Ad Hoc Committee to Review the Criminal Justice Act
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Transcript: Panel 7—Views from Judges and Federal Defenders

Judge Fischer: Thank you, for being with us. I have seen some of you out there watching some of these proceedings, so I know that you know how it works and what's been going on. We do have a full panel of six. The Honorable Paul Warner, thank you, Magistrate Judge from Utah; and the Honorable Carolyn Delaney, Magistrate Judge, as well, from Eastern California. Say hello to my friend, Judge England. Rich Curtner, our public defender from Alaska.

Unfortunately, I don't think I mentioned this earlier, Judge Burgess at the last minute is ill, so we'll try to catch him at another hearing. Steve Kalar from Northern California, I don't know who you are; Hilary Potashner, Fabulous Public Defender from the Central District of California; and Heather Williams, a Federal Public Defender from the Eastern District of California. Thank you all for being with us.

I asked all the previous panels for brief statements. This is a panel we really have a lot of questions for, I'm sure, so I will ask you to please make those brief, so we can get on with our questions. We have read the written testimony as I think you can tell from our questioning. Everyone's very involved in the process. If you could just briefly make some comments. Ms. Williams, would you like to start?

Heather Williams: You're looking at me, so I'll go ahead and get started. Thank you very much for having me here. I actually do want to say something brief, and it's not even in my written statement at all because it's something that's happened since I submitted my written statement.

It had to do with the monthly submissions that the defender offices do in sending the summaries of their full-time employees, their case-weighted openings and the cases opened and closed through the Defender Data and DISMIS programs that we have to report those to Washington, D.C.

When my administrative officer and I sat down the middle of last month after having checked the records to go ahead and export them, we looked everywhere for an export button. It used to be there. It wasn't there then. So my administrative officer sent an email off to try and figure out just how we were expected to go ahead and send Washington, D.C. our monthly report.

We got an email back from a part of the Liaison Department of the Case Management Systems Office, the Defender IT Support Liaison Division which said, "Yeah, we took that export button out because we hadn't yet integrated into this report the Rand II, that is the revised Rand case-weighted openings. So if you send it off the way it is, then it wasn't going to go ahead

and give an accurate report anyways," and so they would figure something out.

Now, the DSMIS program we're dealing with, we got an announcement in the middle of January from this very same office saying, "Oh, look. Here's the newest, the latest, greatest. We've done this revision. It's DSMIS II. It's going to be great because it does X, Y, and Z." Now, I know that Steve Kalar has put in in his papers, and I have put also some information we've received about the problems with DSMIS II because it was sent out before really it had been tested at all.

What happened though here is that we got no information at all that there wasn't going an export button, and what we were supposed to do. We heard nothing at all from Defender IT Liaison at all on this. Furthermore, I have to say I'm incredibly disappointed because I was part of the steering committee in the work measurement study, and I know that when we were a year ago talking about what formulas would be applicable, we already were working with Rand II case-weighted opening numbers.

So we knew about them a year ago at least, and not only that, we were able to go ahead and get permission from this Defender IT Liaison Office to at least create a couple of reports in Defender Data to print out these Rand II case-weighted openings for our current cases. Justice Works has the database in there with the Rand II case-weighted openings.

Defender IT Liaison Office or CMSO have not given Justice Works the permission to go ahead and connect that database with this report we send out, the JS-50, and it's the report then that we look at inside of DSMIS to export out to Washington, D.C.

Now, ok, Microsoft sends things out without enough beta testing all the time, and that's why we get service packs, right, but. To send it out in January, two and a half months before the end of our statistical year when our final numbers need to go for March, and that's going to happen the middle of April, so that Washington, D.C., the AO knows what our case-weighted openings were for the entire year, so they can then project staff and budgets to present to Congress sometime in April and May, and have this new program have so many flaws that we can't even send the information or figure out what information we have.

Instead of holding off until the end of the statistical year, and then rolling it out at the beginning of the next statistical year so we have plenty of time to work out bugs, to me, seems unconscionable. In preparing to go ahead and talk with you today, I reviewed my written statement, and I reviewed the Memorandum of Understanding. I was on the tiger team that helped to go ahead and create these Memorandum of Understanding between the Case

Management Office, Defender IT Liaison, NITOAD, DSO and so on like that.

I was reviewing the one that talks about dealing with DSMIS, and it's the Defender Application Supported Access, it's attachment 3-21 or page eight of the second MOU. It specifically says in here that "CMSO and the Defender IT Liaison Office are to operate and manage DSMIS and Defender Data to ensure the information required by the DSO staff and FDOs is available in a timely fashion, work with the DSO staff to modify the DSMIS application to maintain its viability and responsiveness to its users' needs, and to ensure that the FDOs are notified regarding system changes, adjustments or services associated with assigned defender IT applications."

The reorganization happened over two years ago. This office which took over our IT has been in existence for over two years. For them to not follow the terms of the MOU and not to appreciate the level of importance that this simple report has to our budget, to our staffing, to our stewardship obligations in maintaining the cases as we go along through the statistical year tells me they simply don't understand what we do. They don't appreciate the importance of certain aspects of our responsibilities.

This as much as anything else that we have explained to this Committee shows that we at the very minimum should have control of our IT within the Defender Services Office and should not be sharing those services with the rest of the Administrative Office.

Judge Fischer: Thank you. Ms. Potashner?

Hilary Potashner: Thank you, your Honor. While everything that Heather just talked about is extremely important, I'm going to turn the attention back to the Central District of California because that's been a topic of much conversation today. First, thank you for having me. I really appreciate the opportunity to address this Committee. I think the work that you're doing is of the utmost importance, and I appreciate the amount of time and energy that this Committee is putting into this important work.

In my opinion, the issues in the Central District are not personal, and they're not dependent on personalities or interpersonal conflict at all. In my opinion, the problem that's happening in the Central District is about a structural flaw. That is the genesis of the problem. It's time for the defense function, and particularly the panel to have more independence from the court and the Central District, and frankly, probably everywhere.

The panel needs autonomy to digest its cases, prepare its cases, and present its cases. The court does not control funding decisions for the government, and the court does not control funding decisions in individual cases in the

FPD Office at all. I do not believe the court should have this unique role when it comes to CJA cases. That is creating a three-tier system, and I don't think that's appropriate. And that is why I believe it is a structural flaw. It is not a personality flaw. I think when the structural flaw is corrected, then the culture will be corrected in our district.

What I also want to say is I think that our district can be held out as a model in terms of positive change from the court as well. I think that the court has assisted the public defender and the panel in terms of systemic changes and interagency mediations which has been very helpful. So I do believe the court should be active in assisting and supporting the Sixth Amendment, and the function, the defense function, but on a systemic level.

Some examples that I can give this panel in terms of the work that the court has done to assist the defense are . . . basically fall into two categories. The first is pushing back on the other agencies in their quest to shift their cost to the defense. The court recognizes that and assists with that on a daily basis in our district.

The court was very active when the issue of remote detention came up in our district. The court recognized that it was critical for us to be able to interact with our clients, and see our clients. They saw the value in that. And the court in seeing the value in that pushed back on the marshal service and pushed back on the other agencies in terms of not allowing our clients to be moved to the level that the marshals wanted to move them.

The court got involved in terms of wait time at the MDC, it recognized that this was a colossal waste of time that was frustrating to the defense. So they, so the court brought in the warden from the MDC to talk about why it was that we had to sit in the lobby for so long on a daily basis wasting time. That was extremely helpful to the defense.

The court got involved when these mega cases came to our district. I mean, they've been there for a while, but when there was an explosion of them, and there were enormous discovery dumps where the discovery was coming to us in an unorganized fashion, and was taking us forever to sift through what we even had in cases. The court proactively brought the different stakeholders together and talked about how we could resolve this issue on a systemic level or assist in this issue.

What was born from that was the complex case order. That was critical and helpful to the defense. The court got involved when there was a change in the guidelines, and the drug guidelines reduced by two. It's my understanding from my colleagues across the country that not all courts were helpful in getting that information to the Public Defender's Office which cases would be affected, and what the government's position would be in these cases, but

the court was instrumental and proactive in bringing the different stakeholders together to assist the defense in doing what the defense needed to do in those cases.

The list goes on and on. I do appreciate, and I do want to say that the court has been active and helpful on the systemic levels when it comes to interagency disputes and mediations and making the system work on the big picture. That being said, I am a firm believer that the court should have nothing to do with voucher review, expert retention or specific decisions made in individual cases and cases that are before them.

I think that is an inherent tension and that there should be an independent entity making decisions regarding funding in CJA cases. I think that makes the most sense. It gives the . . . it allows the court frankly to be the neutral arbiter that the court should be equidistant from the prosecution and the defense. That is the way in my humble estimation the system should work. The court should not be overseeing the defense function in individual cases. That is causing, that is where the tension lies in our district, and it is a structural problem. If we address the structure, our culture will follow. Thank you.

Judge Fischer: Thank you. Mr. Kalar?

Steve Kalar: Thank you, your Honor. I would like to begin by noting for the record that your Honor, and your fellow Committee members have spent the last two days in the most beautiful city in the world, and Judge Cardone has had you working twelve-hour days in windowless committee rooms and this courtroom. So regardless of your recommendations, no one can question your commitment to this task, and I'd like to thank you for that.

In my written testimony, I identified a case study, and I argued from that case study that it revealed profound structural problems with our national oversight. In my testimony today, I would like to focus on my recommendations for solutions to those problems. I'd like to demur in my recommendations, and I would like to avoid for this part of my testimony discussing the big "I" question as Mr. Cahn characterized it. That is the question of true structural independence outside of the Administrative Office.

I'd like to commend the anticipated testimony of my colleague, Mr. Patton, the Defender of the Southern and Eastern Districts of New York, in Philadelphia. Mr. Patton has done extensive academic research on various structural models. I've learned a great deal from him, and I'm sure the Committee will as well.

Instead of discussing big "I" structural independence, what I'd like to focus on today is what my view is the lowest common denominator. And that is

regardless of the Committee's big recommendation, at minimum I would urge the Committee to recommend profound structural changes within the AO if the structure remains there. I can represent that every colleague of mine in the country agrees that profound structural changes need to happen within the AO at minimum.

I would propose five specific and concrete suggestions to make these changes. The first recommendation is restore DSC, restore the Defender Services Committee and DSO to the traditional and necessary roles overseeing a constitutionally mandated program. You've heard many times the recommendation to restore DSO to a directorate, and I completely agree with that. But in my various roles on the steering group for the work measurement study and in DSAG, I've had an opportunity to observe how the Defender Services Committee is viewed and treated within the Administrative Office.

I would represent to you that there is no more telling litmus test for whether there is true independence of the defense function than how DSC is treated within the AO. I'm happy to discuss that in greater detail if you would like, but I think that it is unrealistic to expect there be any independence within the AO unless Defender Services Committee as well as DSO both have true responsibility. I think part of that should have a defender representative or a member on DSC.

I think the defenders have proven during the work measurement study that we are sober, responsible, responsive citizens. I think that defender membership and CJA membership on Defender Services Committee even if ex officio would help everyone involved.

My second concrete recommendation is remove CMSO from the IT oversight of Defender Services and CJA, and fund IT. I've laid out great detail why I think there are problems with CMSO. I would emphasize that in my view, those problems are structural, not personal. But they are profound structural problems that cannot be reconciled. I think what is necessary is for good, strong, high level, high-grade funding of IT.

We have over a billion dollar budget, and yet we have very low-grade IT staff, the few that are authorized within DSO. I think it would be appropriate to have IT staffing at a high grade commiserate with the great responsibilities that we now bear to provide data, and to provide justifications for that budget.

My third concrete recommendation is restore DSO autonomy over budget execution. Now, I personally and I'm a strong advocate for the work measurement study. I think that because of active defender involvement, every defender of the United States, the work measurement study stands as a

triumph of what could happen with mutual respect and collaboration between the judiciary and the defenders.

But even with the work measurement study, there are day-to-day execution decisions necessary for a budget. I have personally witnessed Chief Judge Blake, who is the chair of the Defender Services Committee, advocate for the defenders. And I would note, I don't think there is a more vigorous or committed advocate for the defenders. I have witnessed her advocate for budget issues that as an outsider, I'm astounded that even it is an issue.

It is unacceptable that Defender Services Committee and DSO do not have the autonomy to manage day-to-day normal budget issues without the intervention of many layers of AO bureaucracy. It makes it a completely unworkable system.

My fourth recommendation is I would recommend that DSO and defenders have legislative access. We have our own budget. We have a constitutionally and congressionally mandated budget, and yet we have no voice in legislative or budget decisions. The little voice we do have is informal. It's often by virtue of personal relationships. If we are committed to structural independence within the judiciary, as the lowest common denominator at minimum, there must be a defender voice, and a DSO voice, on legislative decisions such as budgetary decisions. There are many other important legislative issues as well, such as for example the CJA hourly rate.

My final recommendation is a broader recommendation, and that is, we need a buck stops here mentality. Every defender in this room, and there are many in this room, have pleadings in their district for many, many different staff members, and our names are on the top of the pleading. If there's a problem with that pleading, the chief judge calls me or every defender here.

We need that mentality in D.C. I explained for example this really horrific problem with our technology in my written testimony. I explained that there is no buck stops here mentality. It's not ever clear that the people responsible for that problem, whom they work for. I think that the defenders have internalized that message.

We understand that that integrity transparency, responsiveness is critical. I would recommend you review the action plan, voted unanimously by DSAG and sent by Mr. Sands, my colleague, to illustrate why the defenders and how the defenders plan to respond to those data integrity responsibilities. And that same mentality needs to be present in D.C.

But with responsibility comes autonomy, and that is sorely lacking. I manage a budget of roughly $13 million. I have sixty-two employees. I'm a large office, but I'm dwarfed by the office next to me. Yet, I have far more

autonomy to hire or to fire staff than Ms. Clark, who is responsible for budget, ultimately responsible for budget of well over a billion dollars.

The layers of bureaucracy necessary for any real staff changes or staff hires or grade level determinations within DSO is completely dissonant with the grave responsibilities, the significant responsibilities they bear. In my view, you have a situation where they bear much of the criticism for not being responsive or not providing information, but they don't have the autonomy to fix it. That's an unfair position, and it's untenable position, and that also has to be fixed.

I look forward to discussing any suggestions, and any other questions the Committee may have.

Judge Fischer: Thank you very much. Mr. Curtner?

Rich Curtner: Thank you, Your Honor, and thanks everybody for inviting me. I want to commend the Committee. I was in Portland for hearings, and I read the testimony of many of the people that have testified before this Committee, and heard testimony today. It's just amazing to me the breadth and the depth of the information that I've seen that you're hearing now, and I want to commend that because I think that's important for all the parties and going forward with this Criminal Justice Act plan.

I'd like to . . . I could certainly answer questions about Alaska because we're unique, and we're probably I think even more unique than Wyoming in some ways, but I'd like to focus my opening remarks on some of my experience. Over this last year, talking to my colleagues about administration of defender offices and how we do our work. I hate to date myself in front of my younger colleagues, but I've been a public defender for forty years. I'd worked in three different types of administration paradigms for public defender work.

In Ohio, we were an independent organization contracting with the courts. We were fiercely independent. Of course, I started about $10,000 at a law school, and my retirement plan was Social Security. We had very little training, but we were independent. When I moved to Alaska, the public defender there works under the Department of Administration for the state, the executive branch. And we also have to deal with legislative branch for funding.

Now, I thought it was a great office. It was well-funded. I think when I went from the faculty of Ohio State Law School to being a public defender in Palmer, my salary doubled, and we had resources, and we had training, and we had money for experts, but we were funded with oil. After a couple of years, their oil was lower than it is now. And so we took two weeks of a furlough.

We had issues as far as independence because we had to lobby for funds, and the head of the office worked under the governor, and was appointed by the governor. Twenty years ago, I became the Federal Defender for Alaska. It has been a pleasure for me to do that. Part of that has been the colleagues I've worked with, my mentors when I started, Barry Portman, Franny Forsman, Judy Clark, Fred Kay, Hilary Potashner, Tom Hillier, and you heard from him in Portland, and also Steve Wax.

We had . . . I thought it was a great experience to be a federal public defender because we had resources. We had benefits. We had to support the court from my experience. I saw that with my colleagues in the Ninth Circuit. Now, I have to say I don't know if it's that way throughout the country, but I thought that working as a federal defender was the ideal for me because we have independence and resources together. Now, that's over the first fifteen years I was in office.

The last five years I've been more concerned about as you've heard some of the issues coming up, and so I just wanted to share some of my experiences. I think that it's critically important that I think that, from my experience, the Federal Public Defender program has been top, top of any of I've been associated with or been familiar with.

I'd like to . . . I'm just concern that we can maintain that, and that would be my hope is that through this process, we could continue to have, really support criminal indigent defense in this country. Thank you.

Judge Fischer: Thank you. Judge Delaney?

Judge Delaney: Thank you to the Committee. I think I've said what I wanted to say in my written remarks. I will defer any further opening statement for anything you wish to ask at that time. Thank you.

Judge Fischer: Thank you. Judge Warner?

Judge Warner: Thank you. I appreciate the invitation to come and offer a few remarks and to answer questions. Just a couple of very brief opening remarks, I'm going to actually try and do what the good judge asked us to do. Since I rarely get anyone responding to what I ask, so I'm going to try and do it for you.

I don't think anyone that I'm aware of ever decided to try and be a federal judge, be it magistrate judge or district judge or any other type because they want to do budgeting. That the idea of riding herd on the CJA counsel and so on was really what motivated them to want to be a judge. Quite frankly, I think that that has led in many instances to judges to the extent possible showing a fair amount of benign neglect on that process and delegating as

much of it as possible to magistrate judges at least in my experience, and I recognize I don't see the whole picture.

But having said that, and I've heard some of the discussion already today in terms of recommendations of maybe getting out from under the judges' purview, but having said that, I do believe that as long as judges are involved in that budgeting, and particularly in mega cases where we've got multiple defendants and extended and complex cases that require a lot of extra time and money relative to budgeting and so forth.

It seems to me that there's a couple of basic issues there that we struggle with as judges, at least I do, and I know my colleagues do. The first one being, the perception of fairness. I think there's a perception, and as an aside, I was formerly, I've been a magistrate judge for little over ten years, but I was formerly the presidentially appointed U.S. Attorney in Utah for eight years.

I think there's the perception that the government has unlimited resources to do whatever they want. That's simply not true. I can tell you as one who manage the U.S. Attorney's budget for a number of years that they have a litigation budget, and they're expected to operate within it. There is that perception. Certainly, I know that as I have tried to recently work for three and a half years on a very large white collar fraud case involving multiple defendants and literally millions of documents and so, the fairness issue was constantly on my mind, being what is the perception that is created when we try and somehow ride herd on the resources that are going to be provided for individual defendants and their counsel vis-à-vis what the government has available to them.

I will tell you that my experience suggests that most judges, that I'm well aware of and I've worked with, are keenly aware of the competing interest if you will between the need for an adequate, competent defense for the indigent defendants as well as maintaining fiscal responsibility and adhering to the realities of what the CJA can provide for.

I often describe that difference is the difference between Chevrolet and a Cadillac. A Chevrolet will get it done, and it's a competent transportation, but some people want a Cadillac but they can't afford it.

The final thought I will just leave with you in terms of the opening remarks is this. For me, a sea change in this whole process for me was when I began to get the circuit court budgeting attorney involved, the Tenth Circuit budget. Carrie Waters is her name. It was huge. It was absolutely huge from the standpoint of I think the fairness perception. She was a very experienced criminal defense attorney. She worked individually with multiple defense counsel. She made recommendations to me. And most, equally important,

she could speak for the Tenth Circuit.

When I approved the case budget at the direction of our chief judge who was the assigned district judge, she could sign off for the Tenth Circuit, and then those CJA panel members could have a certain degree of confidence that they were actually going to get paid for the budgets that they had been approved for.

In the past, even if the district court approved a large expenditure on a big case, it was no guarantee that the circuit courts were going to pass off on it. That I think was a win-win for everybody. So I'm a big fan of the budget attorneys in the circuit courts. They have helped bring a process that from my perspective boarded on chaos to a much more orderly process. Thank you.

Judge Fischer: Thank you.

Katherian Roe: Magistrate Judge Delaney, I want to start with you. In your written remarks, you talked about the process in your district as far as vouchers. My understanding from your written remarks is that magistrate judges don't review final vouchers. They go to the Federal Defender's Office, and then directly to the district court judge. Is that accurate?

Judge Delaney: No, not exactly. It depends on the cases. If they are vouchers in cases where I appoint the attorney come to me after a mathematical review by a person in the Federal Defender's Office, and then I do the reasonableness review. Likewise, each district judge for cases that they're handling the criminal trial, there's a mathematical review in the Federal Defender's Office, and then the assigned judge does the reasonableness review.

Katherian Roe: You indicated in your statement that you are somewhat uncomfortable with that concept. Can you tell us about that?

Judge Delaney: I think I speak generally, and to echo what Judge Warner has said that I at least am conflicted at times doing a reasonableness review of what a particular panel attorney has decided is necessary to defend his or her client in the best way possible. I don't think that you would find many judges who would disagree with the level of discomfort that we have. I think we're a little lucky in our district that we have a relatively small panel. We're a relatively small district. And so we have some level of familiarity between the judges and the panel attorneys and the Federal Defender's Office. We know each other, in other words.

But I don't think that that completely answers the question that Judge Warner has brought up which is it's a difficult situation. We're appointing people to give the best representation that they can, and then we are in a position of perhaps second guessing the judgments that they make in approving the expenditures. I don't know that anybody would disagree with that.

I guess the problem that I did not answer in my written statement, and I still cannot answer is, what is a better solution? And I think I very carefully kicked that to the Committee. Each district has its own unique challenges. I certainly have heard a lot of concern about having national oversight. That doesn't seem like a good decision.

Having an independent body for each district seems like a very financially troublesome option, although I think might be in an ideal world, a wonderful solution. Judge Warner's solution of having a contact with the circuit is certainly a possibility, but I can't speak to how exactly that would work. I welcome your questions on the problems, and I welcome any solutions that you want to run by me because I don't have a good one.

Katherian Roe: Let me ask you, in your district, is there a perception that there is voucher cutting? I mean, when you say you're uneasy with this, and having to second guess and make a decision, how do you resolve that? I mean, do you . . . ?

Judge Delaney: I don't know that you ever do resolve it. I think in our district, we have very good informal relations with the Federal Defender's Office. One quasi solution that many of us have come up with is to ask the Federal Defender's Office to take a look at the billing, to see if anything jumps out of them. It's particularly useful in cases where there are codefendants. I think that puts them in a difficult position as well.

They do it for us, I think on an ad hoc basis, because we try and work collaboratively. I think I speak for all judges, we don't like to cut people's bills. I mean, this is their livelihood. We don't like to second guess their judgment. We don't like to impact their financial well-being, but we're tasked at least now with that responsibility. So it's problematic.

At least I think the way most judges in our district do it is if there is a question as to the billing, we allow, we can return it to the mathematical guru in the Federal Defender's Office and say, "We'd like to have more justification about the number of hours that were billed as to this," and then allow that attorney some sort of explanation.

At the end of the day, the judge makes the call as to how many hours he or she is going to authorize, and then it goes to the Ninth Circuit. I have heard my colleagues say that generally speaking in their experience, when it goes to the Ninth Circuit, the funds are reinstated. Some of my colleagues at least have expressed a throwing up of hands as to why we go through the review. I have not personally had that experience, but I've heard from others.

Katherian Roe: You receive the bill back so you know how much was actually paid by the Ninth Circuit and authorized by the Ninth Circuit?

Judge Delaney: No, I don't think so. No, I think once it goes up, it's gone from us forever. Is that right, Judge Warner?

Judge Warner: I haven't seen that.

Judge Delaney: Judge Warner, he says he hasn't seen that either.

Katherian Roe: Do you know if there's data kept, and this is for both of you, Judge Warner and Judge Delaney, do you know if data is kept in your districts as to voucher cuts?

Judge Warner: Go ahead.

Judge Delaney: I know in my district it is, and I'm told by again our mathematical review that we have about 4,000 vouchers that go through. About 1% are subject to question, and a smaller percentage than that even for cuts. In our district at least, it's a relatively small situation, but to those panel attorneys that are affected, of course, it's a big problem.

Judge Warner: I have complete ignorance. I don't know whether the district actually keeps statistics on that or not. I don't think that it's a routine matter in the sense that it happens regularly, but it does happen, clearly. I think it happens at least in our district, and again, I recognize it's a snapshot, but where you have certain attorneys who perhaps by reputation or history seem to always have a larger bill at the end than what would be normally expected. And they get some additional scrutiny it seems like.

I think that the reality is, is that most judges that I'm aware of don't particularly enjoy that process. They don't want to do that process. We do require a greater degree of one, justification on what they're asking for. In the last five, six years as budgets got tough, I think our courts have been tougher on looking at the justification rather than just rubber stamping.

Then two, I think that we've been tougher about getting them to pre-approve expenses that may exceed the statutory limit or the policy limit rather than come back after the fact and ask for approval after they've already spent the funds.

Katherian Roe: Judge Warner, you made a statement a little earlier in your beginning statement about some people want a Cadillac but can't afford one. Is your reference to that some folks want a better defense than they can afford?

Judge Warner: Yes. I guess it could actually be one of two things. It could either be the defendant who wants a more expansive defense, maybe a so-called "better" defense lawyer that they think that they could have hired if they had the

money. Sometimes it's just the defense lawyer who would like to do more things, but . . . as an example, I had a request not too long ago on a large trial for daily transcripts. That was in advance. There was no justification. They said, "We want daily transcripts," and I said, "No." I said, "If you will indicate on a case-by-case basis, I don't want to say case-by-case, but witness-by-witness basis or a number of witnesses where there's a specific need or what you can justify why you need daily transcripts, but that's a very expensive process to just go with daily transcripts as a generic process."

Now, this was an attorney who had been a CJA-appointed attorney but was not a CJA panel member. He was primarily a private practitioner, but had been appointed after he had taken on the case, then the retainer ran out. To save expenses starting somebody up in the middle of the case, he was then appointed CJA. He really wanted to in essence provide a defense that he was used to providing where he had unlimited, quite frankly, unlimited resources. That's the Cadillac defense.

I have to say that at least in our district, my experience have been with most of our CJA panel members, who are very fine lawyers as are our federal defenders, that they are sensitive to the financial constraints. They know how to get the best bank for the buck. They're not asking for bells and whistles that would be nice, but they know aren't absolutely necessary.

Katherian Roe: Can you give me an idea what bells and whistles are, other than daily transcripts?

Judge Warner: Well, this may not sound like much of a bell or a whistle, but I'll give you one example. We had one CJA counsel from a large law firm in our district that irrespective of the nature of the case asked for an investigator and a paralegal on every single case. It didn't matter the nature of the case or whatever. They always asked for paralegal systems and for investigative assistance. Now in many instances, that's appropriate as we all know, but just sort of as a starting point, asked for it in every single case.

It was just something I might need, I might want, so I want to have it available as opposed to taking a look at the case and trying to evaluate the necessity of it on the basis of the facts of that given case. That's not a very good example, but it's the one that comes to my mind.

Katherian Roe: All right. Thank you.

Judge Delaney: I wonder if I might just give an example that I think is more problematic which is in Title III cases for example, different attorneys have different views on how much of the surveillance video and how many of the recordings of intercepted calls they need to listen to or watch or whatever. That becomes problematic I think for the judge to try and intervene on that decision because one attorney feels that he or she is not doing their job if

they haven't looked at all the videotape as opposed to another attorney who says, "Well, I'm only going to look at the ones that the government has identified my client in."

The difference in the vouchering can be astronomical between those two approaches. But I have a difficult time making a judgment in that case as to whether one attorney is doing it right, and one attorney is doing it wrong. There are no guidelines, and perhaps that's one of the things that this Committee is considering, but I find it difficult to look at the voucher system sort of in the absence and each of us does it slightly differently to decide what is reasonable, and what is not.

Katherian Roe: I think that the way I would look at that is if that person was representing one of my family members, would I want them to be listening to all the tapes or would I just want them to listen to the ones that the government said incriminated them? I think you have to look at it like that when you're determining what's reasonable.

Judge Warner: Let me just quickly follow up on Judge Delaney because I think she hits an important point. In this very large white collar case that I've been working on the budgeting on for three and a half years, we have five different defendants with multiple defense counsel, all CJA-appointed. When they submitted case budgets, they were from a low of a couple hundred thousand to a high of about $1.1-$1.2 million.

Now, they're all competent counsel and recognizing that you can't compare every defendant straight up with every other defendant because they may have varying levels of comparability but still, there was great disparity between what they were requesting and what they needed done. They were experienced counsel, they were competent counsel, and yet, really big, big differences.

I think what Judge Delaney was saying is absolutely correct that that is tough for us. We hate to sit back and second guess and say, "Well, maybe you need to look at X number of transcripts or maybe you need this or maybe you need that . . . ." That was why I was so complementary of the case budgeting attorney out of the Tenth Circuit because she was able to look at those budgets across the board with her experience as defense counsel, not looking at it through the eyes necessarily of a judge, but looking at it what does an experienced defense counsel need, and to talk with them individually one-on-one, and to arrive at what I believe were really reasonable budgets that provided the kind of representation that the defendants needed and yet, didn't break the bank. That's a challenge for judges to do that because we do feel conflicted at times, but right now, that's the box we're in.

Katherian Roe: Thank you. I want to change the subject a little bit. Ms. Potashner, I wanted

to ask you about something that Judge Clark was talking about this morning. He was lamenting the fact that often your office is conflicted out, and it sounded like simply because the U.S. Attorney's Office said that you had a conflict, and that then you would not be able to be in a case. Has that been an issue for your office from your perspective, and can you elaborate a little bit on it?

Hilary Potashner: Sure. Historically, it was an issue where the U.S. Attorney was unilaterally declaring conflicts for the Federal Defender's Office. Over the last few years, we have really changed the approach that conflict analysis is done in our district. Historically, the U.S. Attorney's Office would simply call the Clerk's Office and say, "Oh, this case cannot go to the Federal Public Defender's Office because they have a conflict," and it wouldn't even be on the public defender's radar. That has changed.

And so the Federal Public Defender's Office declares conflicts or doesn't declare conflicts and controls the analysis of the conflict from our perspective. It has gotten better in that regard. It is true that sometimes in big cases, we do have conflicts and we can't come in to the case, but we have been working with the U.S. Attorney over the last few years to really minimize when that happens.

I know this morning there was an example given where the number two defendant came in first, so the Federal Public Defender's Office did not take . . . or took the number two person, and was unable to take the number one person. That should not happen anymore in our district because we do get a call from the U.S. Attorney when a case is coming in, and we talk about which person the Federal Public Defender's Office should take. And so I think to answer your question, I think it's not. Sometimes we are conflicted off, but I think we're reducing the number of times that we're needlessly conflicted off the most serious person.

Katherian Roe: As you know, we heard from a number of your panel attorneys about the environment, if you will, or what's going on in your district as far as morale.

Hilary Potashner: Yes.

Katherian Roe: and how they got to this place. In your testimony, you indicated that you thought this was structural.

Hilary Potashner: Yes.

Katherian Roe: How do you think this can change? How do you think you can . . . ? You said, you thought it could be turned around. How do you think you can turn this around? And I go back to the issue again, I think of what we've heard in so many places around the country and here that respect and having the

defense as part of the whole system for CJA appointments for one thing and CJA voucher review, and removal from the panel, those kinds of things, seem to make a big difference in the culture of a district.

Hilary Potashner: Yes. Well, I think the starting point is that the structure needs to change in terms of resource allocation in CJA cases. I do not think that the presiding courts should be making decisions in terms of which experts can be retained, which ones shouldn't, how many hours this should take, how many hours that should take because there's a tension there. The lawyer is limited in what the lawyer feels like he or she can explain to the court in justifying billing.

The court is getting limited information in what the defense development really is. Then the court starts questioning decisions that are being made by the defense counsel and gets half answers because the nature of the system is such that the defense cannot fully articulate what needs to be done in the case to the presiding judge.

It is an impossible situation. If there was a separate entity, an independent entity that was defense-minded, that was experienced in federal defense, and that could be approached by a CJA lawyer, and in order to fully explain what needs to happen in the case and why the case needs the funding that it needs, and that was separate and apart from the court, then the court wouldn't be inserting itself in the defense function.

And with the court pulled back from inserting itself in the defense function, I don't think this tension would continue to exist on this level. It is not a tension that is felt between the Federal Public Defender's Office and the court. And the difference between the Federal Public Defender's Office and the CJA panel is that the Federal Public Defender's Office does not need to ask permission to spend seven hours doing X responsibility or task in a case or to hire this expert or that expert.

The Federal Public Defender's Office has autonomy in making those decisions. Resource allocation translates to development of the defense. There needs to be distance between the presiding court and the development of the defense. In our district, there is just too much overlap there for the panel and the court. I appreciate the court's position. The court is trying to make decisions with half information. I appreciate the defense's position in those cases because they can't share full information. That's why there's a structural problem them. It needs to be a separate, independent entity that does not answer so directly to the court.

Katherian Roe: Do you have a position about whether or not that entity should be within the Federal Defender's Office or outside of the office?

Hilary Potashner: I think either would work. I think if it were in the Federal Public Defender's Office, that is a big job, and the Federal Public Defender's Offices would need the resources allocated in order to do that job. I do think it's possible for the Federal Public Defender's Office to do it because the Federal Public Defender's Office is experienced in criminal defense, and understands how to make decisions, cost-effective decisions in cases but still fully litigate their cases.

I do believe the Federal Public Defender's Office if properly walled off could serve in that function. I also think that an independent criminal defense practitioner could also serve in that role, but it's a big job. It is not a pro bono job. It would need to be full time plus staff in a district of our size.

Katherian Roe: Thank you.

Judge Fischer: We need to move on to Mr. Cahn.

Reuben Cahn: Can I begin by asking the two judges the question that echoes what I asked before which is I'm trying to understand what judges are doing when they do a reasonableness review. When you get a voucher and it's got X number of hours for performing some task, how do you decide what reasonable is? Let's start with you, Judge Warner.

Judge Warner: Well, fortunately, I haven't had to do too much of that, but one of the things that I like to do is to get, and it's been eluded to that we don't get as much information, but the more information I have about what the time was used for is helpful to me. To simply indicate that they spent ten hours doing X doesn't help me very much, then it causes me to say, "Well, could have been done in seven hours or eight hours or is ten hours sufficient?", but if they give me more detail . . .

I'm always looking for more detail. I recognize that is problematical and is a burden on the counsel to do that, to give that detail, but from my standpoint, the more detail I get, the more likely I am to grant the hours that are asked for.

Judge Delaney: For me, the cases that have jumped out at me for reasonableness review are ones where there is a federal public defender and a CJA panel lawyer working together with codefendants. The only ones that have really raised issues for me have been when the federal public defender has been the one to file all of the motions and trial briefs, and the CJA panel lawyer has just simply joined in those motions or joined in the trial brief.

Then I look at their billing and think, "That seems like an awful lot of research and writing for saying, 'I join in this motion.'" It's happened very rarely, but that's the reasonableness review that I have undertaken. I think the

problem that we've talked about with multi-defendant cases is at least in our district, it's been sort of an informal practice for one lawyer to step forward to be the lead attorney, to be the one speaking for all attorneys to agree to a date or agree to a schedule.

Anecdotally, we've seen attorneys who tend to step forward, also tend to be the ones that don't want to delegate any of the reviewing of the videotapes or viewing of the audiotapes to paralegals, and want to watch everything. That's not to say that's wrong. It's just to say that that's an expensive proposition. That's what causes I think at least for me the tremors when I look at the billing.

I don't know if what he's doing is right or wrong, and I don't want to second guess him, but when the billings are out of whack, and I do note that just recently, we got at least in our district a report from the Administrative Office on all the attorneys that billed over 1,000 hours. I think that sends a mixed message to judges because at least to me when I saw that, what I thought it was telling me, although it didn't explicitly say this, was these are attorneys you need to keep an eye on because they're billing over 1,000 hours.

That felt uncomfortable as I look through each of the attorneys and realized that there were some attorneys who had been appointed in 15 cases and had billed over 1,000 hours. Well, I'd be surprised if they could bill under 1,000 hours for 15 cases. Then there were other attorneys who had only been appointed in one case and had billed over 1,000 hours. Then you would look at the case, and it would be a very sophisticated, complex appellate issue perhaps. So I think there's a tension that all of us feel both at the Administrative Office, the judges, the federal defenders, the panel attorneys, and I don't know how to address it.

Reuben Cahn: Let me relate to you that the Defender Services Committee and the Defender Services Program has a strategic plan, and I probably won't get this language right, but the basic thrust of it is that the mission is to provide cost-effective representation consistent with the best practices of the profession. Is that goal, those two sometimes conflicting goals, has that language ever been communicated to you as judges?

Judge Delaney: Yes. In fact, we've recently have had an animated discussion because that best practices language comes up in an interesting way. One of our judges just brought to our attention that he had been asked by a panel attorney to fund an investigator post-verdict to interview some of the jury members. This particular judge felt very uncomfortable with that, but it was pointed out to him that that's a fairly routine matter in Federal Public Defender's Offices at least in our district with our investigators, and so to deny a CJA attorney that would be giving a different tier of representation.

It was also communicated that at least in the seminars that some of our public defenders have attended that that's been communicated as a best practice at least in certain types of cases. These are things that are sort of constantly coming up, and we don't always know what is regarded as a best practice in any particular case. We need someone to tell us which is why it's helpful to us to have an informal dialog with the federal public defenders in our district.

Reuben Cahn: How about you, Judge Warner?

Judge Warner: Just quickly, I'm familiar with the language, and I do think it's almost contradictory language in the sense that on the one hand you're talking best practices, on the other hand, you're talking cost-effectiveness, and I think there's some inherent tension there. The problem is you take your car into a mechanic at a dealership, and I believe this is true that they have specified hours that it takes to do any given job. It takes a half hour to change a water pump or whatever. And I don't . . . I'm not mechanic, so I'm not using a very good example here. But it's assumed that that's what it takes. Any competent mechanic can do it in thirty minutes.

We don't have those standards in our profession. I hope we don't have those standards. The fact is that you take ten defense lawyers and they're going to approach the same case in probably ten different ways. Some of the things they'll all do but some things they'll do differently. Quite frankly, that's what is the genius of our system, I think. They are not fungible. Some are rock turners as I call them. They want to turn over every rock, and others don't.

I think Judge Delaney and I have said the same thing, and maybe in different ways, but we're being asked to do something that is very difficult and that is to second guess, if you will, what individual counsel are doing, and how much is too much or how much is not enough. We recognize that each lawyer is an independent professional, and they do things their own way, and that's a good thing. When we have to then come in and second guess from the standpoint of the amount of money that's being expended, that's the tough thing. And I don't know there's an easy answer on that.

Judge Delaney: I think the one thing to our benefit is that we see the attorneys before us, and we see how they are able to handle their clients and their clients' defense. And so, there is a little bit of . . . yes, that particular panel attorney is charging a lot of hours for handholding, but that client needed a lot of handholding to be walked through the process. There certainly are times where I would look at it and I would say, "Yes, I know that's a very difficult client. I wouldn't even consider cutting that," which would be difficult for an outside agency to do. Not that I'm not happy to turn it over to somebody else as long as it's not a national situation.

There are idiosyncrasies in each district with each attorney, with each defendant, that a judge is in a somewhat unique position to regard. I don't say that that's the perfect system by any means, but it is one benefit.

Reuben Cahn: Thank you. Mr. Kalar, can I just ask you? Can you give me an example of some of the budget execution issues you were talking about, specific examples of what does DSO unable to make a decision about on its own that it should be able to decide on?

Steve Kalar: Certainly. After the work measurement formula, the steering group working with Mr. Jones, the head of PSIO, spent roughly two years devising a very complicated and a very sophisticated formula. That formula was designed based on the use of statistical year '14, 2014 data. We were very transparent about that. The formula was vetted heavily within the Administrative Office, vetted heavily, laterally, from Mr. Jones' organization up the chain, and his line of authority, and was very publicly discussed, and was a source of I think much relief among the defenders. Ms. Williams was also in the steering group. We worked hard to be very transparent about that.

Then when it became time to actually execute that formula and to actually allocate the staffing associated with that, it became a huge issue over which statistical year was going to be used, statistical year '14 or statistical year '15. There were differences in the number of cases that had marginally difference on the number of staff. I won't bore the Committee with the details. It was in my view a tempest in a teapot after this enormous collaborative effort, unprecedented collaborate effort.

I saw Judge Blake advocate vigorously, vigorously on our behalf as well as Ms. Clark and DSO to execute something that everyone honestly thought had been a given. Over a marginal difference that had huge ramifications for the trust and the confidence that the defenders would vest in the AO. The episode was so trivial, it's hard to even report it, but when I'm watching Chief Judge Blake fighting tooth and nail for something that was a given during the work measurement process, it impressed upon me, "What is the view of the judiciary as far as independence of the defense function when the respected chair of DSC has to fight this hard to execute something that everyone had assumed was a given?"

Reuben Cahn: I have a question for you Ms. Williams. I'm trying to . . . we've had a lot of discussion about Defender IT and in particular, the problems that are created by the management of the IT being separated from the operations as a necessity of maintaining the confidentiality of defense data. It sounds to me you are really pointing to a very different problem that that data, the aggregate data that I guess is in some way our billing data is not being managed in a way that it can get to DSO and to the AO for it to be used for the purposes it needs to be used for. Can you just elaborate a little bit, is what

I'm suggesting what you're describing, and if so, why is that not capable of being accomplished?

Heather Williams: I don't know why it's not capable of being accomplished. I mean, there may be another mechanism that we can go ahead and export the data by saving a file and just emailing it, but then it has to be input some place to go ahead and do some kind of an analysis. Why it's not being done? I don't know. It was being done before the change, and I don't know, and Mr. Kalar may have a better idea than I about whether or not in the JS-50s, those reports, whether or not they had used the Rand II data and this is something anomalous to DSMIS II or whether or not that was going on before.

But it didn't seem to be a problem before, it had never come up before, and now, it seems to be an issue. We had to go digging to go ahead and get an explanation. Defender IT Support Liaison was not forthcoming in publicizing it to the community, and then it ended up being Mr. Sands as the head of DSAG to go ahead and let the defenders know what was going on. I don't know if I answered your question.

Reuben Cahn: Yeah, I think you did. Thanks. Thank you.

Judge Walton: We've heard about the three-tiered system of representation of criminal defendants in the federal system, you being one of those tiers. We've heard about the structural concerns that you have at AO's office, but do you think the current system inhibits you as defenders from being able to provide quality representation to your clients that are fortunate enough to be appointed by you?

Heather Williams: Yes and no. When we got our budget allotment, they were 80% of what the full budget was that we expected. From the get-go, we have been conservative in making decisions about the office. When we're going to hire certain individuals given what the work measurement study has approved and looking out over the five years, whether this is a year where budget hasn't been passed? The sequestration was still another possibility, and being conservative in IT purchases, and furniture purchases, and still trying to court experts who would be willing to go ahead and provide the services at a lesser rate than maybe they were entitled to, but they so believed in the defense function that they were willing to go ahead and do that.

Looking at travel, looking at training in ways that we could go ahead and save money in case we weren't going to ever get the full funding. And so from my understanding is we haven't. Does it inhibit our abilities? We have our priorities. Our priorities are to represent our clients and to make sure our staff are trained and they have the tools that are necessary. Something has to go by the wayside. Sometimes that's the delaying hiring a certain position. Sometimes it's not buying furniture. There's a cost benefit analysis that's

constantly going on in making those decisions.

Hilary Potashner: I would agree with Ms. Williams that there's always a cost benefit analysis. We are a Public Defender's Office, and so money is always tight. We haven't . . . we did not do well, my office did not do well through the work measurement study. I appreciate the need for a national level, but on an individual district level, my office is projected to shrink and shrink pretty significantly. So I'm very worried.

We have old furniture, people work way more than forty hours a week, and people, we make do. Do we provide high quality representation? Yes, we do because of the commitment in my office starting from the front desk and going all the way to me. We have 200 and something people in my office, and everybody is doing it for other reasons than fancy offices, forty-hour work weeks, and high pay. We are able to do it, but we believe in the Cadillac defense, even for poor people. We believe in it. We do not think that a retained case should have a higher level of representation than our cases. And we work really hard to make that happen, but it is of course, a struggle.

Steve Kalar: Yes, your Honor. I believe that the structural limitations within the Administrative Office now negatively impact the quality of representation that my office can provide to indigent defense, not from the district level here, as you've seen, I enjoy a very supportive bench here in Northern California. It's not a funding problem. It is a mismanagement of resource and information problem. Here in this room are the four defenders of the state of California, the largest state population, and we collectively employ probably over 1,000 employees.

We are the executives of large law firms, and we cannot get accessible, reliable, transparent funding data to make business decisions. I have 10% of my staff currently are temporary employees, termed employees, fantastic employees that I would hire as a permanent employee in a snap, but I can't afford that luxury because I have a very difficult time projecting my billing and my funding, not from lack of congressional support, not a lack of funds, from the lack of information.
My primary concern is when I am projecting very significant expenditures for capital defense or I'm staffing a capital case, I'm constantly creating basically a shadow network of information that we, the defenders share among ourselves to try to project our weighted case open figures, our staffing figures, our funding figures. It's an untenable situation. CMSO is at the heart of that problem.

Rich Curtner: Well, being in a small district, small office, I think that I don't see the effect as much. I guess the metaphor I think of is a tsunami. If a tsunami is coming through California, it's going to come up to Alaska. If I have a small office, it might be diminished by that time. But I really do communicate with the

larger offices in how these budget issues are addressing their offices and affecting their offices because it also affects mine in a lesser extent.

Judge Walton: I am not unsympathetic to any public entity's desire and even need for additional resources, but I agree with the assessment that in my experience Defender Offices do provide Cadillac representation. Knowing a little bit living in Washington about the politics of Washington, I could see the powers that be saying, "Well, if Cadillac services are being provided with the resources that are being made available to Defender Offices, why you need more?"

Steve Kalar: We can't even get the information to defend a Chevy, much less a Cadillac. I think it's a dangerous proposition to do characterizations of defense. Every defender in this room provides high quality representation. We do that. We do our job because we believe in it. Because of the fundamental structural problems within the AO, we cannot provide that constitutional mission. I think it's not productive to quibble over how we characterize that representation.

At its core, the defenders cannot get the very basic information necessary to execute our job, and the panel, the panel are far behind us because CJA panel has, they have no idea what's going on. They don't have defenders with statisticians on staff doing the analysis.

Hilary Potashner: And if I could just add to the tiers, I think part of the tier analysis is comparing Federal Public Defender programs to CJA programs. I do think that there is a disparity of the representation between what happens from my office and what happens from the panel. It is not because we don't have excellent attorneys on our panel because we do. But my office, the lawyers in my office, the investigators, the paralegals, they are permitted to do more for their clients than the panel is permitted to do in my district.

It is because I understand what it takes to defend a federal case. I understand why it is important to talk to family members. I understand why it is important to sometimes get in your car and drive to your client's house rather than have your client take hours of bus rides to get to your office. I understand those things. I don't quibble with lawyers when they say they need to do those things in order to represent their clients, in order to bring their clients along in a really scary time, in a really complex case. I get it.

And so my office is given, and that is not necessarily very much money, but when the CJA panel is hobbled by not being to do those small things, that adds up. The totality is differentiation in the level of service. Characterizations aside, I think that the Federal Public Defender even on the restrained budget that the Public Defender's Office has is able to provide a more full service, higher quality representation because of those issues.

Judge Walton: As you probably know, there've been some who have advocated that if you take the authority away from the court that it should be placed with defender offices and I didn't see any visible signs of opposition to that other than you'd need additional resources in order to accommodate that. We also have heard some say that they don't think that would be a good policy because there are conflicting interest sometimes that defender offices have as compared to panel attorneys. What do you feel about that? Is that a legitimate concern?

Hilary Potashner: I think it's a legitimate concern. I also think it's something that can be addressed with ethical walls. I think it is possible for there to be a unit within the Federal Public Defender's Office to administer the cost and the funding of CJA cases. I do think there needs to be a separation. It can be in the Federal Public Defender's Office in my estimation. I also think it could be in an independent office.

Heather Williams: I agree with that. When I was in the district of Arizona in the late 1990s, they had a pilot project there where they hired a CJA lawyer who'd been practicing actually in your district, Cary Clennon, to come out for a year to basically do the reasonableness analysis that the judges had been tasked with before, and offer an opinion about whether or not the time being spent on a case was reasonable or not.

I don't know if that's translated now into some districts, for instance, as the Northern District has a CJA attorney on staff, no longer CJA but the go-to person, Diana Weiss, and before that, I understand it was Carrie Waters. They don't necessarily engage in that reasonableness analysis but offer opinions when judges have questions.

With Defender Services Office, there could be created a separate office that would go ahead and provide to each district or on a regional basis lawyers who have CJA private practice experience and who could formulate perhaps committees which would include somebody from the Federal Defender's Office. Other private lawyers in the community go ahead and do these reviews for reasonableness and get some outside opinions, even if the judges were to continue and make the final decisions.

I think there are lots of options and possibilities out there to go ahead and provide a more objective review that, by people who are experienced in the business, who have been in the shoes of the CJA counsel, to go ahead and offer educated and experienced opinions about reasonableness.

Judge Walton: There's at least one, there may be more districts in the country that don't have a defender office of any type. Do you think we should advocate that there should be a defender office of some type in all districts?

Heather Williams: Yes.

Judge Walton: Why?

Heather Williams: Because I see the level of representation we provide, and I hear the stories, for instance, from I think it's the Southern District of Georgia which has no defender office. I think it's the one in Savannah about concerns of the kinds of representation that only CJA counsel provide, and because of the political aspect perhaps of some the judges who are on the bench there and who then goes ahead and gets the cases in that particular district.

We serve many functions. Not only are we the first level of review for appointment purposes, but we provide so much support to that community of lawyers whether they're retained or whether they're CJA lawyers to go ahead and provide training, provide brainstorming which can sometimes be a real challenge when you're in private practice, and don't have somebody next door to go and talk about cases with or to update the panel, and those lawyers about changes in case law so they can be as effective assistance of counsel as possible.

We do so many things for every district that we're a part of. Even though we have differences, for instance, in the district of Arizona while we did the CJA appointments, we did not have anything to do with voucher review. I thought it was going to be a nightmare me coming to an office that does the CJA, at least the mathematical, as Judge Delaney described it, that first level of review.

But I've been so impressed with the panel administrator and the way he approaches, well, both of them. We have one in our Fresno office too, the way they approach the review with the panel, the relationship they have with the panel to be able to persuade panel to take cases when they have frustrations or when they maybe have full case-loads. I've been so impressed with the level of involvement that the panel administrators are able to provide.
That's a cost then that the court doesn't have to have. It doesn't have to be a part of the court's budget, but we're not getting any benefit additions to our budget by virtue of taking that administrative responsibility away from the court, but I think we provide an amazing service.

Judge Walton: One other question for the two judges and there may not be a response or adequate response to this but having presided over several high-profile cases including the Roger Clemens case, I mean, that wasn't a Cadillac defense, that was a Rolls-Royce defense. I think a lot of people feel that you get what you pay for, and a lot of criminal defendants and their families probably are going to legitimately believe that they're not getting the quality of

representation that they're entitled to because they're not having that same type of defense presented on their behalf because of fiscal constraints. Are fiscal constraints ever an adequate explanation to provide to the American public about why the Sixth Amendment seems to apply to some at some level and others at a different level?

Judge Delaney: Oh, thank you. You know, I think everyone understands that we live in a society where money does matter. But the premise that you can buy a better defense is one that I reject. At least from my experience, I cringe so often when defendants decide that they want to hire somebody just for the sake of hiring somebody, discounting the experience and the wisdom of our Federal Public Defender's Office. I would much rather see someone go with our Federal Public Defender's Office than going outside.

I worry when I go to the doctor that perhaps I'm going to the idiot who says, "Well, if you give me $10,000 then I'll give you whatever operation you want," instead of going to my insurance carrier or my preferred carrier who knows what he or she needs to do within the appropriate budget. So I'm not sure that answers your question, but I think the reality is experience and day-to-day interactions have an enormous value in our criminal justice system, and the Federal Public Defender's Office as well as the CJA panel, it's a remarkable value for the taxpayers' dollar in my view.

Judge Warner: I would just second all that Judge Delaney said. I was a huge advocate in the early years of serving as U.S. Attorney for the formation of the Federal Defenders in the District of Utah. The reason was that I saw such uneven representation that was coming against our office from the panel and from privately hired attorneys. Money did not seem to be the dispositive issue at all. Some people paid an awful lot of money for people who were coming in and really didn't know very much about what they were doing.

I agree with Judge Delaney. I'm very impressed with across the board the competence that we get out of our federal defenders. Yes, there are some who are better than others. There are some judges who are better than others. We all know how that works, but the fact is that there are many instances anecdotally, I'm sure that we all have them where we have seen highly paid attorneys coming in that really made a mess of things, whereas had they just stayed with a very competent federal defender they would have been much better off.

So, I think it's an easy argument to make that quality representation is proportional to the amount of money that we spend on it, but as we've heard from some of the other panel members, there are people who are being provided outstanding representation at some sacrifice by those who provide it, but they're doing so on very limited budgets. I don't think there's a direct correlation between the two.

Dr. Rucker: Thank you, Judge Fischer. I want to start with I guess one big question and an observation. It seems to me what we've been hearing in our public hearings and what we've heard yesterday and today, and are hearing from you as well is a lot of dissatisfaction with the way the structure of the system is, the way the system is working. Mr. Kalar, I want to thank you in particular for your five issues that you raised, and solutions for them. It seems to me whether it's pointing to stay within the AO, and what I'd like to do is pose the one billion dollar plus question.

Why keep it with courts? Why keep it within the AO if there's all these structural problems? They're so difficult to change. The judges don't like reviewing the vouchers. The panel in many ways don't like the judges reviewing the vouchers. Why not take it away from the judiciary? You said but totally different independent structure, so you can have your control over the IT. You can get the data that you need. You could go directly to the Congress and advocate for the money that you need, and not have to worry about resources. The panel members wouldn't have to worry about their vouchers being reviewed by the judges and the cuts. Is that too idealistic?

Steve Kalar: No, please do. I would be delighted. I thank you for the opportunity to amplify that my recommendations are the lowest common denominator. I would ask that please at the minimum include those recommendations along with other recommendations you may make. I have entertained the possibility that Congress may not actually enact legislation recommended by this Committee. Should that unlikely event happen, I think that these minimum recommendations are absolutely necessary.

I would like to emphasize that I am not making these recommendations and discouraging the Committee from considering other alternatives. As I mentioned before, Mr. Patton, my colleague in New York, has far more expertise than I on the details of those large structural changes. I don't want to make promises I can't keep. I do think, I know that the defenders are actively discussing the possibility of a larger community, a representation for the Committee. I'd like to continue those discussions, and hopefully, we'll be able to provide that later on the spring.

My . . . I've only had this job for three years. I've heard reference that the dog years it feels like many more years than three years. My very limited experience has not been in the legislature, it's been in the AO. Any limited expertise I may have, I'd like to focus on those necessary changes because I will represent without hesitation that every defender in the system agrees at minimum this has to happen.

Dr. Rucker: Any other defenders like to respond to that?

Hilary Potashner: I would agree with Mr. Kalar that it is a request at a minimum that the changes that he suggested be implemented. I do think that it is critical if we stay within the AO that DSO has much more autonomy apart from just re-elevating where their prior position was when it was ODS rather than DSO. I really think that DSO needs to be able to be the voice of the mission of the defense function.

When I, and I am newer to my job than Mr. Kalar is to his, but one small example I would give is what happened in terms of clemency. The president requested that petitions be filed for our former clients. We were told that we can assist in organizing them but we could not file on behalf of our own clients. There is something fundamentally wrong with that. If we stay within the AO, decisions like that cannot be made in the future, decisions that are contrary to the very mission of the defense function.

Heather Williams: The big I, independence is something that defenders do discuss. People have not made decisions. Some people are strongly in favor, some are strongly opposed. All the times that I've been part of the defender system, I have to say in delayed budget approval by Congress after delayed budget approval and continuing resolutions that there has been a certain amount of security and being part of the judiciary.

For all of us who grew up as part of that, we are loath to go out into the big wide-y world because we have this generally supportive umbrella that helps us and understands our mission. And it is when our mission is not understood, it is when we are not understood and our needs are not understood and our clients' needs are not understood that we then become tempted and asking to go out on our own.

It is not going to be a cost-savings measure to do that however, because the Office of Defender Services as it exists right now would have to increase incredibly in order to be able to support the Defender Offices and the CJA and this independent review of CJA vouchers that we're discussing here today. It's not going to be a cost-saver.

Dr. Rucker: I understand that. Mr. Curtner, do you want to . . . ?

Rich Curtner: No, I agree with all those comments. I mean, it's a really big issue to be outside of the judiciary that I agree with Mr. Kalar. These are the minimum changes we have to look at I think to support the system, the CJA Act right now. I mean, I can guarantee you that all of our offices are looking for the best bang for the buck. We looked at best practices, and we're looking at cost-effectiveness, but the best practices is our priority. The whole issue is, how can we get the bucks to give the bang that we think are the best practices for our clients?

Dr. Rucker: Okay. Thank you. I'd like to ask that of the judges as well. Would you like to see it kept within the judiciary or would you be glad to see it gone?

Judge Delaney: I worry that standing alone the Defender Services would be decimated, that at the end of the day, their voices would not be heard in the climate in which we live. I feel that now as imperfect as our system is with the Defender Services in the judiciary, at least what little voice the judiciary has and it is a little voice, I'm afraid, is at least speaking for the most part on behalf of the Defender Services.

If they were to stand alone, I fear that given the nature of their clientele in the political climate in which we live, it would be drastically worse than it is now. I don't disagree that there are significant problems in the system that we currently have set up, and particularly I'm sympathetic to the plight regarding the information systems. I think we're all hostage at this time to our information systems.

Having the Defender Services information systems held in the way it's being held, simply can't continue. I hope I don't offend any of my colleagues by being worried about setting you free, but I do worry. So I wouldn't be in favor of it for that reason.

Judge Warner: I don't have a strong feeling on it. My initial reaction is that there's probably lots of judges in the country that would be more than happy to be rid of it quite frankly just because there are numerous headaches associated with it. But I also think the law of unintended consequences may well play a role. That's sometimes difficult to figure out and project, but as has been indicated, there is some benefit of being under the umbrella of the judiciary. Once you're out from underneath that, there may well be unintended consequences that at this point are hard to see or hard to project, and I think we should be very careful about doing that without really exploring that carefully.

Dr. Rucker: Thank you. Let me ask one more question. I have a lot but I'm going to ask one more. One of the things that we've seen over the last few years is this huge explosion on e-discovery. We had Sean Broderick here and he talked about it, and Russ Aoki yesterday as well. It seems to be that Sean's office is tremendously underfunded. They only have three coordinating discovery attorneys for the nation, and he just doesn't have enough staff to begin to do the training that we need. Can your offices provide that training? Are you up-to-speed on that? Do the defenders around the country have the resources necessary to keep the panels and train the panels on this vastly changing technology?

Steve Kalar: No, and I'd like to explain why. During work measurement, the work measurement study, the judiciary explained to the defenders, "We are going

to carefully evaluate your work, and we're going to fund you based on your work." We learned that lesson. When defenders subsidize the defense of an indigent case by providing free e-discovery management without any corresponding increase on resources, we are subsidizing and hiding the true cost of defending these incredibly complex cases brought by the federal government, so no, we won't.

My office will happily take the lead defendant. We will do everything possible to provide and share information among the panel, but I think it's frankly irresponsible in an era of increased budget scrutiny not to fund the necessary tools required for the defense of large cases. The way to do it I would pose is to radically increase expenditures for Mr. Broderick's office or similar offices, populate those through the country. It would be a tremendous resource savings for everyone involved. But I have real concerns about hiding the true cost of those cases within a defender budget.

Hilary Potashner: We're happy to share our training with the panel. We train our lawyers in Summation and Case Map and other tools for e-discovery, and we're happy to continue to invite the panel to our internal trainings. We cannot function as CDAs for large cases. We represent a client in the case, and we go as far as we go with that client. If the case settles, we don't have the resources to continue to function in that manner, so it's not a tenable solution to put it in the Federal Public Defender's Office.

Heather Williams: I know of instances where the courts have gone ahead and hired its own paralegal to assist codefendants in helping to organize the large e-discovery cases, but that's only just the tip of the iceberg. I'm in the process of formulating a committee within my own office to try and figure out what to do with e-discovery in these massive cases, how to retain it so that we satisfy our ethical obligations to keep the clients' file together.

We're trying to figure out, Mr. Broderick is willing to help us out as are the people at NITOAD, to try and figure out protocols and means to best keep the e-discovery so that our clients have it accessible and available if they need it because they have future charges or there's changes in law or something wasn't discovered in the e-discovery. I mean, there's a myriad of possibilities that are out there that require us honestly keeping this, and keeping it organized and safe for the clients. It of course is going to mean perhaps more personnel. It certainly is going to mean more equipment and programs. So we're all going to be needing to deal with that.

Hilary Potashner: I just like to add something to this topic. I eluded to it in my opening comments. This is where the defense bar really needs the court's help and active intervention is in e-discovery. That's where on a systemic level the courts can help the defense in cost-containment because e-discovery, the way it comes to us whether it's organized or disorganized, whether it comes in

native files or not makes a huge difference on how we can manipulate it and evaluate it on the side of the defense. And it's the court that's in a unique position to force the government to present it to us and provide it in a manner that is the most user friendly possible.

Dr. Rucker: Thank you. Thank you, Judge Fischer.

Judge Fischer: Judge Cardone?

Judge Cardone: I have a question for the two magistrate judges. Judge Warner, what percentage of the cases of the defendants that come in front of you for their initial appearance, what percentage of those are retained versus appointed counsel?

Judge Warner: I don't have the exact percentage, Judge, but I have to tell you, it's very, very low in terms of retained. It would be less than 5% easily. I'm sure that it's maybe even 1% or 2%. We end up appointing counsel on the vast, vast majority of cases in our district.

Judge Cardone: How about you, Judge Delaney?

Judge Delaney: I think that's consistent. I was going to estimate 10%, but now I think that's too high. I think it would be more like 5% at most.

Judge Cardone: Ok, so, I love being on this Committee because my colleagues are tremendous, and Mr. Frensley just pointed out an article to me that was written in 1960s about the time of the implementation of the Act. I'm going to read you a sentence. "The comparatively small number of criminal cases in the federal courts, approximately a third of which will probably come under the provisions of the Criminal Justice Act, make the program both manageable and relatively inexpensive."

So. We're here studying an Act that has grown unbelievably large. I keep hearing, or we keep hearing repeatedly, that this is a service that attorneys should be providing. I heard Dr. Rucker's question about these mega cases. Are we just kidding ourselves? I mean, what are we talking about here? This is not a relatively small number of federal cases of which a third of which may need counsel that are indigent. We are talking about from what I can see a program that is financing federal defense against a huge government prosecution. How is this going to work? Any suggestions, Judge?

Judge Warner: I don't know that I got suggestions on how it works. I can only describe the problem. Obviously, and I was in the U.S. Attorney's Office for many years before I went on the bench ten years ago, so I bring a little bit of perspective than some of our fellow panel members. We've all seen the federalization of crime since the late '80s, the '90s and since, Congress has had a knee jerk

reaction to making street crime and other drugs, guns, you name it, federal crimes.

There was a time that I can still well remember when federal prosecutors were primarily white collar prosecutors. Now, the courts are flooded with immigration cases, gun cases, drug cases, and so forth. And so it's no surprise that we no longer represent the model that you described, and that these people who are coming in are indigent by and large and do need representation.

Nevertheless, there are still the very serious cases, the white collar cases, the mega-cases, and many of them end up needing representation as well because the government has seized their assets or frozen their assets, so they're just as indigent realistically speaking as the street criminal that didn't have anything.

It seems to me at least that, you know, we are dealing with something that's not going to go away. If anything, it's going to get larger. I know the Department of Justice has come out no too long ago with their smart on crime initiative, and I'm not sure what that means. In our district, the numbers dropped for a while, but we got a new U.S. Attorney, now that the numbers are going back up. So, yeah, I think that you accurately described it. I don't know what the answer is, but I do know this, and this is kind of going back what Dr. Rucker said. I was thinking about it after hearing this.

One of my concerns is that I don't think there's ever a lot of enthusiasm, for want of a better word, within Congress to spend a lot of money paying for people to defend criminals. Now, that may not be popular in this room or a lot of other places where we have a lot of experience in this, and we understand the Sixth Amendment, we understand the Constitution, and so on, but there's a lot of people in this country including a lot of people in Congress who aren't excited about that.

Judge Cardone: But let me ask you a question because I heard both of you and Judge Delaney say that . . . well, Judge Delaney in particular has a concern that the defenders, the defense function wouldn't make it on their own, they wouldn't give them funding. What would happen to all these defendants? They can't afford counsel. I mean, are they just going to stand up there and go . . . ?

Judge Warner: What would probably happen in my opinion, Judge, and I'm on pure speculation here is when we go back to the days when before we even had a panel or federal defenders, the magistrate judge would pick up the phone and call any attorney that they knew or could find and say, "Get over here at the federal court, and take this appointment." They might be a bankruptcy attorney, they might be a real estate attorney . . .

Judge Cardone: In a mega case?

Judge Warner: Pardon me.

Judge Cardone: I mean, that's not the world we live in. That used to be the world because there were very few cases, and they were relatively, they weren't complex, but now . . .

Judge Warner: But if we lose the funding, I suspect that's the last ditch alternative. One of the reasons why, as I think about it, I'm a little bit concerned about taking the funding out from under the umbrella of the judiciary because I think there is some protection there even though there's lots of problems we've heard about today, you put it in a stove pipe or standalone funding mechanism and it makes a lot easier for Congress or other groups to attack that as supposed to where it's currently sitting.

Judge Cardone: Okay. Judge Delaney?

Judge Delaney: I think what you would see is what our state colleagues have already experienced which is state public defenders who are wildly overwhelmed, paid pennies on the dollar for the number of hours that they are working, cases where judges are doing mass guilty pleas, it's not a system I think we want to devolve into. So I agree with your recognition of the fact that we have dramatically increased the number of defendants both because the cost of a private defenses increase and because the type of crimes and accused that we are seeing have much less income perhaps given the rise in costs, but it is a problem. There's no doubt about that.

Judge Cardone: All right. Thank you.

Chip Frensley: I have two questions. First to the judges, I'd like to ask, and I recognize that you may spend less time on issues related to vouches and things like that than some of your other colleagues, but I'm just curious if you can estimate the amount of time you spend in a week or a month or however you want to do it to give us some sense of the time burden that this places on judges being involved in this exercise.

Judge Warner: It's not a great deal of time, but it's regular if that makes any sense. Really, there's not a week goes by that I don't deal with some aspect of that, but I don't consider it to be, I don't think about my job and say, "This is a real time drain dealing with it," but I certainly recognize that it's very regular that I'm looking at some aspect of that.

Judge Delaney: For me, it's not a huge time drain, but I have heard from my district judge colleagues, the term I've heard is "unrelenting'" which is that there's just one after another after another. Some of these vouchers can go on for six, eight,

ten pages, depending on how many line items there are and attachments, and that sort of thing. You're supposed to look at each and every one of them, so it can be quite a time-consuming and unpleasant task.

Chip Frensley: Second question to Mr. Kalar, I'd like to direct this to you. We've heard a lot being in San Francisco, being here in the Northern District about the system that you all have in place with respect to the supervisory attorney. We've heard from the supervisory attorney, we've heard from panel members in your district, and we've heard from a judge in your district about that system. And I'll just ask you, if you could, to tell us what you believe is the . . . what is behind the perceived success of this model that you have, first. Secondly, if you believe it to be exportable, and finally, if you are going to be selling this, how would you sell it?

Steve Kalar: I throw in the rest under-coding for free, which is a joke I always make with the prosecutors when I'm trying to get them to do something unreasonable for my client. The origins of this I think success are my predecessor, Barry Portman. Mr. Portman and many of the judges you see portrayed here on this wall for the last twenty years have developed a system and a structure that developed these protections.

Why is it successful? It is successful because of the structure. This is not Shangri-La. We fight. This is a human institution, and we have sharp elbows, and big personalities. Ms. McNamara, very politely described a battle that was actually quite heated between myself and her, and the members of the bench where we were having a very, very frank conversation about maintaining a very valuable member of the CJA panel.

What permitted Ms. McNamara and I to advocate for that CJA member in a very heated conversation was not the relationship with the bench, although that helps, and we have as you've seen an extraordinary relationship. What permitted that to happen was the structure because that happened within a structure of a meeting where we were formal representatives and a formal context with understanding it was confidential. We were invited to give candid input.

Personalities are important, and I value the relationships we have, but relationships change. There have been relationships that were dysfunctional in this district before. The only thing that produced the success of that model was the structure that guaranteed the input.

And how I would sell it if I would sell it, I'm cautious about selling the model because I hate to impose on other districts, I would report what seems to work for us. What works for us is I have noticed from the structural system that when there is a very detailed defense involvement and the defense bar hears that our judges, their primary concern with the panel is

often the failure to represent, not overbilling, but under-billing.

That recognition that goes out among the leadership on the defense panel builds respect for the bench. When the bench as part of this formal structure or process sees that the defense community are sensitive to concerns about billing and representation and are responsible, I believe that builds respect from the bench to the defense community.

You can't transport a culture but I think you can transport the structures that produce that culture, and that would be my endorsement of this structure that I frankly inherited from Mr. Portman.

Judge Gerrard: Very well. It's probably a bad question to bring up at 5:58, but it seems to me that we may, and I emphasize the word may be conflating some issues with respect to the independence issue. I guess I want to know what that means from your perspective, and we have a great panel here to address that. I think there's little dispute that judges have the responsibility for case management in a case, but what does that mean? What does case management mean?

It certainly means managing reasonable deadlines. It means reasonably managing discovery, reasonably controlling pretrial and trial procedures, but does it mean voucher review? Does it mean reasonableness review or appointing CJA counsel or FPD for that matter? Does it means decisions with respect to appointing experts or ancillary services?

Rather than talking about whether the defense function, so to speak, whether the defense function should remain within the purview of the judiciary, maybe some of the issues that we should be talking about is what portions, if any, of the defense function should remain under the purview of the judiciary. Anybody have any reaction to that? In other words, just saying we need to take it and whatever it is outside of the purview of the judiciary, do we need to start talking about specific issues?

Hilary Potashner: I can talk to what I think shouldn't remain under the control of the judiciary which is decisions that impact and affect the strategy and the litigation, and the decisions that the defense makes in terms of representing the client. That part I think should not be controlled by the court that's adjudicating, and presiding over a case. I think that is pretty clear. In terms of initial appearance, you mean, initial appointment and looking at the financial, I'm a little more agnostic about that. But once a defense lawyer is appointed to the case, I do not think that the court should be in any way controlling the litigation being done by that defense lawyer.

Judge Gerrard: And I guess that doesn't even agree with my premise. I mean, maybe you agree, maybe you disagree with my premise, and that is should we be looking at individual issues instead of throwing out the baby with the bathwater? Should we be looking at individual issues? I guess I want to

know whether the premise is even accurate.

Steve Kalar: It is, your Honor. I refer back to my colleague, Michael Caruso who testified before the Committee in Miami. When asked about independence, he shrugged and said, "What is independence?" I think that it is a helpful exercise in this inquiry to be very specific. I think that Ms. Potashner gave an interesting example, and I'd like to offer another.

It is inappropriate for the judiciary to be actively involved in our budget advocacy with the legislature. We have a separate budget line item. We have very specific needs. We have a very responsible committee in charge of oversight with us, and I think the defenders have demonstrated that we have responsible, clear-eyed management perspectives on funding.

And so when there are budgets, and we're in the process of this now, when there are appropriation requests being designed for fiscal '18, and DSC and DSO and DSAG are not actively involved on those budget decisions. I think it's inappropriate. I think that many of the frustration that this Committee has heard from sequestration, from the firings, from the furloughs, frankly resulted from that interference.

Judge Goldberg: Thank you. I would cede the fifteen seconds we have left to Professor Gould.

Judge Fischer: Professor Gould. Go for it.

Judge Goldberg: [INAUDIBLE].

Prof. Gould: Thank you. You know enough to know that a professor can't be held to fifteen seconds on anything. One of the things I take away from this panel, particularly really from the defenders is the difference in the quality of representation or the kind of representation you say you can provide as against the limitations that some of the panel attorneys face.

So if we think this as being a gap of some sort, we can also imagine that that gap is larger or smaller in different districts. Indeed, the Committee has data— admittedly, there are some reporting issues that may be different—but the Committee has data that shows the rate of expert use service providers, investigators, paralegals, experts on up, varies considerably across the districts, across the country.

Certain districts, and a lot of them are represented at this table, have a much higher rate of use of experts than in other districts by the panel attorneys. Since I presume you as public defenders travel the country and talk to your colleagues, do you have a theory or an explanation for why those rates are so different in different parts of the country?

Steve Kalar: Yes, I think I'll speak first, Professor, I do, and I have suggestions for how to fix it. I think that . . . I'll start with an anecdote. Dr. Rucker imposed upon me and my Ninth Circuit colleagues a task to reveal the federal defender expert rates in the Ninth Circuit. And we howled, and we protested, and like good defense attorneys, the first thing we did is compare information against each other.

When we did that, I learned that I had inherited a frugality from my predecessor that was a source of scorn and derision from my Ninth Circuit defender colleagues. I instantly raised my expert rates, and I instantly saw better results. Now, my too low rates were not because of any malice towards the defense function. I had no idea what the standard was. Dr. Rucker inadvertently created a system where I saw what the going rate was. I think part of the problem is I don't think the district judges know what the going rate is or the panel is. What is the standard of care?

My first suggestion would be built in funding. Fund in every district the lowest quartile you have on your grasp and put a big red box around this and say, "This is the expected minimum expenditure on service providers," and just see what happens, because human nature being what it is, I think the districts and the panel will say, "We're supposed to spend this. This is clearly allocated for this purpose, and maybe we should spend it." I have seen that during work measurement that having those conversations with my colleagues about resources helps.

My second recommendation is to share the report data. I know that in this, well, I've heard in this district that when cases start to get a little dusty, the chief judge walks around with a case age report that, shares among the other district judges. And the next day, all my speedy trial continuances are denied, and the cases are on the fast track. I think sharing information even just internally within the district to show where people stand in the national quartile helps. It helps inform what is the minimum standard.

I think that teaching judges at the new judge college would help a great deal. As Judge Boulware testified today, I envisioned him teaching, what is the minimum standard of care for service providers at the new judge college, because I think he's incredibly persuasive, and he brings personal experience, and I think that would help.

I think this Committee should demand that those increased costs be defended, that this not be reapportionment or realignment of expenditures from good districts, from high districts to other districts, and have clear and clean data to defend that the necessary increased expenditures that will result from this.

And I think the Committee should demand a study, and a paid study, not

people doing this pro bono, and do an academic study on the returns for investments because I can report to you as a manager, I have seen the return on investment. If I have high quality experts, those cases often resolve early in the case, and then I pocket the difference. I think those anecdotes are much more persuasive if they're studied from the academy.

Prof. Gould: Please.

Hilary Potashner: I would guess in the Central District of California that our percentage is pretty high in terms of using experts and ancillary services.

Prof. Gould: It is.

Hilary Potashner: I would expect that it might be dropping a little bit as of recent. I would say that the differences you're seeing from different communities and different districts, it seems to me from what I've heard from watching testimony, it's the difference in the training experience of the panel lawyers depending on the district. I think that the panel lawyers in my district, many of them are extremely experienced, sophisticated federal practitioners and they know when they need experts, and they know when they need third party ancillary services. They will ask for them.

I think what you've heard from the testimony in the last couple of days is that the defense bar is getting a little exhausted in the amount of paperwork that it needs to do in order to get those. But I don't think that they're going to stop asking for them because of the exhaustion from the paperwork. I do think that we are losing based on the rates and also the delay in payment some experts off our list, that they're not willing to work for the panel because of the delay in payment.

In my office, I do experience sometimes that experts are no longer willing to work for the FPD, and so then it becomes a question for me, "Will I raise my rate to meet the expert or do I just go to a lower tier expert?" It's a struggle.

Prof. Gould: Would any of the rest of you like to add or . . . ?

Heather Williams: Can I add briefly because I was just recently appointed to the Ninth Circuit Capital Case Committee which actually is the mega-case committee that we've only focused recently on capital cases. Dr. Rucker is also part of the group that discusses matters. Something that came up recently was whether or not the ranges of payment for investigators, for certain kinds of experts should be increased or not.

We were blessed and that we have two case budgeting attorneys here in the circuit, and they had done a survey, and they shared that information with us, but as Mr. Kalar pointed out, I mean, that doesn't need to stop there. That

kind of information should be shared with all the judges in the circuit so that they have an idea that rates don't stay stagnant, and we need in order to go ahead and effectively represent, and maybe even in the long run save money as Mr. Kalar had found out, actually increase so that we get the experienced quality assistance that our CJA lawyers need.

Prof. Gould: Thank you. Judge Goldberg, you were right, fifteen seconds turns into ten minutes. Thank you, Judge Fischer. I'm done.

Judge Fischer: Thank you all for being here. As I've said before, please feel free to supplement your written testimony at any time by sending it to our website or our able staff, and comments can be submitted confidentially as well. We're not even halfway through with this project, but we have massive amounts of information that we'll be sorting through, but that doesn't mean that we don't want more [INAUDIBLE] . . .

Heather Williams: We can't hear you.

Judge Fischer: continue the dialogue with all of us and with the courts, and travel safely.