

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #5—San Francisco, California

March 2-3, 2016

Transcript: Via live stream--Testimony from Chief Judge Ted Moskowitz (S.D. Cal.)

Judge Cardone: I see Chief Judge on our video screen there. I'm going to ask for those of you in back because you cannot see him, we have some chairs up here so if you'd like to see so that you can see his testimony, feel free to come on and up and sit up here with us and let's get started. I don't know if, you can hear us Judge?

Chief Judge Moskowitz: Yes. Can you hear me?

Judge Cardone: Yes. I can. We might need the volume a little bit louder. Is there any way to do that?

Chief Judge Moskowitz: How's that?

Judge Cardone: Much better. Okay, whenever you're ready.

Chief Judge Moskowitz: All right. I am the Chief Judge in the Southern District of California, if you have difficulty understanding or hearing me, just ask me to repeat. I'm blessed with this rare condition that makes a speech a little bit more difficult. So the key thing I wanted to talk about was our selection process because it's different than others, and I urge the Committee not to make one rule for a selection; that if the culture in each district may be different, or will be different, and what works some places may not be effective others, and our has existed with a recent modification since the creation of the district in 1966.

The judges select the panel and make the appointments and we do this, and I'll describe the process in a moment, for two reasons. One, we have always thought that there is a clear potential for a conflict with the Federal Public Defender, our Community Defender's making the appointment. In multiple defendant cases, there is the issue of cooperation. Certain lawyers are known as ones that will work a deal early on for their client and that may be counterproductive to the client represented by the Federal Public Defender. And in our district, although not at the present time—because I think the Executive Director of Federal Defender's is on your Committee, and he is of the utmost ethical character—but in previous years there were statements made, like lawyers including their clients early for Fast Track deals, or if they cooperate, were called dump trucks. We're concerned that they may be frowned upon in selection if the defense bar was doing it on their own.

The other reason is, the judges are particularly aware of the skills, the writing and the efforts put out by the lawyers and it's best that we evaluate them and also go through their vouchers, cognizant of the need for defense community input and so our program works as follows. We try to solicit a diverse group of candidates for the CJA panel, Federal Defender's does an outstanding job in educating the panel and getting the word out with email blasts, et cetera. We can reach a lot of attorneys and I get them interested in participating. Each applicant is screened by a Defense CJA Advisory Committee chaired by a representative chosen by the court and they go through the applications and recommend them, usually recommend, highly recommend, not recommend and they explain why.

With the input from the Advisory Committee we have a CJA Committee of the Court which is chaired by a judge other than the Chief as district and magistrate judges. We're blessed to have a magistrate judge on the committee that was a prominent defense attorney and CJA panel member and they screen the applications, the recommendations, and then they make the recommendations to the full court, usually around the first meeting in December, and our court is unique. We meet every Monday at 1:00 and discuss court business and so usually the first Monday in December is devoted, or late November is devoted, to selecting the panel.

I'm sorry. It's actually early November because the panel starts December 1st and all seventeen judges active and senior have a say in the vote and a panel is selected and the judges talk about the performance of the attorneys and the idea is to get the best advocates for the people who are represented by the CJA panel and this the input from the lawyers at large, the committee of the court and then all of the judges that results in a selection of the panel. We believe that, one, what we have been doing all this years is that good system, a few, about a year or so ago we added the CJA Advisory Committee and they not only help us in the selection but also in recruitment and further dealing with the issues that the CJA panel has. There are multiple court issues that involve the U.S. attorney, the court, the panel of attorneys, and the Community Defender, and we all work together in trying to reach a resolution. Plus, there is the method if a judge is behind their vouchers et cetera the CJA panel rep can call the Chief, and the Chief does something to help move the vouchers along.

We believe it's an effective system, it may not be good for any other district but it works well in ours, and we would help the Committee not have a one system that fits all of the districts. That's the main subject I wanted to talk about. Also I talk about the exciting and titillating topic of case budgeting but first if you had question about our panel selection and administration I'll be glad to answer them.

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Judge Cardone: I do, Chief and again, I'll start the questioning but anyone on the Committee may have questions. My questions goes to what you were saying about the CJA Advisory Committee and then the CJA Committee that have you set up in your district and how well it works. One of the things we've seen as we've travelled around the country—and how you think it works well and therefore we shouldn't mess with that, I guess is the way to put it—one of the things we've seen is that as judicial personnel change some of that can change. In other words, if you have, if you as a Chief Judge care about the way the CJA panel works and the CJA vouchers are being moved along and making sure that everyone's doing their job then it's going to work well, but if you get a chief who doesn't care as much or if you get judges who aren't as committed to it, then it may not move as well. You've been a district judge, you're now the Chief Judge, how do you see, I mean do you see any problems?

Let's say your successor just doesn't pay the attention, doesn't hold his fellow judges feet to the fire when they don't process vouchers. Do you have any suggestions for the Committee on how we address those sort of problems?

Chief Judge Moskowitz: That's a good question and I think the uniqueness of why our district works. How's that? At these meetings on every Monday there's a lot of peer pressure to move your cases, get your vouchers done, do your work, how about taking cross for others and we all work very collaboratively together and so no matter who is Chief if the other judges hear things they will bring them up at the meeting and our district likes to pride itself on being very efficient. And so it's the tradition for the Chief Judge to make some phone calls that very politely nudge colleagues and everybody expects them to and accepts them, and so if the next Chief and I assure you he would, since I know who he is, would take these items seriously. Then, other judges would bring them up, the CJA Committee would get wind of it and make recommendations to the court and it would function well.

As I said this may not work in other districts. Attending Chief Judge meetings nationally, I know of no other districts where the court meets as a whole every week, and I think that's our tradition when there were originally five district judges, and they started this under Ed Schwartz, and it's continued. And frankly, it's frowned upon to miss the meeting, and that's where these topics come up.

Judge Cardone: Dr. Rucker, do you have any questions?

Dr. Rucker: Good morning, Judge Moskowitz, and thank you for appearing before us. It's nice to see you. A brief question about budgeting. You've been involved in budgeting for several decades now and I'd like for you if you could briefly comment about the budgeting process and what do you see to the beneficial aspects of it or negative aspects and what you might change from the way

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we've been budgeting here in the Ninth Circuit?

Chief Judge
Moskowitz:

The Ninth Circuit has been a pioneer in this because it was our circuit that was criticized by the House of Representatives Chair of the Budget Committee back around I think it was 1996 or '97 and it became a big issue. There at the time the Ninth Circuit was handling 20% of the capital habeas cases nationally but spending about 60% of the national budget and Congress wanted to know why and how we were going to get these things under our control. The idea of the committee, Dr. Rucker and I were appointed to was to budget this cases and that would be a tool for a case management, getting the lawyers to focus on what they needed, lawyer time, investigator, experts, interpreters and do it in phases.

We originally had five or four phases for a capital habeas cases and for non-capital cases you can do within two or three phases; pretrial, trial, and post-trial. The idea is to focus the attorneys on what they need to do in their case and try to get some amendments. We find that rarely are the budgets exceeded but they act as a good case management tool. Congressman Rogers a year or so later was aware of this and he congratulated the court for taking efforts to bring costs in line. It has reduced the cost because they're managed and at the end to me, one of the best parts is that you have vouchers that are not going to be slashed or reduced because they're in line with the budget.

Kristine Fox, who is in my opinion one of the national experts, I see is going to speak with you about it. She was in on the start and has spread to non-capital cases, the policy requires all cases where the likely expense will be over \$30,000 to be budgeted. The problem is this, that judges feel incapable of doing budgeting.

Now, we have budgeting attorneys and we had a pilot project and they are greatly helpful in budgeting but there's still a fear and trepidation by district judges that they're out of their element and I tried to tell them that it's easy. You just sit down with lawyers or if you feel uncomfortable have a colleague or magistrate judge do it for you, if you think there's a conflict concern, and just figure out what needs to be done. I find the boys are very reasonable and they take it seriously and want to do a good job. It's training of the judges to get over that hurdle of fear that they don't know how to do it that to me is the problem that needs to be addressed.

Judge Cardone: Mr. Frensley, any questions?

Chip Frensley: Yeah. Thank you, Judge. I was just curious if you believe that there is any back-end impact, if you will, to all the efforts that you all do with your selection process. By back-end impact, I mean what if any relationship do you see between the level of work that goes into panel selection and how that impacts the issue of voucher reductions or cutting or more globally the

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independence of the defense function.

Chief Judge Moskowitz: That's a good question. I would like to believe and no one has pointed out to me that our district has a problem with voucher cutting. Certainly, and I can't see you clearly, but Chip was on Defender Service's with me and we would hear stories about 10%, 15%, 20% cuts by judges and without reason.

I think that would be unacceptable with the Ninth Circuit, certainly in our district. When there is an issue, the judge will bring the lawyers in if it's more than a nominal sum and on the electronic voucher in the comment section via questions and the lawyers that can answer them and the judge then does some kind of order with a reduction. Usually, there are things like this with the ECF filings, some lawyers will list six minutes or one tenth of an hour to look at every file.

But it doesn't take six minutes to see that there was an arraignment. You were present, your client plead not guilty and here's the next day and to have a series of them day in-and-day-out adds up. So the judges may say, "You need to group them. You don't get six minutes for each and take care of it with the lawyers that way." But I don't think we have an overall budget or voucher problem. If and when a judge has an issue I will get a call and I'll figure out how to diplomatically work on it and get it resolved.

Chip Frensley: Do you attribute any of your belief if there's a voucher cutting problem to the extensive work you do on the frontend vetting people for selection to the committee or to the panel?

Chief Judge Moskowitz: Frankly, I think it helps. The lawyers know who is wasting time and unnecessarily billing and if someone doesn't get renewed, I think the lawyers may suspect a reason as to why. But I have to say one of the things that helps out with the panel is the Community Defender's education program and the ability for them to come in and talk to us if they sense there's a problem there.

Our district prides itself on being user-friendly and that it only works if the judges are open to calls from lawyers about the vouchers or problems. It's not only me. Every judge in the district prides themselves on the user-friendly approach. Mr. Cahn wrote me on an issue and he suggested we deal with the issue, as typical of our district, by getting the people involved together and trying to figure out a solution. It's people that don't share that view, I think are frowned upon. There is peer pressure to be user-friendly.

Chip Frensley: Thank you, Judge. Glad you remember me. It's good to see you again. I think I had slightly more hair then.

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Chief Judge Moskowitz: I thought that was you. You did a good job on that committee, I miss it.

Chip Frensley: Thank you, Judge.

Judge Cardone: Ms. Roe, any questions?

Katherian Roe: Thank you. Mr. Chief Judge, I wanted to ask you a question about the CJA Advisory Committee. You indicated that a year ago, the CJA Advisory Committee was formed. What led to that change? Why were they formed?

Chief Judge Moskowitz: As an idea that we should get the lawyers involved, that we're seeing one side of lawyers but we're not seeing the other side of the applicants. Lawyers, I think as this Committee has shown, are willing to express their opinion about the others in the field that are applying to be on the panel. So we thought we were missing something. I also wanted to formalize what we had had. We'd always had a CJA panel representative but it wasn't as specified in the where, what their term was, what their duties were.

We formalized that and did that with the committee. It's not only to comment on the selection process but also to have input. One of the issues that Mr. Cahn can tell you about is the Marshal's shackling of defendants in the courtroom, and we have tried to work things out with that, but having input and having a representative is a good conduit. Not every problem can be worked out but it's an example of how we tried to work issues out.

So, the need to have this committee, and also they have the ability to do supplemental training. We are luckily endowed with sizeable library fund so if they can put together a program for the panel, we would support that.

Katherian Roe: You indicated that you don't believe voucher cutting is much of an issue in your district.

Chief Judge Moskowitz: I'm sorry. I can't hear you.

Katherian Roe: You indicated that you don't believe voucher cutting is a problem in your district. Did you hear me that time?

Chief Judge Moskowitz: There's like an echo.

Katherian Roe: Can you hear me now, Sir?

Chief Judge Moskowitz: Yes. Thank you.

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Katherian Roe: You indicated that you don't think voucher cutting is a problem in your district, yet we received information that the number one concern for CJA attorneys in your district is voucher cutting. First of all, why do you think that that's their concern and second, I guess I best put this, I know you're the Chief Judge, why do you think that the court doesn't believe that's a concern?

Chief Judge Moskowitz: No one's mentioned anything to us. We did have a concern with voucher problems there. For example, we have a court in El Centro out in the Imperial Valley and that's 120 miles to the east. Lawyers will go out to represent clients and they'll represent three clients and the trip and full mileage and time will appear on three vouchers using the electronic vouchers system.

We have found that out and we had to educate the lawyers that that was not proper. We also found out that there were many . . . I can't say the number, but there were lawyers that were routine billing maybe twelve to sixteen hours a day when you combine all their cases, and that's unusual, but the eVoucher system allows us to catch that and so we educated the lawyers that these are problems. The six minutes for ATCF filing was something of concern and perhaps they think that vouchers are a bigger issue than they are.

Frankly, [if] that makes them more accurate, that's a good thing. I think no one on the Committee would approve of paying a lawyer for one trip three times or two times. That's just not right. But no one has mentioned, and I have a large and open door as possible, about a systemic voucher problem. I would like to know if they exist.

Katherian Roe: In your district, do you keep track of . . . is there someone charged with keeping track of that information, what vouchers are cut and how much they're cut and the reasons given for why they're cut?

Chief Judge Moskowitz: No. I can ask for a report from the clerk. But there's no one who routinely does that.

Katherian Roe: During your . . . sorry.

Judge Cardone: We have a question in the back and we're running out of time.

Reuben Cahn: No, go ahead, I'll cede.

Katherian Roe: I was just going to ask, during your time as Chief, do you if anyone asked for that information?

Chief Judge Moskowitz: I did. I asked the . . . I'm sorry.

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Katherian Roe: When was this?

Chief Judge Moskowitz: That was probably about two years ago. I've been Chief four years and it was probably about two years ago to see who was cutting vouchers, and why. And I found out there were several judges that had made voucher cuts and the reasons seemed supportable.

Judge Cardone: We're running tight. Any other questions? It's not going to work on that, we need to get you . . .

Reuben Cahn: Judge, one question. You spoke out the CJA Advisory. Are you hearing me, Judge or no?

Chief Judge Moskowitz: Not well.

Reuben Cahn: Not well. . . . Judge, can you hear me now?

Chief Judge Moskowitz: Yes.

Reuben Cahn: Okay. So the question I wanted to ask was on the CJA Advisory Committee. You know from your time on the Defender Services Committee that there are a number of different . . . [INAUDIBLE] . . . how the committee functions, not merely an advisory capacity but actually makes the decision about who will be on the panel and who will be rotated off and those sorts of things. Can you talk to us a little bit about why the district decided not to adopt that model but adopted the advisory role [INAUDIBLE].

Chief Judge Moskowitz: For two reasons that I mentioned. Number one, we feel that there is a potential for a conflict of lawyers, present certain lawyers who always cooperate their clients and as I said, the word for it or phrase was dump truck and those were the lawyers who came in early but their clients got good deals.

There was some resentment among member of the bar and we have found especially in multi-defendant cases that the defense bar should not be choosing who will be representing the lawyers. The second reason and perhaps most important is that judges feel that they are in the best position to determine who is doing a good job and who is not.

We see the written product. We know who files routinely late. Who doesn't make a good pitch at sentencing and those people are of concern to the court. San Diego is the biggest city in the country, with a very small town atmosphere, and everybody knows everybody else, and we feel that judges being impartial will have the best way of deciding who should be on the

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panel.

Judge Cardone: If we don't have any more questions I want to thank you Judge Moskowitz very much for your testimony here today. It's been really helpful. We are really tight on time and so if we do have any other questions, we make get back to you and follow up but I wanted to tell you how much we appreciate you being willing to appear before us. I know we want to be able to fully discuss these issues and your knowledge and your experience has been very helpful. Thank you very much on behalf of the Committee, Judge.

Chief Judge Moskowitz: All right. I'll just close by emphasizing there what works here may not work elsewhere and I certainly have concerns that if judges are knocking people off the panel because of the way they advocate, that would be a serious impediment or infringement on the needed independence of the defense bar and that's something we as judges here firmly respect.

Judge Cardone: Thank you.

Chief Judge Moskowitz: Thank you. Have fun.

Judge Cardone: We are, we are; let's get ready on the next panel.