Ad Hoc Committee to Review the Criminal Justice Act
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Transcript: Panel 2—Views on E-Discovery and Technology

Judge Cardone: We're going to call the second panel to order. Again, I'm going to remind everybody, since we just came back from a break, if you have a cell phone, please make sure that it's off.

Our second panel is "Views on e-Discovery and Technology." Our panel participants, in not the order you are seated, are Russell Aoki, Coordinating Discovery Attorney; Sean Broderick, National Litigation Support Administrator; Donna Lee Elm, Federal Public Defender from the Middle District of Florida; Douglass Mitchell, CJA Panel Attorney from the District of Nevada.

That being said, again, let me say thank you very much for being here. We would like you to make a brief opening statement. We got your submissions. We'll have the opportunity to ask you questions, but we would like you to make a brief opening statement, and then we will begin our questioning.

We'll start with you, Ms. Elm.

Donna Lee Elm: Thank you very much your Honor, and this very important, long-overdue Committee. Thank you for inviting us. Thank you for putting us together and listening to us. We have some very closely related issues we'd like to talk to you about.

I am not only the Federal Defender from Middle Florida, but I am the Chair of the Defender Automation Working Group. I am also the defender member on the Joint Electronic and Technology Working Group with DOJ. I do have a fair amount of involvement in IT, although I must confess that I am a dinosaur.

There has been a growing awareness, and Mr. Broderick brought this out very well in his, that DOJ is flying ahead of us in terms of their technology. They, and private firms, are well in advance. If we are going to be providing the same type of representation you can get if you paid for it, defenders are way behind, and CJA are left even further behind.

Recently, when I started chairing DAWG, we looked at it and said, "We need to try and move defender IT ahead. We need to try and get us more into the IT age here. We pushed to try and get a lot of things done. At the same time, there was the reorganization. I have to tell you that my thought was, "Okay. They have moved the administration of our IT over into another group; shouldn't be a big deal. We just have to be a little schizophrenic."

It turned out to be slowly dawning on us that it was a major and problematic shift, and it's what Mr. Kalar said, I think is true, in his written testimony. It's a structural problem. It's a structural problem that we're dealing with here.

In my written testimony I explained what the problem was. What I propose to do now is say that that really begs the question of, what would an effective structure for defender IT be? How would that work in the proposal of how we try and set this up?

In the end, obviously, I think the advisory groups have to be deeply involved into how that is done. This is not something that has come through the advisory groups yet, but I want to propose, from our work that we have been doing on this for a while, and the talk we have had, what this may look like and may work as. That would be this: we need to start with central leadership.

As I explained in my testimony, we had central leadership in DSO. We had defender IT there. That was removed, and moved over to CMSO. We had no one to fill the void. We have an IT liaison who is a lovely gentleman, but he is an IT liaison. He is not a leader. He is not a manager. He does not have enough experience with administration to know where he needs to go for what he needs to do. Lovely guy, doing his job, but it's not the job we need to have done.

When that was removed from DSO, we did get a person in CMSO, which is case management, and I'm going to presume you know these acronyms. If you don't, just . . .

Judge Goldberg: Thank you. We're so inundated with acronyms. I would really appreciate if all of you would try not to use them. Tell us what you're talking about.

Donna Lee Elm: Okay. Defender Services.

Judge Goldberg: That one I know.

Donna Lee Elm: Okay. DSO. CMSO: Case Management Services Office. CMSO is one of the new IT . . . AOIT branches. There's two of them. We really just deal with the one. What they did, when they did the reorganization is, they took our IT, as you may recall, to move it over into CMSO. We protested and then got to keep all of our defender-client information separate, but administration went over there. We have our defender-client, and a lot of our programs over here. We have a branch of the AO's IT over here, with some of the administration.

I tried to explain it in my written testimony. It's pretty crazy as to how many different places we're going for who's in charge of what. In any event, it was removed from CMSO . . . removed to CMSO. The person in CMSO who is in

charge of defender IT, though, really isn't in charge of defender IT. She's just to do administration of it.

Then, we have no one really managing it. What has happened is, people have moved in to fill the void. DAWG has moved in often to fill the void. In fact, on things like trying to select personnel for NITOAD, in trying to pick whether we're going to do a little minor change onto one particular program. DAWG, which is an advisory group, has been put into that position. The head defender of Texas Western has been pushed into that position.

DSAG, which is the Defenders Services Advisory Group, the top, probably our top defender group, has been pushed into that position. Of course, CMSO has been trying to take some of that position. It has left us in an untenable place. What we need, and what I recently went to talk to them about, was a strong leadership management position.

We need that once again, and with someone who is a good manager, a good communicator, understands administration of an agency, but someone who, unlike CMSO . . . none of it is their fault . . . has our mission, great quality representation, and understands that we are here to take care of clients. We are a law firm. This is not the business of the AO.

Also, if we were to get that person in that position, there would have to be several positions reporting directly. I would suggest, NITOAD should be reporting to this person. NITOAD is our national IT, the center where they actually have all the servers. They work with all the emails. They do the troubleshooting. They set things up. They are our national IT. They are in Texas Western and are under Maureen Franco.

That person . . . right now, that person is reporting to God and everybody. There are so many different persons that person has to report to, it would be very hard to follow. I think that if we had one central, strong leader, it could be reporting there. We need a data specialist, and there has been talk of getting someone into that position, but it became very clear to us, with work measurement study, that we have not paid enough attention to how important our data is. I'm not talking client data. I'm talking our numbers. Our time. The things that will determine what our budgets are, what are staff are, and therefore our ability to take care of our clients. We also need our security person there, our national security person. That is critical. No one questions that that is critical.

There should be liaisons, still, with DSO, with CMSO. There's a lot of good that we can find in these different programs and sharing with them. We have learned things from them. We have contributed things to them. I think it has been a good collaboration, but it should be a collaboration. It should not be part of an organizational chart necessarily, that says, "You're reporting to

these different people." At the same time, DAWG's role, which has been thrust into the executive function way too much, needs to go back to being an advisory group. We have a day job, and we're really not designed to do more than an advisory group.

Now I would like to talk, then, about three other things. NITOAD: This is the heart, lungs, blood of our IT. We have tried to build it. It is grossly understaffed. We don't have "two deep" on almost any function. If someone goes out sick, and the thing goes down that that person is assigned to, there may not be someone there to fix it. All good professional IT organizations will have two deep, at least, on the critical functions they are supposed to do.

We don't have anybody writing policy and program. We've been trying to get him hired. I think they are about to get somebody on board, but we don't have written policy. We don't have procedures written. This is an appalling lack, and we have not had the staff to do it. They have been scrambling to keep us afloat. We do not have people to look at the architecture of how you build a big IT program. Our IT program is growing, and needs to grow. All of these we did surveys . . . a year ago we did surveys, extensive surveys. We met with experts. We did all kinds of things. We put in a personnel request for NITOAD. For the life of me I can't remember if it was six or eight that we thought we needed. After putting that in and documenting everything in what my budget analyst said was one of the most beautiful staff requests they had ever seen, they came back and said, "We think we may be able to get you one."

I said, "I'll take one. We need a lot more." Then, we didn't get the one. This fall, we put it all together again. We asked for four. So far, we are finally approved for two, when we really need, really need more. If the defenders ran their own IT program and were able to say, "We really need. We understand. We need, desperately, a modern practice of law, and to do that we have to have our IT," we would make sure we could have the personnel we need, if we could fund it. Those two, by the way, haven't been approved yet, either. We still have to go to the FJC or the budget committee. We may not get those either.

The other thing is this: CJA, even if we get the strong, robust, independent defender IT program, CJA has been getting almost all of its resources through this gentleman and his team of four people. That is woefully inadequate for what our CJA program needs. It is less . . . if we are the red-haired stepchild, they are the goldfish in the bowl. They are just not accorded the same things, and perhaps it is because they don't have the presence in the AO we have. Our CJA really need those resources, really need the training, really need to be able to use them, and this is all we have.

There has been a proposal by some of my colleagues that it would be very

good to have a specialized tier of CJA, like our Learned Counsel for Capital. Some places have Learned Counsel for White Collar, or Financial, and some of the other things. A tier that could be trained, and if we got the resources, his office should be beefed up substantially to be able to have training and to provide national software, and get a national program going for CJA instead of what you have right now, which is, if I have a problem case, I go to them. If we actually, proactively, had a program for them, it would be wonderful to be able to have our CJA being able to do what our defender offices can do. All of that is so far below--you know the million-dollar budget he talked about just for the training facility for DOJ? That's our entire budget for all of our federal defender defense.

Finally, true confessions: When all of this started, I was a "stay in the AO" person. I was a, "We need the protection of the AO. I don't want to be independent." I haven't thought about it that much since. The one thing I have come to the conclusion of is this. Defender Services cannot give us the leadership we need to put this together. They are stuck with a liaison position, which does not have the strength. They are trying to do things, but in trying to do things, they are not able to get there, and not able to get there fast enough. We have not been able to get the people we need for NITOAD. We know what we need.

I have come to the conclusion that we need to have defender IT have independence. If we need to do that, then I back into it. I think we need defender independence. Thank you.

Judge Cardone: Mr. Broderick.

Sean Broderick: Thank you. I'm going to pivot a little bit broader to some of the points that Ms. Elm concentrated on, and talk about e-discovery and the concept of e-discovery broadly, not just the IT infrastructure, which is very critical. We have IT infrastructure for the defender system, and then broadly, some of the things that Mr. Aoki and Douglass Mitchell and I will probably focus on, is technology. At this point, technology impacts every attorney defending an indigent client against a federal criminal prosecution. A generation ago, when the Prado Committee convened in the early 1990s, technology wasn't even listed as one of the fourteen issues to be examined.

We know the world has changed. Consider as just one example. As Chief Justice Roberts noted in Riley versus California, modern cell phones are, quote, "Now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy. When I think of technology and e-discovery, I am reminded of Charles Dickens and the famous quote of, "It is the best of times. It's the worst of times." On one hand, what attorneys can now do on their own is remarkable. From reading and sending emails on the road, to

conducting legal research using Westlaw and LexisNexis, to preparing briefs and syncing files between home, work, and mobile devices. Sole practitioners can now do what big firms could do fifteen years ago.

E-discovery provides more and better evidence than paper. For example, communications between people now leave a digital trail through emails, texts, and message logs, allowing attorneys to show relationships and document knowledge of events that would have been nearly impossible in the pre-digital world. Yet, e-discovery also creates significant challenges for parties, as I know you all know. That is due to the high volume of information, the many sources and formats of which e-discovery is generated and stored, the hidden information it might contain: meta-data, embedded data, the differing e-discovery production formats, and of course the software and hardware limitations. The challenges are especially daunting for CJA Panel Counsel.

The defender program has a remarkable collection of offices and individuals addressing e-discovery in their respective districts. There are numerous computer systems administrators, investigators, paralegals, and I have to say often the unsung heroes dealing with the challenges of e-discovery for offices. AFDs and defenders are thoughtfully addressing these issues. Donna is actually one person who has been doing that. She has a number of examples from her own office, which can demonstrate if you have effective strategies for dealing with large volumes of e-discovery it can be an advantage. Doug Mitchell and Russ Aoki have both gone to trial in complex e-discovery cases. They have learned valuable lessons that they can share with us.

That said, to keep parity with the Department of Justice, the defender program will need more resources to keep up with the demand and growth of electronic discovery. Speaking of the Department of Justice, one of the more positive developments of the last few years has been the willingness of DOJ to reconstitute and maintain an ongoing working group, JETWG [Joint Electronic Technology Working Group], another acronym. I apologize, to address the challenges involved with e-discovery. As I mentioned in my submission, the working group continues to operate. It is looking at things such as suggested practices for providing incarcerated clients access to e-discovery.

It’s a challenging project, since there are clients in more than 1,800 facilities. Many of those facilities don’t allow any type of e-discovery. We’re hoping that a set of suggested practices will lead to greater consistency in policies and practices, and make it easier for clients to have that access. Our caution is not going to be a panacea, but hopefully, with the proper framework to allow more clients access to e-discovery, it will help contain cost and improve the quality of representation of clients.

There are six broad points I would like to make. As Bob Ranz said this morning, there is no one size fits all solution. Each district has different needs, challenges, and resources. Secondly, buying one tool or handing the information over to an IT expert, is not the solution. People need multiple tools. Have a multifaceted approach to a discovery management plan, and counsel must understand, ultimately be responsible for that overall plan.

The speed at which technology changes requires continuous assessment of the technological case needs and flexibility. There are fast-developing issues involving cyber security. In fact, many of you probably had challenges coming over here because of the large cyber security conference going on. Encryption, mobile and cloud technology: It's the kind of thing that people like me, who are sort of geeky, are glad that now we are talking about some of these issues. They are having a huge impact, as we all know, on you all and on people who represent clients.

Fourth: We talked a little bit about training earlier this morning. To train people, we do need hands-on programs, where people use the technology in similar ways they do their cases, or when possible, in their own cases. Sitting in a presentation or two on technology will not do the trick. With the guidance given by Lori Green, chief of the training division, Bob Burke before her, and other attorney advisors, we have worked hard to have hands-on training for the panel and defenders when possible. It has had a positive impact, and it is critical that we continue to do that, if we're going to get up to speed.

Fifth: Although tempting, hitting the "Print" button will not solve the discovery management problems. Critical information will not appear on paper. We also have to be careful about converting native files, meaning the original formats, our emails, our Word documents, our PowerPoints, into basically e-paper, because we need to have the format that is most usable, complete, and efficient. It's what we do in our daily lives, and it is the kind of things that can help us deal with the challenge with e-discovery.

In conclusion, I would just like to say that to solve these problems with e-discovery, we're going to need a combination of knowledgeable counsel, experienced litigation support staff, software and discovery management tools. When possible, discovery provided in usable and searchable e-discovery formats and a table of contents or index to provide context to the case and the discovery contents. Assisting counsel in becoming more knowledgeable about e-discovery, utilizing experienced litigation support staff, and maintaining software and discovery management tools, will go a long way towards harnessing e-discovery advantages while containing its overall cost for the defender program. Thank you.

Judge Cardone: Thank you. Mr. Aoki.

Russell Aoki: Thank you. As you know, I am one of three coordinating discovery attorneys on contract with defender services. We handle multiple-defendant cases involving large volumes of discovery. If I was going to summarize what I do in three items, it is, we help contain costs, we help maintain quality representation, and we train lawyers on the use of technology. It could be something like avoiding duplicate efforts. We handle drug cases that might have twenty or thirty, fifty thousand wiretaps. They might have twenty, thirty, forty lawyers involved. Thinking about, how long is this going to take to go through those twenty thousand, thirty, fifty thousand wiretaps linearly, one item by item? A hundred hours? Two hundred hours? Then, multiply it by the number of lawyers who are going to be doing that.

That's where we step in to try to build the tools that will allow lawyers to go through them more rapidly, isolate the calls that they need. We all know that we can't just look at something one time and be ready for trial. That means going back and looking at it several times. That tool allows them to do that more efficiently. For big cases, like fraud cases, where we might be dealing with millions of pages of documents, millions of emails with attachments, we put them on a database, something that is web-based.

Three things we look at are, is it easy to use? Knowing that the user is going to be a sole practitioner, somebody with limited technology experience. Is it secure? We only use databases that have third-part security audits. Also, is it going to be something that we can continue to work with and have good technology support? Because, much like your own Windows operating system that requires security updates all the time, web-based databases need that too. They are always, constantly, being innovative. They're trying to make themselves hack-proof; they are trying to make it easier to operate now, too.

One of the things that we use for it is avoiding lawyers from doing the linear page-by-page, or item-by-item, review of millions of pages of documents. You cannot do it. You cannot do it within a few years. You're talking about ten years to get through some cases. Trying to get them engaged with using technology, and we're talking about lawyers who have been practicing twenty or thirty years, who are three-ring notebook lawyers, and they want it in paper.

Getting them to be engaged with it means, that is training on our part. That means making the database palatable for them. We'll do something as simple as the initial organization that works in . . . this is how you can create folders of every defendant, of every witness. We go through the indictment. There's certain businesses that are referenced all the time. Here's how you can create a folder for that, and when you do the searches, you can put those documents, tag them accordingly.

Most of all, it's the training. We have found that database companies, they really are built for civil litigation. They are built for civil litigation that has to have technology departments. We have to take over the training. We work with either the database company, to really understand criminal defense, criminal cases that we don't do redactions, we don't produce documents. We're dealing with multimedia formats. For their most complex cases, we do the training ourselves, because we understand what the lawyers are looking for, how they're going to get to it, and what really they care about the most.

In terms of our work flow, we look at it as two stages. One is, we get the discovery, take a look at it, and get it out to all the defense lawyers as soon as possible. Give them some kind of tool that they can review the documents immediately, assess the case immediately, so they can address detention hearings, pretrial motions, so they can make a determination where they can identify which cases are really going to go to trial.

That means we take a look at it. If there are corrupt files, any big production cases' corrupt files; the documents may not be searchable. We see typically, very often, cases where large productions of PDFs are produced to us that are OCR, meaning they're searchable, except for the Bates number. When you get down to the last couple of weeks, everything is going to be referred to by Bates number, so our office will re-OCR everything, which would normally cost anything from two cents to five cents a page, and when you're dealing with tens of thousands of pages of documents, it really adds up quickly.

We do it ourselves, in house. If we sent it out, by the time we got funding requests, by the time the vendor got around to it, we're losing valuable time for the lawyers to have this assessment. It used to take us months to be able to create a sortable spreadsheet so that you can sort through and find the wiretaps for particular target numbers, or number of calls that are to a particular number. It used to take us two or three months. We work with several technology companies to tell them, "This is what we need. We think you could do this in an automated fashion, to take those five thousand line sheets that are all in one PDF, and use an automated process to break them all up and match them to the audio." Now we can get those out in a week to two weeks. It really is a critical tool for the assessment of drug cases.

I think that when we first started working on this, when I first started in the Western District of Washington, and then since 2001 working nationally, people didn't know what to do with a CDA, or what a CDA involved, and there was some confusion as to whether we had some control of the way they handled their cases, which we don't. We're the support team for them. We come in and help them right away, in terms of maybe creating strategies to handle their cases.

We had one case early on from the . . . we filed a petition for the appointment

of a CDA ex parte, but there was one jurisdiction where the government got wind of it and opposed it, opposed it because based as a taxpayer, money shouldn't be dedicated to spend money on Russ Aoki. They were not really understanding what a Coordinating Discovery Attorney does. Things are so different now. Now I would say lawyers are reaching out to us every week for help. Courts are telling defense lawyers, "Go find a CDA. This is a case that needs a CDA." I would say the last eight months, we have probably got four cases that were initiated by the U.S. Attorney's Office, who went to the defense lawyers and said, "This is going to be a big case. You're going to need to get a CDA involved."

I think it really says a lot about the acceptance of what a Coordinating Discovery Attorney does. I think the comfort also is because I'm a lawyer. I'm a CJA panel lawyer. I have been practicing for a number of years. I have been in court many times. I understand what sole practitioners go through, what small firms go through. I also understand the importance of maintaining the integrity of the evidence. For example, when documents get scanned, I want to make sure that there is an index, so that if there is ever an issue of the genuineness of the document, I can track it down to the actual box and pull the original document out.

For databases, when you're looking at a document in a database, we make sure that displayed on it is what is called a "relative file path," which means, you're looking at this document. You can tell it came from this folder, from disk number thirteen, from production number twenty. You can go back and track it again as to, where did this document come from? I think also, because I'm a lawyer, I understand the rules of professional conduct. RPC 1.6: Maintaining confidentiality of materials being used in the representation of your client. I think before the DOJ started encrypting, we have been encrypting our productions for several years prior to, and training lawyers to understand why it's important. Yes, it is government discovery. They have looked at it. But it's something about their clients. They don't want them floating around.

We want to make sure it gets transmitted in a secure way. Also, 5.3: It's a lawyer's responsibility to make sure that vendors are keeping everything confidential, are doing proper work. We make sure that when we work with vendors, they understand our work. We will educate them. We have worked with vendors for several years in making sure that they understand what our needs are, who the users are going to be, and that everything is going to be maintained in a confidential way, and a secure way. Occasionally . . . we certainly had this happen on one occasion, where the government wanted to know if the lawyers are accessing the database, and when they're accessing it, and who is accessing it. The database company has to know you cannot give that information. Absent an order, you're not going to give that out.

How many database companies would have folded as soon as somebody flashed their FBI badge in front of them? Understanding the importance of our work for the vendor, I think that's another big attribute. This has been an interesting opportunity for us, and a rewarding opportunity for us, to be involved. In terms of being a lawyer, to me it's always about giving something back to the community, promoting our profession, and being a Coordinating Discovery Attorney, we get to work with who makes up the most lawyers in our countries: sole practitioners and small firm practitioners. We can impact the community by helping improve the quality of representation. We look forward to helping in the future.

Judge Cardone: Thank you. Douglass Mitchell.

Douglass Mitchell: Thank you. I realize that the Committee is reviewing issues relating to the CJA program that extend far beyond the topics that we will be addressing today. Today's topic is perhaps as timely an opportunity to review the CJA program in meaningful ways, as any of the others the Committee will be considering. I think it's timely because, as I'm sure everybody here appreciates, over the last several years there has been a change in the things that appointed counsel need to do in criminal cases. That change is largely a function of changes that have been taking place in society at large. I think studies that have been done by the University of California at Berkeley and others have concluded that today, ninety-five percent or more of all of the information that is created in the world is created digitally first.

It is all maintained, in some form or another during its lifetime, digitally. What that means for appointed counsel who represent defendants in cases in front of courts is that the evidence of what people did, and what people said, is increasingly digital. The evidence that then has to be brought to court in order to present a client's case is increasingly found through an analysis and review and synthesis of digital things. As a result, we find ourselves in a period of time where we're transitioning from a paper-based world into a very digital, and intangible, world.

That transition, like almost every transition we encounter in various aspects of society, entails certain inefficiencies. It creates certain issues that didn't exist before the transition period began. Like every other aspect of society, the attorneys who go through that same transition have to adapt. They have to work through the inefficiencies in order to make what is unfamiliar become familiar again.

The inefficiencies arise in areas such as a lack of familiarity with the information and discovery and evidence that the attorney needs to work with in order to prepare his client's case, in order to understand what evidence exists of what people did and what people said, and what they knew, and what they intended, so that they can then advise their clients, and then they

can also take that evidence, cull it down to the very most important and very most material pieces of evidence that they then can use to present that client's case to a jury at trial.

When you have attorneys who are unfamiliar with the form of the evidence or the information, because it comes to them on a hard drive, and it comes to them in a form that is a forensic image that may be encrypted, and all of a sudden for the first time in that attorney's career, he has to figure out how to access that information. He has to figure out what to do with it so he can review it, and he can then understand what he needs to know in order to advise his client and prepare his client's case to the best of his ability.

The inefficiencies exist because very often when there are these technological changes in society, it takes a few years for the support industries, in this case the litigation support industries, to catch up with those changes. Very often, the tools that are available for a lawyer to analyze this new kind of information are inefficient, and it takes a little longer to use them. Inefficiencies also pop up because, not only are the tools lagging behind, but even more certainly, the lawyer's familiarity with those tools is also lagging behind. It takes a little time. It takes a little time for the lawyers to learn how to use those tools effectively and efficiently. It takes a little time for them to then go through larger volumes of data, think in larger patterns, so that they can synthesize the specific pieces of evidence that they can use to support their client's case.

The inefficiencies also pop up in terms of time itself, because it does take longer when you're unfamiliar with both the material you're working with, and also the tools you need to use to work with those materials. Inefficiencies pop up also in terms of the time it takes for lawyers to develop the skills they need to deal with the new information and to use the new tools. These periods of transition almost always entail not just inefficiencies in terms of the familiarity with the materials and the tools, and not just inefficiencies that arise in terms of time, and not just inefficiencies that arise in terms of skill sets, but also inefficiencies in the form of additional costs, because it takes longer to do some things than it used to take. It sometimes costs more because the resources that are necessary to access the information and make it usable cost money, or didn't exist before, and therefore it costs more to use those tools.

It seems to me that one of the great challenges that confronts this Committee as it reviews the CJA program as it is now, is developing a set of recommendations, a set of policies and practices, that can be implemented as first principles that will help the CJA program develop a set of attorneys who can use more efficiently the information that is now being disclosed by the government in criminal prosecutions that involve forms of electronic discovery, who can use the tools that are necessary to access that new kind of

information that is being disclosed, who develop the skill sets for reviewing large volumes of data efficiently and effectively, so that they can sift through the haystack to find the few needles of material information they can then present at trial.

As everyone can appreciate, there may be millions of pages of paper in discovery, but at trial, everything comes down to just a very few. It comes down to that few set of documents, those few witnesses, that an attorney can then craft into a persuasive narrative, a persuasive story, that can be admitted into evidence, either in the form of witness testimony, or document evidence, or other types of evidence, that will be more persuasive than the story that the prosecution can tell, using the same haystack. It's the process, and I think it's the challenge of the CJA program, the Committee in particular now, to find a way to develop that set of talent or skill set among the attorneys who are appointed to represent criminal defendants.

The Department of Justice has taken on that burden, and they have invested large sums of money to ensure that their prosecutors, both in the Department of Justice and those in the individual U.S. Attorney's offices and districts throughout the country, are capable of dealing with the types of evidence that they are seizing as they go and investigate criminal conduct, and the types of evidence they need to review to determine and identify the specific pieces of evidence they will present at trial, and then the way in which they will present that evidence at trial. They have invested a great deal of money, a great deal of time, and a great deal of effort to raise the level of their attorneys to the point where they can do that.

The challenge for the CJA program will be equally great. It will be in some ways more difficult because, unlike the Department of Justice, which is a hierarchical, monolithic structure in some respects, maybe not in all respects, but in some respects, the CJA program is a distributed architecture. There is no centralized system that controls or dictates the behavior or policies applicable to each of the solo practitioners, or the small law firms, that are appointed to represent attorneys. It becomes more difficult. It becomes more difficult to build the skill sets, because CJA attorneys very often don't have the resources to do it themselves. It becomes more difficult for CJA attorneys to acquire the resources on their own, because they don't have the financial wherewithal to do it. It becomes more difficult for any number of reasons, when you are all by yourself and you have no support other than a secretary who helps you, from time to time, organize and type and prepare.

The task is a daunting one, but I think it's a task that is capable of being accomplished. I think it is something that is also a very meritorious effort. It is a terrible thing to sit in a courtroom at a calendar call and to watch other attorneys stand up and announce to the judge that they are prepared for trial, which will begin in a week and a half to two weeks, knowing that the

attorney who stood up and announced that he was prepared for trial had not yet even attempted to look at two hard drives that were full of electronic evidence that the government was prepared to introduce against that attorney's client. It's a terrible thing to have that happen, not just to the defendant, but to the justice system itself, which needs to have the appearance of impartiality, the appearance of a level playing field, and the appearance of fairness and justice for everyone that comes before it.

It is also difficult for the courts, which, after that trial was over, are faced with § 2255 motions and petitions, where that defendant, who then on appeal or after appeal has been exhausted, comes back to the court and says, "Judge, my attorney never even looked at the information that was on those two hard drives, so I didn't have the effective assistance of counsel."

I am grateful for the opportunity to appear before you today. I'm grateful for the opportunity, and for the Committee taking the time it is taking to consider these issues. It is, I think, an important issue. It's an important time to have this review, at least with respect to this particular subject matter. I'm grateful for your time. Thank you very much.

Judge Cardone: All right. We'll start with Mr. Cahn.

Reuben Cahn: Let me begin with [INAUDIBLE] . . .

Judge Cardone: You need the microphone.

Reuben Cahn: I'm sorry.

Judge Cardone: That's all right.

Reuben Cahn: I would like to move from your conclusions backward, and understand why your concerns about defender IT lead to a conclusion that the only solution is defender independence. As I understand it right now, the real problem we have is a disconnect between the operational side of defender IT technology, the people who manage the network, the programs the defenders use that contain confidential information, and the people who administer it, the people who control procurement and compliance and interrelationships with third parties.

Those are split now, and one group doesn't have full access to the other because they would be breaching ethical rules if they did. Is that right?

Donna Lee Elm: Yes.

Reuben Cahn: The first question would be, why can't we just put them back together? For many years we had DSO administrative control over IT, and NITOAD, the

operational side, was effectively under direct defender control in the Western District of Texas. Why isn't that an adequate solution?

Donna Lee Elm: That did work for a number of years. I have thought of that quite a bit, Mr. Cahn. It did work for a number of years because we did have strong leadership in DSO, in Defender Services, that was providing the leadership, and Defender Services was providing the support. It worked pretty well, but we keep getting further and further behind. When we stop and look now at how far we are behind DOJ, when we're supposed to have parity, it didn't move us forward as fast as it should have.

Secondly, when I look at where we are right now with our liaison position and what Defender Services can do, they can't get us the personnel we need. It's not through a fault of Cait Clark. It's not through a fault of CMSO. I think it's structural. They are in a position where they just can't get the sorts of things they needed when Ted Litz had a higher position. With this demotion of Defender Services, for whatever reason, we cannot get a strong person in to run defender IT. I mean, I met with Cait Clark, saying, "We need this," and apparently we are kind of stuck with a lower-level person.

We may need some extra people in IT. Just trying to get some extra bodies has not worked. It certainly has not worked despite a whole lot of effort in NITOAD.

Reuben Cahn: I am hearing what you're saying, and maybe I misunderstood your first position. It sounds like what you're saying is that DSO independence, DSO ability to control its IT infrastructure and our IT relationship with them, would fix this need. Or are you talking about "Big I" defender independence, removing the program from the . . .

Donna Lee Elm: No. I'll tell you what I'm talking about. I'm talking about defender IT independence. To get that type of independence, where we can manage it. In the structure of the AO right now, DSO is not able to do it for us.

Reuben Cahn: Okay. Let me go back one step, though, and ask you, right now, the one problem is that we have an inability to get on board people who we need on board. Another problem is that we're having difficulty moving forward with technological advancements that we need to make. I shouldn't say "advancements;" just the basic maintenance of functionality of the basic programs we use. The obvious question to be asked is, why can't we fix those problems with small tweaks? Why can't our memorandums of understanding and a greater commitment to resources adequately deal with those problems?

Donna Lee Elm: We have tried earnestly to get a greater commitment to resources. It is appalling that we don't have even staff to write procedures, that we have an administrative . . . we are part of the Administrative Office of the U.S.

Courts, and we don't have somebody who can even write policy and procedure. We're just barely trying to get that after well over a year of having identified it as being absolutely critical. The one deep problem . . . we just can't seem to get there within this.

Yes. I don't have a problem with us staying within DSO, within the AO, if we can get those things. The problem is, we can't.

Reuben Cahn: Let me ask a question about the pace of technological advancement and where we are relative to civil firms or DOJ. I think you have given some description of that, and that we are well behind, and probably falling further behind. I think everybody understands that. We were behind before the reorganization. I think that's fair to say. How do we begin to address that problem? Let's say we have defender IT independence. That alone doesn't catch us up. What do we need to do to catch up?

Donna Lee Elm: One of the good things we got from the work measurement study was discussion by Harvey Jones, who is with HR and led that statistical study. When he found out that we had a ratio of I believe thirty-five staff to one IT person within the defender offices, and some of the others . . . I really would be happy to provide the Committee with the actual numbers. I am trying to remember this from a year ago. I think Bankruptcy has nine to one. Probation I think has about fifteen or eighteen to one. We have thirty-five to one.

If you're trying to move . . .

Reuben Cahn: Do we have any information on what DOJ's ratios are like?

Sean Broderick: We don't at this point. The other thing I would distinguish is, you are right to bring in DOJ, that the IT infrastructure for litigation versus just "IT infrastructure," for now we're really just talking about IT infrastructure.

Donna Lee Elm: We're just talking about keeping the computers going. One of the things that came out of the work measurement study was the concept that defender offices across the country needed to have a much lower ratio, to try and even get us close to where the courts, Probation, some of our fellow agencies are, let alone DOJ. DOJ, I dare say, just from the information that Mr. Broderick gave you, is well ahead.

We have suggested that maybe the ratio we need to aim for is twenty to one. It may be lower, it may be higher, but that might be a much better ratio. If so, we would have to almost double our IT staff nationally. That's just within the defender offices. As we're trying . . . and I have been talking with a lot of defenders about beefing it up. Start to hire more IT. Start to get your IT program going. Hire paralegals who can do more of the litigation support work. Hire people who can do forensics, so you're doing it in office, and

cheaper.

Then, we realized that it runs on the stomach of NITOAD. You have to have your national IT there, too. Even though defenders are given a large number of FTE, of Full-Time Equivalent employees, that they can choose who they're going to hire, what type of person . . . they may say, as I did, "I'm hiring two more IT people for my office right now." NITOAD is a national program, and because of its position as a national program, we have to go through so many more hoops to try and get bodies in for it. It turned out to be very difficult barriers, like I said. We have recently been approved for two, after working really hard, and having a go at it twice, and it still hasn't gotten final approval.

Reuben Cahn: Let me just clarify something you just said. You said it's because they're a national program, it's particularly difficult to add resources that we need. Is that a result of the transfer of staffing jurisdiction from the Defender Services Committee to the Judicial Resources Committee? Is that what has created that difficulty?

Donna Lee Elm: I think, Reuben Cahn, you know better than I, but that is my understanding. I don't know if it's a budget issue. I'm not as involved with that, but I do know that it has been extremely difficult when we have desperate need.

Reuben Cahn: I would like to turn . . . do I have time for a couple more questions? I would like to turn to a slightly different area. I think Sean and Russ, you are the ones who can probably answer this question, and maybe you also, Douglass Mitchell. First of all, I appreciate tremendously the work you do. I can't even imagine the scale of the task. That's what I want to ask you about is, what is the scale of the task? Has there been any comprehensive assessment of what we need to do to get . . . put defenders aside for the moment, but to get the panel lawyers the level of technology that they need, not to be on a level playing field, but just to be able to offer competent representation in this new world in which a simple drug case involves gigabytes and gigabytes of data?

Whoever wants to answer, please?

Sean Broderick: I'll say that the short answer would be, no, we don't. One of the points I made is, technology is moving so fast that it's hard to figure out what should be the metric to determine what are the needs, and where we need to go, and what are the expectations. What we have been doing, the National Litigation Support Team, we have been doing a fair amount of trainings locally, to work with different offices, and trying to have more hands-on . . . I should say, offices but also CJA panels, trying to assess where they are at. We have not come up with a comprehensive plan to say, "This is the baseline where I need to go." Russ, I think your district of Western Washington did come up, and this is actually now a few years ago, came up with an idea, a baseline

assessment of technological skills or equipment that the panel attorneys maybe want to have.

Russell Aoki: That's correct. Understanding the complexity of cases now, our jurisdiction has put together a list of the kinds of equipment that a lawyer needs to have to be on the CJA panel. To us, it's a pretty basic way you operate businesses, but for a lot of the lawyers, they had to go out and purchase some equipment, some products, to be able to do things using Acrobat, and be able to do OCR and search.

Reuben Cahn: Could you tell us really quickly, what were the basic tools that your assessment led you to say that every CJA lawyer ought to have?

Russell Aoki: I'm sorry?

Reuben Cahn: Could you give me a list of those basic tools that CJA lawyers ought to have?

Russell Aoki: For example, the ability to scan, the ability to use something that can convert a document into a PDF and be searchable, which would be Acrobat Professional. Sorry, I don't have the list in front of me.

Sean Broderick: It was fairly basic, as I recall. Word processing, email program . . . this was a number of years ago that this came up.

Russell Aoki: The idea was to start with something pretty basic that we assume everybody is going to have, but understanding that some people didn't, and start building from that.

Reuben Cahn: A couple questions. One, can you later, after this testimony, provide us with that list? The other question was, can you give me an idea of what percentage of the panel in the Western District already met that standard, and what didn't when you did your assessment?

Russell Aoki: I don't . . . we did not do a survey. We were aware of some panel members that we questioned, whether they had the capabilities, based on statements they had made to the court. We were dealing with District Court Judge Marsha Pechman and Magistrate Judge Mary Alice Theiler, who had explained their concerns that what they had been hearing. I would say it was a very small percentage. Since we didn't conduct a survey, those few people raise the concern that, what if there's a dozen people out there like that? We wanted to make sure it was clear.

Reuben Cahn: Okay. One last question. It seems to me that one of the most critical problems we've got, of you know we can't where we need to go if we don't know what we need to do, and clearly we don't have a national assessment of needs, and therefore we don't have a strategic plan. Is there any incipient movement

towards accomplishing those things, so that we can then begin to determine what we've got to do in this area?

Sean Broderick: To clarify, there has been, and as Judge Cardone knows from her work with the Defender Services Committee, we have had a number of strategies involved to serve as an interim staff. Included in those things has been getting a number of software products at a discounted rate, working towards the possibility of using web-hosted databases in certain select cases. Taking advantage of having Coordinating Discovery Attorneys is part of the reason why my submission noted some of the things to look forward to. But I think this is a good time to revisit where we are now, and see if there is a way to figure out what would be good things to have as a baseline, and figure out ways to make it easier for the panel, who already have, as we noted, solo practitioners, who have a lot of demands put on them, but see if there is some ways to assist in that process.

Reuben Cahn: I said "one more thing," but I'm going to make a request of you, which is that since I love to give other people work, would it be possible to have all of you consider what you would suggest in an ideal world, a plan to come up with this plan? What would you want done for us to develop a plan, which we could then pursue? Submit that to us some time down the road, in the near future. Thanks.

Sean Broderick: I want to just say, that is one of the things I did list, in my submission. Some of the things we talked about was having additional staff for CJA panel attorneys, looking for potentially more CDA contracts, and thinking about having specialized . . . this is something that Mr. Mitchell talked about . . . especially for the large, mega-case, having attorneys who are more comfortable dealing with the technology, have more resources to take the lead on those cases.

Judge Gerrard: [INAUDIBLE]

Reuben Cahn: Yeah. I'm good. You've got it.

Judge Gerrard: Okay. You can also, but . . . to Mr. Broderick, and also to Mr. Aoki, and that would be, first of all, thank you for your testimony. As a Committee member I am being educated in this area. One of my questions, and a follow-up from Reuben, is the scope. I did notice, Mr. Broderick, in your written submission, your possible future steps, and two of them that you just mentioned, one of them being additional CDA contracts to provide assistance in specific cases. I would want to know . . . you don't have to answer it today, but what we would want to know, as a Committee, what are you looking at as part of the plan, how many, but I would like to know how staffed or understaffed you are now as far as CDAs, how broadly they are used, and geographical areas. I know in certain areas of the country, you're used extensively, and in other

areas you're not used at all, and you're certainly being under-utilized. I would like you to educate us as far as one, the coordination between the two offices, between National Litigation Support Administration and the CDAs, the coordination there, and then, number two, how broadly is the utilization?

Sean Broderick: I will tell you, at this point, I think . . . we have three people who are on contract on the national level for Coordinating Discovery Attorneys: Russ Aoki in Seattle, Shazzie Naseem in Kansas City, Missouri, and Emma Greenwood in New York. Right now . . . our initial plan was budgeting ten active cases per CDA. At this point, between the three of them, I think it is up to sixty cases. There are cases . . . they have cases in, I believe, eleven of the circuits. I think there is only one circuit where we don't have an active case. So, certainly being utilized a fair amount.

I will also say that one of the things with technology and one of the things that works for the CDAs is, as people become more comfortable the idea is they get more used to, for example, one of the things has been sortable spreadsheets, which we talked about. Now, we are finding more people who are able to do that on a local level, and we see some people doing that, where it doesn't necessarily require a Coordinating Discovery Attorney because the hope is, as we build along, as we continue to do more training, people feel more comfortable; they feel more comfortable working digitally, and it becomes less of a foreign thing. Hopefully that will adjust the demand, but also people are more comfortable with cases they couldn't have handled four years ago. Do you want to build on that, Russ?

Russell Aoki: Yeah. We're very busy. We're very, very busy.

Judge Gerrard: That's, I guess I want the scope. Could you use another two or three or four? You can tell us.

Russell Aoki: Absolutely. I think part of the measure, or the threshold question for us, is what kind of cases that we get into. A few years ago it was less data, fewer defend…, multiple defendants, and now the cases have to be very big, almost an unusual case for that jurisdiction. Some jurisdictions have a lot of big fraud cases or big drug cases, and we may have several cases there.

Judge Gerrard: In other words, there's a missing piece there. In other words, you're in the, what I would call the mega-mega cases, but there are a number of cases that could utilize your services. They just aren't being utilized.

Sean Broderick: There's some of those cases where the four of us, the National Litigation Support Team, will do some direct assistance on those kinds of cases, basic kind of things, focusing on tools, focusing on, for example, "here is a sortable spreadsheet." It's something that is objective. So as not to get into any kind of significant analysis. We pick off some of those that we can, sort of the

low-hanging fruit, and then work on our training to focus on also the basic cases, so that people can apply those skills to the more complex cases, because it's easier to work on a case that you know well, and you know how to do; transfer that into a digital context, and then you become more comfortable with the tools and what you can do.

Judge Cardone: Judge Goldberg.

Judge Goldberg: Ms. Elm, I want to ask you a couple questions about this transfer, the IT from Defender Services to the CMSO. I'm not unsympathetic about your concerns. It's probably a bad analogy, but let's say Congress somehow said to the Department of Justice, "Your IT is going to be managed now in conjunction with the Department of Agriculture," something like that. There would be a revolt. I totally get your concerns.

I want to ask you a couple of quick questions, and then try to get a deeper understanding. You say in your submissions, you are concerned that some government entity, I won't specify which one, but maybe you're most worried about DOJ lawyers, could subpoena your electric case files. Has that happened, or have you gotten wind that that is about to happen, or may happen?

Donna Lee Elm: I predicted that that would be a question. Let me answer it this way. Right now they can't, because they are kept within the umbrella of confidentiality. If our files go on out to a third party, do I know that I'm going to have a defense attorney running and screaming, "Don't let them do this!"? Most sentient and thoughtful judges would say, "Yeah, really, no, don't do that. Don't give them that file. That is their case file." But, if you look at what has happened in things like attorney-client communications, when an attorney and client communicate and it is something that is overheard by a third person, it is waived. You know this basic law. Sometimes it is applied even in areas that are a little out there.

Judge Goldberg: Has a party averse to the defender community ever made that argument that you are aware of presently? I realize it could change [CROSSTALK].

Donna Lee Elm: No, but they couldn't at present.

Judge Goldberg: They could. Of course.

Donna Lee Elm: They couldn't, presently, on our files. All we need to do is have somebody realize that we have waived confidentiality, and I predict it would go there. I would also predict that most judges would step in and say, "No." But could it? Yes.

Judge Goldberg: Again, I'm not unsympathetic to your concerns. Has there been, and I realize that didn't happen too long ago . . . 2013, this happened?

Donna Lee Elm: I'm sorry?

Judge Goldberg: When did the transfer happen? 2013?

Donna Lee Elm: 2013.

Judge Goldberg: From that point in time to . . .

Donna Lee Elm: Actually, the transfer of IT, at the beginning of '14. The beginning of '14.

Judge Goldberg: Has there been any compromise of attorney-client communication, or work product communication, that you are aware of, during that time period?

Donna Lee Elm: Zero. We have been really watching it very carefully.

Judge Goldberg: Just more generally, then, so I can understand it a little better, what is the information that is being now jointly overseen? Is it . . . I have no idea. I have a Department of Justice background. No public defender I tried a case against was ever showing me their data files. What is in there that you are concerned about? Are there actual client communications? Are there strategies between Reuben and Katherian, about how to try cases? Is there data information? All of the above? Tell me, what is in the databases that you're concerned about, without divulging specifics, because that would defeat the purpose.

Donna Lee Elm: Yes. Of course. There's basically four things we're concerned about. The one is your traditional attorney-client privileged information. We have that in a number of places. There are client files, of course, and a lot of us keep client files just within our district. They're not on the national. But, our national case management system, Defender Data System, which Mr. Kalar will probably talk about tomorrow. Our national case management system has a place for notes, for all kinds of information about the case, and there's a number of us who use it for our case log. That means that we have client communications, we have all kinds of information.

We have our emails, and we often are involved in email discussions with clients or with other people, with witnesses, with our experts. That is in our national system. We then start branching out to work product. When we're talking to each other, that's in our national system. All that is in NITOAD. Then we go to . . . there are places where we may keep records and documents which have some of the private information, financial information, things like that.

Judge Goldberg: A lot of important material, including attorney-client communications.

Donna Lee Elm: Correct. There's also, though, and forgive me, but we consider our case data to be at least sensitive, because it is the basis. We are very careful about our

case data, which is our numbers, and how much time we put in on cases, and all of that, too, is very sensitive. That usually is not going to be release without discussions with the defender.

Judge Goldberg: Hypothetically, if all proposals, this Committee's proposals, were completely, one hundred percent accepted by the Judicial Conference, and Congress, what would the specific fix be that you would like to see? Be as specific as possible.

Donna Lee Elm: We need to be able to hire the people we need for the national . . . I'm not talking about the offices. I'm talking about the national program. We need to be able to hire people to at least double our NITOAD staff. We need to be able . . . we have just recently greatly increased our bandwidth nationally, so now we need to be able to start using it more. We need to be able to put someone in place. If we stay within DSO, Defender Services has a greater capability to be able to put people into this position. I'm not saying how you go with this, but if Defender Services still exists and we are in it, we need to be able to hire at least three people to staff.

Judge Goldberg: More staffing, and have the IT back under the sole umbrella of Defender Services.

Donna Lee Elm: And to be able to move much more quickly in trying to get things done. That's a lot of my concern, is that we have to go through so many administrative hoops, so that we can't get anything done.

Judge Goldberg: One question for the panel, whoever wants to chime in, we are getting a lot of information. Maybe one theme that is emerging is under-utilization of [by] CJA lawyers of experts, all of the above, investigators experts for sentencing, psychological experts, and experts of your . . . data experts, coordinating discovery experts. What advice would you folks give us on how . . . maybe this is not our task, but maybe it is. How do we get the word out to the CJA lawyers who are not in the bigger cities, that these resources are available? Because I think, Mr. Mitchell, you said, and you were right, that DOJ lawyers, they are being taught this.

I remember when I was at DOJ, I said, "Let's get the particle boards with all our exhibits, and put them in front of the jury." The agent said, "No. We're going to do this by computer. We have a database." That is how I started to learn what resources are available. You're right, DOJ is this big . . . what was the word you used? Monolithic?

Douglass Mitchell: Monolithic.

Judge Goldberg: Monolithic structure.

Douglass Mitchell: Monolithic hierarchy.

Judge Goldberg: They're doing a great job educating their lawyers, but how do we . . . you posed the question, and I'm going to throw it right back at you. It's a problem. How do we alert CJA lawyers that these services are available? How do we do it? How do we get the word out to them? That's the first step. "These services are available. You have to learn this."

Douglass Mitchell: I think it's a multifaceted approach. I think the first thing is, there must be a top-down recognition that those services and support resources are both available and necessary in the right kind of cases. That comes from the national CJA people like Sean Broderick, and his team, that do a phenomenal job of communicating, as best one can from a pinnacle sort of position down, and that has to continue.

The second I think that has to happen is, there must be a communication of the necessity and availability of those resources to the district court judiciary. I think there is a need to make the district court judges familiar with, and comfortable with, the idea that some of these ancillary resources and support services really are normal and necessary and reasonable in the context of today's litigation, so that there is not this discomfort at the judicial level with the kinds of resources that are being requested, both in terms of what the resources are, and also in terms of what the cost of those resources are. Sometimes the cost of the resources can seem exorbitant, but when you factor the cost of a resource against the attorney time that it would take to perform the same tasks without the resource, as it would take with the resource, the cost of the resource is nominal.

Judge Goldberg: Not just educating the CJA lawyers; educating the judges.

Douglass Mitchell: There's a judicial education, I think, because there is a hesitancy to think, "Oh, no. I have to spend $400,000 on this online review platform, and they want to do this kind of objective coding and they want to do subjective coding, and they want to use predictive coding." They start talking in a language that is unfamiliar to a lot of judges. When you add on the cost of that, the lack of familiarity coupled with the cost I think creates hesitancy. I think there's a judicial component to it. [CROSSTALK]

Judge Goldberg: One more quick question; I'm hogging the microphone, and then I'll turn it over. Are judges, in your opinion . . . I want to hear what Mr. Aoki has to say, and Mr. Mitchell. I guess all of you, just "yes" or "no." Are judges supporting, based on what you have seen, or not supporting, the use of this technology that you would all agree has to be used? Let's just go down the

row. "Yes" or "no." Are they supporting it or not?

Donna Lee Elm: They are supporting it, but a lot of times there is sticker shock when they find out how much it might cost.

Judge Goldberg: What do you think?

Sean Broderick: Same response.

Russell Aoki: They are supporting it. I think part of it is because it's the same judge that has appointed me to be the Coordinating Discovery Attorney, so trusts my opinion, that I know what I'm talking about.

Douglass Mitchell: I can speak mostly for my district. I think we are very fortunate to have a group of judges who are aware of these situations and provide us with the resources. I do know that I receive telephone calls from time to time, from CJA attorneys in other districts around the country, who ask questions about, "How can I help my judge understand the following?" There is some . . . I think there is a desire to provide the resources, and I think judges generally have a sincere intention to help where they believe it's appropriate. The problem is making them familiar with and comfortable with what that means in today's litigation world.

There's just one last little thing about the levels of things that need to be done. I think there also has to be a concerted effort on a district level, not just to have the kinds of training and notice that come from Sean Broderick and his team, and not just the kinds of things that would come from a judiciary that is familiar with and comfortable with these kinds of resources, but also there needs to be a collegial training and education among the appointed counsel within a district, where there is a regular . . . I don't know if "training" is the right word, but skill set building, over time, so that they become comfortable with it in a collegial, colleague kind of way, as opposed to a top-down way. I think it takes both. I think it takes top-down, I think we need to have the presiding authorities comfortable that it is reasonable and necessary, and then you need that collegial support structure that comes when peers are talking together about doing things in the best way possible, and sharing their experiences and building one another.

Judge Cardone: Before I pass to Judge Gerrard, I just have a question for Mr. Broderick or Mr. Aoki on this topic. I know that counsel throughout the country reach out to you. One of the things we have talked about is how often it is that judges don't approve budgets, or don't approve experts, et cetera. Mr. Broderick, Mr. Aoki, do you have any . . . have either of you sought to help a CJA panel attorney in a case, and been told your services were not going to be allowed, and if so, how often has that happened?

Are you following what my question is?

Sean Broderick: With our services, we have not experienced that for ourselves, partly because there isn't . . . we are a service, and there isn't any cost involved with that. Our team hasn't experienced that kind of reaction as far as not being interested in the kind of support that we provide.

Judge Cardone: For you, if they contact you and reach out to you, do you then get communications from throughout the country, or is it very regional?

Sean Broderick: It's pretty much across the country at this point. It's all over the country, and it really varies. Sometimes it's someone who is like, "I have three thousand pages. I don't know what to do." For that district and that particular division, they haven't dealt with those issues, which is great, because, like, "Okay. We have some good solutions for that." Then you have the more challenging ones, where it's terabytes of data, and there's a short turnaround. That can be a more challenging thing, but we're getting the gambit of requests for assistance, or at least conversations, which usually is working backwards with them and going, "What is it you're trying to do?" There's a lot of things that are possible, but if you work backwards, it gets easier.

Russell Aoki: I'm sorry. The question was pertaining to our appointment to . . .

Judge Cardone: Yeah.

Russell Aoki: So far we have been very recepted. There was one incident where there was a petition for my appointment and it was denied, and I don't know the basis for that, frankly. I think total, I am close to seventy cases that I have been appointed to, and that was the only incident.

Judge Cardone: That was only once, that you were denied?

Russell Aoki: Yes.

Judge Cardone: Okay.

Could I ask a quick follow-up on that? You're appointed in this case, but sometimes you'll recommend third-party vendors to provide services in those cases. Have you had any problems ever with those recommendations of third-party vendors being denied by the presiding judge?

Russell Aoki: No.

Sean Broderick: You've had some push back on some cases.

Russell Aoki: Yeah. They ask good questions. The court would ask good questions about it.

They can be big-ticket items. When you're dealing with a terabyte of data, you really don't have alternatives in being able to look at it. They are forensically preserved, they have to be unlocked, metadata has to be preserved, which is the dates and times. We have had push back by one court in terms of the expense. The vendor responded back by continuously reducing the cost of it, which, great for that particular court, kind of bad for us, because vendors aren't going to do that in the future. When we go back to that jurisdiction, they'll go, "Why does this cost three times more?"

"Well, because the vendor was trying to get their foot in the door, so they kept reducing the price and reducing the price."

That was the only . . . one thing that I find very helpful, if the case budgeting attorneys have been really wonderful about this, because they understand, most of them have been in the trenches, they know what it takes to defend a big case, so I always try to make sure that they are aware of what I'm doing in terms of what I am going to be asking for from the Court.

Sean Broderick: One thing, just to follow up, is that as Ms. Elm pointed out, that you all might not be aware of, is that we reference the pocket guide that just recently was put out by the FJC, and one of the things is, we're trying to get more judges to understand, and this was a joint project with representatives from the Department of Justice. In that, for example, talking about something that a lot of judges probably haven't dealt with, which is, online databases and not just a repository, like Dropbox, but an online system to do review.

I think in the long run, that is one of the tools that is going to be for the larger cases, can be more useful, because you can assist lots of people, you can move the IT infrastructure out from an office so it is not as much of an impact for a CJA panel attorney. Douglass Mitchell, I know you can talk about this, because it is a very standard process in the civil world, to use database systems like this.

Douglass Mitchell: I think it is one of those tools that should be used in almost any case that has any appreciable electronic information at all. In many cases that are now paper cases, but all the paper has been scanned into some sort of digital format. I know that in our civil cases, where we represent clients who have millions and millions of pages of paper, zenobytes, or whatever they're called, of data. We don't do cases anymore unless the discovery in those cases are loaded into some form of online review system. It's impractical, it's inefficient, for instance, to take a PST, which is a file that contains an individual's email that have been sent or received using Outlook, and there might be a gigabyte-sized PST that might have a hundred and fifty or two hundred thousand email in it. To try and review those email by loading that PST into an attorney's Outlook and going through it one at a time that way, is an inefficient and ineffective way of trying to review discovery.

These online databases become very efficient, and they become very effective. Another one of the things that I think would be a good move for districts to make is to adopt a set of standard tools that can be used as a default set. There are so many benefits that flow from that. Not only do attorneys get to learn one thing, knowing they're going to use it the next time, but costs begin to go down when you have volume contracts that go to the vendor. They become more familiar with how you want things done, so they do things quicker; all sorts of good things happen when you're in this transition period and you're able to identify a standard that everybody can work toward.

The online systems are immensely valuable. We did a mortgage fraud case a few years ago that was the largest, from what I was told by the government, was one of the largest mortgage fraud cases at the time. We had over four hundred real estate transactions. Each of the individual buyers who was their own little scheme had three to eight transactions, all of which became material and relevant when those witnesses were called to the stand. We were able to create a database and an online repository that allowed us to very quickly and very easily sort the documents in a way so that each buyer's transactions would come up in a nice little group. We could split them down even further to specific pieces of property, and we could look within each file very, very quickly. Things that would have taken days and weeks of human time, we were able to do in minutes and hours.

It was enormously efficient, enormously effective, and in fact it was so effective that when we went to trial, I didn't take any paper to court with me, unless I was going to examine a witness that day, and I had to have a piece of paper that I needed to hand to the court as the exhibit to stamp. The whole trial was conducted with us having access through the court's Wi-Fi system to our online database, to the documents we anticipated to use as evidence being on a computer for an evidence presentation system. All we did the whole trial was just say, "Would you show Bates number such and such?" When we needed to, at the spur of the moment, locate something that we didn't anticipate needing for cross-examination, we just found it in the database very, very quickly. We had it printed out if we needed to, or we just gave the guy who was doing our presentation the Bates number, and then we walked up and we did the cross-examination. I didn't carry a single binder.

Sean Broderick: If I could just jump in, Doug. That's the optimal. Keep in mind, our challenges are, one, a lot of our data doesn't play well in these kinds of systems, part of the reason why we are lucky to have a lot of CSAs who have strong skills in forensics, because we have to deal with a lot of data. The data we are dealing with often doesn't play well with that, and we're still waiting for the industry to catch up in some way with the kinds of things that we need. It is good, but I want to just highlight, it's not where we quite . . . the industry is not quite where we need it to be.

Judge Cardone: All right. I'm going to pass it to Judge Gerrard.

Judge Gerrard: Let me tell you about the three-week bank fraud case that I just finished about five months ago, and I had twenty binders full next to me, in trying that case. Where were you then, Mr. Mitchell? To close that gap, and maybe to even the playing field, I do want to go back a little bit to those cases other than the sixty cases that are assigned to CDAs. What is being done, and what can be done, to provide direct assistance? Both to you, Mr. Broderick, and to Mr. Mitchell, too, as a private practitioner, both to provide direct assistance, which you can do by phone and other ways, but to provide ancillary services, in what I would call the medium-complexity bank or wire fraud case, or the multi-defendant drug case, that isn't the mega-case that gets there?

Sean Broderick: The defender offices are critical in that role, and often are the ones who take the lead in those kinds of cases. Part of the strategy has been working with defender offices who have staff, who are comfortable with that, and I could turn it over to Ms. Elm to talk a bit further, but I would say that is a linchpin to the process.

Donna Lee Elm: One of the things that defender offices across the country do is, in the multi-defendant cases we often take one of the defendants, and then of course CJA take the rest. As long as we don't have a conflict, then usually the defenders either through the defense kind of agreement, or maybe the court will suggest that we take a lead in organizing the discovery, we have on staff, of course, litigation support personnel, paralegals, IT people with forensic capabilities. We are better funded, and a lot of times we will take the lead either by being appointed to it, or just voluntarily. That has been very helpful in bringing along our CJAs, so that they can learn from it and work with us in it.

Often they can jump on some of the contracts that . . . Mr. Broderick's office has some national contracts for software, and we can start bringing them in. It has been a good way to try and make some of the transition.

Douglass Mitchell: To echo some of the things Donna said, I think one of the things that can be done, and should be done is, for those defendants who are the most culpable, that an attorney who has the skill sets necessary to handle large volumes of electronic discovery, as well as the trial skills, be appointed to represent that defendant. There are, at least in my experience, and growing up much the same way as Judge Goldberg, with somebody just throwing it at me and showing me and teaching me . . . I started out when I was a young lawyer, being on a case with better lawyers. The better lawyers would teach me and show me, sometimes, through osmosis. I think that is probably one of the most important things.

The other thing that I think is important in some kinds of cases is to involve experts very early in the process. There are certain kinds of fraud that take

place, for instance, within an industry. There's a file structure, sometimes, within that industry; there are key words and phrases; there are patterns of fraud. In other kinds of criminal conduct there are patterns of behavior, red flags to look for. I think very often, if you bring in an expert in the industry to help teach and train the lawyers who understand the law, but may not know how to recognize red flags. You can increase the effectiveness of those attorneys when they figure out what the red flags are, and they start seeing the patterns easier.

The other thing we have done in big cases that I have been involved in is, we have had a series of practice sessions. When the discovery comes in and it becomes available online, and people can start reviewing it, we teach them. Then we come back a while later, and we hold shorter sessions, where people can ask questions and they get little tips and tricks. Then, over the course of the case, they develop a familiarity with the evidence, with how to use it, how to search for it, and they become generally more effective.

Judge Gerrard: Very good. The last thing I would say, and I would echo Reuben earlier, that I think it is really important to assess the technological needs right now. I know it was done before, but where we're at right now with CJA lawyers, and then to develop a plan to educate and assist in a layered way that you were talking about, and I would be very surprised if one of our recommendations wasn't along those lines. Thank you. We would encourage you to do so. That's all I have.

Judge Cardone: Ms. Roe.

Katherian Roe: Well you probably feel like you've been asked every question you could be asked by now. I want to talk a little bit about training, Mr. Broderick, and I know that you have a very small staff. One of the things that we heard around the country, for training in general, for CJA attorneys, is that there are these national programs that are offered, and sometimes in most districts also the Federal Defender offers a program, but for something this specific, I don't think all Federal Defender offices have the ability to offer this kind of training. It's not the same as cross-examination training or something similar.

Have you considered, and I know you are short on staff, but have you considered going to district by district and trying to train the panels?

Sean Broderick: Yes, and that has been very helpful. For example, just last week one of my colleagues were working in Indiana Southern, in Indianapolis, and we specifically worked with that office. In Arizona, it's a good example, we went to Tucson and Phoenix, specifically designed just for the panel attorneys because we also find that training with defender offices, who have an infrastructure, they have resources, they have a structure, they have an information management system already in place.

For the panel, we specifically designed it just for the panel. Our national program we do, the Techniques in Electronic Case Management, our assumption is actually to assume that it's a CJA panel attorney, and it is fine for defender offices to come to that. We do, I think, about six to eight trainings similar to that for the defenders and for the panel. It's something that we think is very important to do. The challenge can be, is that with the panel, you have to have a fair amount of faculty. You have to have a lot of support.

One advantage with the defender offices, as you know, is, you can say, "This is the type of computer you have. This is the kind of structure you have." With the panel, they come in and a percentage of people will have Macs, some people will come in with Windows 98, and we're like, "Okay. You might have to get a new computer." We actually enjoy doing that. You're right, that that is something we want to do more of that, and figure out ways to work with the defender offices to keep that going. I know certain defender offices have started a similar process for their panel.

Katherian Roe: Let me ask you about that. I heard Ms. Elm talking about IT services in some defender offices. For the most part, those are bigger offices. Smaller offices usually have just one IT person. They don't have paralegals to assist the IT person often. That person has to not only be the support person for the entire office, up to twenty, twenty-five people, but also do all the case-related work. When Ms. Elm was talking earlier about how they are hiring a couple more IT folks in her office that would be a great thing for, I think, most of the Federal Defender offices to do. But now, with the work measurement formula, I think you may have been hearing, or will hear, that folks can't do that, because those IT people, those paralegals, don't generate any case load, cases, weighted cases. If they don't generate weighted cases, it is very difficult to hire them.

I think that we need to do a lot for the panel, obviously, in this situation. It's worrisome just how far behind they are. I also think the federal defenders have fallen far behind also. With the new work measurement formula, I don't see us catching up. Have you had any concerns, or any discussions regarding that?

Sean Broderick: I know a number of offices have been looking toward creative ways of dealing with these issues, which I think makes a lot of sense. I believe that this is something that now it needs to go through the work measurement program, and it should be. Unfortunately, you're right, as I understand it. You don't get any points to that, as far as getting additional staff. It's something I think that the advisory groups are going to . . . I suggest that advisory groups take this on, think about that, because if we are going to close the gap with the disparity with the Department of Justice, we are going to have to do more.

Katherian Roe: Obviously the hope is that the defender offices will be able to also assist the CJA folks, but if the defender offices don't have the personnel, they're not going to be able to do it either.

Sean Broderick: The CSAs, and the paralegals and investigators often, just like everybody else, are quite busy and doing a lot of work already.

Katherian Roe: I just want to ask you one other question, about Coordinating Discovery Attorneys. I know that, or at least I think I remember correctly, that your budget comes out of the Defender Services Training Budget.

Sean Broderick: Training Division. That's correct.

Katherian Roe: Is that how Defender Services, I'm sorry, Discovery Coordinating Attorneys, are also paid? With your budget, which is out of that budget?

Sean Broderick: It's within the Defender Services Office budget right now. It's separate from our budget, but it is specific contracts that are with the Defender Services Office through a community defender office.

Katherian Roe: Mr. Aoki, when you go into a district, you don't bill at all for the case, for the actual case, from the court?

Russell Aoki: Correct. What I would be petitioning the court for would be outside services. If we use a database company, or a technology company, for example, the sortable spreadsheets we've been talking about for the wiretaps, I would petition the court for those funds, but not for my staff. We do try to do as much as we can in-house.

Katherian Roe: One more question for Mr. Aoki. Mr. Aoki, now that I know how to say your name, I'm going to keep saying it. I wanted to ask you a question about the case budgeting attorney. It seems to me that the judges tend to trust their case budgeting attorneys. My question to you is, is that something you always do? Do you always go through them? I know you indicated that you would tell them what you were doing. Do you show your contracts to them before they get processed with the court?

Russell Aoki: When I submit the funding request to the district court, I will also give a copy to the case budgeting attorney, understanding that the district court may be asking them, "What do you think of this?" I think out of a courtesy to them, I want to give them a head start to look at it, so they're not caught on a cold call. I do try to make that my practice.

Katherian Roe: Thank you.

Judge Walton: These monster or mega-cases you're talking about, that are creating headaches for defense counsel, are the creations of the government, because the government decides what to indict and who to indict, and how to indict them. Is there something that we should be recommending to Congress, by way of legislation, or to the Criminal Rules Committee, or to judges themselves, in reference to the discovery being provided by the government, and the way it is provided, that would provide assistance to defense counsel in reviewing that discovery, and therefore have an impact on the cost?

Douglass Mitchell: I'll let you go first.

Russell Aoki: That's a great question, and I am hesitating, because there's just so many levels to this. It could start with something as, if they have it, can they give us the investigative reports first, so the lawyers can make an assessment of the case? Can we get the 302s and the search warrant pleadings first, instead of the hard drive of the receptionist that worked at the company? It also goes to the ESI protocols, great protocols, but they seem to stop at the U.S. Attorney's Office. They need to extend all the way out to the agents, because how many times do we hear from the U.S. Attorney's Office, "That's the way we got it from the agent." But the protocol says . . .

Now we are looking at converting formats, breaking huge PDFs down into individual documents, re-OCR'ing them, making them searchable. There are just many levels to it. Then you have drug cases where they're using local law enforcement. Now we're getting photocopies that are scanned. The image quality, to be able to search that, is pretty poor. Now we're talking about, to overcome that, hiring reviewers to do objective coding.

Judge Walton: What would be helpful, to me at least, and maybe to the rest of the Committee, if we got those recommendations from you, of the things that we should be proposing be done by the government in order to make the job of discovery easier, and therefore obviously impact on the cost.

Douglass Mitchell: I'll be a little bit of an outlier here. I understand the concerns, and they are large ones and they are significant ones, but it's a tough balance to strike because we're dealing in an adversarial system that says the prosecutor has to look through the haystack and prove its case, and then in some respects it requires the defense to look through the haystack with an entirely different lens, to find different needles that will help them prove their case.

In some respects, there is some danger in shifting too much of the organizational and identification responsibilities over to the government, and take away from the defendants that obligation and need to do the sifting and sorting and analysis. It's a hard thing. If the government does too much of it, there's a tendency for the defendants to start looking at the case through the government's eyes. They see the government's perspective, but they don't

take the time to look at it from the defendant's perspective, and then see the defendant's case.

In some respects, at least for me, just personally, the more important thing is to find a way to raise the defense attorney's capacity to handle these kinds of cases so they can do as easily with the haystack as the government does. The government has to go through it, and they have to find their evidence. There has got to be a way to raise defense counsel's skill set to the point where they can do the same thing. It's a hard, hard balance; tough balance.

Judge Cardone: I have a kind of a different take on that question. It seems to me, in cases I have seen, more and more, the haystack shifts. In other words, the defense attorneys work really, really hard on all this evidence that they got from the government in discovery, and two weeks before trial there's a whole new haystack. How often, Mr. Broderick and Mr. Aoki, do you see that? That really increases the cost of the case, and it seems to me I am seeing that more and more from Justice.

Sean Broderick: You can go.

Russell Aoki: It's really very interesting, because you're exactly right. There are jurisdictions that the philosophy is, withhold certain documents or types of discovery until the very end. I was talking just a moment ago about distributing the investigative reports at the get-go. I'm dealing with a jurisdiction that, "We don't do that until the very end." They must go to trial a whole lot, because everybody is going to be looking at the investigative reports just a couple weeks before trial. Judges will ask me, from my experience, what really helps cut back on expenses. That is, getting people engaged in the case right away, setting deadlines. Judge Fischer has a wonderful order that gets people up and running in the first forty-five days.

On my own cases, I do a lot of white collar criminal defense work, I'll go to the court and say, "I would like to have a preliminary list of exhibits," three or four months early. That's how I'm going to target those hard drives of discovery, how I'm going to target, because I have to first try to figure out how this case is going to be prosecuted. In the same way, I want a preliminary list of witnesses as well, with a reciprocal obligation. What that does is help accelerate, helps refine my search, and keeps me from going from . . . I can see why lawyers are tempted to go have that linear review, because they're not sure where they're going to go with this case. Having the exhibits, witnesses, having the case scheduled, getting everybody on board, and making sure that that last production isn't going to be like the Friday before I had a case, a Hell's Angels case, I got six thousand exhibits Friday. Trial starts Monday, and I had to put them in some sort of organized fashion.

Judge Gerrard: We haven't even talked about sentencing, where it can shift again on a false calculation and restitution. We understand.

Judge Cardone: All right. I want to thank all of you for your time. Let me say a couple of things first, that if, as a result of testifying here today, we have raised a lot of issues. I know there has been some follow-up requests from Mr. Cahn and from Judge Gerrard, but I also want to let all of you know that if we have stimulated some thoughts that you weren't aware we needed that information, please feel free to submit whatever you would like. This is an information gathering Committee, and we really want whatever you have to give us, so that we can review it. Feel free to do that. You can certainly contact our staff to get them that information. You can get on our website. However you want to get it to us is fine, but we really would appreciate any follow-up.

I want to thank all of you for your time, and if we have any questions, we'll be sure to get back with you. Thank you.

Get ready on the next panel.