJA panel members want the FPD involved as much as it is or did the FPD say, "here's all the things that we can do," and the court said, fine go do it? Because I think there might be different cultures in different districts. I think in some districts there is suspicion by the panel members of the FPD and they don't necessarily want that level of involvement at least as maybe to assignments and panel membership.

Steve Wax: The Federal Defender was set up here in 1974 as a Community Defender branch of the county metropolitan public defender office. When I came in in 1983 and the office was converted from Community Defender to Federal Defender, the system of defender involvement in the CJA matters was already underway.

The Chief Judge at the time, the late Jim Byrnes, while I fought bitterly with him in every individual case, he understood that the defense function needed to be independent and he and his colleagues were fully supportive of, and when they rewrote the district CJA plan in '82, '83, to convert the office from the community to a federal public defender, they delegated the responsibilities to the defender.

The panel was relatively small at the time. The office when I came in, was four assistants and the defender. So relatively small system. Everyone bought into it. Now I think that if you look at the history, there was some suspicion in the defense bar. Why is the court rigging or converting the Community Defender into a Federal Defender? They were trying to take control. Then they hired this thirty-five year old kid from upstate New

York, who'd never tried a federal case to run the office and by God, this is just clearly, Wax is going to be their little boy. It didn't turn out that way.

Everyone, I think at the end of the day understood that by having the defender involved, all of the fiscal decisions, the money decisions were being either influenced by or in some instances made by a person who was acting based on his belief in the Sixth Amendment and not simply trying to control costs. Clearly, I understood that I had to be fiscally responsible. There's a difference in being fiscally irresponsible with a belief in and an understanding of the Sixth Amendment and just being fiscally responsible. That's why I think it worked and the U.S. attorneys understood that if they were running a grand jury investigation and they needed a lawyer assigned for a witness, that they could call the office. They could deal with the CJA panel people in the office and the integrity and secrecy of the grand jury process would be maintained.

If a lawyer needed to hire Dr. Grounds and the office was representing a codefendant, the panel lawyers understood that no assistant within the office would have access to the information about what the lawyer who's trying to hire Dr. Grounds is asking for and it worked. You have to have integrity; you have to have a belief in the integrity. We were fortunate. I more or less inherited it and I certainly carried it forward.

Judge Fischer: Thank you. Dr. Grounds, I suspect that there is a range among judges of, from totally skeptical of forensic psychology to being open and welcoming. Do the lawyers to your knowledge consider that in deciding whether to approach you or do you have a sense of who is going to be more interested or more willing to accept your recommendations or does that not play a part at all in your experience?

Dr. Grounds: I don't think it plays a part to my knowledge, for the following reason, since cases are assigned to judges and CJA Attorneys are asked to represent a particular defendant, that process takes place outside of my purview. Certainly defenders will tell me this particular judge really gets what you're going to be talking about. They might say, as in one case, you've got five minutes to get the judge's attention and ten minutes to keep it and so that's helpful to me.

Never have I been told to pitch or spin or cherry pick data. I think I've been doing this long enough that I sort of go down the path that I think is the best standard of practice in my profession and provide that information and the judicial process does what it does with it.

Judge Fischer: Thank you. Professor Boruchowitz, you talked about rates and I was surprised there are actually some lawyers out there who think the rate is enough. I don't. I don't think it is, but how . . . is there a way that we

should deal with rates to address the difference in localities and the difference between what a rate might be . . . I don't want to malign any state, but a state where lawyers generally are billing maybe $100 an hour for private cases and places like Los Angeles or San Francisco where they're at $600, $700, $1,000 an hour. Is that an acceptable approach? Should we try to recommend something along those lines or is that not worth it?

Prof. Boruchowitz: Judge, I think that it makes some sense to take into account differences in locale, and certainly there are different costs of living for example in a rural area than in Los Angeles, so that makes some sense. I think the minimum rate needs to be higher, and then maybe some cost of living adjustment for the most expensive places, but it seems to me that the minimum across the country needs to be higher.

Certainly the basic cost of the lawyers business are going to be roughly the same and the debts that they carry with them having become a lawyer in the first place, are roughly the same across the country. The cost of living is a factor, but I think that that should be on top of a higher minimum.

Judge Fischer: How do we come up with a new minimum to recommend?

Prof. Boruchowitz: That's a really good question. I think that one way to do it is and I did a little bit of math in my letter to the Committee, is to look at what the U.S. attorneys are getting, including their benefits and overhead. That's kind of how I tend to . . . when I valuate the systems around the country, I look at what the private bars is charging and I look at what the government lawyers are getting paid and the benefits that they have and the overhead that they have.

Roughly speaking, most of the articles that I've read and the experience that I've observed about private practice is that the compensation is roughly half of what the fees are. In other words, your overhead is another half of the fee, and so that to me is one way to look at it. If the U.S. attorney has got this salary, this package of benefits which costs, significant percentage of their salary, and the overhead including, in the overhead, the staffing that are available to them and then recognizing that maybe it should be even a little bit more than that because the defenders don't have the law enforcement agents available to them.

While I never practiced as U.S. attorney, I did work one summer with a U.S. attorney in law school in Southern District of New York and I watched the agents bring the cases to the lawyers. That's the resources that the defenders simply don't have and so in that sense the overhead for the defenders maybe needs to be a little bit higher in the defender offices themselves.

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

Judge Cardone: Judge Gerrard.

Judge Gerrard: Yes, I'll try to limit it here. First of all I wanted to ask probably all . . . I'm sorry. Is it on?

Judge Cardone: It's on, but you've got to get it close.

Judge Gerrard: Okay. All three of the lawyers on the panel we talked about the elevation Of DSO back and my question is systemic and that is, and I believe it was you Mr. Hillier that mentioned that there was a disconnect, and what I want to know is what that disconnect is and what led to the disconnect between the administrators and defenders. I guess I would say other than political impersonality, which is always going to play a part, but are there systemic issues there that we should be looking at? We need to identify problems and then solutions so that's my question and I think to all three of you.

Thomas Hillier: To begin and what we do is sort of mission driven, it doesn't fit very easy and to a business model like many AO units occupy. I think the AO personnel see trends in each one of the special units in the AO that are pretty predictable, you have all these charts that make sense based upon workloads and stuff. But you look at the defenders and it's just everywhere, it's erratic and I think they look at that and think that's, the defenders are out of control. I mean, we've all . . . Steve and I heard that phrase more times than to care to remember, that the defenders are out of control.

It's really a function of just what happens in each district, so the studies would happen and say no, these guys are doing it right, but there's as Judge Williams says, there just seems to be a resistance to that and then a desire to make this kind of homogeneous and have a linear chart with everything we do too. I think there is a disconnect there between what you would see outside of a mission driven, culturally influenced situation. I think the other disconnect is what Steve and I were talking about, you know where the judges who work with us get it. They see the stewardship, they see the drive, they see the desire to have the best possible representation. I think—and the Judicial Conference is very mysterious to me—I think of like the election of a pope when I wonder about what's happening up there and I think that's a function of perhaps those decision-makers not really being on the ground with us or with the people that are, I think.

I really believe it's important that when decisions are made about our function and this goes to your question Judge Fischer, will it fix it if we

make some of these changes? Only if people who are working with us are part of that decision making process, so that the information that's driving the decisions made is coming from judges who've been on the committee.

I think as importantly as anything having Kathy, Judge Williams and Judge Borman and Judge Nachmanoff and Judge Prado and people like that who have actually been defenders in those committees, but I don't think that's happening so there is just a disconnect because of that.

Judge Gerrard: All right, thank you. Mr. Wax

Steve Wax: My thought is there's a zero sum game that the people within the administrative office are playing as they see it. That zero sum game means, in the crassest sense, if the defender gets additional money, a judge doesn't get a desk or a carpet or a law clerk. And in dealing with the staff in the Administrative Office for the many years that I did, I was continually both amused and disappointed in the way in which they felt about their interactions with judges.

Perhaps their view of the black robe was a little different than mine, and that too many of the staff, and I hope I'm not being offensive and say this, viewed some of the judges with whom they interacted as royalty and they could not say no to them. If a judge wanted a new law clerk, it was perceived as I perceived it, by the staff in the AO they had to get that judge the additional law clerk. There was then in the zero sum game, no money for the additional research and writing attorney for a defender office.

I think that that zero sum game attitude is part of where the disconnect comes from within the AO staff. Another part is that from the top down and from the Judicial Conference on down I think that within the AO the staff was told and or felt that they were told that the defenders were just another court unit. That we were fungible in the same way as a pretrial services office or a probation officer or staff within the bankruptcy branch of the AO were fungible.

And the understanding that existed and the term that I heard the judges use in the early years of working with the Defender Services Committee, they had a fiduciary duty, an obligation to the defender program, that understanding of that fiduciary responsibility was lost, hence you get a disconnect. If the staff and the judges are saying, that we're just another court unit and not recognizing that when the CJA was passed, the program was put in the judiciary as the, and I hate to quote Secretary Rumsfeld about Guantanamo, the least worst place to put us.

To put the defender program within the Judiciary wasn't a good idea, but it was the least worst place. Well, that least worst place the judges and the AO have lost the understanding, you've got a responsibility that is different.

Judge Gerrard: Those are big disconnects and that's helpful. All right.

Prof. Boruchowitz: Judge, my comment is going to be from a more distant perspective, because I don't have the experience of running a Federal Defender Office, but I think this discussion points out the problem. The fundamental problem in lack of independence when the defenders are part of the judiciary, and the judiciary controls their budget.

I offer the perspective of the Public Defender Service in D.C., which of course is federally funded in a slightly different kind of court system, but still a federal program with an independent board and a culture of independence that's recognized. If in developing a new structure your Committee wants to think about that as one way of looking at it, that you have true independence that judges have nothing to do with it.

I would repeat briefly something I mentioned in my letter that in our county system in Seattle, when more cases come in the system or more needs occur, the defenders present that to the, in this case an executive branch department, and because of formulas that have been developed over time, the funds just come through. You have this many more cases, you get these many more lawyers.

If you have this many more lawyers, you get these many more investigators, you get this many more supervisors and the judges have nothing to do with it. The only time I ever had to deal with judges about funding, was when I thought I didn't have enough from the county and I went to court to get more and the judges ordered more, but I made a case that I needed more, but by enlarge day to day judges had nothing to do with it and that's what I think should happen.

Judge Gerrard: Thank you, one final question. Dr. Grounds, again about the system. Have you had any experience or concerns about in your practice, conducting either full examinations or diagnosis or analysis as requested by counsel? Any fear of professional fee cutting in any of your cases?

Dr. Grounds: No, but I will . . .

Judge Gerrard: No outside pressure in any way?

Dr. Grounds: No, but I will say . . . well, I think that's a slightly different question. Certainly I think most forensic psychologists practicing in Oregon and

certainly I charge 30% to 40% less for federal indigent cases and attempt to make the hours required as tight as I can. I also utilize students to help me with research because we try to include relevant research for the judges' consideration and that's unbilled time and lastly I think most people practicing as I do would say that we never bill for every hour. Certainly not every minute, but not every hour.

I do believe that within all of those constraints, if I go back to the CJA panel office or via the attorney, if I go to the attorney and say, "Look, this is just so complicated. I can't do it for the twelve or the sixteen hours that I estimated. I need more." I cannot recall an instance when that was denied, if I present reasons.

Judge Gerrard: All right, very well. Thank you.

Judge Cardone: Can I just ask for a follow up to that?

Dr. Grounds: Yes.

Judge Cardone: So, what's your position about the statutory maximum? Are you saying that most of the time you work to stay within the statutory maximum allowed and how does that affect the service you provide? Could you do more, would you do more? Do you think it affects what you're giving, the product you are giving I guess?

Dr. Grounds: I would say that the vast majority of the time I do not stay within the statutory limits, because I don't believe that I can do the work within the hours that that allots. Sometimes I can if it's a simple case. Rare, but more often than not I will go beyond that which means that the request goes first to the panel, then to the presiding judge and then to the circuit. Again, I can't recall a time when that request, if well-reasoned, has been denied.

Judge Cardone: And ow about the process, are you sitting there waiting to do this analysis while they decide at the circuit, because one of the things were are looking at is that has to go all the way up to the circuit and back down before a lot of attorneys are even going to let you start to work because they don't want to get stuck with the bill. How does that affect your process?

Dr. Grounds: There is a dollar amount or a number of hours of work that I can legitimately do while waiting for approval from the circuit court. My experience is that it typically takes around three to four weeks, to get full approval, so that does delay the start of my work and both the panel attorney . . . well, of course in the Federal Defender Office that's different.

The panel attorneys let me know the minute that that approval has been obtained and will typically in anticipation, send me the discovery that I

request, which typically includes a great many documents. We try to get everything ready to go when the funding is approved.

Judge Cardone: All right. Dr. Rucker.

Dr. Rucker: Thank you Judge Cardone. I want to pick up on some of the points that were made in the opening statements and some of the written statements. Professor Boruchowitz mentioned the culture of excellence. They talked about having the defense having resources equal to the government and Mr. Hillier in your written statement, you mentioned on page forty, you talked about the adversarial competition should be between equal forces, yet you had to wait a couple of weeks to get authorization for an investigator.

Then Mr. Wax, you talked about reviewing all the vouchers that go up before the judges for service providers. I'm not sure if you do all the vouchers or just for the request for service providers or excess amounts. So where I want to go with this is we've seen surveys that indicate there's a wide disparity around the country between resources being used by the panel attorney and we see in surveys when the judges talk about the quality of representation.

They're saying the defenders, the federal defenders do the best job, with the panel attorneys doing not quite as good a job, but it seems to me it raises an issue of resources in the administration of all of this. If Mr. Hillier had still been with the defenders, he wouldn't have had to wait two weeks or four weeks or something like that. You could've gotten authorization immediately from your defender, to have an investigator or a service provider and not have to go to the judges, either at the district court level or at the court of appeals level.

I'd like to ask you to talk if you would about the quality of representation and the availability of resources for the panel and if we should think about an alternative model. Is it a model like what Mr. Wax had been doing in Oregon? To look at this, you would give resources and have those resources available or should be something totally different and move where the judges are not involved in approving these resources.

Judge Cardone: Who do you want to start?

Dr. Rucker: I'd like everybody to speak, but we can start with Mr. Hillier or Mr. Wax.

Steve Wax: Tom's looking at me.

Thomas Hillier: As always.

Steve Wax: There's no question that there's a delay in getting resources to the panel attorneys. That is different than it is for the defenders, unless the new budgeting processes that are being imposed on the defenders are also slowing things down there. Fortunately, I guess I left before I had to contend with that. Dr. Rucker, my thought is, it's wrong as a matter of policy for a judge who is going to be presiding over a case to be reviewing a motion and affidavit requesting resources.

I think that function should be removed from the Article III judges who are the [ ] and that would take an amendment to the Criminal Justice Act. In saying that that's wrong, I'm not advocating replacing that function with a bureaucrat. Some of the CJA resource council who have been hired in some of the districts or some of the other staff who've been hired at the circuit level as I've perceived it, have tended to be approaching the work in a bureaucratic function, not with an understanding of and the desire to further the Sixth Amendment.

I don't think that simply taking the judges out and putting in some functionary, whether under the control of the court or not is the way to go. I said it before and I'll say it again. I think that you need to have the resource questions being addressed by a person who has been there, doing defense work and believes in defense work. Cutting out the multiple layers of review, district court to circuit court, I think is necessary. I don't see how any Ninth Circuit judge can provide meaningful review of the incredible large volume of vouchers or motions that they need to deal with.

I was going crazy trying to deal with the District of Oregon vouchers and the percent that now have to go for circuit review every year gets larger and larger as the complexity of the cases continues to increase and the statutory maximums are not keeping up. I would not want to be one of the three Ninth Circuit administrative judges, who is presented with a multi . . . well, it's no longer in paper, but however many bits and bytes are coming through the system.

It's not meaningful review in my judgement. I know that toward the end of my time reviewing, I was not able to provide the same quality and depth of review that I was in the beginning when I was looking at a smaller number. To a certain extent, I think that were fooling ourselves in thinking that the circuit review is anything other than either a rubber stamp or something where a judge thinks that she or he needs to demonstrate to someone else that he or she is being responsible and therefore you're going to cut 10% or 20% or oh, this one looks big whatever. Cut them out of the process.

Now, I would not say at this point that there is no role for some district level judicial officer, in dealing with some of the resource allocation questions. I say that in part because my experience here was that the involvement of an Article III judge gave me protection from either the circuit or the Administrative Office, when some of the judgments that I was making and recommendations that I was making were questioned.

If I talked with the judges, if I provided them the information, they were in a better position to deal with their colleagues on Judicial Conference or Ninth Circuit committees. Now, if the entire structure of the system is changed so that it is an independent body, the need for that type of role protection would be decreased. In terms of defender and panel and relative quality of representation, defenders do it every day. I think that the reality is that some of the difference that the judges see is likely based on experience.

You have a lot of panel attorneys who are just doing it less often and it's so bloody complex and the Guideline law changes and the wiretap law changes so quickly. If you're not doing it every day, you just can't keep up. I'm feeling that now because I'm not doing it every day and I have some reluctance now to take on some cases in subject areas that I haven't been dealing with for the last year and a half.

Dr. Rucker: Thank you. Mr. Hillier.

Thomas Hillier: Just very briefly because Steve really covered it. I think the Wax model of CJA administration is a great model and certainly something that should be encouraged as an interim step.

Judge Cardone: Mr. Hillier, can you get a little closer to the mic.

Thomas Hillier: When you look at Steve's CJA plan and the way he works with the panel, it's better than having the panel lawyers go to judges, filtering it through the office. When I became a federal defender was a year or two or three in that I took over administration of the panel. It had been administered by the court and the court was doing a good job. There was nothing untoward about what was happening there, but it was a little slower and it was a little indifferent and I just felt that the defense function should be under one tent, so let's bring it in.

I think it really increased the efficiency of the process, but more importantly it created trust and morale, a betterment that was really important. Steve says really the bottleneck here is the reality that most of these cases are complex nowadays, and be it an expert or a CJA lawyer voucher and you have that delay that goes through the circuit. That's a

legislative fix, but I think that's got to be encouraged or I would hope that would be encouraged by the Committee.

I personally believe that a model that . . . that the model that the Prado Committee voted out is, I like it because I do like having the judges in the mix. I think it adds to our credibility. It adds to our communication and it just adds to a better system overall. I learn from the judges and the judges learn from us, so I don't want to just . . . I just believe that it's okay if we're there as long as the operation of the federal public defense is as independent as it can be.

I believe that Steve said that there's just a credibility that goes with, and a growth that goes with the collaboration that is inherent in being an independent group within the judiciary. Such as, the Federal Judicial Center.

Prof. Boruchowitz: My thought is that one way to bridge the gap potentially between CJA panel attorneys and the federal defender program would be to have a presumptive number of hours that the CJA lawyer could have immediately for investigation. Perhaps depending on the type of case, maybe depending on how if they have a . . . if they annually have a certain number of cases as a regular basis, you get a certain number of investigator hours so that they know they can call their investigator immediately. You've got five hours, you've got ten hours, go start on this while I learn what else we need.

That would be one way to do it, to avoid the delay that happens. And I know certainly from running a defender office and also from working as a clinical professor where, I had a partnership with my former office and I could use their investigators just by making a referral, how much easier that is than having to wait for somebody to approve it. If there was a presumptive number of hours that you had and potentially a presumptive dollar amount for expert witnesses, so you didn't have to have that kind of delay and you didn't have to have it approved every single time. That's a thought that occurs to me

Dr. Rucker: Let me ask one other question if I may, particularly of Mr. Wax and Mr. Hillier. Mr. Wax, you mentioned that the complexity of cases over the last few decades has gotten increasingly more complicated, particularly with technology and with discovery kinds of issues. Now that you're no longer a defender and on the panel, how are you staying up with that technology and the changes in technology? Do you have the resources and training that you need, and Mr. Hillier the same kind of question for you as well?

Steve Wax: My experience is probably unique in part because I, in assisting and putting together the advisory committee of the Innocent's Project, asked

the Chief Investigator and Chief Paralegal in the Federal Defender Office to serve on that committee. I'm not the guy to ask. In terms of what I'm doing in private practice, I recognize now how incredibly blessed I was to have the resources of a defender office and how difficult it is to have to martial the resources on an ad hoc basis for each case.

I don't know that I can offer a solution to that problem. I think that what I'm seeing is suggesting to me that I could and should have done a better job of coordinating the investigators, the psychologists, psychiatrists, et cetera, who are available to the CJA panel attorneys, when I was the defender. I think that Lisa Hay is being more involved in that now here in the District of Oregon. I think that all defenders should take up that burden perhaps a little more than we tend to.

Judge Gerrard: Mr. Hillier.

Thomas Hillier: I agree with Steve in the sense that now that I'm out, I wish I was back so I could help the CJA people more because I feel more what some of the problems are. We weren't oblivious to it back when, but I'm glad the person who replaced me is very tuned into that and is doing everything you can to increase defender involvement with the CJA.

In private practice experience, it's been so minimal now. What's happening is at least in the Western District of Washington, they're not charging as many cases as they used to be. I don't know if you're hearing that from other districts, but we're not getting as many cases, so I haven't had too much involvement. I work in like Steve said a little bit of a unique situation. I'm working in a big firm that I convinced should hire me to bring CJA cases in and kinda graft them on to their larger pro bono program to give young associates an opportunity to really feel the soulfulness of public defense, but also to harness that energy as push back with the government.

The idea was to take huge cases and where a solo practitioner wouldn't have the resources, we, I'd throw all these associates at the case pro bono and they're all pro bono to try to do really accomplish what needs to be done in those complex cases that can overwhelm a CJA sole practitioner, but we haven't got a lot of traction yet, so I don't have a lot of experience on how that might work out, but I don't know if I've answer your question, if that's thoughts helpful.

Judge Cardone: Thank you Mr. Hillier. Mr. Frensley.

Chip Frensley: Mr. Wax, it's hard to argue with the impact on the quality of representation in the District of Oregon with respect to panel lawyers, based upon the panel administrative system that you have in this district.

We have over the course of our hearings today heard individuals testify about the benefits to the quality of representation where a model such as panel administrator within the defender of our office is utilized. But as you know, when you offer an alternative to judicial administration, there's going to be criticism and you alluded in your earlier remarks to one aspect of that criticism and that's the idea of conflicts.

That particularly resonates because that's the whole basis of the reason why people say it ought to be away from the judges, is that it's a conflict. So I'd like for you to speak a little bit about your views all the potential conflict of administering a panel within the defender's office and why to the extent you believe those conflicts don't outweigh the potential conflicts or real conflicts of it being within the judiciary.

Steve Wax: I believe that there is a conflict whether the function is handled within a defender office or the court. A different conflict, but a conflict nonetheless. When the court is involved in dealing with the expenses, the conflict that I perceive is that the court is not approaching the issue from the perspective of the defendant, the person who needs the resources.

A lawyer in making a request is acting on behalf of his or her client. The judge in reviewing the request is not. I perceive that to be a conflict in role. The conflict within the defender office is the more traditional conflict between codefendants, between witness and defendant. It's real and one could not take on the function that we did here in Oregon without being conscious of that and without setting up administrative structures to address it.

We also tell all the lawyers that if they believe that the conflict is too great, that they can go directly to the court. In thirty-one years that may have happened to half dozen times. Maybe it was five, maybe it was seven, but the lawyers understood that we would act with integrity. Within the Federal Defender Office, at least through September 30th, 2014, there was only one office that had a lock on the door and that was the CJA panel . . . well, my office did, but I never locked it, but the CJA panel office had a lock on the door.

The filing cabinets within the CJA panel office had locks on them. The panel attorneys, the panel staff and the judges were all told that if I was personally involved in representing a person, don't call me. Chief defender Steve Sady would get the call or the head of the panel office and we worked it through. We discussed with the Oregon State Bar thirty years ago when I first started doing it, is this okay? What about the conflict rules in Oregon RPCs? The answer was, "Well, that's grey, Steve." There a lot of things in life that are grey and we worked out a system in order to deal with it.

As I said before, we had to do it with the U.S. Attorney's Office as well, because part of the function of the defender office here, as is true in many districts now, is to line up the attorneys for the individual cases. We have to carry that out with the same degree of integrity. There were a number of occasions over the years when assignments, assignment orders were prepared within the defender office with no name, John Doe because the U.S. attorney felt it was sufficiently sensitive that they didn't want to tell us the name of the witness.

We'd line up the panel attorney, say to the panel attorney call up AUSA so-and-so and you'll get the name of your client and where to find them, it worked. It worked. People of goodwill it seems to me who are conscious of the issues can make that type of system work. You just have to educate people and continually put the issue on the table.

Every time we would review the Criminal Justice Act panel and we would do the administrative training for the new panel members and invite the old panel members to come, among the things we discussed were the methods by which people get into cases, how they get the resources for the cases, how they get paid and just put that conflict issue right out on the table, deal with it.

Chip Frensley: Mr. Hillier, do you have any views on the conflict issue?

Thomas Hillier: Well, I agree with Steve. I think it's better that this problem with conflicts be under the defense tent and not the disparity, the role disparity that exists with judges. Some of the problems that I read about in the testimony that seems to be created by that where lawyers are actually afraid to go to the judges to get funding. That's not going to happen when it's all under the auspices of the defender office.

In terms of resolving the actual conflicts that Steve speaks of, it's what he says. It's about talking and communicating with each other, developing the trust and the confidence that should be able to be developed by that open honest communication and a belief that Steve Wax and Steve Sady are going to do this right. I just don't think there's a problem there. In those areas where there's a concern, those people just got to get down and talk this through and ask those hard questions, well, which model's better?

I think, uniformly or at least more uniformly than we see when we try to wrestle together the opinions of defenders across the country and CJA lawyers that they will, if they're talking with each other, it's more likely that we're going to come to a point we're speaking with a more uniform voice.

Chip Frensley: The ultimate decision-maker regardless at this point by statute are the judges. If there were to be a change in that of course, it would require statutory change, but if there were to be a change, would either or both of you advocate . . . well, maybe the question is, who would you advocate as being the ultimate decision maker? Would it be the defender? Would it be someone else and if so, whoever you advocate for, would you have concerns or how would you answer the question of, is the fox guarding the hen house?

Thomas Hillier: You mean if there was legislation?

Chip Frensley: If there was legislation, where would you put it rather than being with the judge?

Thomas Hillier: I think you got us. My view is that you set up a committee within the CJA, outside of the defender, but within the CJA committee as the Prado committee suggested. You have local panels that oversee that function and they're established pursuant to your plan, but they're not under the direction of the Federal Public Defender. You go independently to him, so I think you can remove perhaps some of the conflict aspect of it by having these little entities within each district that help resolve those issues. That does take a lot of time to do this so I think from administrative standpoint defenders would appreciate that assistance also.

Steve Wax: Yeah, sure. It sounds good. I also said before, I think that judicial involvement, perhaps rotating through the magistrates is another way to handle it. I think that there is an educational process that goes on now at least within the District of Oregon that I think is valuable, or at least my experience was it was valuable, and talk to our judges here and see if they agree. Where I would talk to them. If they had questions about what was going on and why is Dr. Grounds needed in this case?

And I would say to a judge, "Well, judge I handled such and such a case X years ago and this, that and the other issue." We would talk about how to handle it. I think that there is a value in maintaining a judicial role. If the reality is going to be that the chief judge of a district is still going to be on the other end of an unpleasant call from someone in Washington, "What's going on out there in the District of Oregon?" If I haven't been communicating with the chief judge as the defender and if the chief judge has not been kept apprised of the expense issues, that system won't work.

Now, if we've created a separate and independent board like the Federal Judicial Center within the judicial branch and that entity is going to be dealing directly with the defender rather than through the chief judge, then I think Tom's model would be fine, but if there is going to be judicial involvement in the governance and funding of the programs in

Washington, then the judges in the district should not be cut out of the process because they need to be informed and there needs to be a solid relationship between the defender and the district judges so that the district judges are going to be able to, in an informed way, deal with the hard questions that I know they get now.

The circuit calls the chief judge here, what's going on in X case? I know that happens. Some of the chief judges were more interested in having me write the letter for them and they'd sign it. Others do it more independently, but if we're not talking there's a problem. I guess my answer is flipping, that sounded fine is really based on the larger question. What's going to happen with the overall structure? Once that's determined then I think you can get to how you do it on a district basis with keeping judges in or taking judges out entirely.

I think that even within a system in which the judges are still signing off and have the statutory authority, creating the type of panels that Tom discussed is a great idea. My understanding is that exists in some districts, in terms of review of vouchers. That if a judge in a district cuts a voucher in some districts, there is a panel a CJA panel to which the lawyer can appeal, complain, ask someone else to take a look at it. That's a good idea.

I think that is something else that you all should be considering in terms of where the ultimate authority for these financial decisions will lie.

Chip Frensley: Are you satisfied with, assuming judges stay in, are you satisfied with the reasonableness standard or do you think that there should be some different standard like good faith or presumptively reasonable or something like that or do you think it's really splitting hairs?

Steve Wax: Splitting hairs, whatever words you put on it, people are going to do it they think is right. Reasonableness works fine. Reasonableness is of course in the eye of the beholder, so it's presumptive reasonableness.

Chip Frensley: I don't know if anybody else had any thoughts or . . .

Prof. Boruchowitz: Let me just, as you're thinking about this, it might be helpful to look at what Massachusetts does in their assigned counsel program statewide. You may be familiar with it. It's independently run within the state defender system. They have qualifications, evaluations. It's very rigorous administration of the assigned counsel program that may be something to think about when you're looking at alternative ways of running CJA.

Judge Gerrard: What's the level of review there? We haven't talked about that at all once they panel it, whether it's a . . .

Prof. Boruchowitz: I believe, Judge, it's been awhile since I looked at it, but I believe every two years, the administrator evaluates each of the assigned council. They have a limit on how many hours they can work for the program. They have to have certain educational requirements. So it's pretty rigorous review on an ongoing basis of the people involved.

Judge Gerrard: What about individual vouchers, if there are disagreements as to an individual voucher, but . . .

Prof. Boruchowitz: I'd have to go back and look it. I don't remember.

Judge Cardone: Well, and, I'm sorry. Did you have something you wanted to tell?

Dr. Grounds: I did, but I can wait.

Judge Cardone: Because I have a follow up, a two part follow up to his question, which is during your original I think it was your opening statement, you made reference to areas of a country where prosecutors select. If that is true, this is, I think the first time many of us have heard that and say . . .

Prof. Boruchowitz: In the state system, not in the federal system.

Judge Cardone: Okay, that was my question.

Prof. Boruchowitz: I just used as an example of how the lack of independence can corrupt a system. And it was in a state system.

Judge Cardone: You didn't see that anywhere in a federal system?

Prof. Boruchowitz: No, not in federal system.

Judge Cardone: Ok, and then a follow up to his other question, which is I know that you've done some work in the best practices area. Do you have any sort of area that you particularly find to have best practices that you would recommend? Is that the Boston or the Massachusetts?

Prof. Boruchowitz: There are several places for different kinds of things. I think the Public Defender Service in D.C. is really a model. I helped to evaluate that program a few years ago and I've worked with their folks since I became a director back in the late 70s. I'm very impressed with the structure that they have. The independence they have, the resources, the commitment of their folks to do good work, the limit on their workload. It's really, I think in many ways a model.

In the state system, I think there are elements. I like to think my former office is a model and it has been recognized by folks around the country,

that's formerly a nonprofit. Now, part of the county government, but with standards. One of things that's happen in Washington is the Supreme Court of Washington has said caseload limits and experience qualifications that people have to meet and you have to certify every three months that you are meeting the caseload limits. Those are big, big improvements over what we have had statewide in the past. I think there are some elected defenders that do some really interesting work. San Francisco has I think done a lot of really creative and innovative things and the independence of being an elected public defender gives you extraordinary independence.

So, I think there are elements of different offices around the country, but I think if you can just look at one, I would say the PDS in D.C. would be a really good one to look at.

Judge Cardone: Well, and, so, a follow up to that is, PDS does . . . that's the public defender system, has no control over the CJA attorneys who are still under the judiciary. Correct?

Prof. Boruchowitz: I don't know if I'd say no control. I'd have to go back and look at my notes from that, but I do know that they provide a lot of the training for the CJA people on a very regular basis. In terms of the quality of the work and the assessment of what's going on, they're very involved with that. I don't believe they select the panel members or assign cases to them, but I'd have to go back and check that.

Judge Cardone: Or do anything about the voucher or the experts?

Prof. Boruchowitz: I don't think so, but I'd have to . . . yeah.

Judge Cardone: All right. Anybody else on the Committee? I want to open it up to Reuben or Katherian.

Reuben Cahn: I have a historical . . . let me move this over. I have a historical question for Tom and Steve. Is this picking up? It is or it isn't?

Judge Cardone: It's not on, I don't think.

Reuben Cahn: Hang on a second.

Judge Cardone: All right. While he's getting that worked, Dr. Grounds, you did want to add something and I just . . .

Dr. Grounds: I did. It just occurred to me as I'm listening to the questions about the reviews of vouchers, it may be of benefit to think about a way to educate whoever the ultimate decision makers are as to typicals or best practice

forensic psychologist will evaluations in various types of cases, the hours involved, the tasks done, the products provided and a typical or a range of expenses that the judiciary or whomever the decision maker can use as at least some benchmark and it's possible. I'm not sure how that could be generated and provided by members of my profession, but it's just an idea I thought I would throw out.

Judge Cardone: Ok, Reuben.

Reuben Cahn: I'll just try and speak as loudly as possible and hope it picks up, but my question to both of you, since you were there at the time and Tom you were on the committee, the story we're often told is that the Prado Committee's recommendations came out and they were doomed because defenders didn't support them very well. I suspect that may be part of the reason, I also suspect defenders aren't quite that powerful. So I'd like to know if you could give us a little bit of information about how you saw those recommendations received and as we think about making possibly big, possibly small recommendations we can increase the likelihood of them actually having some effect.

Thomas Hillier: Well, Steve was one of the deciders to areas was in the debate with a defender so he probably had some good, definitive information. I mean, I was a receiver of basically hostility.

Judge Cardone: Speak into the microphone.

Thomas Hillier: I mean, it was it was pretty amazing. Judy and I wore dark suits when we presented before the defenders for fear of tomato stains, but among . . . the defenders didn't buy in. Why? I think there were a range of reasons, I believe one was that, there weren't . . . there was not a crisis yet and they were very comfortable in that place that they were, they were working towards parity and they didn't want to do anything to jeopardize what was a seemingly good situation for fear of the unknown.

Overwhelmingly, they sided, but I think the Judicial Conference used that to its advantage in in rejecting the independent model. They talked about and I think the Judicial Conference had an inflated view of how benevolent their involvement in the process was and how altruistic they would be no matter what. Perhaps it was just stay . . . and they saw this model as being expensive and for whatever reason, they felt that was important, but . . . I think they just used that combination of factors to say no.

I believe there was a sense that judges should have some element of control over the defense function. I think that is where another sort of disconnect was involved. And one of the questions I hope the committee

will ask the judges in general, should we be doing this? Why are we doing this and see what the answers are, but, so, Reuben, you know all I could do was read what they reported out and it seemed a little too generalized to me. I just felt, I really felt that there was a desire to control what we did. These other factors were laid out there as justifying that desire.

Steve Wax: Well, Reuben, my revisionist is history through my lens as tainted or tinted as it is would be two fears motivated the defenders. I have no clue what motivated the Judicial Conference. The two fears that I think I remember being expressed in the room when we all our of our own pockets flew to Chicago for a rump session to have a debate that the Administrative Office did not authorize and wouldn't allow us to spend our own money there, or our office money to have, were these.

I think some defenders, I recall, I believe I recall some defenders being afraid of centralization of control. The feeling that we were better off with the individual appointments by circuits and districts with a relatively then small and not all powerful Defender Services Division and that if the defense function was taken outside the judiciary, there would be a Defender General. I remember hearing people talk about the notion of the Defender General with fear in their voices.

Second, I believe I recall a discussion about the fear of the Legal Services debacle and what happened to the funding of the Legal Services Corporation when it was set up as a legal services corporation, an independent entity suing the government and Congress and whichever administration it was, at this point I don't remember what year it happened, legislation was passed that prevented them from bringing certain types of lawsuits and there was fear of a Legal Services Corporation type of impact on our funding. That's what I remember from the discussions.

My recall is that the vote was pretty overwhelming against the Prado recommendations. I think that the fear of centralized control with the Defender General was in my judgment particularly misguided because part of the problem is that I think the Defender Services Division and Office of Defender Services finally started addressing was the need for a central voice and central brief banks and centralized training and you know creation of the training branch. And the ability to muster the disparate forces of the eighty-one offices serving the ninety judicial districts, which has become a much more important part of our defender world than it was throughout the 80s and 90s.

I think that not . . . within the structure necessarily of the administrative office, but if you have a Federal Judicial Center type entity, you talk about parity. You'll then have an entity that can actually deal with the Attorney

General, at least try to deal with the Attorney General on an equal footing and be invited to talk to Congress and be brought into some of the very important policy discussions about how the federal criminal justice system is to operate. We don't have that voice now. We need it.

Katherian Roe: This is a question also for Mr. Hillier and Mr. Wax again going back to the historical context. My question is, during the course of the hearings we've heard a lot about the problems that are facing the CJA attorneys. Certainly, we've heard a lot about the federal defender program and the community defender programs, but the problems that are facing the CJA attorneys seem to be so much more pronounced.

And the question I have is, that back after the Prado report was released and the defenders nationally were getting together and talking about what the issues were if there was an independence, if they became independent and change the structure. Was there much conversation during that time period about CJA and did you see the same kinds problems that we're seeing now with the judicial, if you will influence, interference, however you want to term it with the CJA process?

Thomas Hilllier: I think one of the best things about the Prado Committee was that it gave CJA lawyers a platform to speak in a national way about the problems they saw. Our defender conferences where CJA lawyers were invited every now and then, it was just such a small sampling that I don't think we really appreciated it entirely, the breadth of the problem, the depth of the problem and how it varied so dramatically from district to district.

So, they got to talk about voucher cutting, voucher delays, rate of payments where the big things then. The Prado Committee made very strong recommendations to take corrective action in those realms and the judiciary did and the raises occurred, better training was developed, judges that guided judicial policies that relates to the Criminal Justice Act talked in, you know, general terms about . . . judges, don't cut vouchers and give the opportunity to CJA lawyers if you have a question about a voucher to be heard.

So there were improvements that occurred because of their participation in the system. The problems today, I'm mean what I'm hearing is, it seems to reflect more on the economy right now, and also cultural issues or differences in the districts, but I just think there's a . . . it's not so much the rate of pay and the availability of training as responsiveness from the court to request for funding and that's what we're talking about here more today, is can we improve upon that in some way by some different model?

I think we've kind of moved on to the next set of CJA problems and it's a good thing. We didn't solve all the problems back then, but I think there

was dramatic improvement particularly in pay and training as a as a direct result of CJA participation in the Prado hearings.

Steve Wax: The little bit of perspective that I can add to that is, if you look at the, you know, '64, our first defender office set up in '69 or '70 through today, fifty some years, the CJA lawyers, the panel lawyers were not on the radar for the first twenty or thirty years of the program. The effort that was underway in the '70s and '80s was to establish the federal defender system and there was no CJA Panel Advisory Group. The CJA panel attorneys didn't attend meetings with the Defender Services Committee as the federal defenders did.

I think the Prado Committee pushed to the fore the importance of recognizing that 50% give or take of the assignments in the federal courts were handled by lawyers outside the federal defender offices. And the system, we all started to pay attention to that starting in the early to mid-90s and have continued to do. The federal defender offices were finally sometime along the way in the 90s funded to train and manage CJA panels.

The courts were pushed and pushed and pushed to set some requirements for membership on CJA panels. I mean, I had a case back in the 80s where client is also charged in, I'm sorry I don't remember which district in Texas it was, but every single member of the Federal Bar in Texas was required to take cases.

And some poor fellow who was a patent attorney, never wanted to ever go into a courtroom, was assigned on this multi-jurisdictional case and it was awful. The poor guy out of his own pocket paid a criminal defense attorney to handle it. Well, I don't think that exists anymore. So I think we are a long way from what we were in part because the Prado Commission did its work and we need to go forward with that.

Judge Cardone: All right, we're about ready to wrap up. I just have . . . is there anything any panel member, this is your chance. Anything you'd like to add before we wrap it up?

Prof. Boruchowitz: Judge, I'd like to say that I think everyone here recognizes this is an extraordinary opportunity. Many years have gone by between Prado and today. The needs have been documented pretty significantly already. I urge the Committee to recommend as much independence as you can. I guess in terms of Mr. Cahn's question about small or big, I'd urge you to go big because the need is big. I think from a distance, one of my observations in terms of why defenders are fearful of change is that they're afraid to rock the boat sometimes.

I see this in the state and local systems as well. Things are bad, but they could be worse. It might be worse. I know from my own experience that working to improve the system actually can improve it. We have seen dramatic improvements. Thomas suggested some in the federal system. I've seen them in the state system.

It requires resolution and requires a commitment to independence of the function, but if everybody works together, if your Committee recommends that kind of major change to have real independence for the system at the same time providing some sort of a board or panel or center that is going to be powerful enough to be heard, then I think real change can happen and I urge you to recommend that. Thank you very much for the opportunity.

Judge Cardone: Thank you. All right. Yes.

Dr. Grounds: I thought I'd have one brief comment as well then I didn't get a chance to say, and it is simply this: that I'm constantly reminded that the stereotypes were guarding criminal defendants are strong and that even though I constantly remind my students not to form hypotheses based on the facts of a case or the discovery that we receive, the police reports, the FBI reports, I myself am often aware of going into a case with a preconceived notion.

I can tell you that in the vast majority of cases, I have . . . where that happens, not too many . . . I have pulled myself up short when I see the person and I recognize that the preconceived notions that I have are simply not consistent with the three dimensional human being in front of me. I believe with both my heart and head that experts can play a vital role in aiding the judicial system to make the best possible decisions and to the extent that a systematic recognition of that or training provided around that and funding for that, I think it will not only benefit the judicial stakeholders, but also the real human beings who are defendants, their families, and the communities to which they will return.

Thomas HIllier: Could I just add to that because I was listening to Dr. Grounds earlier and I was just struck by something she said about how so many of, most of the people she sees have had childhoods that were impacted by a lot of trauma that has impact on where they are today. This is why your work is so important. We need to get people to be aware of that. In the end what this is all about is improving the principle of equal access to justice.

Remember it wasn't ten or twelve years ago that the United States Sentencing Commission decided that our, as we called it lousy childhood evidence that we would present to judges on why they should mitigate a

sentence and we didn't use the word lousy typically, was deemed to be not relevant, not ordinarily relevant, but not relevant.

You know, what could be more relevant to your decision about what to do in this particular case than that, but we beat that back through processes like we're involved in today with the Sentencing Commission and finally the *Booker* decisions. So, you know, Godspeed to you and thank you very much for this opportunity.

Judge Cardone: Mr. Wax.

Steve Wax: The brief last word. I'll wave the flag. You hear a lot of complaints and concerns. I feel truly blessed to have been able to work in this federal system here in Oregon and in my individual cases as well as in running the office, for the most part, to have been left alone to be a lawyer, to represent my clients. I think that in formulating a hopefully new plan to improve the system, I don't want to leave without saying to all of you, thank you and how incredibly fortunate we all are to be able to have this voice and to have had the opportunity, Tom and I over many decades to do what we believed was in the interest of our clients, as we believed it should be done. And I hope that's the case with all of our colleagues around the country. I know it is here for me in Oregon, so thanks.

Judge Cardone: Thank all of you on behalf of the Committee. We appreciate the time that you've given us. It is so important the work we're doing and for people to be willing to participate is so important, so thank you. We're going to recess, time for lunch and we'll be back at 2:00. I think the panel actually starts at 2:15, but for those of you that are going to be on the panel, if you could be here close to 2:00 so we can get settled. Thank you.