Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing #5–San Francisco, California
March 2-3, 2016

Transcript: Panel 3—Views from CJA Panel Attorneys and District Reps

Judge Cardone: Welcome. We're on Panel 3 of "Views from the CJA Panel Attorneys and District Reps." I want to welcome all of you here. Today, our panel participants includes Scott Cameron, CJA Panel Attorney from the Eastern District of California. Scott Dattan, how do you say . . .

Scott Dattan: Dattan, yes ma'am.

Judge Cardone: Dattan, CJA District Representative from the District of Alaska; Debra DiLorio . . .

Debra Di Iorio: Di Iorio. It's two I's, Di Iorio.

Judge Cardone: Di Iorio, CJA Panel Attorney from the Southern District of California; Philip Treviño, CJA Panel Attorney from the Central District of California; and Mark Windsor, CJA Panel Attorney from the Central District of California. As we get started, again, I'd remind anyone who has a cell phone, make sure that you have it off or on vibrate and I'm going to ask each of you to make a brief opening statement. We've seen your submission, it's a very brief opening statement and then we'll begin with questions. We'll start with you, Ms. Di Iorio.

Debra Di Iorio: Thank you, your Honor. My name is Debra Di Iorio, and I have had the privilege of being a CJA Representative for about the last quarter century in San Diego. I'd like to talk to start off my talk referring to the principles in *Strickland v. Washington* about evaluating what is effective representation of a criminal defendant because I think that that discussion is very germane to the issues this Committee is exploring. Significantly, in that case, the Supreme Court refused to issue specific guidelines or draft a checklist for determining what is reasonable in assessing counsel's representation and there was a very good discussion about the pitfalls of judicial second-guessing which I think applies to our quest for funds. The quote that I want to say to you is, the Supreme Court stated, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate that conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

They went on to say intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence defense counsel must have, discourage the acceptance of assigned cases and

undermine the trust between attorney and client. My segue here is probably pretty obvious. I believe the same principles and standards should apply to the CJA counsel's representation of our clients, our requests for expert witnesses for investigative interpreter funds for the type of services that was just testified to by Mr. Aoki and his compatriots in discussing what happens in these mega budget cases. That unfortunately is not always the case. In the Southern District where I practice, our bench is very different. It's a collegial bench, people get along very well, the attorneys are treated very well, but the judges came to the bench from very different paths. They don't all share the same background and they don't all share the same judicial philosophy and they certainly don't all share the same attitude about funding the CJA panel.

In preparing for this testimony, many attorneys from my panel contacted me to talk about problems that they've had with funding. Again, I want to emphasize that these problems are not . . . our judges are also not a monolithic entity. Each judge approaches a case differently, but there are too many anecdotes coming from our district that evince the same sort of problems, problems getting paid, getting funds for experts. For example, expert fees are frequently slashed in half and what the result of that is that you don't get as highly qualified an expert to defend your case. It frequently happens in some of the child pornography prosecutions that we have, the forensic evaluations, so you first of all are dealing with somebody who is willing to work well below the industry standard and secondly, those who are willing to do the CJA work are extremely busy because we have a lot of huge cases right now in which we need their services and the turnaround time is very lengthy so you also need a judge who's aware of that, thinks the need for the service is important and is willing to give you the time not necessarily just for you to get up to speed on the case, but for your expert to be able to conduct an evaluation and do a report. There are very desperate practices and attitudes about that in the Southern District.

There are also some issues with cutting of interpreter fees and investigative fees or other matters and then especially in these mega cases, there's a real problem getting not only the resources, the discovery coordinators, but also the time to utilize those resources. I had an instance in a case in which we were able to get a discovery coordinator and I bring this up because I actually am in favor of the discovery coordinators. I think they're great and I think that's the way to go, but that's also not a perfect world. In my particular case, we had a budgeting attorney from the Ninth Circuit come down, we spent hours and hours developing a budget, most of us were not familiar with how to do that, we articulated what we needed, we put together the entire budget, the services were approved. Later on, when I was trying to get my contract research attorney paid, the voucher was cut…there was a suggested recommendation of about 40%.

I didn't really understand where that recommendation was coming from, I

dropped the ball on doing anything about it quickly, I thought it was up in the Ninth Circuit, it turns out there were all kinds of issues that I was supposed to do rejecting the voucher, but to make a long story short, the relief that we got in that case, the voucher was eventually paid, came from the judge. The judge took a look at the services, took a look at the budget, took a look at what was done and the judge said, this guy came in under budget, he was operating under the assumption that his services were all approved because they were approved not only by the Ninth Circuit budgeting attorney, but then, by order of the court and yet, there was a disconnect in getting him paid. That's probably an aberrant situation, but it happened.

Why those things are important is because they create a perception which may not even be a reality that when it comes to the CJA, you may not always get the resources that we need to be put in place. It has a chilling effect on our advocacy. Now, there's an impassioned discussion going on in our district and probably as you've been hearing in your testimony about whether those problems and issues could be resolved by having someone else evaluate whether or not services are reasonable or evaluate whether or not vouchers are reasonable. In our district, everything is done by the judges, there's no independent committee, there's no input from anyone else, but I would imagine that not all of them really like doing that. I know I wouldn't like doing that. My point is this, whatever decision is made about who should make these decisions whether it's the judges, whether it's an independent body, what I would like to suggest is that those evaluations need to comport with due process.

It's wrong to do work and submit a voucher and get no notice and open the envelope and find that your check is less than what you billed and have no idea that that was coming. It's wrong not to have the opportunity to address the concerns of the judges or the evaluating committee about why you spent the time that you did without being able to rebut or address those concerns, and it is very wrong not to be able to do anything about it because there's simply no appellate process. I think at a minimum, there should be a presumption that our representation is reasonable and there should be a meaningful opportunity to be heard. Thank you.

Judge Cardone: Mr. Dattan.

Scott Dattan: Thank you. My name is Scott Dattan, I'm from the District of Alaska. I was listening to the previous speakers talking about the resources available. We've just started one of those mega cases in Alaska where I have to do the case budgeting and they asked me to take over the role as the lead attorney. The first bit of discovery, we had to get a terabyte hard drive and give it to the government and have that all dumped on one big hard drive and now, we have additional discovery coming in. We've hired a case paralegal and I'm working with Ms. Perilman here in the Ninth Circuit to work up budgets and

try to take care of discovery issues. It's all kind of new in Alaska because we don't have a lot of these big cases. The cases we do have, there's a tremendous disparity between the resources that the government can bring to bear in a case and the resources that a CJA panel attorney can respond with.

There's a cap on the amount of the hourly rate that an investigator or a paralegal can be paid and one must continually go back and seek additional funds from the court. Those funds are almost always granted. The requests I guess are usually deemed reasonable in light of the resources available, but then the payment process is extraordinarily lengthy for both the service providers and the attorneys despite the CMEs or the electronic billing process. It still has its bugs. It sometimes takes three, or four or five months. For my purposes, that's not overwhelmingly important because I have a practice that allows me to not get paid for months at a time for a CJA case, but that's not always the case with the paralegals or investigators or other experts that I've had to hire and ask to work for a lower CJA rate.

From the perspective of panel attorneys in Alaska, what would be most important is that CJA lawyers get paid a little better. You really can't attract some of the best lawyers unless they have another way to support themselves because frankly, the rate of pay is not very good. In fact, my office manager complains that, I shouldn't take any more of these cases at all. I really enjoy them and I don't mind doing it, but some people can't afford to or won't reduce their incomes in order to take them, and given that we have a very small CJA panel in Alaska and no end of cases, we often have to hire lawyers from the CJA panel in the State of Washington to supplement the panel in Alaska. The thrust of my testimony today would be yes, we want all these resources that the Defender Services can give us we are more than willing to try to use them, but you also have to look at the individual lawyers and provide them with assistance and stop asking them to subsidize the defense of indigent defendants.

Judge Cardone: Mr. Cameron.

Scott Cameron: Good afternoon Committee. My name is Scott Cameron, I am the District Representative for the Eastern District of Sacramento. I've been the District Representative for approximately two years. I've been with the CJA panel for approximately eight years. I know that the Committee expressed an interest with their invitation to discuss the budgeted cases. In the Eastern District of California, we have had a handful of those, but we don't have an extreme amount of experience with the budgeted cases, but I had a budgeted case, one of them, and I reached out to other attorneys who had the budgeted cases and solicited some feedback. The feedback was quite ranging. The feedback ranged from, that the process itself was a bit cumbersome or 'onerous' was the word used. Another attorney had a contrary opinion, who was used to submitting budgeted budgets to the California Supreme Court for state death

penalty cases and he found in comparison that the budgeting process was not onerous.

I think one bit of unanimous feedback that I received on the budgeting cases was at the beginning of the case, trying to forecast what the case needed. As the case progressed, the ability to forecast what would be needed improved, but I think some unanimous feedback that I received again was in Quarters One and Two, you don't really know much about the case and those are two very important quarters to be forecasting and so that was a bit of a challenge. There was also some concern that may have actually may no longer be timely. A lot of the attorneys in the Sacramento . . . the Eastern District panel-wise is divided into two sections. On the northern end of the Eastern District is the Sacramento office and in the southern end of the district is the Fresno office. The northern part of it in Sacramento our budgeted case . . . we had a budgeted case there where a lot of attorneys were on, there was a different case budgeting manager at the time.

Now, I understand there's a new case budget manager and so I got some feedback from those attorneys in the Sacramento area who felt that the case budgeting manager needed a little bit more trial experience to understand what was actually needed in order to evaluate the budget. However, in speaking with somebody who's presently on a budgeted case and with the new case budgeting manager, they felt the person was very qualified. I've had some ranging experiences. I think my own experience was when I was informed that my case would be budgeted. I did have resistance. I felt it was an additional administrative step that I would be taking. I also felt it would maybe commit me to some rigid portions of a defense that might need to be more fluid as my understanding of the case evolved. Thank you.

Judge Cardone: Thank you. Mr. Windsor?

Mark Windsor: Judge Cardone, Committee members, thank you very much for this opportunity. My name is Mark Windsor and I'm from Los Angeles, California, the Central District where it is my understanding, mega cases were invented, and so I've done my share of them since I've been there. I've been there for about, I believe eleven years now. Before that, I was in the Northern District as a panel attorney here in San Francisco and before that, in San Diego in the Southern District where I was both a trial attorney at the Federal Defender's Office and after that, a panel attorney there. I have taken this opportunity that you've given me to present you with a concrete example, a case in particular that I have handled that I believe exemplifies most of the things that are currently wrong with the way at least the Central District of California handles its CJA panel.

For the benefit of the live stream, I'll just briefly summarize that that was a RICO murder case that for a period of time commanded most of my working

hours and thoughts. During the course of that representation, I represented a young man who is charged with a RICO murder. He was facing first, a death penalty and then ultimately, a mandatory life sentence which ultimately was imposed. During the course of that representation, I submitted several vouchers. My understanding is that those vouchers were reviewed for reasonableness. I have some feedback from the CJA supervising attorney that they were carefully reviewed because at one point in time, I was contacted to provide further explanation by that supervising attorney as to why in particular, my review of documentation was consuming so many work hours.

I responded to that almost immediately with a detailed letter. Not very long after, that response, I was told by the CJA supervising attorney that she reviewed my letter, she was satisfied with my explanation and she paid my voucher. The case continued on for about another seven months or so. At the end of the case as is the procedure, I submitted a final voucher with some outstanding hours and then also a CJA-26, not the form, but we now use a letter, or at that time, we used a letter that we write to the supervising Ninth Circuit attorney because of course, this was well above the cap of $9600 or $9900 I think it is now. The supervising Ninth Circuit judge decided that it would be best if the trial judge took a look at my bill in its totality to determine whether it was reasonable. I was informed of this, I was told that there would be a review, a reasonableness review and I waited, and I waited and about five months later, I got that reasonableness review determining that about half of my document review hours were excessive and also determining that my total voucher should be cut by in excess of $44,000.

I am not alone and I think that the Committee should know this. I canvassed my panel for similar stories and specifically, I emailed them and asked them if they had, for any information regarding a procedure where their final voucher was sent back down to the trial court for further review. I received at least twelve responses that detailed what had happened to them. The best case scenario in these stories were as follows. They were informed that a reasonableness review would take place. They waited for that review. Ultimately, their voucher was found to be reasonable and they were paid anywhere from three months later to six months later. That's three to six months more wait time in addition to what it normally would have taken. I think this is important because that's as good as it gets. What seems to be happening is these procedures for additional review by the trial judge appear to be taking place only when the bills are high, in other words, only where the attorney has put in a considerable amount of work.

The reason I think this is important is that what is developing in the Central District of California is essentially a penalty for working hard on your case. You can be almost assured now it seems that if your bill is high by general standards or if your bill is higher than other attorneys on the case, you're pretty much guaranteed this procedure which as I've stated, guarantees a

three to six month wait time for your pay and I would submit to you that payment delayed is payment reduced. This is not what I think we should be doing. It is my opinion that what's happening in the Central District of California is exactly the opposite of the direction we should be taking. What is particularly disturbing by this is that I've served on two other panels and when I first came to the Los Angeles panel, it was nirvana. There was a person in charge of what we were doing, a CJA supervisory attorney who not only appeared to have an understanding and appreciation for our work, he appeared to have the authority to make decisions on our payments and this was critical.

When there was a problem, he would call us up or email us and we could talk to him and we could have a rational conversation about how to handle the situation. That regrettably is no longer the case. More importantly, it is my opinion and the opinion of some others that what we are experiencing right now in the central district is the loss of an entire generation of our best and brightest panel attorneys. The difficulty with this is it doesn't happen all at once. When a panel attorney decides he's done, and many of them have decided that and this comes after a series over three to four years of a seeming never-ending stream of memos that come every two or three months from the CJA committee implementing yet another obstacle for either payment for our defense teams or for receiving payment for our work.

When this decision is made, they don't just quit, most of us can't, especially in Los Angeles because if you are going to provide high quality representation in a place like Los Angeles, you are required to dedicate a significant amount of time, and I would submit that really, you need to do that no matter where in the country you are. Criminal defense is not a hobby. It is a calling. It's one of the highest-callings in the law and I think most of the people on our panel in Los Angeles understand that the testimony I've heard in other panels here with CJA attorneys, clearly, they understand it too. These policies, these obstacles and this targeting of the hardest-working attorneys on our panel is going to send us back to the good old days where it's supposed to be a hobby again. I have heard that in some of the training of new attorneys brought on to our panel, they're actually told that they should not consider this fulltime employment, that they should make sure that they're only working on the panel part-time.

That may make sense depending on what the case load is, depending on the types of cases you get. Certainly, when you start on a federal panel, you probably shouldn't be getting the mega cases with the lead defendants. Over time, if you do this long enough, you have developed a skill, an important skill a critical skill. You provide a service that is essential to equal justice and to respect for the law in our country. This is not something that should be part-time, it's something ultimately that you need to dedicate your legal career to if you're going to do it properly in my opinion. These attorneys who

are outraged in Los Angeles begin by taking fewer and fewer panel cases and looking elsewhere and developing a private practice. I know that this takes years. I know because I've started the process myself. This is not something you can turn around in a week and suddenly most of your cases are retained. You have to build that practice. It takes time.

Many of the panel attorneys in Los Angeles, many of the very best panel attorneys in Los Angeles have been engaging in that endeavor. They are not taking cases, they are moving on. I think the panel that spoke here before, the individual, I didn't know his name, but he talked about how good attorneys are the key to a good panel. You learn from them. It's not just training, you see them in action. You see them next to you at counsel table. You watch them as they cross-examine witnesses in trials that you're on with them, the damage that will be done to our panel, and the damage that if this continues, will be done nationwide to CJA panels everywhere, I don't think can be appropriately calculated, I believe it will be huge and I believe it will set back what I believe is everybody's goal here, a truly fair system of equal justice for all for the foreseeable future. Thank you for your time and attention. I welcome your questions.

Judge Cardone: Mr. Treviño.

Philip Treviño: Good afternoon Judge Cardone and fellow Committee members. I want to thank you also for the invitation to appear before you. I am an attorney in solo practice today. I have been on the district court's trial panel since 1990. I was originally a Deputy Federal Public Defender in the Central District of California in the mid-1980s. I left to go into private practice in 1990 and also went into teaching law. I found quickly teaching didn't really suit me which is easier to actually do the practice. I also am on the appellate panel to Ninth Circuit and I also currently serve on the selection committee for capital habeas counsel in the Central District. It's been a joy and a pleasure to work in this district for as many years as I have. I've seen a lot of changes come and go. I've seen a lot of revisions, a lot of procedural changes, a lot of changes in the law and my practice also has changed fairly substantially across those years.

I was avidly and very enthusiastically a trial lawyer for quite a number of years. I carried a very heavy docket and I loved doing trial work. As the years continued, a number of the judges on the bench in my district began inquiring if I would accept capital habeas appointments before them. Our capital cases were coming in from the California case, California Supreme Court and it was not an area I intended to go in to, but I did. After a considerable reflection, I agreed to do it and so my practice has changed because I have found over the years doing capital habeas casework is really not compatible with a normal trial docket. As I pondered how to present myself to you today, for some reason, three specific experiences I had earlier on in my career had

come back to me over again so with your indulgence, I'd like to just tell you one scenario that I saw repeatedly when I was still a Deputy Federal Public Defender, I'd get a client, horrific fact pattern, rap sheet . . .

Judge Gerrard: Pull your mic a little closer.

Philip Treviño: I'm sorry. I'd have a new case assigned to me, I would go through the discovery, it's a pretty overwhelmingly adverse fact pattern, I'd look in my client's rap sheet, my client had a number of priors and had been invariably previously always plead guilty. I'd go to talk to my client and as much as I loved doing trial in those days, I'd talk to the client and I would fairly, clearly strongly suggest, this is really not a very triable case, and time and again, my client would say, "You know Mr. Treviño, I have always plead guilty before . . . ," and I'm thinking, "yes!," and then the client would say, "but this time, I'd like to have a trial." "Great. It's your constitutional right, let's do it." And we would. And we'd go to court, and I could see the judge was not happy that I was taking up that courts time with this particular matter. I could see the venire wasn't particularly pleased to have its time spent in this matter either, prosecutors and the agents had it in for me, and we'd go through day after day of jury proceedings and I'd get my face rubbed into the cement, and we'd get the conviction. We go back for sentencing and this was pre-Guidelines days, remember? We'd have this significant, very onerous sentence imposed. After everything was said and done, over and over again, my clients would come to me and say, "Mr. Treviño, thank you so very much for everything you have done for me." I sort of was puzzled because I kept thinking, "you came to me with a dog of a case, we got creamed in court, you've gotten a very lengthy sentence, what is it exactly that you're thanking me for?"

It was a while before it dawned on me that my clients were thanking me because I had listened to them, because I had taken up their banner and I had stood up on their behalf in court. And it further finally dawned on me, no one in their lives had ever done that before. This was not my personal background. I was beloved as a child, I always knew my parents valued me, my family gave me a wonderful support network, but my clients had never had that, so that's actually what they were thanking me for.

I want to segue to, when I got an appointment in the Ninth Circuit on a habeas matter, in state court, my client had had a three-day sentencing conviction after a jury trial where he had been convicted of numerous child molest offenses. At the third day of the sentencing hearing, trial counsel tells the court on the record, your Honor, my client would like to address the court now, and the state court trial judge responded on the record, "Thank you, no; I don't find it's helpful to hear from the defendants." That makes its way up to the Ninth Circuit at which point I get appointed. I got in a very vigorous argument with a panel who was very interested to know what would my

client have said, and I'd consistently sidestepped the question. I said, "I'm sorry, our record doesn't tell us," and I knew they were upset. I wasn't making it easy for them, but they issued a published decision holding for the first time ever that there was a federal constitutional right to allocution.

We were remanded to the magistrate court for hearing now as to prejudice, and I got to meet my client for the first time, and my client said to me, "Mr. Treviño, we can dismiss the case now." I'm shocked. I said, "what do you mean?" He said, "That's all. I just needed somebody to say that that judge was wrong. He should have let me be heard." But I said, "we're winning!" "No, it's okay. I'm going to do my time. Thank you." So, I stood up and I dismissed the case, pretty much of the shock of the magistrate judge who was presiding.

Bear with me I'm going to come, I hope full circle, with the third and final point. I got an inquiry from a district judge on a particular capital habeas matter. I hadn't wanted to take these cases, but anytime a court asks me, I try to be responsive and if possible, be there for the court. I reviewed the California Supreme Court's decision and I was revolted. It was a horrific fact pattern. It was a horrible, violent, sexual aggression and there were several murders of very young children. I couldn't get through the legal analysis. I was stopped at the factual analysis, and I realized I had to grapple with and decide a key question that I think every defense lawyer sooner or later has to face, which was: am I going to be the kind of defense lawyer who will cherry-pick clients and only take the cases I want to do, or will I truly stand up and deal with and represent any client? I decided to take the case.

My co-counsel and I went to meet our client for the first time and he asked a question of us. One and only one question. He said, "I just want to know are you going to come and see me because my direct appellate lawyer would never see me." I said, "I can't address what the appellate lawyer did, but let me explain. In habeas, it's a different process. We will come see you, but I don't know how often." He said, "you'll do it however often you think is necessary and that's okay." I said, "yes we will, but I want you to know there's a very real process and prospect as we go through this case together. You may get executed, and my co-counsel and I are human. We're your lawyers, but we are human. The more we deal with you, the harder it may be for us sometimes to have to come and face you, but we will do what we need to do." This man whose case so revolted me at the outset that I couldn't read the legal analysis initially, this man says to me, "Mr. Treviño, if that happens, you and Mr. Brennan need to just get up and go on and be happy in your lives. I'm not here because of anything you did."

That moment, as I thought about how to address this Committee today, these three illustrations of what has been a core of my entity as a defense lawyer kept coming back to me. To the best of my ability to distill it I believe it is

because I've listened to a great deal of the testimony this Committee has received, and I've been extremely impressed with the breadth of this Committee's work, and the amazing effort that the various individuals who have been before you have given to their careers and their representation of the indigent.

I do have the perception that a great deal of the focus here has been on the role of the lawyer and the fiscal aspects of the administration of the Act which necessarily are very important. I am reminded that we are not just lawyers, we are lawyers and we are counselors. All too often, I fear it's that counselor role that isn't really perceived, discussed or very much even understood, but I think it's what gives heart to the work that we do. I think it may be at the root of much of the frustration we experience as CJA lawyers when we do feel challenged, or hampered in our ability to serve our clients properly, and I know it's a big part of what keeps me going forward. I'm not sure if I can help this Committee in any significant way, but it's my hope to do whatever I can and I will welcome your questions.

Judge Cardone: Thank you. All right, let's start today this afternoon with Katherian. So, Ms. Roe?

Katherian Roe: Thank you all for being here. Mr. Treviño, I just want to say I appreciated your stories and I think that the question would be whether the time spent as a counselor is reasonable and necessary. I think we all know it's necessary. I think the question would be is whether you can get paid for being reasonable especially when we see all these cuts that go to client conferences. I don't disagree with you, I'm just saying I think that's where we will run into trouble.

Philip Treviño: I understand why. I believe at least I can understand how that can become a bit challenging. My expectation is most of the challenge is a question of what the perspective is that the reviewer has. I've heard various individuals testify before you and comment on the need for a particular type of individual in certain positions, whether we are talking about case budgeting positions or whether we are talking about other types of positions and I couldn't agree more.

Judge Cardone: Can you lean a little closer to the mic?

Philip Treviño: Yes. My apologies.

Judge Cardone: I know you're sharing . . .

Philip Treviño: I can be a little dense sometimes, Judge. Thank you. I think it is so important for the individual who's doing the review to have some true comprehension of the need for the whole panoply of services. I am not however somebody

who believes that there should be a great deal of time spent in these different ways, but I do believe some amount of it is at least occasionally necessary and I do think some truly dedicated lawyers will provide that additional service even without the compensation, but it is a little disheartening if that type of service isn't even honored and understood as to what its importance is.

Katherian Roe: I understand.

Philip Treviño: Have I come back to you at all?

Katherian Roe: I understand. Ms. Di Iorio, let me turn to you for a minute. This morning, we heard from your Chief Judge, I don't know if you heard his comments or his testimony this morning, but when I asked him about the issue of voucher cuts, he seemed to indicate that as far as he knew, that wasn't a problem at all in his district. I did mention to him that we had heard that it was the number one complaint of CJA attorneys. I was obviously basing that on your written statement. Can you tell me a little bit about that? I'm trying to understand the disconnect if it just hasn't made its way up to the chief judge. I don't know if your Federal Defender is also involved or, oh, I guess that would be Reuben. I'm just wondering how is it that he just doesn't know that, or your court doesn't seem to know.

Debra Di Iorio: I think that one of the things that we need to do, when we say we, I also mean myself, and Mr. Cahn, and I may try to see Judge Moskowitz and talk to him about some of this. In my opening comments, I prefaced them by saying that there is a very large disparity between the judges in how they handle cases. It's not the nature of the bench in San Diego for them to entertain complaints about their fellow judges. If you have an issue with a voucher being cut, you would never go to another judge to complain about that and that's because they are very independent, and they do not interfere in one another's cases. Having said that, he is the Chief Judge and I am a member of the panel, and I'm also a member of the CJA advisory committee, and I think that upon hearing his comments, it's incumbent on me and others to talk to him about that.

I think that's perhaps something that we need to do better, but that's the reason, is that I would never go to Judge Moskowitz for example to complain about something that . . . first of all, many of the things that I'm telling you are stories from other attorneys. They're not necessarily my stories, but I don't think anyone would ever go to another judge to complain about what happened in a different case.

Katherian Roe: Essentially, you're left with anecdotal evidence and there's no way you can actually gather information about other than just asking each person individually?

Debra Di Iorio: You could because we could reach out to attorneys and say, can you present us with all the cases and which you've been cut? We could give you those case numbers and you could see what was submitted on the vouchers and you could see what was ultimately paid. There would be a way to do that if that was something that the Committee was interested in. I don't think that that problem is limited to the Southern District and I don't think the Southern District has a problem that is worse than other districts. I think it's just an issue with CJA representation. To circle back to the comment that you just made about the reasonableness of meeting with clients, I have a slightly different take on that. I meet with my clients a lot and I get to know them a lot. The result of that is generally that many of my cases with very difficult defendants settle.

I am frequently appointed not as the first or even the second, but as sometimes, the third attorney on difficult cases where they absolutely cannot get along with their appointed counsel. I have had success in settling those cases which should be settled precisely because I spend the time to get to know my clients, to listen to what they have to say and to discuss the evidence with them. At that point, when they believe that I've listened to them, it's much easier for them to accept my statement, "Dude, don't go to trial; you're going to get killed!" But you have to put in the time. I don't think it's handholding, I think it's an essential part of providing adequate defense to my clients and I think ultimately, it saves a bundle of money.

Katherian Roe: Have you had voucher cuts that were directed towards the amount of time that you spent conferencing with your client?

Debra Di Iorio: I haven't had many vouchers cuts, I can tell you that I have had that envelope-opening experience where I was hoping that Steve Harvey has given the envelope to Ms. Colombia and not me, that's happened, but I don't know why because there was no explanation. In fact, I don't even know if I would have noticed the most recent one that I had had not another attorney on that case complained. My voucher got cut, and then I went back and looked at mine and thought, "oh, so did mine." Mine was a smaller cut, but there was no explanation provided. There was no notice or any indication that there was a problem with the representation. It may be that that's why it was cut because that case did not go to trial, but I don't know and so I can't 100% answer your question.

Katherian Roe: I know you have a pretty recent CJA advisory committee in your district. Is that an issue that you feel comfortable having the CJA advisory committee take up?

Debra Di Iorio: The CJA advisory committee is brand-new and the purpose of it initially as we understood it was to make recommendations to the judges as to who should be on the panel. Our district, the judges pick the panel. There's no

input from anyone other than the judges. The judges make all of the decisions and it's not something that happens transparently. I think in response to some of the issues that have been discussed around the country, they felt that perhaps, there should be some input and so they selected a group of us. This year, we just selected our panel again in December, December 1st and that was only the second year that we did it. Now that we're getting a little more comfortable with the process, I think that we're going to try to broaden it to issues that affect the panel other than who should be on it.

Katherian Roe: Thank you. Mr. Windsor, I wanted to ask you a question or maybe a few. Obviously, I read your materials and heard your testimony here today. Have you any knowledge about anyone else at the time that you received, we'll call it a claw back, at the time that you received that voucher, that cut and then they wanted the money back. Have you heard of anyone else in your district having that same issue?

Mark Windsor: Yes, I have. In fact, there was that issue in another case that happened before mine for about an equal amount, actually more. Particularly, that case is actually more outrageous. Of course, I think it's outrageous and I hope that many of you agree, but this case is even more outrageous than mine in that it was an attorney that took his case to trial in a multi-defendant case that was never officially declared extended or complex, thus triggering relief from the cap. Now, even though that was never officially said, in Los Angeles, pretty much, every case is going to be extended or complex. There are very few cases that you're going to get that aren't going to be multi-defendant, that aren't going to last years and that aren't going to go well above the cap. That cap is really kind of a joke in Los Angeles. It doesn't accurately represent the average case. The average case is going to go well above that cap where we are.

What happened to this particular attorney is that he was the only one of maybe four or five defendants, and I don't know all the details, who took his case to trial. Other attorneys on that case went above the cap but didn't go to trial. They billed $20,000, $30,000 and they were paid and there was no problem. The final voucher was paid. This attorney went to trial, billed $60,000 which was what that costs to do and was paid incrementally on his vouchers. At the end of the case, he also had his bill referred back down to the trial judge by the Ninth Circuit supervising judge. That trial judge said, this is a pretty straightforward issue. I've decided it's not extended or complex, therefore, it cannot be paid above the cap so please pay us back $50,000, and that was rubberstamped by the Ninth Circuit supervising judge. This is just blatantly unfair and it has had a tremendous chilling effect across the panel. It's been well-publicized, we all know about it, I knew about it before the report came and I just can't tell you the effect that that has on all of us.

The way that the Ninth Circuit judge has responded to this is to now put in place, just recently, just a couple of weeks ago, a process by which if your case goes above the cap, as soon as it does that, you have to submit with your bill, even though it's not the final bill, it's not even close to the final bill, you have to submit a nine page CJA-26 form. I know Anthony Solis and Marilyn Bednarski are going to talk to you about this form tomorrow. I've looked at it, but I haven't had to fill it out. I have to fill it out very soon, my billing is actually due today. But other attorneys have been filling it out and the report that's come back is attorneys are spending twelve and fifteen hours going through all their cases and filling out this nine page form.

Katherian Roe: That's not compensated, is that correct?

Mark Windsor: Not compensated. You can't bill for billing. That's lost time.

Katherian Roe: I read your statement. Is the final result, where we're at right now is that you have not received any relief from this that you still are expected to pay this money back?

Mark Windsor: I think we're kind of on new ground. I know that this other attorney who's had this cut, he's a little bit ahead of me in the process. He received his news from the trial judge about six or seven months before I did. If you look at that, the administrative opinion that keeps being cited in our district, In re Smith , that's a decision by one Ninth Circuit judge responding to an appeal of a cut from a CJA attorney. That one judge opinion says under the guidelines, we're supposed to give you some process and here's the process you've got. Trial judge makes a determination, you don't like it, it can go to the Ninth Circuit supervising judge and then you're done. That's it. I don't buy it. That's not process.

Judge Gerrard: So is that being appealed or not?

Mark Windsor: No appeal.

Judge Gerrard: Okay.

Mark Windsor: That's it. You're done. You're out. Fortunately, we have organizations like the National Association of Criminal Defense Lawyers who have worked with this attorney and is in fact working with me now to obtain pro bono counsel so that we can all spend our time instead of representing our clients figuring out how we're going to carve some sort of meaningful process out of this. So no, it's not over. I will say actually, I have yet to receive a letter that I'm supposed to receive saying, give us the $44,000. That hasn't happened yet, but it could happen any day.

Katherian Roe: Have you received anything addressing the actual issues you raised, some of the issues that you had raised that one of the attorneys who had similar hours,

similar discovery review hours to you had been in a different category or another person had had a lower number of discovery review hours because he was the second lawyer on the case, things like that? Have you received any answer that addresses those issues?

Mark Windsor: I've received an answer of a fashion. I've received the answer of the trial court issuing a denial of my detailed letter of reconsideration. In that letter which took weeks to craft and took the patience of a few of my colleagues to help me with. We went through that very carefully. We went through the scenario, we looked at the documents, I had my paralegal put in more hours on my own dime to look through the documents and go through it and I paid her directly out of my pocket, I'm not going to see that money. She did a great job as she did during the case itself. The issues I raised, the merits of my petition for a relief have never been addressed. They were not addressed in the trial judge's denial, he simply listed, I read these documents. The petition for relief is denied. The Ninth Circuit judge simply said, interestingly, the Ninth Circuit's email, and it was an email said, I've read the trial judge's report. He doesn't even say he read my letter. Maybe that was just an oversight. I assume he did read it. I agree with the trial judge. Denied. That's the extent of the process that I received.

It appears to me from this record, and you have these documents that there has been no meaningful review of the trial judge's decision in this case.

Katherian Roe: Thank you.

Judge Cardone: Judge Gerrard.

Judge Gerrard: Right. Very well. I've got a couple or three areas. One of them is timely payments which I don't particular understand, but I've heard from three of you, I believe and I'll start with you Mr. Dattan. You said that the payment process in the Alaska District is lengthy. Was it most of the time or often four to five months?

Scott Dattan: I'd say usually, at least that long, yes.

Judge Gerrard: You have electronic filing there?

Scott Dattan: Yes. We were one of the pilot programs for electronic filing.

Judge Gerrard: Okay. Let me ask you this. Are those for just exceeding the statutory cap cases or all cases?

Scott Dattan: Primarily for exceeding statutory cap cases which happens probably 50% of the time.

Judge Gerrard: All right.

Scott Dattan: The other ones are probably done in two or three months once submitted electronically.

Judge Gerrard: All right. Has that been raised with the panel?

Scott Dattan: Has it been raised with whom?

Judge Gerrard: I'm sorry, with the panel review process. The CJA panel.

Scott Dattan: Yes. It's interesting you bring up this. We have an advisory committee as well. In part, in response to what other people have said, our advisory committee is actually the appeal forum for voucher cuts in Alaska. It's usually resolved in that way. If the voucher is cut by the district court judge who reviewed it, then the district court judge first gives the attorney the opportunity to respond and then refers it to the advisory committee to review. Yes, the entire panel in Alaska is concerned about the length of time it takes to get paid.

Judge Gerrard: All right. Thank you. Ms. Di Iorio. You have indicated that you've had voucher cuts?

Debra Di Iorio: I have to say that I've been fortunate to have few of the voucher cuts, but I'm speaking on behalf of many people who have.

Judge Gerrard: As to yours, there was no reason given and no, either notice or opportunity to be heard?

Debra Di Iorio: That's correct.

Judge Gerrard: All right. Do you consider that to be a problem?

Debra Di Iorio: I consider it to be a huge problem. We already work at a legally-discounted rate. We do what we do because we believe in it. We're passionate about the defense of our clients. We are here to defend their constitutional rights and it's beyond ironic that when it comes to our compensation for that which is already low, we don't have any of those rights. I find that to be wrong.

Judge Gerrard: You're on the advisory committee?

Debra Di Iorio: I am.

Judge Gerrard: Okay. Has that been raised?

Debra Di Iorio: No. Again, as I had commented before, this is just our second year in it and we viewed our mandate primarily to make recommendations about who

should be on the panel which is a separate concern because again, there's no transparency in that process, but when we heard about this ad hoc Committee and some of the issues that were being raised, we have discussed amongst ourselves whether or not this might be a good opportunity to try to broaden. The actual order says that we are allowed to discuss any matter that affects the CJA panel so I think it is within our purview to do it.

Judge Gerrard: Again systemically, you also testified, I believe, there has been cuts on interpreter fees?

Debra Di Iorio: Yes, and investigative fees and expert fees.

Judge Gerrard: Based on what? Based on the number of hours or the hourly fee? What is the basis given?

Debra Di Iorio: The stories and they are anecdotes, the anecdotes I received were that they just received a word back that the order would be denied, but that it would be approved for half the amount that was requested.

Judge Gerrard: For interpreter services?

Debra Di Iorio: I heard that that happened for interpreter services, for expert services and for investigative services. That experience, I do not personally have, but that's what I've been told.

Judge Gerrard: Okay. Very well. All right, Mr. Treviño, you're in the same district as Mr. Windsor. Obviously, we've read most of your submissions and heard your testimony. You said you have seen changes. You're on the panel selection committee, is that right?

Philip Treviño: I'm on the capital habeas selection committee. I'm not on the trial panel selection committee. I am on the trial panel, but I should clarify, your Honor, I don't take ordinary trial appointments at this time. I only take appointments as coordinating discovery attorney, but I have continuously been a member of the trial panel now since 1990, I believe it is.

Judge Gerrard: One of the things that Mr. Windsor testified that was most concerning to him was that the Central District is losing some of the best panel attorneys. Has that been your observation?

Philip Treviño: I'm very saddened to report that yes, I do share that perception. It has been the case now for a number of years it seems that morale is a particularly low point with panel members. What I tried to convey in my written testimony if I may touch on again here, when I reached out to our panel for input and anticipation on my appearance here, I got back a lot of different types of feedback, some of which were very granular points that I believe this

Committee has already heard and is hearing again today. With regard to voucher cuts and delays in payment and difficulties getting orders allowing the use of certain types of experts and so forth. I think those are all very important points, but what struck me most in the feedback that I received from my colleagues on the panel, I heard from those lawyers in particular who are even more senior than I and in particular, lawyers for whom I have a great deal of respect, because I have worked alongside them for many years including when I was doing trials and I work with them still even now, sometimes, when I'm reviewing an appellate record from a matter they've handled or when we're just as colleagues, brainstorming on a legal issue or whatever, these lawyers for whom I have a high degree of regard.

A number of them came back to me and said they no longer trust their own judgments, that they are of the perception that they are being reviewed in so many different ways, but their judgments is to what is appropriate in terms of how they handle their representation has been challenged to the point that they will second-guess themselves and decide to forego a motion, not because they're convinced that the motion isn't appropriate, but because they believe that their decision to present such a motion will be challenged, or if they make the motion bill for the time, their compensation will later be challenged. That's possibly what I find most disturbing.

There are those lawyers along the line who have also left across the years. I'm hesitant to say that they have less necessarily because of these concerns, because I know we always have some degree of attrition on our panel. It's been going on for a long time, but it does seem like it may be happening more now that it had previously. I certainly hear people talking about their intent to leave. I believe them to be honest when they say it. I'm not sure that it is always followed up with the actual decision to leave. Mr. Windsor is accurate, there's a lot of complications and a lot of additional work that has to go into transitioning ones practice. It might be that that's, but in the heat of a moment they'll make the statement but not necessarily follow through with it.

I do believe since the era of the . . . my memory just blanked. I want to say attrition and that's not right, our sequestration. I always thought the word was a little odd in that context. Since the era of sequestration is when we began to see it a marked change. I know that there were huge forces operating against all of the nation at that time, but it seems some of those perhaps really hit the judiciary, and the CJA in particular.

Judge Gerrard: That'll be my last question is that . . . we're not from California, is there any context that you wish to, I mean has this just happened out of the blue over the last two or three or four, five years or is there any context that the Committee should know?

Phillip Treviño: It's been ongoing. I do think that Mr. Windsor is accurate when he points out that the predecessor as the supervising CJA attorney was more effective in

terms of helping provision the panel with what it needed. I'm not able to tell this Committee why he is no longer in that position, but he is not. My fundamental takeaway from all of this is, I want to backdrop for just a second if I may historically. I remember when all CJA vouchers were processed by the individual presiding judge. I also remember as an illustration during that era, writing a check for roughly $10,000 to photocopy the record in a capital case. I was working full-bore on that case at that time because even the deadlines are coming up.

A district court judge who had asked me to take the case and I had always enjoyed a very good rapport and I had no reason to believe anything had changed, but on his own he decided to stop paying everybody in his court. Court interpreters, court reporters, anybody who received funds under the CJA including me, I was asking for reimbursement on my $10,000 check for the photocopying. None of us got paid. I ended up taking a writ of mandamus against him at the Ninth Circuit, and I went to our CJA judge at that time and I complained and she just keep saying, "Phil, calm down. I'm taking care of it." Because I think, "You don't understand, I can't pay my bills," and she just kept saying, "Calm down," and I should have trusted her. Because sure enough, a couple of weeks later we learned that she had in fact been successful with Congress in negotiating the appropriations that allowed our district to have a pilot program of the first supervising CJA attorney in our district, and that removed the voucher authority from all of the individual district judges and put it in the hands of that individual in the CJA supervising attorney's office.

I remember what it was like dealing with the individual judges. I think that was a far worse system. I think we have come a long way but I do not think we have a perfect system, and I think that unfortunately we have made some slide, we've been sliding back lately. I'm telling you that based on my overall perception, from what I have seen now for quite a number of years there's only one answer: and I think that is, this all needs to be taken out of the judiciary's hands. There needs to be some separate entity created that does the voucher review, the compensation, the authorization for ancillary services. Because there have been so many different types of tensions over the years and I think we're all losing energy and time on something that could very thoroughly, correctly, and appropriately be delegated to a completely different entity.

I'm going long. I hope your Honor will indulge me just a little bit more. I've been repeatedly disappointed in the testimonies, when your Honors have asked, the Committee has asked of the different witnesses before it, what the individuals here would suggest to you, if you were going to make a recommendation, what alternative? To my ear at least, time and again, there hasn't been an answer forthcoming and I found that disappointing. I'm afraid I'm not going to be much better on that. I've been cracking my head on this

thinking, I give you one little suggestion. I don't think it's a perfect one but in my written testimony I referenced the California appellate projects. I only dabble occasionally in those matters. I have overwhelmingly and have always been a federal practitioner, but I do occasionally do a state appeal. Doing my bill in that, it takes three to five minutes maybe. Bang, it's done. Doing bills in the federal world is a major endeavor and it's become more and more of a time drain. It is become more frustrating I think for all of my colleagues as I hear their stories come to me at least that they don't get the reimbursement they seek. I hope I've answered your question, your Honor.

Judge Gerrard: I want to hear from Mr. Windsor. My question was context in.

Mark Windsor: Yes.

Judge Gerrard: Was there something the California courts where . . .

Mark Windsor: Speaking of the Central District in particular I can tell you that right about the time of the sequester, there was an audit performed by the new CJA chair I think in the committee, and I think some Ninth Circuit judges got involved. There were I think about five panel attorneys in the central district that had what appear to be irregularities, I assume. I don't know the backstory so much. I do know that we were all brought into a courtroom and presented with the data. One of these attorneys had billed more than twenty-four hours in a day. One of them, their yearly billing would indicate that they had billed eight hours a day every day for 365 days, so there were clearly irregularities. There were things that . . .

Judge Gerrard: There were at least the Central District was . . . I mean there is some context to it. The Central District was attempting . . .

Mark Windsor: Yes.

Judge Gerrard: to respond to something and place a new procedures or rules is a . . .

Mark Windsor: Yes. That is the stated, I want to say genesis of all that has come since that. Essentially, we've been painting with the same brush, and I find that disturbing, I find it upsetting and many of my colleagues do as well.

Judge Gerrard: Okay. In other words, there was a group of what, five, or whatever?

Mark Windsor: I don't even remember the number. We have 130 attorneys on a panel. This was the first time I had ever heard of a callback of saying somebody, "We paid you but we've now figured out that that was an error and you have to pay us back." All of these attorneys agreed to do it for whatever reason I can't say that I have any inside information on what those reasons would have been. For me personally, I've been doing this eighteen years and I've

gone back over the bills that I can go back over. I've never been significantly cut. Ever. Until now.

As far as I can recall from the data that I have, I don't know if there's something back there twelve years or something. In this particular case I was cut $2000 for an expense. Not my time. Now I've been cut a couple hours here and there, that happens, and that's going to happen. I'm fine with that. Let me be clear, the panel needs oversight, absolutely. The panel that you had here earlier, by the way, I was able to listen to it, the budgeting attorneys. I found that fascinating and I found that compelling testimony.

I would echo Peter Shaw, who by the way is very well-respected in the legal community in Los Angeles. The reason he is, is he's fair, he's direct, he makes decisions and those decisions are given credence and authority, and that's the key. Because no matter who you start out with in a supervisory position, they should know what they're doing. Save us all the headache of having somebody do this who has never practiced criminal defense because it's going to be a headache and it's going to take years for them to get educated, but even if you do that they're going to get educated.

If you deal with the same person who is the center point of CJA funding and that person has independence and authority and hopefully experience, that's going to be a huge benefit right off the bat. Because everyone is going to be going to know who they're dealing with, they're going to know what to expect, that person will be a professional, that person can look at the funding situation with an eye towards high quality representation and nothing else, and that's what they should be looking at. Nothing else. I'm sorry I've gone astray.

Judge Gerrard: That's fine.

Mark Windsor: For my context, I'd never heard of a callback since then and now this is happening in very recent months. This is a new development. It appears to be a new approach. From what I've heard from other panels, it also appears to have happened elsewhere. This may be coming to a panel near you, I think is very disturbing as I've already said.

Judge Gerrard: Thank you, Judge. That's all. Thank you.

Judge Cardone: Mr. Frensley, you're up.

Chip Frensley: Thank you. Mr. Treviño set the table and so I want to ask the question of the panel. Is there anybody on this panel who would make the argument that the current system is great, judicial involvement is the way we need to go, no change needs to be made? Anybody want to carry that banner? I know Mr. Cameron you referenced in your written materials your personal belief that

the system was a little awkward, it was the term you used but you acknowledged that you had come across some panel attorneys or district panel reps who thought it wasn't a bad idea because of familiarity with the case.

Scott Cameron: I did reach out also and canvas my panel, certain attorneys, especially ones that I know they're quite opinionated. One I was surprised by that, I didn't include that in my written testimony, he valued the fact that the person reviewing his claim for compensation was familiar with the complexity of the case, and had seen what was going on in the case with that particular client. I included that to be full disclosure. I do find it awkward as well as I think the majority of attorneys who . . . in my particular district, a lot of the attorneys on the CJA panel started in a state indigent defense panel. Became proficient at trial work and then began CJA panel work.

In that state experience, there is this separate entity that Mr. Treviño was speaking of, that reviews the claim. It seems awkward because you want to justify why some additional time was taken to speak to a difficult client. That client who was somewhat obstructive, but you don't want to use that language with the judge who's presiding over the case. Yes, I do find it awkward and I feel that that, the majority of attorneys who started in the state system find it awkward. You're right, there was a . . .

Chip Frensley: In the context of that type of review in the state system that you're referring, is the standard the same, is it a reasonableness review, or is it some other standard?

Scott Cameron: In terms of in the other panels, the state panels? Is that what you're asking?

Chip Frensley: Yes. Yeah.

Scott Cameron: Yeah. There is a reasonableness review by the other panel. For instance, Mr. Treviño mentioned the California appellate system. I'm also a member of the Central California Appellate Program which handles a band of the Third District Court of Appeal for State of California and the Fifth District Court of Appeal for State of California. That project has a staff attorney who is assigned as a staff attorney for my case. If I have a particular problem with the case I can consult with him, but they also review my bill. They do perform a reasonableness review, and will cut my bill if necessary, but they also have a pretty stringent set of guidelines that work, like reviewing fifty pages per hour, and that the body of the brief being three times as much time as the statement of facts, but those kind of work better in an appellate arena. I don't think those guidelines will work well when you have a variety of federal cases like immigration cases or wiretap cases, or mortgage fraud cases. They all have different endeavors. I think that this separate entity concept is important.

Chip Frensley: Has anybody ever given any thought to whether or not reasonableness is the appropriate standard that should be used for reviewing or do you think maybe there should be something different?

Debra Di Iorio: Since we've gone to the eVoucher system, it's a lot easier for the judges to do reviews like, let's say, they want to look at § 1326 cases which are now amongst the most difficult, litigious cases we have, but there's a wide gamut on those. Some people plead out to a fast-track, it's very inexpensive. Some people litigate § 1326(d) challenges and maybe go to trial to preserve that. They have come up with these averages on what's an average case. First of all, we don't know what the averages are. Secondly, the idea of an average case is abhorrent because there's no such things as an average defendant, and that really impacts the way that you defend a case. Your defendant the person that you have, whether he has mental health issues, whether she has an abusive background. All of those things impact how you deal with that case, how you deal with the sentencing issues, how you negotiate. The idea that there's an average case and that someone's bill is going to be scrutinized and it doesn't fit into the average and might be cut, I find to be very problematic.

Going back to your comment about does anyone agree that having the individual judges is not a problem. Let me say this, I don't know any federal judges, I know some magistrate judges and I'm sure there are some but I don't know very many federal district court judges who came up through the panel.

Chip Frensley: Let me ask you, while you're thinking about this. Don't you think that the idea of averaging, case averaging is contradictory to the idea that the judge should be making the decision because the judge knows so much more about the case than anybody else does?

Debra Di Iorio: I actually find both of those concepts a little bit troubling. On the one hand, the judge does, as Mr. Cameron said, the judge does have the familiarity with the case perhaps another reviewing person wouldn't have, but they also see things through their own lens. If I'm filing a motion, for example, attacking statements and I'm trying to preserve something or I'm trying to prove to my client, "Hey, I heard what you said about the way that you were treated post-arrest by the agent." I don't know that we have a chance at winning this but you have a real issue with the way your statements were taken, I'll file a statements motion. There are some judges who may think, "That was the most ridiculous motion. I can't even believe you file that and you billed X, Y, and Z."

Putting myself in the point of view of the judge, I can understand why they think that, but it may be because, again, those judges don't have the experience of representing criminal defendants and they don't always realize

what needs to be done. We used to have motion hearings all the time and we used to have settlement conferences with the judges. Sometimes… I had one case where we had a motion hearing and my district court judge in denying a checkpoint motion took judicial notice of the fact that my client was Hispanic. Well, he happened to be African-American; and my guy was tugging on my sleeve going, "Get me a deal. Get me a deal."

Having that motion hearing and having him see that perhaps things weren't going to go the way he thought they would go helped to settle the case and avoid the trial. There's many, many different examples of things that we do as defense attorneys that may not be obvious to people who don't share our experience. There's no rancor involved.

Chip Frensley: If given the choice between multiple decision makers who may or may not have any background or experience in criminal defense work versus a centralized individual with that kind of background. Would you have more confidence in one over the other in terms of the ability to review a voucher?

Debra Di Iorio: That's Hobbesian choice. We've got to get somebody who doesn't have any criminal defense experience scrutinizing our vouchers or the judge?

Chip Frensley: No, I'm sorry. I said somebody who does have criminal background experience.

Debra Di Iorio: I think that having either and I know, I've spoken about it to Mr. Cahn and the Federal Defender's Office and wants no part of it, but I think that there are some jurisdictions, and they don't have the resources for it, they're very busy, they do a lot of great stuff for us so I would not want to put that on them. I think that having people who are familiar with not only criminal defense but panel work is critical in evaluating the vouchers because it's not all the same, it's not the same. I was a federal public defender under Judy Clarke. What we did in that office and how I worked and how I did my cases, we didn't have the same type of billing and we didn't have the same type of concerns. They're not the same.

Chip Frensley: You said that voucher cutting was the biggest concern in your district. I think through the conversation it appears that that's a product of judicial involvement. If not the judges then who? Have you thought about that and if you thought about your own suggestion for an alternative?

Debra Di Iorio: We have. Again, I just need to reiterate, it's the biggest problem but it's not across the board. It's not an across the board problem and it doesn't happen to everybody, but when it does happen it spreads through the CJA panel like wildfire because it's a fear, it's a perception that we have. Have I thought about it? Yes. I cannot speak for everybody.

Chip Frensley: Sure.

Debra Di Iorio: I do think that some of the things that I've heard about how other districts handle it, like they have a committee or they have different people that are on it, again, speaking to who chooses the panel. The judges have to be involved in those kinds of decisions. They have to have some involvement in the process. They see the lawyers, they see issues that we don't know about, but I don't know that they should be the only the final arbiter, so I would like to see more input.

Chip Frensley: Mr. Dattan, I just want to ask one question given the logistics of the District of Alaska. You sort of necessarily are confronted with issues of remote detention, and I'm curious to what extent there have been any issues with regard to compensation for travel expense, windshield time that sort of thing, and whether or not the involvement of the judges in that process is in any ways adversely affecting your representation.

Scott Dattan: For years there was inadequate housing for federal defendants in Alaska and we had to travel to Sea-Tac to Seattle to see our clients and the judges were very good about providing those travel authorizations. They liked it better if we tried to see two or three clients at a time than if we just saw one. Now, there's been a new prison billed about 150 miles from Anchorage that has created some extra bed space that the state will lease to the federal government. Out-of-state travel is significantly less but the drive, especially depending on conditions, can be pretty terrible. Again, the judges understand that.

The primary problem we have with no federal facilities in Alaska is the inability to provide electronic discovery to our clients because the computers, the facilities in the state facilities are very old and we get things in a variety of formats. It seems like there's a different format and electronic discovery from every agency and it's hard enough for the relatively new computer to keep up with all the different formats. Take it to the jail and they can't deal with it at all. Often the defense don't get to see it unless we take our own computers to the jail, get permission from the Department of Corrections, another hassle that has nothing to do with the federal judge. Try to review discovery with them on personal devices in the visiting rooms in the state facilities.

Right now, reviewing discovery is a much bigger problem than travel even though travel used to be a bigger problem than reviewing discovery.

Judge Cardone: Judge Walton.

Judge Walton: Ms. Di Iorio, you've raised an interesting issue of having done defense work early on in my career, I have some appreciation of the importance of

maintaining the positive relationship with your client. If you had a situation where your client was insisting that you found what you thought from your legal perspective was a frivolous motion, but you felt nonetheless that you had to file that motion in order to maintain that positive relationship with your client. Would you file the motion? If you filed the motion would you expect to be compensated for it?

Debra Di Iorio: If the motion was really frivolous and there have been a few that have been suggested to me by my clients, I would not file it. I have had that conversation with clients and they've come up with some street motions or motions that they've heard about, and I have simply refused to file those motions. No, I would not file a motion that I believed to be utterly frivolous.

Judge Walton: Did anybody feel any different about that if you felt that the motion had to be filed in order to appease your client in order to maintain that relationship with him or her?

Debra Di Iorio: When these situations have arisen I've tried to explain to my clients that there are other better motions to be filed in their case and I direct their attention specifically to those and say, "Look, that has no chance of succeeding. I don't think that that's the way to go but let me tell you about something that I do think has possible merit and what do you think about . . . ," and then we discuss whatever it is. When they see that, I've thought about their case have some suggestions. Most of those, in virtually every one of those cases they've been able to switch gears and to follow my advice. I don't believe that I've ever filed an utterly frivolous motion and I don't intend to.

Judge Walton: What if it's not utterly frivolous, it has some level of legitimacy, but you think you're not going to be able to win?

Debra Di Iorio: [INAUDIBLE] . . . am I going to get, to win the motion. There are a lot of motions I'm not filing. Sometimes I do it to preserve appeal, sometimes I do it for, because I believe that there's actually a right that needs to be indicated, but that's not my standard.

Mark Windsor: Judge, I just chime on that a little bit. I agree with everything that Ms. Di Iorio has said. Except that I just want to clarify, when I think of a frivolous motion I think of something that usually it's something my client may have heard inside. This is the law now. File this and this will happen. Then I have a long talk with my client or hopefully a short talk with my client and we work it out. However, just because the law, just because there's a solid wall of authority against the position, that doesn't mean I would consider it frivolous. One of the advantages to the federal defenders of San Diego when I was there and I'm sure when Ms. Di Iorio was there is we all had to do our own appeals. That was required at that time.

I can think of at least two cases. One of which is actually published, that I had, where there was a plain error review. I had actually inherited the case, and the law had completely changed on the issue. The only way to see that coming was from our perspective obviously that prior decision was erroneous. It failed to take into consideration certain realities that made it unfair. Ultimately, to the credit of our case law that worked itself out. There are frivolous motion . . . what one judge could easily see as frivolous just because there is authority against it, this is part of the problem with having judges review vouchers is we're going to have very fundamental differences of opinion as to what exactly frivolous means.

Judge Walton: If you had, Mr. Windsor, the ability to totally revamp the system in order to make it as fair as possible with the appreciation that Congress is going to impose some level of oversight and accountability since you're talking about the appropriation of public funds. What would that system look like?

Mark Windsor: Thank you very much for asking me that question. I meant to actually make a few statements in my opening about it and I guess I got carried away and I just didn't get there. I've listened to a lot of the testimony on this. As, I'm sure is no surprise, the most important characteristic would be independence and authority, and if not complete independence from the court then a significant degree of deference from the court.

In my written comments, I just want to modify one thing. I think at the end there I said, the trial judge should have no input whatsoever in the decision of vouchers. I have listened to some of the other testimony from people far more knowledgeable and thoughtful and who've had time to really think about this in this Committee. I would say that realistically, it is going to sometimes be appropriate for the decision maker, the reviewer of a bill if there's a question to consult the trial judge that makes perfect sense. I don't think there's any problem with that. I don't think there's any problem with consulting a judge because they're clearly are things that that trial judge is going to know that few other people are going to know.

Where the problem is whether that opinion of the trial judge is taking into consideration by somebody who is independent with complete authority to make the decision or whether that trial judge has the authority to decide how much a lawyer in front of him gets paid. I hope that answered the question.

Judge Walton: Mr. Dattan, you indicated that the pay is too low and I may agree with that. What would you think the amount of pay in Alaska should be in order to attract people to the panel and to retain good lawyers on the panel?

Scott Dattan: There are good lawyers on the panel and they're working for far too little money. Some of the best criminal defense lawyers in Alaska probably won't take CJA cases unless the pay is raised to at least $250 an hour. I'm talking

about two former U.S. attorneys for instance, who are on the panel and won't take the cases because they're working for law firms and the firms don't let them work for $129 an hour. There are at least ten very good criminal defense lawyers who just refuse to take appointments because of the combination of the rate of pay and the amount of work it takes to adequately document the vouchers in order to get paid at the end of a case.

Judge Walton: I don't know what the cost of living is in Alaska, but for example, I'm sure the cost of living for example in West Virginia where I went to college is very different than what it is Washington, D.C. Should there be a location adjustment?

Scott Dattan: I think there was when I first took a federal appointment in Alaska. I recall that there was. I don't know. I don't know quite how to answer that. That might create a whole new list of difficulties for Congress or for whoever had to administer that cost of living. I know that federal employees get now a 23% cost of living allowance for working in Alaska. In addition to whatever the . . . it was 25% that's got down incrementally. I know that Assistant U.S. Attorneys get their base pay plus a cost of living allowance, federal defenders get their base pay and a cost of living allowance, and that's not reflected in payments for panel attorneys.

Judge Walton: Thank you.

Dr. Rucker: If I could follow-up on Judge Walton's last question, we've got people from around the circuit here. What about the cost of living, the hourly rates in Los Angeles, San Diego, other places? What should the hourly rate be on those districts? Should it be adjusted or should it be $250 an hour like what's been suggested for Alaska or what?

Debra Di Iorio: I would love to ask for $250 an hour but I don't think that that is going to pass so I wouldn't suggest it. One comment that I do want to make. I don't know there's a mileage allowance that fluctuates sometimes depending on I assume the price of gas. People here in California I know that we pay quite a bit more than people in other parts of the country. I don't know whether that there's any adjustment for that. Again, these differences in region I don't know whether they're accounted for right now or not. I would definitely suggest a raise from $129 an hour to $175 an hour, I think that would be fine. It would be very easy should the panel ever want it to . . . I graduated from law school in 1988 and I have litigated . . . I can't even tell you how many trials since then.

If I were to go into private practice in a litigation firm, I think that I would probably be compensated upwards of $600 an hour based on my experience and my litigation experience. We're not in this for that. There's no criminal defense attorney that I know of who works for the CJA or even who works

with federal defenders that is in this to get rich, but it would be nice to have more adequate compensation.

Mark Windsor: I think Ms. Di Iorio makes a critical point. We either not in this for the money or we're all fools because it's not going to happen. I don't think it's so important what the hourly rate is, although, I think it should be raised. Let me tell you what my real issue is. I don't understand quite the system but it appears to me, and correct me if I'm wrong, that this Congress, the Congress of let's shut down the federal government has authorized me to receive $144 an hour. Someone in the judiciary, the one sector of the entire human population that should understand and value my work has said, "Whoa, don't give these people that much money. We're just going to give them $129. "That's the issue. The issue is respect. This is really the issue in the Central District of California. That's the key issue. We're not sitting around and wish that we can make more money. We're sitting around knowing, those of us who have done this long enough, we know that if we're not respected, our clients will never be, their rights will never be, and we will never achieve the goal of high quality representation and equal justice. That's the issue. The issue is not, in my opinion, respectfully, that's the core issue.

We've been authorized for a higher rate. It is outrageous to me that the judiciary is the one that's lowering that hourly pay. I don't understand it. Maybe there's something I don't get, and I would love to hear about it. From my perspective, that's what I'm seeing. I'm seeing judges, or the judiciary, or the administration within the judiciary, keeping us from getting paid more money. I don't understand that.

Judge Goldberg: [INAUDIBLE] just a quick question. Were you the person who testified about a nine-page form that you have fill out? Was that you? Yes?

Mark Windsor: Yes. Yes.

Judge Goldberg: Without going page by page, what's on this form? What do you have to fill out? What information do you have to provide?

Mark Windsor: Have you seen this form?

Judge Cardone: We have the form.

Mark Windsor: Okay. I'm going to . . .

Phillip Treviño: The form has been submitted. The Committee has the form as one of the submissions . . . I apologize, I didn't hear you.

Judge Goldberg: Just summarize it just a real quick.

Phillip Treviño: You are basically asked to break out a lot of the data from the overall billings of the case or the billings that have occurred to date, and give a justification for the various types of services that are rendered. I have not personally filled out the form because I don't do that work at this point, but the frustration level is very high among my colleagues who are filling out the form. They are finding it extremely tedious and time-consuming and extraordinarily frustrating. I'm going to defer though to Ms. Bednarski and to Mr. Solis, who will be testifying before the Committee tomorrow. That's one of the items on their presentation.

If I may take a moment to join with Mr. Windsor and the others on this side of the bench, I agree the rate should be increased whether it's an increase to the $144 that's been authorized by Congress or to the ideal of $175. I'm happy with either of those things but I would home in more on just simply certainty of payment that, under whatever the rate is if we are paid promptly, if we are paid in a respectful manner. Our professional integrity is on the line every time we sign a voucher. I take that duty very seriously. I'm an officer of the court. If I represent that I've done this work it's because I've done it. I guess I just would ask if Mr. Windsor does also for the respect in getting the compensation. I don't do this for the work . . . excuse me, I don't do this for the money. I would be in a different line of work altogether but I'm happy here. I would be happier if the paychecks were a little bit more predictable.

Judge Walton: I assumed that one of the questions we would be asked would be, is there any empirical data that would support the proposition that a higher rate of pay would improve the quality of representation? What would your response be if asked that question?

Phillip Treviño: The deafening cheers that my colleagues would ring in my ears would suggest that yes. You would get a higher morale, a greater willingness to take on the duties and responsibilities that these appointments call for from us. Has a study been done to show that, your Honor? No, not that I'm aware of. Any augmentation in our pay that I could envision on CJA work is never going to rise to the level of the open market value for our work. It's just not going to happen and I think all of us understand that. It is disappointing and frustrating to see the resources that are mustered for other functions, and specifically right now I'm thinking of DOJ. The abilities that they do have to litigate matters and that we're not put on par with them, that we're not enabled at least to go forward confident and with the tools we need to represent our clients to be able to get experts . . .

If I may trouble you for just a moment, I had an expert testifying in a capital habeas matter in district court. The t presiding district judge was mesmerized for hours while this particular individual testified. She was phenomenal. She agreed to a fraction of her normal professional rate which I think was maybe $700 at that time. She agreed to do the work for the $250 that the Ninth

Circuit would authorize. I got relief from my client. I have no doubt that it was based on her testimony. Because of the busy schedule she had she didn't get her bill in in what the presiding judge thought was a timely fashion, so she never received any payment.

I went back to the judge who is an individual I highly respect. He had given me a magnificent decision on my clients behalf based on this expert testimony and that expert never get any compensation. How mortifying for me to go and deal with her in her professional capacity and explain to her, "I'm so sorry, you're not getting any money at all." She stumbled. She should have gotten her bill in earlier. But there was no question. Everybody knew she had testified, everybody knew the work she had done. I have to say I think it was really clear how impressed the judge was with her. How can an expert like that ever to be expected to come back and do the public service again for the court that she did in that case?

Again, not so much, perhaps, the money but I always see the frustration. Do we know that the system is going to function and that people are going to be paid? The $129? I'll take it, I'm not thrilled with it, but I understand it. The $144 would be I think, more respectful, the $175 frankly, would be very nice.

Judge Cardone: Can I just follow that up with the question, did the judge ever explain? Was it just late?

Phillip Treviño: His explanation was that the request for compensation was tardy, and it was.

Judge Cardone: How late was it? Do you remember?

Phillip Treviño: I'm sorry?

Judge Cardone: How late?

Phillip Treviño: I don't recall precisely, your Honor. I'm thinking on the order of eight to ten months after the hearing.

Judge Cardone: Okay.

Phillip Treviño: But this was a matter that was pending in district court for seventeen years before I got relief. It was very long complicated matter. When we finally got into our actual evidentiary hearing, there had been massive litigation that had gone on prior to that.

Judge Cardone: Okay. Professor Gould, did you have a question. Oh, I'm sorry.

Professor Gould: You wanted to add one more thing?

Scott Cameron: Yeah. In response to the Honorable Judge Walton's question is how is the pay rate affect the quality of the representation? One thing that I've noticed is that in my district, a lot of the applicants that are both rejected and accepted tend to be new attorneys with little to no federal experience, frankly. There's exceptions to that for sure, but I do think that the higher pay rate would cause more private federal practitioners to apply for panel work which would help increase the quality. I mean, we can all learn from these people. We do learn from them, we see them in court.

There was one year, however, where the economy was bad where we got two or three of the top attorneys in the area applied, but with that year being the exception, I noticed that the applicants coming in are often just state practitioners on that indigent defense panel seeking to get some federal experience.

Professor Gould: If I may break in, we are actually running ahead of schedule which is amazing, so I have a few questions for you. This has been fairly powerful testimony, and I have a couple questions about the bases for your conclusions. Unlike some other witnesses who have appeared, several of you have said I'm not just testifying based on my own personal experience, I've spoken to my colleagues. I'm wondering if you can share with the Committee roughly how many people have you spoken to that formed the basis for the conclusion. Are we talking five to seven, are we talking ten, or is this impressionistic based on your experience in general?

Debra Di Iorio: I can answer the question on my panel that I think there are 120 of us, and I would say that the comments about voucher cutting come from over 30% of the panel.

Professor Gould: Okay.

Debra Di Iorio: It's something that's discussed all the time amongst ourselves whenever there is a CJA conference of any kind when we are at the end of the training sessions that comes up and it gets very passionate.

Professor Gould: Okay, thank you.

Phillip Treviño: What I would say is, some of my comments and testimony are certainly derived from my observations across time, but I have made several calls upon the panel at large through email solicitation for input. I've also in personal conversations with different lawyers made a request for input. I can't put a precise number to it but I'd say it's substantial. I'd say we're up and to close to maybe 100 different lawyers who have given me input.

Professor Gould: Okay.

Phillip Treviño: I would also temper that with some lawyers gave me very specific short answers. Other lawyers give me long commentaries. Some of those commentaries prompted me to pick up the phone and call for further clarification. I feel that I have a lot of input but I don't know that I could say I have a unanimous view from . . . I don't think that our panel necessarily has a unanimous view on many issues. Trying to synthesize it and present here is really what I'm hoping to do but I feel like I'm calling upon what a lot of different people have said.

Professor Gould: Okay. Mr. Windsor, I believe you actually mentioned a number of people you had spoken to. What's the rough basis of number?

Mark Windsor: Professor, I think there are two data sets here.

Professor Gould: Okay.

Mark Windsor: There's the recent history data set which is admittedly small. What we have in the Central District, probably one of the best things that we have implemented in the panel is a listserv that every panel attorney is on, and it's been very helpful. There's a lot of help emails that get responded to and we all get to see the responses and we learn from that. I sent a message two days ago over this listserv, and I received . . . I actually received eighteen responses and I've identified twelve as similar situations. The other responses were, "I'm afraid this is going to happen to me." It hasn't happened yet. Short term, small data set. Long term, obviously I've been monitoring this listserv for a long time. I know many of these attorneys personally and so I talk to them on that level.

Now, as far as numbers, I would say it's certainly not all of them. I haven't reached out to all of them and some of them I probably never talked to in my life. It's a big panel. As far as losing the comments that I've made, the assertions that I've made that we are losing an entire generation of our best attorneys. That is based on conversations with, I would estimate . . . direct conversations with, I would estimate about twenty attorneys that I know of and my gleanings from years of emails. That are getting worse and worse. For what it's worth that would be it. I think data-wise the people that you should talk to are coming tomorrow. That would be the two CJA reps and they might be able to . . .

Professor Gould: No. I appreciate that. I'm just trying to get a sense of the basis for your testimony today.

Scott Cameron: May I answer?

Professor Gould: Yes, please.

Scott Cameron: Yeah. I conducted phone interviews of approximately six to seven people that I actually targeted because I know them to be opinionated, they're very vocal. Then, of course, I've been on the panel for eight years, Sacramento to me, anyway, feels like a small legal community. I suppose everybody feels that way about their community, but everybody knows each other. Over the period of the eight years, I have a finger on some of the issues, but to answer your question in terms of the reliability of the data would be about six to seven phone interviews.

Professor Gould: Okay. Let's flip this then. You've talked about voucher cutting, you've talked about delays, you've talked about a number of problems. The folks you have talked to, when they tell you the problems they've had, are they talking about a problem in your district that is, if you will, system wide or across the district or are they talking about problems that they're having with, if you will, an isolated judge or a particular clerk or something? Is this systemic or if we could fix a couple of people, if you will, if the Committee could, would this be fixed or could this be improved?

Debra Di Iorio: Definitely not all of the judges. There's no question about that.

Professor Gould: I'm sorry, I didn't hear you.

Debra Di Iorio: It is definitely not all of the judge. I don't think that other than a systemic fix, I don't think that you could do anything about it. I'm not sure how it would work in practice and then it might be very intrusive and offensive and backfire. I don't want to say that it's everybody. There are many, many judges who support, fully support funding the CJA panel.

Professor Gould: The rest of you?

Phillip Treviño: I'm not sure that I would be able to answer that question in a direct way because I think much of it depends upon who the individual is, whether it's specific to that individual in a particular case of the day that's a frustration or whether I'm dealing with somebody who's more measured and contemplative and has a broader overview of the practice under the CJA. I've tried to account for that in my presentation here. I may have failed but in the various inputs that I've received from the different counsel, again, knowing them and having interactive, some for many years and others, not at all previously. I've tried to take into account that, who my source is.

Professor Gould: Let me give you a little bit of a context to why I'm asking this, and I speak entirely for myself here. One of the advantages of being a reporter is you get to sit back and watch what's going on. Some of you have said you've looked at the testimony in the hearings in the other cities. I looked at, say, a hearing in Birmingham where not a lot of complaints from the people who appeared before the Committee, and yet if you look at the data, not a lot of experts

being or service providers being used in those districts. The number of hours from the attorneys is not as high. We come out here to California, more experts and service providers being used, more attorney time generally and yet you all are saying problem, problem, problem. Is there some things different about what's happening in the districts in California or Alaska, or is it that your experience is compared to a different legal market? What's going on here so the Committee can understand why they're hearing from you on these issues?

Mark Windsor: Can I start on that? I think with regard to the Central District of California as I mentioned in my initial statements, I believe that we are the district that invented the mega case. One of the ramifications of that is what comes with the mega case are the mega attorney bills. My sense, my belief, actually, Professor, this is not really based on hard data, but I believe that what's happening is there are some judges within the system and maybe very high up in the system who probably, I would assume look at the Central District as the most expensive district and we've got to do something about it.

I'm imagining with what I can glean is snowballing into this never ending stream of procedures that are not focused on high quality representation. They are focused on one thing and that is reducing our vouchers. They've tried to talk to the U.S. Attorney's Office and say, "Will you please stop filing these?" Of course, the U.S. Attorney's Office is independent. They can't be told what to do by the judges. I assume giving up on that, they've turned to us, who they can tell what to do and we're getting this. That's my theory. It is not based on data.

Professor Gould: It's a useful one. What about the rest of you?

Debra Di Iorio: I think one of the things that has happened in our district is, again, with the advent of the eVoucher, the judges have the ability to just go and look at individual attorneys and see what they've charged over the years. It doesn't necessarily take into account if you have a mega case where you might not bill for it, we generally bill at the end, although we can do interim vouchers. Again, because most of the judges that we have don't come from private practice, they just look at a number and they don't realize . . . I think I put in my submission, they don't realize how much of that money we don't keep and how much goes to overhead and every other thing, so it looks to them like, "Wow, they're making more money than we are." I think that's one thing.

Secondly, we have a huge increase in mega cases in our district in San Diego as well. I've had mega cases both when Federal Defenders of San Diego has been on those cases and when they have not, and there's a huge difference in help. When Federal Defenders is on those cases, first of all, they are able to assign usually two attorneys to work on those cases and sometimes reduce

their caseload. They have excellent software programs and they help us to organize all of the discovery. Some of the testimony that you heard earlier from the previous panel about how do we get CJA attorneys up to speed. I do have thoughts on that, make the software available to us. The discounted rate is still high, make the software available to us. We will go to training. We will learn. We want to. It makes our lives so much easier. When Federal Defenders of San Diego is on those cases, they do some of that work for us and it helps reduce costs and it helps us provide better representation.

Recently, and I don't know whether it's nefarious or whether it's just a reality, but the U.S. Attorney's Office has been moving to recuse federal defenders in almost every single case. Some of the conflicts are actual and some of them are really tenuous, "Well we might if the case goes to trial, in rebuttal, call this witness who in 1992 was represented on a § 1322 case by Federal Defenders, we got to kick them off."

Professor Gould: Right.

Debra Di Iorio: The magistrate judges don't question the veracity of that statement and so then lo and behold in all the mega cases I have right now, there's no federal defender attorney. It makes a difference. Those things impact as well.

Professor Gould: Okay. Thank you, Judge Cardone.

Judge Walton: One other question. If it were up to me, I'd love getting out of the business of having to review vouchers. Assuming we make that recommendation, but Congress doesn't buy and they say, "No, we're not letting you off the hook." Do you have any idea or any recommendations as to what we could as an alternative, recommend be done in order to address the concerns that are being expressed?

Debra Di Iorio: I do. I think that if the judges are going to be involved, do they have to be the sole voice would be one question. It may be that Congress says, "Yes, we want those judges to do so." If that's the case, then as I articulated in my opening statement, there has to be notice, an opportunity to be heard, and an opportunity to challenge the reduction to another body. There has to be due process.

Mark Windsor: If they're going to make the judges continued to be involved, and that I think is not the best case scenario by any means, either for the judges or for us. If that's going to be the case, I think the system already exists, and that system was described to you this morning, Peter Shaw, the budgeting attorney from New York, those are workable systems. They may not be ideal but they are workable systems because these are people that take oversight seriously. They don't just count beans. That's not oversight, okay? That's what happening in Central District. They look at quality. They determine who

should stay on the panel. They make decisions about that. If somebody is not meeting the standard they take care of it. That is the kind of oversight that we need. That's what we need. Every law firm, every organization really needs that kind of oversight.

It sounds to me, and certainly what I know about the appellate panel in the Ninth Circuit and what I know about Peter Shaw and the respect that he commands, that system is very close to existing right now, and you already know about it.

Phillip Treviño: I'm going to agree completely with Mr. Windsor on that because I have a great degree of respect for Commissioner Shaw. I think things function magnificently at the circuit under his supervision. But I will go further and just say if for some reason that's not an option that your Committee considers viable, I would suggest that at a minimum, the presiding judge not be the decision maker. Whether you have each judge pair up with different judge, whether it's a rotating judge, who has voucher duty for one month out of, however many cycles, whatever it is, have it be somebody other than the judge who is presiding over the case. In some instances, that's probably going to be to our disadvantage because there are some judges out there who find . . .

Judge Gerrard: How is that working in the Central District right now?

Phillip Treviño: It's not happening in the Central District that way. That's why I'm saying I would suggest as . . .

Judge Gerrard: Okay.

Phillip Treviño: If we can't have something, like one of the very proved models like Commissioner Shaw is demonstrating, then let's at least not stick with what we do have where it seems to be in one configuration or another it is primarily the judge who has presided over the matter. There are a great degree of things quite frankly that I'm not going to be comfortable ever telling the judge who's presiding over the matter. Even if it's to my personal financial detriment because I don't want to be discussing my client in such a negative light, because even if it's done after sentencing, my client may be back on a revocation. There may be any number of reasons why my client may still suffer at the hands of a judge who had seen some negative commentary in the billing that was necessary to explain, this is why I had to do this many meetings, this is why I had to go out at length and interview these particular witnesses, and frankly, it's not flattering to my client because it makes clear to the judge my client has been difficult, and that may result in my bill being cut, but worse it may result in adverse treatment to my client later. Give it at least to somebody else one of the other judges, one of your colleagues on the bench if you have to do something. If we can't do

something like Peter Shaw provides.

Judge Cardone: Alright. On behalf of all the Committee, I want to thank all of you. It's been very, very helpful. I want to tell all of you that if the conversation we've had today has stimulated any thoughts, if there's more information you can provide, please, please feel free to do that. You've met our staff and worked with our staff, so feel free to contact them and get it to them directly. You can go to cjastudy.fd.org and get it to them. We are really appreciative of any information you can get us because we're really trying to get all of the information we can get.

With that being said, once again, thank you very much for being here. We appreciate it. We'll adjourn until tomorrow morning at 8:00. Thank you.

Debra Di Iorio: Thank you.