

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 1—Santa Fe, New Mexico

November 16-17, 2015

Transcript: Panel 1—Views from the Judiciary and a U.S. Attorney

Judge Cardone: The hearing is officially called to order. I am going to ask everyone to please silence all of your cellphones. This is the first in a series of seven hearings of the ad hoc Committee to review the Criminal Justice Act. My name is Kathleen Cardone. I am the United States District Judge for the Western District of Texas and I am chair of this Committee. Before we get started, I would like to introduce the other members of the Committee that are here with me today. I am going to start with those of, uh, the Committee that are a part of our first panel. To my right is Mr. Reuben Cahn, Executive Director, Federal Defenders of San Diego; Judge Mitchell Goldberg is here, United States District Judge, Eastern District of Pennsylvania; Judge Reggie Walton from the United States District Judge for the District of Columbia; and Mr. Chip Frensley, he is the National CJA panel attorney district representative. Also present from the Committee are members who will be participating throughout these two days of hearings. They include Judge Dale Fischer to my right, United States District Judge from the Central District of California; Judge John Gerrard, United States District Judge for the District of Nebraska; Ms. Katherian Roe, Federal Defender for the District of Minnesota; Dr. Robert Rucker, Ninth Circuit Assistant Circuit Executive for Court Policy and Research; Mr. Neil MacBride, attorney with Davis, Polk & Wardwell; and Professor Jon Gould, our reporter from American University. Joining us by video and email is Professor Orin Kerr from the George Washington University Law School. Also, please let me introduce the staff of our Committee who include Ms. Arin Brenner, Ms. Autumn Dickman, and in the back, Mr. Mark Gable.

This Committee is pleased to be conducting the meeting in Santa Fe in order to coincide with the Annual National Assistant Federal Defender Training. Our desire in doing so is to have the opportunity to hear from some of the participants of that training conference and to better take advantage of this gathering of assistant federal defenders to focus on all matters before the Committee. In particular at this first hearing, the Committee will be having a focus on issues involving the border, issues involving the training of criminal defense attorneys, and issues involving Native Americans.

Now, just a brief history of the Criminal Justice Act. The Sixth Amendment guarantees to the accused the right to counsel in a serious criminal prosecution. To ensure that representation, it is now well-established that after assessing the financial condition of the accused, the government may bear some or all of the cost of the representation of that person. The responsibility for appointing counsel in federal criminal proceedings for those unable to bear the cost has historically rested with

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the Federal Judiciary. In 1964, the Criminal Justice Act or what we call the CJA was enacted. It established a comprehensive system for appointing and compensating lawyers to represent defendants financially unable to retain counsel in those federal proceedings. It also authorized reimbursement, a reasonable out-of-pocket expenses and payment of expert and investigative services necessary for an adequate defense. Amendment to the CJA in 1970, authorize[d] districts to establish Federal Defender Organizations as counterparts to the federal prosecutors in those districts, where at least 200 persons annually require appointment of counsel.

It is now more than fifty years since that CJA was enacted. There are approximately eighty-one authorized Federal Defender Organizations who employ lawyers, investigators, paralegals, and support personnel. They serve over ninety of the ninety-four judicial districts. Those Federal Defender Organizations in combination with more than 10,000 private panel attorneys represent the vast majority of individuals who are prosecuted in our federal courts.

In April of 2015, I and my fellow Committee members had the district privilege of being appointed by Chief Justice John Roberts to serve on this ad hoc Committee to review the Criminal Justice Act. In doing so, Chief Justice Roberts listed fourteen specific issues for us to review. They include areas of judicial involvement in the CJA process, employment and compensation under the CJA, quality of representation under the CJA, and the structure and effectiveness of the CJA. This is not the first of a kind study. Judicial conference policy has long supported a periodic, comprehensive, and impartial review of the CJA program.

In 1967, the judicial conference and the Department of Justice gave Professor Dallin Oaks the responsibility of performing such an analysis. Then in 1993, a report authored by the committee to review the Criminal Justice Act which was chaired by Judge Edward Prado was presented to the Judicial Conference. It was a 212-page report and it described the historical evolution of appointed counsel in the federal courts as well as presented detailed findings. It made twenty-eight specific recommendations to improve the CJA program to include selection, training, evaluation, and compensation of panel attorneys, the establishment and management of Federal Defender Organizations, CJA funding, and improvements to the administrative structure. Many of the Prado review committee's proposals were endorsed by the Judicial Conference.

It has now been over twenty years since that report. This Committee is very thankful for all of the work that has been done by our predecessors and in particular, we wish to recognize Judge Prado who is an ex-official

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member of this Committee. He is not here with us today because his position on the Fifth Circuit Court of Appeals requires him to be elsewhere. However, he will be present at our future hearings and his help in framing the work of this Committee has been invaluable.

I want to address for all of you a little bit about the framework of this study. The study is expected to be completed in the spring of 2017 when it will be presented to the Judicial Conference of the United States Courts. Between now and then, this Committee with all of its collective experience and the views of all of its members intends to gather information, examine the CJA program, debate the issues, and after thoughtful consideration, make its recommendation to policymakers. These findings and recommendations will be documented and explained in a written report. The report will be prepared by none other than our reporter, Professor Jon Gould. It is the Committee's hope that in today's world of computers, email, websites, we are able to sufficiently reach out to all stakeholders and give them the opportunity to provide us with ample information to document our study. For those of you who are not aware, the CJA Committee has set up a website at cjastudy.fd.org which allows anyone to inform themselves about this study and to submit comments.

The Committee will be conducting a series of seven public hearings. This series of seven public is an effort by the Committee to hear from a broad spectrum of individuals and organizations and to engage them in discussion of these issues. The seven public hearings will be as follows: November 16th and 17th, 2015 right here in Santa Fe, January 11th and 12th, 2016 in Miami, Florida, February 3d and 4th, 2016 in Portland, Oregon, March 2d and 3d, 2016 in San Francisco, California, April 11th and 12th of 2016 in Philadelphia, Pennsylvania, and May 16th and 17th, 2016 in Minneapolis, Minnesota. We are hopeful that the criminal justice community will come forward to present their views. All of these hearings will be transcribed for the public record and today's hearing is currently being broadcast live through our CJA study website, again at cjastudy.fd.org.

Okay, we are going to get started. Now, sorry I forgot Birmingham, Alabama, thank you. [LAUGHING]. That's why we are a Committee here. Um, and I do not recall the dates of Birmingham but we will also have a public hearing in Birmingham, Alabama. I apologize.

All right, so we are going to get started. We have our first panel already seated and ready to go. The panel participants include the Honorable M. Christina Armijo, she is the Chief Judge here in the District of New Mexico; Honorable Judge Raner Collins, again Chief Judge in the District of Arizona; Honorable Vicki Miles-LaGrange who is not with us but will be appearing by video, she is from the Western District of Oklahoma; and

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in her place, I believe Ms. Susan Otto will be here to answer any questions; Honorable Robert Junell, a Senior Judge from the Western District of Texas; and Damon Martinez, the U.S. Attorney from the District of New Mexico. So, um, we have our four-panel Committee members to begin our questioning and we will begin with you Mr. Cahn.

Reuben Cahn: Judge Collins, I would like to start with you and ask if you could talk a little. You have been a member of the Defender Services Committee for some time which is chiefly responsible for the administration of the Criminal Justice Act but things have changed over the last several years. Jurisdiction over staffing has been removed. We have been through sequestration. There has been a new study that now controls the staffing of the defenders nationwide and I would like to know if you could talk a little bit about how that changed the role of the defender services and how you feel it affected your job as a committee member and its ability to uh, to direct the program and to achieve its aims.

Chief Judge Collins: Let me say, first of all, I speak for myself and not for committee as a whole as I haven't gotten their permission to speak on their behalf, so I'm speaking as a judge from Arizona, and also I am a member of the committee, but I speak for myself.

Uh, over the last, I have been in the committee for um, I guess five years now and when I first started with the committee, it was a directorate with the AO, and the chair of the committee . . . when Cait Clarke now has a position, but her predecessors was a director, and now she is more like a department head, and that has had some interesting aspects to it. It takes a little bit longer how to get some answers about what things are going to be and things such as at having the budget now being primarily run by judicial resources has been also something is very interesting.

Um, we spent our time learning and knowing what happens in the Federal Public Defender's Office and what happens in the CJA. To give you an example, several, two years ago, a year and half ago, we were able to look at our experience and know that if we did not cut the rate for CJA lawyers um, that we, if we just wait for the end of the year more than likely the numbers had balanced out and that the lawyers will, will still get the money if they were entitled. Instead, it was over our head, was done and that rate was cut and low and behold, we had money to pay the lawyers, the rate, at the end of the year as we thought we would have so those types of things had happened over the last couple of years and now, the budgetary process has now become more about numbers than anything else and that makes it very, very exasperating.

Reuben Cahn: [LAUGHING] I think I understand some of your exasperation. Do you have, I mean, so you've been looked at, that, that you know, the Criminal

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Justice Act from perspective of a member of the Defender's Services Committee for a while now, do you have any thoughts on ways in which the structure could be improved to allow better administration?

Chief Judge Collins: Two thoughts about that. Number one, I have heard people talk about having the CJA Act and Federal Defender' . . . as a stand-alone organization. I'm not sure I'm in favor of that because if they have to go to Congress themselves, and carry their own water to get their budget, I'm not sure they're going to get the budgets that they are used to getting it that they have gotten in the past, that's my word. But I do think that we can set up a system where um, there could be a plank so to speak, under the judiciary but there would be a plank where it is separately administered to, by people who have uh, more knowledge about federal public defender's and CJA, more knowledge about how cases go, more knowledge about what's reasonable or what's not, things such as at and I think there's a separate, there's a way to separate system where it could be that administered, while there would be an overall AO head, it could be administered separately and rather than having, for instance, when we do a voucher review, at this point in time. You know, there are over 600 district court judges that review vouchers . . . not counting magistrate judges . . . and they had to do it with their own different way. There's no one way that everybody does it. Those types of things could be more streamlined and more uniform.

Reuben Cahn: Do you see centralizing as functions with voucher review functions?

Chief Judge Collins: I would love to see that. I love to take myself, a judge, out of it.

Reuben Cahn: [LAUGHING] I understand, I don't want to take up all the time . . .

Judge Cardone: Well, let me say this, um, I know that each of you have prepared written statements and so, I would like to give you the opportunity to present um, from each of your perspectives, um, I think that will help in asking some of other questions uh each of you the opportunity to go ahead and present your statements or any kind of opening remarks that you would like to make so let's start with you Chief Judge Armijo. Did you have a prep, prepared statement or statements you would like to make an opening?

Chief Judge Armijo: Yes I do, thank you and welcome to the District of New Mexico.

Judge Cardone: Thank you.

Chief Judge Armijo: Everybody, sorry about the weather today but [LAUGHING] we need the moisture. Um, in reviewing the criteria here that was sent by the Committee, I identified three areas that I think are crucial as I see it. One is training, uh, training not only in terms of skills or enhancing skills of the

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attorneys but uh training in, in this loosely described turn of cultural sensitivity.

New Mexico is I noted in my written statement is the fifth largest state geographically in our United States but it's one of the smallest in terms of population and uh so a vast majority of our population is a rural population and within the District of New Mexico, the state of New Mexico, we have nineteen independent Indian pueblos. We have two Apache tribes in part of the Navajo reservation on the west side of the state. Uh, many languages are spoken here other than English and other than Spanish. Our court has a certified Navajo interpreter, certainly several certified Spanish interpreters. I, as a jurist, have been challenged on more than one occasion in criminal cases where we have criminal defendants who request an interpreter but yet it not Navajo and it is obviously not Spanish and we, we often have used lay people who volunteered. The both sides have agreed to uh, to be able to perform that function but to come to court for the first time in that role, it is very intimidating as it would be to a juror for the first time or witness in the case and I have reached out to the University of New Mexico Law School and specifically had a conversation with Professor Barbara Creel who is going to be here tomorrow and will address this uh Committee. She is with the indigenous people's program at the law school formally the Indian Law Center and suggested that perhaps in a collaborative effort with the court, in our court interpreters, supervisors that we uh, train people there, uh, give them some basic training about what it is like to be in the court room, to be in that kind of environment so that when the time comes, to utilize a person who is a non-certified person but used in the role of interpreter, that person will be much more comfortable and be able to do that job. That is a challenge here in the District of New Mexico.

The other point of this is, is quite interesting. Uh, uh, our interpreters uh, Spanish interpreters are posed with very unique challenges and folks that come across the border in criminal proceedings and I can remember a lesson taught to me and it was uh, uh, a gentleman who would come over and he was caught stealing cattle and for some reason, it wound up in federal court in our Las Cruces court and he was a Tarahumara Indian from the mountainous region of Mexico. He could not understand why that was a crime because in his culture, everyone owns animals, in common, right? It is part of the right of nature and it was a very difficult challenge to be able to work with this person to convince him that here, that is a crime for which it can be punished and potentially very severely, so I think that culture sensitivity often times is, is something that is needed with respect to many of our, our defendants who had crossed the border but also with respect to our Native American community and I say that uh, uh, based on the lesson that I learned . . . Professor Creel asked me to speak at the seminar that she put together last year and it was a seminar for

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lawyers actually taught by court.. by interpreters not the other way around and she brought together a very diverse group of interpreters who actually spoke based on their unique one-on-one relationship with their various clients or the defendants over the course of time and how important it is to be able to understand so much more than just the statute all right, in terms of assisting that person and understanding why it is he or she is before the court and so, so the term culture-sensitivity came to mind and I think that we can do a better job perhaps reaching out to, to the law school.

The other area that I wanted to address is mentorship. Shortly after I became chief, I put myself on the CJA Committee along with one other judge and we made some changes and I think it had been good changes, they have been well-received and one of the things that has been noticed is that uh attorneys who potentially are very capable, lack the expertise of the courtroom with more seasoned attorneys and they are on our panel and I would like us to see a way to initiate and inform the mentorship program so that someone with, with not a great deal with trial experience, courtroom experience can uh, be mentored by someone who has that experience. I think it would have overall enhanced the, the performance, the value of the attorney in the courtroom.

In the third area, is a need for more federal public defenders. We survived sequestration somewhat, our court house doors never closed. Uh, we as a district did not have to furlough anyone but I know the public defenders suffered greatly. The U.S. Attorney's Office, Mr. Martinez' office was impacted severely as was the United States Marshal. Um, our public defender, Steven McCue announced a week ago that the judicial conference had approved fourteen new positions in the District of New Mexico and we are very optimistic that he will fill each of those positions but I sense that there may be some hesitancy on his part because of the fear of another sequestration and the fear of having to then perhaps furlough people or even let people go but the need is great and I hope that uh, whatever can be done to encourage a stability and ensure that uh, when you're given fourteen new slots or ten new slots or six, then indeed when you um, make those appointments . . . so those folks are going to be available to um, ah, to serve uh, our defendants.

So those are the, the three areas I think training, uh, in the area of mental health is . . . just a bottom line to me, it is, uh, the basis of so many of our problems in the district of New Mexico, uh, the um, the Department of Justice right now is monitoring the Albuquerque Police Department, uh, because of very severe problems, so many of those cases have come to federal court and what we have found is a district as that especially with respect to our Native American community. There are significant mental health issues, uh, that are there despite the uh, the behaviors of that, the uh, bring someone to court. The power point that I will not show here but

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is in written form um, I chose because I want you to understand what it is like in the District of New Mexico, not just a border district but a district that has a very uh, a very beautiful, very um, very wonderful Native American population but we also have the challenges that come with the rural-ness of our, of our district. Thank you.

Judge Cardone: Judge, uh, Chief Judge Collins, did you have uh, statement?

Chief Judge Collins: Well, I would say this as I indicated uh, I speak as a, as a, from a, on my own behalf and not uh, on behalf of anybody else. I'm in the Ninth Circuit as you all may know. I think that's a very unique circuit and we have some very unique uh, jurisdictions in the um, the Ninth Circuit. In Arizona we have some of the same issues, with Native Americans we have the issue with Spanish speakers, and we have so many dialects that come through Triqui, Ch'ol and things such as that. I have been dreading a trial I suppose I have in December with a Ch'ol interpreter. Who only happens to speak Spanish herself, so it's gonna be from English to Spanish to Ch'ol, Ch'ol to Spanish to English. And that was gonna be very difficult. I just got told today it's pled out. So I'm very happy about that.

Judge Cardone: Um-hum.

Chief Judge Collins: But uh, I think that the overall, the Federal Public Defender system itself is a good one. I think that the AO does a pretty good job of making sure the funds go where they are supposed to go. I think oh, within the past few years they did a very good job walking the federal public defenders to their budgetary process, where they have been able to hold their hands, if needed be. Ah, I think now with what has happened with the judicial resources taken over uh, primarily the budgetary function I think such that I'm not sure that, that knowing a particular uh, defender's office is, is going to carry through. I think that's something that we had lost and we need to get back.

Um, I think that the Federal Public Defender, if I had my choice, I'd have every case handled by someone from the Federal Public Defenders Office. Why? They are consistent. They may not be flashy, they may not be a 'Racehorse' Haynes so to speak, but they are always good. They always do a very, very good job and they always know what is happening in their courthouse. CJA counsel, they also work very hard, but sometimes, the difference between one CJA lawyer or another can be stark sometimes.

Um, and we have some CJA lawyers who read every word on every document on every page. You have some who glance on, to look for their defendant's name. You have some who seem never to visit their client more than once or twice. Some will seem like they are out there every day. And that's always a very unique challenge for a judge to make a

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decision but more than that, we get down to paying the voucher. Uh, what's been done has been reasonable and necessary in a, in any particular case.

Uh, I think that the system suffers when judges have an ability, in a case they really don't know that much about to determine how much CJA counsel is going to be paid. Uh, uh, at, at the end of the day. And, I think that has unique uh, aspect sometimes as to how hard a lawyer does their work, uh, trying to determine whether or not, if I do this, if I do that, am I going to get paid by the judge at the end of the day. Thankfully, most of the lawyers do the work that they think is necessary anyway . . . that's very thankful that they do that. Ah, the other thing I would say, uh, in opening remarks is this. Um, judges, as a whole, don't get trained on how to review vouchers. We all come with our own nature of how things should be. If we represented people in the past, great. If we didn't, we tried to learn on the fly and all things there becomes very, very difficult for the defense counsel, particularly CJA, to put on a good defense. And the federal public defenders have their own budget, they can pay their own experts, they can hire the people they think that they need but a CJA lawyer has to come to the judge. It is usually the judge who handles that same varied case and they have to say, "judge, I need so much money for an expert." The judge says, "That's too much money. Find a cheaper expert." Now I think that has a great impact on sometimes, the overall uh, uh, amount of justice that can be entered. And it can be frustrating, because most of our cases, you all know end in change of pleas. So, for our lawyer to work for four, five months on the case and then submit a bill for thirty, forty, fifty thousand dollars and will result in a change of plea. Sometimes, judges eyebrows go up when that happens, and so I think that there should be a way that we can do a system where you can take the judge out to review process, take them out of the expert appointed process also, those are my opening remarks.

Judge Cardone: Judge Junell?

Judge Junell: Well, thank you for coming out to the Southwest, and even though I'm from Texas, I went to school at New Mexico Military Institute here in Roswell. Well, my parents did something about the word incorrigible as they dropped me off there. [LAUGHING].

Um, as a Senior Judge of the United States District Court for the Western District of Texas, uh, and by the way, I've had no one nominated to replace me yet in my other uh, in my judgeship. I serve in the second largest district in the United States. I have been the only presiding judge for the Midland-Odessa Division and the Pecos Division for almost thirteen years. The biggest issue that we have out here, one that makes us unique is that in the Pecos Division, it is larger in land than eleven states.

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That's one division. Ah, it is half as large as thirty-one states and larger than sixty judicial districts as well as having a 500-mile border with Mexico. This is one division, not a district. Ah, the distances within the division create serious obstacles for litigants participants in the overall due process in the federal court.

Um, as we said, there is not a lot of people that live out in west Texas but there is a lot of people coming and going. And when you have two interstate highways going through the Pecos Division and the 500-mile border with Mexico, um, it creates a lot of traffic primarily in the drug trade and the illegal aliens coming in, coming into the country. Um, the vast geography that comprises the Pecos Division resulting impact of that physical location to Mexico is a significant factor, uh, and the statistics for 2014 calendar year both in the Midland-Odessa Division and the Pecos Division uh, we had 776 criminal cases in those two divisions combined, 1032 criminal defendants and I'm the only judge for those two right there.

Ah, I've tried 382 jury trials uh, since I came on the bench in 2012, and the majority by, well didn't go back and count that, what the division was, but the majority, vast majority of them, are criminal cases. Um, defendants are kept in several county jails spread across the division which causes another issue in transportation getting both the defendants to the courthouses but also for the lawyers to see.

There are only twenty lawyers on the CJA Panel for the Pecos Division. Out of the twenty, only one lives in Pecos, nine are spread throughout the Division and ten live and practice in the Midland-Odessa Division which is approximately 100 miles east of Pecos. We have four lawyers that live in Alpine, Texas which is where Federal Public Defenders' Office is. Most of the defendants are Spanish-speaking which adds even more demands on defense council.

Judge Orlando Garcia is going to testify tomorrow who is in the Western District of Texas out of San Antonio and one of the things that he says is, I urged and I agree with him, "I urge the commission to avoid in general one size fits all prescription for reform. What works in Philadelphia will not work in Pecos, Texas. What works in Pecos, Texas will not work in Los Angeles, California." It is just so the practice is different, just because of the size, the geographical area and what we have and the type of cases that we work on and what we have for available lawyers that are there.

Uh, I would also urge Commission to focus on practical solutions to the problems we face which I know you will. And these can make a real difference in the defense of thousands of individual defendants. And I have attached a number of, of exhibits, just kind of showing statistics and maps and things of that but, you know when a lawyer has got to travel, uh, two or three hours to get to the court house, which can make, which can

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occur, uh, it, it, it's tough. And uh, we talked about you know, I looked at all these bills. I've not had any trouble, I, I don't know, maybe a lawyer just don't say it to me but, but the only problems I have with bills, um, for the lawyers and for their, um, for paying them for their work is, um, in habeas capital cases which being in Texas, we have a lot of capital cases and that's why I have seen the real issue coming up and of course, our report get graded by the Fifth Circuit because there is a judge with the Fifth Circuit that reviews those as well but that's where the real issue has occurred is on habeas cases. For me personally, in dealing with those and expenses in those cases.

I am going to throw an idea out and it may have some value, it may not, and being someone that, our expenses are not very high but hours are a lot, is that you know, we have different hours for judges per diem and we go from one town to another town to another town per diem. You know, per diem in Santa Fe I would think is higher than the per diem is Pecos is. There is a reason because people have looked at that cost in doing that. I would suggest that those costs, you know, doing the practice may be more, it may be higher in Washington D.C. than it is in Midland, Texas or Pecos, Texas or something like that and that's an idea that someone might want to throw around and look at that but again, my big issue is that it's not a one size fits all because our courts are not one sizes, so.

Judge Cardone: Mr. Martinez.

Damon Martinez: Um, thank you and uh, members of the Committee, I want to thank you for the privilege to be able to speak before you this afternoon. And uh, as the Chief Judge has already said, welcome to New Mexico. Um, your Honor, I do have a prepared statement that I would like to read at this point.

The U.S. Attorney's office for the District of New Mexico appreciates the work that Committee is doing to ensure that the CJA program provides financially eligible federal criminal defendants with effective representation. Given the specific characteristics and circumstances of each judicial district, the district courts need flexibility in the way that they administer the CJA program and address specific issues in their districts. To that end, we appreciate the Committee's efforts to engage in an open dialogue with the U.S. attorneys on the effectiveness of the programs in their districts by inviting us to testify at field hearing such as this one.

After speaking to prosecutors at the U.S. Attorney's office here in the District of New Mexico, we offer the following thoughts on three issues: First, the vetting process for the appointment of attorneys; second, the process by which retained counsel may later receive court appointment;

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and third, e-discovery. We recognize of course that the courts have responsibility for and control over the CJA program and we make these suggestions in the spirit of cooperation and collaboration.

So first, the vetting process. As the Committee is well aware, the continued vitality of the CJA program is directly dependent upon a selection process that ensures both a diverse and well-qualified panel of attorneys. This is particularly true in New Mexico where the federal judiciary is called upon to hear a wide and unique range of criminal cases. The docket in the District of New Mexico includes not only those matters that form the core of the federal criminal practice, white collar, public corruption, national security to name just three, but also includes a robust immigration, Indian country, and narcotics practice. This far-reaching mission mandates that the CJA panel be well-versed in divergent areas of law, the sum total of which is so generous to New Mexico. It is not just the cases that make this district unique.

New Mexico is a land with a diverse, multicultural population, all of whom celebrate firmly rooted traditions steep in a rich history. The CJA panel can and should reflect the demographics with the people it was created to represent. To accomplish these intertwined goals, the U.S. Attorney's office recommends that the vetting process should include input from all parts of the court community including the U.S. Attorney's office, the Office of the Federal Public Defender, the U.S. Marshal Service, and the U.S. Probation Office, in order to give the court a well-rounded assessment of a candidate attorney's qualifications. The qualifications the courts should focus on should include or not necessarily be limited to a candidate's federal court experience, trial experience in general, ethics, integrity, and client service.

Similarly, rigorous review processes are critical for the periodic reassessment of CJA attorney's performance and continued participation on the panel. The Committee may wish to consider a system of tiered levels of renewal, where, for example, attorneys with the highest rating are renewed for three years. Attorneys with an average rating are renewed for two years, and the attorneys with the lowest acceptable rating are renewed for a year.

The second point, the court appointment of previously retained attorneys. The U.S. Attorney's office recommends that the Committee examine how a retained attorney may later, when appropriate, receive a CJA appointment in a particular case. In some cases in the District of New Mexico and around the country, private defense attorneys are requested an initial retainer from a defendant, exhausted those funds quickly and then sought appointment under the Criminal Justice Act on the grounds that the client was now indigent. This scenario can serve to erode public

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confidence in the Criminal Justice system. Court appearances aside, this can be problematic if it allows a retained attorney to jump the line and receive a court appointment in the specific case. In more cases than other similarly qualified CJA attorneys or in the case where the attorney is not on the CJA panel. Moreover depending on the size of the initial retainer, this practice may also lead to compensation that significantly exceeds the CJA rate over a life of a case.

Third point: e-discovery. The evolution of federal litigation has witnessed an exponential increase in the volume of discovery in many cases. This, in turn, has fed the need for U.S. Attorney's offices to turn to e-discovery to help manage sometimes overwhelming quantity of discovery associated with some cases. On top of that, the Department of Justice has recently enacted new encryption protocols that dictate how electronic discovery can be distributed to defense attorneys. With this in mind, practice the Committee may want to share with the courts if the use of a court-appointed discovery coordinator in cases with a high volume of discovery. Such a coordinator can assist the CJA attorneys in handling discovery, especially e-discovery, reduce the need for CJA attorneys to rely on the government for technical assistance, and most important, provide the defense with a central line of communication with respect to discovery in large cases. Any such coordinator should be skilled in using discovery software and processing various media for doing, downloading, and duplicating electronic products.

Your Honor, in conclusion, I very much appreciate the opportunity to share my office's thoughts and suggestions in the CJA program and issues that significantly impact a defendant's right to effective representation in our criminal justice system. This concludes my statement.

Judge Cardone: Thank you. All right, I believe we have Judge Miles-LaGrange by video and so, if you will give just a second, I think we are going to hook that up so that we can all watch her comments.

Via video

Chief Judge
Miles-Lagrange: Good afternoon. My name is Chief Judge Vicki Miles-LaGrange of the Western District of Oklahoma. Thank you so very much for this opportunity to speak with you about the Criminal Justice Act. My experience with the CJA began when I served as United States attorney for the Western District of Oklahoma. I saw firsthand the importance of having qualified counsel available to represent indigent defendants who are facing criminal charges that carry significant terms of imprisonment and the loss of civil rights. As of the 28th of this month, I have served for twenty-one years as a United States District Judge for the Western District

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of Oklahoma. My tenure as the Chief Judge ends this month. As a judge and especially as the Chief Judge, I have experienced the Criminal Justice Act at work, both in the federal prosecutions and the federal habeas corpus review component of our state capital habeas cases. During sequestration, our court continued to function despite the lapse in funding for the Federal Public Defender Office in part because the lawyers volunteered their service without pay to address the funding shortfall.

The CJA panel attorneys continue to serve through payment suspensions that occur with unfortunate frequency, adequately funding a defense function on the large national scale and in individual cases is crucial to enforcing a constitutional right to counsel recognized by getting it. The necessity and value of the Criminal Justice Act system is really beyond question. The question moving forward is how to make the system better. My comments today are focused on the interface between the judiciary and the administration of the Criminal Justice Act. In the Western district, we have a traditional Federal Public Defender Office and two separate panels of CJA counsel. One, for the regular district court cases and one for the capital habeas cases. Finding and retaining a highly qualified group of attorneys to serve on these panels depends on four fundamental elements.

First, adequate funding for both counsel and supportive expert in other services. Second, prompt payment of claims without inappropriate voucher cutting. Third, an appointment system that ensures the attorneys are appointed often enough to cases they are well-qualified to take and fourth, training that helps the attorneys stay current with the law and related areas. Judicial officers are involved directly in the first two elements of the system. While oversight and accountability are important, we should consider delegating approval of case budgets, a request for expert and other services, and approval of interim and final voucher payments to a judicial officer other than the judge presiding over the case. We have just such a case budgeting system in place for our capital habeas corpus cases.

Insulating the judge who will hear the case from the monetary aspects of the case could have several positive consequences. For example, the attorney requesting expert and other services would not have to discuss defense strategies with the judge who will hear the case. Requiring the attorney and the judge to carry on these conversations places both parties in an awkward position. An attorney might be dissuaded from requesting funds and a judge might be dissuaded from approving the use of funds out of concern that the investigation will not yield useful evidence or out of concern about the national budget or simply because such there is no precedent in the jurisdiction or such a request. Discouraging advocacy by withholding necessary funds is contrary to the history and the purpose of

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the Criminal Justice Act. Asking a judicial officer who will not be deciding the merits of the case to consider these requests will promote the independence of the defense function by adding a buffer between the presiding judge and the advocate. Judicial officers who engage in similar case budgeting develop an expertise that benefits both the court and the advocates. By engaging in the process of approval before the expenditure is incurred, the chance of unwarranted reductions in vouchers at the end of the case is reduced dramatically, if not removed all together.

Finally and perhaps most importantly, the goal of equal access to justice will be advanced by establishing a system that allocates funds fairly and responsibly. We should consider an amendment to the Criminal Justice Act that separates the monetary components of representation from the judicial officer deciding the merits of the case. If an amendment to the Act is not feasible, we should amend the guide to judiciary policies and the model CJA plan to provide a framework for local action by the districts. Each district should be free to choose the system that works best for everyone. But a system that separates these components is essential. The independence of the federal defender office is also critically important.

While district judges do not control the financial issues of the defender offices, we are certainly involved in the initial decision to create an office and in the appointment and reappointment of the defender. It would be extremely destructive for a district court to become involved in their day-to-day functioning of a defender office or to attempt to control who is appointed as the head of the office. By the same token, it's important to have a structure that allows the system to address legitimate problems promptly and effectively. The Administrative Office of the United States Courts has the capacity to provide that necessary structure. A division of the AO devoted exclusively to the defender services program and the defender services committee had existed for decades. Recent reorganizations have divided some of the functions of the administrative staff and reduced the degree of autonomy of the defender services committee. The original model that capitalized on the expertise of the defender services staff and the oversight of the defender services committee should be restored and expanded. That structure secures the independence of the defender offices, fiscal responsibility, and full accountability.

Our local solution should be our reference point. The Defender Services Office should serve as the buffer between the defender offices and the courts, devising and implementing a system capable of securing adequate funding and resources for the offices, ensuring accountability, and providing support to both the offices and the courts when and as issues arise. The Criminal Justice Act system is a powerful framework within

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which indigent defense services are delivered every day. The courts, the defendants, the lawyers, and the public have been well-served by this system. With just some fine-tuning that reflects our accumulated experience, we can secure this system for decades to come. Thank you very much.

Judge Cardone: All right, with all of the opening statements now being made, I'm going to turn it over to Judge Walton for any questions he may have.

Judge Walton: Um, Chief Judge Armijo, you indicated that greater diversity is needed among, uh, interpreters because of the diverse population that you have in the district of New Mexico. Do you have the same concerns in reference to the attorneys who represent, uh, the same population?

Chief Judge Armijo: Well, I agree that the, uh, attorney population should be representative obviously of the, uh, the, uh, the people that we serve. There's no question about that, um, It's a difficult question to answer because, uh, statistically, I think about 50% of our, uh, appointments are to be, uh, panel members, 50% to the, uh, Federal Public Defenders Office. Um, two months ago, there were two representatives from defender services who visited our district and I met with them as did my clerk of court and, uh, and others and, it was expressed to me, uh, they're surprise that there wasn't a larger population, uh, or percentage of, uh, of those defendants, uh, being served by the Federal Public Defenders Office and they thought 50%, uh, for the panel was extremely high based on, I guess, their knowledge of other districts, um, around, um, the United States. I am hoping that uh, with fourteen new potential appointments here with our federal public defender that, uh, that those appointments will be made and that most of those will be attorneys so some of them will have to be support stuff obviously. Uh, but I do think that, uh, uh, diversity absolutely is a criteria. We need to reflect, uh, uh, in a work we do, the people that we serve. There's no question about that.

Um, related to that, however, I think there's a question of training and how do we, as a profession really recruit, uh, and train. Uh, folks, and that's why mentorship to me is important that concept of mentorship because in our district we have really select few attorneys that will handle the complex cases and generally the major felony, general felony cases and you have, uh, attorney's that what to practice. They have the, the talent but they don't have the experience and I think mentorship is, is one way to do that and try to, uh, build that into the, into the system.

Judge Walton: Um, Mr. Martinez, one of the complaints that you frequently hear in reference to the adequacy of representation of people who can't afford to hire their own lawyers is that, the government has unequal resources and as the result of that, uh, defendants who have to try to operate within the

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system or the, uh, uh, are at a distinct disadvantage. Do you think that's true here in New Mexico?

Damon Martinez: Your Honor, um, respectfully I disagree with that statement, um. I've been in this position for less than two years now but over the time period that I've been sitting in the seat of the U.S. Attorney for the District of New Mexico, it's been a constant balancing act . . . of where we are putting resources within our office. Whether here in New Mexico, we, we have, uh, border obligation, we have about 180 miles, uh, of common border with Mexico so we have immigration cases. We have two national security lab or two national labs in Sandia and Los Alamos. So we have the national security cases concerns. Uh, unfortunately, uh, our statistics for 2013 as we are found to be the second most violent, uh, violent state in the nation per capita and then I believed in 2012, uh, we were up, unfortunately up there leading the, uh, addiction, uh, people who died of overdoses with heroine and, uh, opiate or, uh, prescription drug over doses, so in dealing with, and also, I'm not addressing Indian country, in dealing with what we have to deal with from the prosecutors perspective, we don't have enough resources.

For examples with Indian country, our resources are stretched thin. Uh, Chief Judge Armijo already talked about, uh, we have twenty-two Native American tribes here in New Mexico. For the most part, most some are very small and they don't have the infrastructure, didn't have their own criminal justice systems so in essence what has happened is, are, are uh, our Native American, Indian crime section serves as a DA's office. We are taking those cases that we otherwise wouldn't take and in the state like New Mexico, that is large in area, our prosecutor, prosecutors are constantly traveling throughout the state and their workload, their caseload is incredible. So, I'm speaking for the U.S. Attorney's Office but I would also speak for the other federal law enforcement agencies such as FBI or DEA or ATF, that I am thinking of, it's a constant, they are constantly trying to prioritize to try to figure out which are the main concerns that we have to deal with at any one moment [INAUDIBLE].

Chief Judge Armijo: Judge may I follow up on something that Mr. Martinez said? Uh, New Mexico, the District of New Mexico, has the highest number, at least last year, I think that statistic is still there, the highest number of defendants, sex offenders under supervision nationally um, the juvenile facility that we um, are very proud of, AMI kids, uh, because we do have small juvenile docket, the great majority of the young men there are sex offenders that is something that is a terrible statistic for this district. Mental health again is one of the underlying issues in virtually every criminal case that we have primarily those out of Indian country and especially our, our small juvenile population.

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Judge Walton: Ok, Judge Collins, you raised the concern that tends to be universal based upon what we heard from others who submitted written comments or proposed testimony and that is that judges who are assigned to cases should not be reviewing and approving vouchers. Uh, Judge Miles-LaGrange suggested that maybe it should be another judge who is not assigned to the case. I don't know if you think that is an acceptable model and if not, then what would be an acceptable model and do you think that would, would be palatable with Congress that they would be willing to take that responsibility from the judges and then give it to some third party.

Chief Judge Collins: I am not sure that Congress be willing to do that unfortunately, but I do think what Judge LaGrange said has some merit to it. Uh, at least having someone further removed from the process would be helpful but I . . . there are some districts where the federal public defender reviews the voucher, and the judge is not involved other than signing the voucher. I think a system like that could be setup and that would be even take the judge further out of the system that way, so I think if there is a way to do it uh, but uh, uh, I think a system that the judge who presides over the case, determines what expert is hired, how much someone is paid, I think that's uh a system front with problems but I do think Judge LaGrange's . . . at least removing the presiding judge from it, is a step in the right direction but I would remove it even further and maybe have the federal public defenders officer review those vouchers and just send it to the judge for signature.

Judge Cardone: Judge Goldberg.

Judge Goldberg: Just a follow-up and to play devil's advocate a little bit, isn't the trial judge in the best position to determine what went on in the courtroom and thus what's fair or not fair by way of the voucher as opposed to a public defender who didn't sit in the courtroom and didn't understand how, let's say for this instance, how difficult the client was, so how . . .

Chief Judge Collins: The judge isn't going to know how difficult the client was either, when it's all said and done. And the judge only sees what happens in the courtroom . . . there's a lot that goes . . . most of the case happens outside of the courtroom, away from the judge's eyes. And frankly, when a judge hasn't been trained to be a defense lawyer, never tried a defense case in their life, now their put in a position trying to determine how much money someone should get paid, that's not fair to the judge, it's not fair to the litigant either. And you know I, I, I love all my brethren, but of some them tried cases when judge . . . when lawyers got \$25 an hour and they think that was a great amount of money to get and they think it is too much now, to pay somebody \$125 an hour. So, I think taking the judges out of the system would be a very, very good step . . . I tell you, seeing the case and

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- having it tried in front of you, doesn't give you any expertise about what's appropriate to pay someone in that particular case. It just doesn't.
- Judge Goldberg: Chief Judge Collins, I won't follow up and ask you to comment on the observations of the circuit judge who, you know, or also in a position to uh, to . . .
- Chief Judge Collins: Well, I will be, I will be glad to say I think you should take them out of the process too [LAUGHING] . . . that you put them even, even in a worst position because they, they are depending on the trial judges to say with extraordinary case in the first place and then taking look at the bills so far removed, it's definitely unfair at that point.
- Judge Goldberg: I want to ask you I think more of philosophical question but I think circles back to the issue of vouchers some have been brought up already in our hearings and we've heard the term used ten times already. We have even talking about it a lot. It's particularly voucher cutting. Chief Judge Miles-LaGrange said that, and I wrote, and I'm paraphrasing what she said, it is very eloquent, I thought. She said "discouraging the use of funds to defend the indigent goes directly against the core of the Criminal Justice Act." I have a circuit case here. I won't say from which circuit it is. It is not from any of your circuits, feel free to comment on it, and the essence of it, my fair summary I think is that, CJA representation should be in part pro bono and the passage I want to read and ask everyone to comment on it. It says, I am quoting, "but it must be remembered that CJA service is first a professional responsibility and no lawyer is entitled to full compensation for services." And then it goes on to use the word "pro bono" a lot, so I think we have two different philosophies and this goes right to the heart of I think voucher cutting. Judge Miles LaGrange saying we should not be stingy in any respect on defending the indigent and this case says, well, it could be a pro bono work. So, I'd be curious to hear what you folks think about that.
- Chief Judge Collins: My initial comment would be, when you only paying \$125 bucks an hour, it is already pro bono. It is already there.
- Judge Goldberg: It is better than twenty-five.
- Chief Judge Collins: It is better than twenty-five dollars an hour, that is true. It is already pro bono. And to ask the lawyer to volunteer their time and their efforts in some of the various serious cases that we have, is totally unfair. It is unfair to the lawyers. It is unfair to the litigant. The way our system . . . the way cases have changed over the years . . . they have just . . . they're more complex. Uh, there are more ways you can get in trouble with the law in the first place, there's thousands of statutes out there now, and then have a lawyer volunteer their time, they'd be well-versed about trying a

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particular case with some particular statute. I don't think that is a fair result at all. I just don't think it's possible.

Judge Junell: I don't have a problem. I don't have a problem with reading the vouchers. I have not, uh. There have been a few occasions and the way it works in the Western District in Texas, and Judge Cardone correct me if I don't have this exactly right, but they go, the voucher goes to our district office and then they look to see if the right rate is charged, if things like that like technical sort of things and then they come to the judge and in that case, the attorney has the opportunity to object if there was something done to the voucher I guess but accounting which I have never had that occur. The only, again, uh, I have as many cases, as anybody here, and just not had any problems and I think we might we want to have a way to review it if our way to object to it to the judges looking at that, might be able to be a bit more systematic than we did and still we have the problem. In reading the report, I was really surprised from the national association there. It is just, it has not been an issue.

Chief Judge Armijo: You know with sequester, uh, with I think it is just difficult economic circumstances consistently in our country at this point. I posed a question, what does it mean to perform pro bono work. You know, uh, there are many attorneys that have expressed that the CJA work is their bread and butter and I think it is for the most part. At least in our district so I pose the question. Do you, you try to increase, the, the panel size so that you have more attorneys available and available for appointment or do you shrink that and concentrate the appointments in the hands of the very few. Those are the conversations that have been talked about. I think on our committee at times. On the one hand, you concentrate so you have probably better experienced attorneys. On the other hand, when you have a greater pool out there, you are going to have less appointment so you don't have the opportunity to, to enhance your skills and I go back to this whole notion of ownership. I don't have any answer to the question but I tend to agree generally with, with Judge Collins here.

Chief Judge Collins: You know, uh, having a CJA panel that, uh, depends on their living getting court appointed cases is fraught with its' own peril too, and I think that, that lawyers who are on the panel should have a diverse book of business so to speak, and they shouldn't just be trying to do only CJA work. I think you get a better lawyer, you get a better prepared lawyer and the client gets a better result and then lawyers do other things also. They have 100% of their time devoted to CJA work and not be a member of federal public defender's office and I think that has its own issues.

Judge Goldberg: Judge Junell just to follow up, I personally if, if I don't look at another voucher that would be excellent . . . that would be fine with me. Uh, do you, do you ever engage in, uh, reducing vouchers I mean you have so

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many cases and if you do, uh, do you bring in the attorneys and let them comment on, on what you're going to do or proposed to do?

Judge Junell: I have rarely had a voucher that went over the amount, I mean if it's within the amount that's, that's authorized, I don't go back on it, say, uh, you know, you really should had spent forty-five minutes with that person, you should have been more like ten, I don't know, I never do that. I mean first of all, I don't have time to go and do that and, and the second thing is, is that trying to go back and remember when I cut a voucher, yes, I have to call the lawyer and said, if it, but all of these are done after the case is through. I mean this is not done while the case is going on. I've had lawyers come and ask for, uh, uh, appointment of experts. We follow our circuit rule in doing this, yes, you can have an expert here's the amount that is allowed for that expert, uh, like, um, I am sure there has been a time that I have denied one, but I don't recall any, uh, and that's I don't want to say yes, I never denied an expert but, um, I don't recall any, again, we have an amount, Judge Cardone I can't remember exact, the exact amount that's on there but there's, uh, in a circuit rule on what we have on there and then there is a circuit judge I think that reviews that if there, there should be an issue. My big issue again has been in habeas capital murder cases that's the one where it has been more problematic maybe in the case if that were . . .

Judge Goldberg: What is it in the problem?

Judge Junell: Uh, getting experts to go back on, uh, mental retardation or mental health issues that have been there, um, ballistics experts I mean again these are cases that were tried in a state court. I've been through state appeals and state habeas and now coming to us and wanting more experts upon experts in looking those issues well that's would be most of the time I spent on vouchers . . . has occurred.

Judge Goldberg: Anecdotally . . .

Chief Judge Collins: Mr. Martinez indicated that he felt that uh, about the fees structure. I think in response to what he said, I will say that anecdotally, there are issues of U.S. Attorneys' Offices paying up to thousand dollars an hour for a psychiatrist. No one in the Federal Public Defenders Office or the CJA is ever going to pay a thousand bucks an hour for psychiatrist or psychologist, or any other expert witness.

Judge Cardone: Mr. Walton, do you have a follow up?

Judge Walton: Yeah, I mean, Judge Junnell, what we've heard from some panel lawyers is that, uh, the reason we as judges don't hear, uh, uh, uh about objections that they have, is it they are fearful of raising those objectives because they also rely upon the judges to appoint them to cases in the future. And

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we've also heard that many lawyers will not ask for money above what the maximum amount is without other approval, uh, because they are fearful that they will be cut so they just even though they believe they're entitled to more money, they don't request more because they fear being . . . having that amount reduced.

Judge Junell: Uh, again, I am not head, uh, first of all I don't appoint the lawyers, my magistrate judges do because I've got two court houses that about three hours apart from each other, or actually an hour and a half apart from each other. And so the magistrate judge and Pecos division does all the appointments because they are doing the initials. Uh, the same thing happens in the Midland-Odessa Division in the Western District of Texas. My magistrate judge does it because he is doing, uh, all of the initials in which case that, that's when, uh, lawyers are appointed, uh, so, it's handled that way. In the Pecos division uh, if it's not conflict situation, for instance, if you had four illegal aliens coming in together, are poor what we called backpackers bringing in drugs across the border, the public defender gets the public defender's office, again which we only have four lawyers in that office but they get number one appointment then the next three or whoever's next on the list and so, magistrate judges don't do the vouchers, I do the vouchers after the case is over, for at least in my situation, I don't think that's a, would be legitimate component.

Chip Frensley: Uh, Judge, Judge Junell, just a follow-up a little bit on Judge Goldberg's questions and, and you indicated, uh, concerns or issues with respect to capital habeas, uh, and you talked specifically about experts, and I, I was trying to make sure I understood a little bit what you meant. Were you, were you saying that the concern was the availability of experts to come in and review or the costs and necessities associated with experts coming in and reviewing?

Judge Junell: Yes.

Chip Frensley: Okay.

Reuben Cahn: [LAUGHING] Yeah, could you amplify on that a little bit?

Judge Junell: [LAUGHING] I think more the latter than the former, I mean, and again, uh, and or not, it's, I'm trying to think, and I have two pending right now and so these are fresh on my mind going right now. There is, there is the circuit, I mean, but I have had them in the last two years and so yes, those have been cases which, um, I've been concerned about the cost of experts as well as the cost of and . . . whether finding them, and whether, you know, that, that sort of the, the nature of those things, yes. I'll be glad to get out of the habeas business. Let me tell if you want to take the district judge out of the habeas room, just go straight to the circuit that's, [LAUGHING].

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Reuben Cahn: Yeah, just one follow-up question that, so is it, uh, I just want to make sure I'm understanding what's going on. Is it the rates that the experts are charging or is it the questions of the necessity?

Judge Junell: Both, both.

Reuben Cahn: And how do you as a judge looking at those requests make those decisions and I . . .

Judge Junell: Because I have experience, I've been practicing law for bunch of years, a lot of years and I have seen a lot of habeas cases and I've seen, you know, seen that and I, I think plus again, we're re-reviewing a record that has occurred, uh, I'm not the first one that's seen the record on this case as you, as you know. Uh, and so it's been through both the state appeal uh, maybe a re-appeal, and then in Texas, we have both an intermediary court of criminal appeals and then our final court of appeals, the criminal cases in the state of Texas and it's been through the states habeas and now it is coming to me for habeas, so yes, I, I, I see those things, uh, that I believe are redundant in many cases.

Chip Frensley: But, with all due respect, I mean, isn't it the, the responsibility and role of the lawyer representing the client to decide what would be appropriate in a case in terms of experts as opposed to the judge?

Judge Junell: I, I don't argue that, I don't argue that, but I think the judge has the role as well particularly when taxpayers are paying for that. And, uh, again, again, if you want to take the district judge out of that, I mean, you won't hurt my feelings a bit in doing that, but that's the, that's what it is, yeah. And, and sometimes the cost and I . . . I wish I could give you in an amount, I don't, I didn't come prepared to do that. Uh, but they are, they are relatively expensive, it's seems to me. Within . . .

Chip Frensley: Well there does seem to be one area of consensus among the judges and that is that the taking you out all together would be just fine with you. [LAUGHING] So like I said, that leads to the natural question that this Committee is going to have to review and, and I guess you can look at it as a sort of a blue sky exercise and so if you were creating a system and, I'm asking this to the panel as a whole. If you are creating a system where one didn't exist to administer a program like this. Do you have any thoughts about how you might do that? That would, would take the judges out?

Judge Junell: You know, I still think the district judge has a role in the cases before their court you know, it's not in that, I mean, that, the, the trial cases, the first level of cases. I still think we have a role in doing that and that, uh, but I

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would take us out of the habeas, uh, or at least . . . I think within our circuit, um, if there just to be an issue with that, then we're remit. And I think this idea that "well the judges are going to be mad at me and he is not going to do this," I think that's, uh, hopefully we are not where we are, uh, with the experience we have, that we would do something petty like that but that's . . . you know . . .

Chip Frensley: Judge Armijo?

Chief Judge Armijo: I was just thinking, I think lawyers have an obligation to educate judges and I've been educated many times. I'm very receptive to listening and understanding why this type of expertise is needed, I, I don't have a problem with that. In our circuit, uh, here, in the Tenth, we now have as of, uh, less than a year ago, a case budgeting expert a resource person who's available. She has visited every district within our circuit, uh, is available to answer any questions the judges have, uh, she's also, actually we borrowed her, I guess, took her from the Ninth Circuit, she's, she's.

Chief Judge Collins: Yes. You did.

Chief Judge Armijo: We did [LAUGHING].

Chief Judge Collins: You used the word borrowed, but you took her.

Chief Judge Armijo: We took her.

Chief Judge Armijo: [LAUGHING] Yeah, and I think that having a resource person like that, that has, uh a good handle on what is going on within our circuit makes a great deal of sense so and I support that fully.

Chief Judge Collins: I think Judge Armijo is correct, having a case budgeting attorney who has tried cases before who is aware of what expert's cost in the area is a much better way of, of doing it than, than having a judge do it. With all due respect to Judge Junell uh, I mean I, I haven't tried a criminal case as a lawyer in over thirty years. Things have changed. What was uh, what was uh, but one can do and get away with so to speak thirty years ago you can't do that now. There is a different way to try cases. I mean just things have just changed. The expert witnesses have changed. We know more about human behavior and human makeup than we did thirty years ago and things such as that, it is just a much more complex system than a judge seeing what happens in the court room will say "well, this would be an appropriate amount of money to be paid for that."

Judge Junell: I think this goes back yeah, when I tried my cases earlier, one size does not fit all. Uh, we are diverse and where our districts are and where they

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are located, New Mexico has this incredible, uh issue of diversity of its population here with, with the tribes and everything that we don't have in Texas. Um, we have incredible distances that we both have but that you don't have in Washington D.C. or you don't have in New York and you don't have in you know places like that in handling these issues.

Judge Cardone: So let me just ask this quick question. Judge Junell, when you say one size does not fit all um, what are your concerns I mean, I, I understand that that is one of the things we have to look at because we have to look at the national program um, but at the same time justice has to be justice throughout the entire United States. So what, what is your concern? What, how do you see that playing out as we make our recommendation?

Judge Junell: I don't want to see a funding czar. I don't want to see some funding czar somewhere in the northeast. I mean we can see this only um, I mean, I am not uh, since I'm on a senior status it is easy for me to have these complaints right now [LAUGHING]. We, we look at the guidelines sometime and we say, gosh, why would we do the guidelines that way you know that must have been somebody up north, northeast, or in the west coast that came up with those kind of ideas in doing that uh, uh, something like that . . .

Chief Judge Collins: It's the second time he has mentioned Philadelphia . . .

Judge Cardone: [LAUGHING].

Judge Junell: When the wind comes sweeping down the plains . . . [LAUGHING] also but uh, I, I, think that we are so unique and I don't mean it by court, by court but certainly I mean, even within our own circuit, there is a big difference between Louisiana and Texas I mean that is, that is historical and goes uh, uh, you know for, for years. I think that we need to recognize that and uh again um, it might take someone in New York City, I don't know how long it takes to drive from one borough to another borough to get somewhere to see somebody but the jail is there. Out here, it may be three or four hours to drive to the jail where your defendant is located. We need to recognize that and we need someone needs to be compensated because that is taking time away from their practice in doing that and so by putting an artificial limit of how much you can spend in travel expense for instance uh, I think, I don't think that is a wise, um, I don't know. . .

Chip Frensley: I hate to see Mr. Martinez sit over there without any . . .

Reuben Cahn: [LAUGHING] I have a question for Mr. Martinez, you, you operate the system where obviously you don't get your litigation expenses approved by judges nor your staffing decisions determined by anyone involved in

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the judiciary and you address how, you know you got a very different system where things do come from Washington to a certain extent but you have also got a fair degree of local autonomy, how does, how do you view the system that we've got and how do you think it might be improved?

Damon Martinez: Well, if I could state just for the record I was very happy with . . .

All: [LAUGHING]

Damon Martinez: [LAUGHING] Thank you very much.

Chip Frensley: I just opened the door, they'll walk through it . . .

Damon Martinez: Um, each U.S. Attorney's Office is given a certain budget and the certain uh, pots of money. Being that person that signs for that money and uh, obviously we tried to manage it as efficient and as uh, we have a trust with the citizens of United States and it's . . . we have various formulas that we need to work by and obviously we work by them. We have so much money put aside each year for experts, or for travel uh, the system from the U.S. Attorney's perspective works.

Now, in going to the larger question that you have as far as what could we do to better enhance the system? As I say it in the prepared statements, each judicial dist, or each district needs to have some, uh, some authority to make certain calls, to make certain judgments and what we are asking for is input in the system. For example, let me, uh, I started in the U.S. Attorney's Office down in our Los Cruces office and uh, it was a heck of a baptism down there with the amount of immigration cases, the amount of reactive drug cases and I was trying to figure out, okay, what kind of input can we give that could be helpful to the court? Well, um, you know, you are dealing with attorneys. You are dealing with human nature. There is some attorneys that you would have difficulty and I am not, I am not speaking about any specific attorney, but I have those experiences myself where you would have trouble just getting a hold of some defense attorneys. They were always on the road, you wouldn't get a call back until we came to eve of trial, kind of thing. That could be some input that we could give to the judiciary. Hey, this person has tried hard to get, get across to, or something else . . . can I, we keep, I keep going back to our Native American community but we have some very special, very special qualities here in New Mexico or in the Southwest.

It is my understanding that we are the only state with pueblos, as opposed to reservations. Uh, the system works when there is strong advocacy on all sides and as a prosecutor, I realized that, uh, one of the things that the defense attorney has to do is build a trust relationship with that clients and if that defense attorney does not have an appreciation, does not have a

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sensitivity for some things coming out of the Indian country such as, uh, a handshake could be misinterpreted; if it is done the wrong way in some ways with my understanding. Or if an attorney doesn't have an appreciation for the family system in a pueblo such as the clan system, I think that can hurt. So this is some of the places that we can have some input. I hope that also answers your questions.

Judge Goldberg: So you think it is the, on the input? Uh, I think the hourly rate presently, uniformly is \$127 an hour and I was wondering and that certainly not comparable to say what Mr. Frensley will charge his private clients and I was wondering . . .

Chip Frensley: Not even close.

Judge Goldberg: Not even close. [LAUGHING]. I was wondering do you think, uh, that, that has an impact on the quality of representation that you and your lawyers see from CJA Council?

Damon Martinez: Well, I can't speak to that specific number. I just don't know. I mean, I, my public service has, has been, uh, I've never worked by the hour. Now, I am, I am also, uh, in the National Guard Army Reserve. I currently just transferred to the Army Reserve so the only time that I've done, I have defended people. I've done again as a public, as a JAG, so I don't know if that specific number works.

Here, here would be a concern that I would raise or I guess as Chief Judge Armijo posed the question, I would, I would have a concern that if, if an attorney is subject to doing a certain amount of pro bono work and that attorney has a full spectrum or a full plate of cases to work on, just the human nature of that, what is that attorney going to be prioritizing to do first as opposed to last and if that attorney has to get up to the northwestern part of New Mexico or travel down the Los Cruces to do an immigration cases, let's say from Albuquerque, where is that prioritization gonna be?

Judge Cardone: I have a question um, for Judge Armijo and Judge Collins to do with the, in, in, in line with that, to do with experts and when you are dealing with some of these remote languages, um, you talked about the problem of getting people to help you in the courtroom. What do the attorneys do um, that don't speak these languages? How do, how do you as the court, if you appoint um, someone as the CJA attorney, how do they get the people they need to help them with people that aren't speaking both languages going over some of the discovery, doing all of those things. How is that in your court? Is there a problem with those kinds of funds? Is there a problem with finding those kinds of experts?

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Chief Judge Armijo: I can share an example of a case I had a few years ago, uh, one of the uh, pueblos near Albuquerque um, the defendant was, uh, prosecuted for possessing uh eagle feathers and, uh, we don't have a certified interpreter for the language spoken there and, uh, a member of the pueblo came forward that was uh, available to both the defendant and the government, uh, and said he would be happy to serve as the interpreter because the defendant, he had spoke some English he wanted an interpreter and, uh, so by agreement, uh, and this person was vetted I guess by both sides. Uh, first hearing that we had, because we had a number of pretrial hearings in the case before the trial, uh, very articulate, uh, he came into court wearing a, a badge, a gold badge around his chest on a chain and I noted that but, uh, nothing was said about it, um, it was very short hearing because the defendant became ill and, um, he had to go to the hospital so we resumed about a week later, and this gentleman who had uh, come forward the first day said to me in the court room, "Judge, I can't do this." I said, "What do you mean you can't do this?" "I can't service an interpreter anymore," and he still had his badge around his chain. And I said "why not?" "Because the government, governor of the pueblo told me I could not do this," and I said, "well, the authority here is this court," uh, he said, "Judge I, I respect you, I respect this proceeding, the governor told me I can't do it." And it was very clear to me that his job was on the line and he was the probation chief in the local pueblo, that was, what his badge was about and it was very clear to me that he was told "If you continue this, you're out," and that's the power of, of tribes.

Uh, you just have to understand that, it's played out in, in many times in, in hearings, uh, so we struggle to find someone who is conflict-free because obviously, another person from the pueblo would have the same potential problem and there was a neighboring pueblo that spoke the same language, uh, a woman who is a school teacher came forward. She agreed to do it but she can only do it when school was out at 3:30 in the afternoon so we had to adjust our schedules uh, to accommodate her. We got through the trial, we got through the preliminary hearings.

Um, in cases like that where, uh, a defendant is in custody for example and, and the attorney needs obviously to visit with that [defendant], uh we will do our best through our court uh services uh to find the person who is able to accompany that attorney to the detention facility and, and who could uh translate, uh ,we certainly do that with our Navajo interpreters and certainly with our Spanish interpreters, but when you have other languages and potential dialects which are very common in southern New Mexico out of our Los Cruces divisional office, uh, we absolutely do our best to find someone that can accompany counsel, and any available.

Judge Cardone: And are they paid as experts, how do you handle that?

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Chief Judge Armijo: Uh, they are paid but, uh, that's a very good question, I think they are paid on contract as a contract interpreter would be paid.

Judge Cardone: Through the court?

Chief Judge Armijo: Through the court, yeah, absolutely.

Judge Cardone: So, in the end and as far as the attorney taking this person out to the jail or whatever, that is totally a court-related funding?

Chief Judge Armijo: Absolutely.

Judge Cardone: Even when they go out to the jail with . . .

Chief Judge Armijo: To my understanding, it is, yes.

Chief Judge Collins: In, in Arizona when, when a CJA lawyer has, has to hire an interpreter, we pay for it as an expert witness type of fee. I think most of our CJA panel lawyers speaks Spanish. Everyone in the federal public defender's office in Tucson speaks Spanish and we don't have to worry about interpreters from within but, when, when a lawyer does not speak the language whether it would be Triqui or Ch'ol or whatever that dialect is, we try our best to try and find someone somewhere in the country that speaks that language and they get paid and they stay with an expert witness, and if the, if their court service's interpreter is not available we try to find someone some place else.

Judge Cardone: Do you have any problems from the circuits including though, you know, I, I would imagine finding someone who speaks it and bringing them in . . .

Chief Judge Collins: [LAUGHING] I haven't had a problem getting when paid so far, never.

Judge Cardone: Yeah, but. Never?

Chief Judge Collins: Never.

Judge Walton: Um, I, I, I share Judge Collins, your, your concerns about judges being involved in the process of appointment and approving payment because, I don't think it's my case, where you know, a, a lawyer has to worry. But I think they are judges where lawyers have to be worried, uh, and if we're not able to have this separate entity created, they would review the vouchers or make the appointments and if we, you know, besides what Judge Miles-LaGrange recommended about a third judge or a third party as a judge reviewing the vouchers. Do you have any other ideas as to what we could do to, uh, ensure that lawyers uh, are getting adequately

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paid and they don't feel intimidated uh because they are uh asking payment from the same judges who, who handled the trial, or handled the case?

Chief Judge Collins: If you got, if, if, if at the end of the day, they're still asking the same judge for the, for the money, I think that you do, you can't really solve the problem, I think, the case budgeting process works very, very well. I think most of the times when that happens, the judges buy off on it and I know that's what happens in the Ninth Circuit so when that, when that, when that budget has been vetted by a case budget attorney, the judges seem more readily, uh, able to approve it and not cut it in things such as that, so I think that's a good way of building it also and as, as, as already had been mentioned you got a pretty good one here in the Tenth Circuit, that was trained in the Ninth by the way.

Reuben Cahn: [LAUGHING].

Chief Judge Armijo: We are going to remember that [LAUGHING].

Chief Judge Collins: And, and . . .

Judge Junell: They said they'd like to move to Austin.

Chief Judge Collins: [LAUGHING]. I don't think, there's any snow in Austin on a normal basis. [LAUGHING]. But, uh, I, I think somehow you, you, you just got to get the judge out of the process. I think that's. I think that's, uh, uh, as we all hear the stories about what some judges can and will do it when it comes to voucher cutting, and appointing experts and things such as that. By, and the defender services budget as you all know the federal public defender and the defender service budget is one big budget and about half goes to each but the, the federal public defenders are controlling their own budget and they get to decide how much to pay experts and whether to use expert or not. But a CJA lawyer does not get to make the decision on will they get to use an act or not. It's made by the judge and how much they get paid is made by the judge and that's, uh, a system fraught with peril.

Judge Walton: Uh, have you ever heard from lawyers who, uh, refuse to take a CJA cases because of the, uh, amount of money they're going to be paid on a hourly basis?

Chief Judge Collins: And although you will hear lawyers who will do that, uh, but most lawyers, uh, are willing to take the cases, uh, again, you, you're not looking for lawyers who're trying to make a living and do nothing but CJA cases. You shouldn't be looking for lawyers in that in that vain. You want lawyers to do CJA work because its work, they are good, and they will get paid for what they do, but you want lawyers who are going to

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make that portion of their practice, not all of their practice. And we, we, we developed into a system now where there are too many lawyers when that's all of their practice.

Reuben Cahn: So, can I press you a little on that issue, because as a federal defender, and I've been federal defender for twenty-five years roughly, you know, one of the things we count as one of our great advantages is that we live and breathe federal criminal law. You know, we are the ultimate specialist, like you know people ask me about something outside of my field and I just look at him and throw my hands up, but if you ask me about an issue of federal criminal law and well beyond that, if you ask me about the judges in my district and how they are going to respond to something, I can tell you exactly, then I can tell you this plea agreement is illusory because it doesn't matter what the U.S. Attorney recommends, this judge isn't going to follow it, so don't cut that deal. That kind of knowledge comes from deep immersion and, and we, and we credit that in the case of federal public defenders but you are saying we shouldn't take the same approach with regard to our panel lawyers. Can you explain to me why you feel that?

Chief Judge Collins: Well as I, as I said in an open statements, I, I wish every, uh, case was handled by the Federal Public Defender's Office because there you get consistency, you are going to get a good lawyer, good work, good quality work all the time. When you go to the CJA panel side, uh, though you pay someone now \$127 an hour, uh, they've got, they're running an office. They're not devoting their full time to doing the work of being, uh, uh, uh, uh, criminal defense lawyer, you just can't. They're running a business. They are running a practice that is different than being in the federal public defender's office. You know, I get paid \$127 an hour, number one. [LAUGHING], so see.

Reuben Cahn: As my wife often points out.

Chief Judge Collins: So, so there is a difference, uh, in terms of CJA and, and, uh, and a federal public defender, we may not be able to do away with having only those people just doing CJA cases because we have so many cases now that they require immediate litigant defense and the federal public defender cannot handle all of it. For instance, I, you know, when you get a multi-defendant case. You can only take one. So we are always going to have a CJA system but I think having a lawyer who solely depend on doing nothing but CJA work is, can be problematic.

Reuben Cahn: Judge Armijo, you talked about struggling with panel size, can you comment on the same issue? What your thoughts are?

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Chief Judge Armijo: Yeah, we, we have had some conversations about that . . . uh, we want to get attorneys, uh, on the general felony panel that, that have had some experience in the courtroom and you got folks on the auxiliary panel who want to come on board and we have encouraged them to volunteer, take a day, take two days with another attorney, sit through their trial, second chair, just, just let them mentor you and we have encouraged that, but we've tried to get folks in the courtroom that, that have the experience uh, we've struggled with that because we have, we have heard that often there are attorneys who rely on, on CJA as their bread and butter, that, that is the focus. Uh, and I can think of two attorneys that are ranked among the high billers you know extreme high billers maybe that is the reason um, I think that, that there have been complaints in our district about, from attorneys, panel attorneys not getting enough appointments but the problem with that is the, the larger your, your panel is the least likely, you are going to be called. That is the problem. So you add uh, uh, or have a large number, and again we are 50%, 50% uh, or do you try to, to reduce that to some extent or through attrition and really focus on training these people getting them better qualified, getting them to understand the use of experts how to use experts, enhancing trial skills and, and um, and having just to uh, a better well-rounded group of people to pick from. It's talked about in both directions, um, but we are getting complaints from panel members, that they are just not getting called but it is, it is the luck of the draw and its obviously the number of filings that, that are made by the uh, U.S. Attorney's Office.

Judge Cardone: Who decides who gets on your CJA panel?

Chief Judge Armijo: The committee does.

Judge Cardone: And that committee is made up of?

Chief Judge Armijo: Uh. Up until uh, essentially two and half years ago, it was uh strictly uh, panel attorneys that were, the committee select number and uh, after discussing this topic with the number of chief judges around the country um, I noted that New Mexico was really one of the exceptions that for the most part a great number of districts uh, the court has a, a role in the committee process, has a presence and we determine to uh, make that change in the district to New Mexico and I or my designate will sit along with the, one of my magistrate judges and we have also uh, uh, um, better scrutinize the court has the, the membership of that committee when we have vacancies and we've now uh, put on the committee attorneys who have great expertise in litigation uh, either in, in criminal defense uh or in, in the civil rights area because sometimes there is a fine line between the two. Uh, and I think it has really made the committee process a better process because we have been able to, to look at the skill factor of folks that come up on application and make recommendations. This whole

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notion membership has been talked about and has come up so it is, uh, there are two judges on the committee in fact we just went through our, our process here a couple of weeks ago so our full court will be reviewing the recommended uh appointments here at our December Article III meeting and we do that twice a year.

Judge Cardone: So the committee makes a recommendation but in the end, the judges [INAUDIBLE] . . .

Chief Judge Armijo: Yeah and, and for most part we will adopt. We have always adopted those or maybe there may be a question or two that is come up but they like generally do the same question or choices that come up by the committee where someone is sort of on the line but that is the process the court will, will approve and finalize it at a special meeting.

Judge Walton: Judge Junell and Judge Collins, do you have a similar process. Do you have process for removing lawyers from the panel if they are not performing up to par.

Chief Judge Collins: We have a process as the panel similar with Judge Armijo has, we have um, a legal defender, county legal defender, county public defender uh, state court judge um, and a couple other people with prior practitioners. They are the committee they, they interview look at people who apply to be on the panel then they give the slate to the judges, we approve or disapprove it. There is no formal process for removal, but there is a process for removal uh, I guess I am going to say that and Judge Armijo has mentioned training. The AO has some excellent training programs and I think one was going on right now which is why we are here in Santa Fe because many public defenders are here uh, that there is training out there for CJA lawyers as well as public defenders there is a lot of training that's being sponsored by the AO, a lot of them was cut when we had sequestration, but a lot has come back.

Judge Walton: Judge Junell?

Judge Junell: We are on a mission as a CJA lawyer but we do have a committee and um, I am not on it, they have referred, because of prior divisions, I have my magistrate judges do that, and we don't have a formal um, process for getting someone off to the CJA panel. Uh, and you know I think it comes somewhat obvious for now, I will give you an example. Uh, we have a lawyer who gets indicted, that is on the CJA panel that's I mean, that is one they are not going to get appointments uh, so because they may not have a law license after their cases is completed. But um, occasionally um I've talked to a couple of lawyers. Again, it never had anything to do with I did not like. We would get a client complaint and, and said "my lawyer never comes to see me." You know somebody needs and, so I call the

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lawyer and this is rare but I will call the lawyer and say “you know, we’ve had this complaint. You need to, you need to be active, but sometimes we will be in the middle of a case but that took place, the case has been completed and makes sure that, the lawyers actions did not harm the client uh, in any way uh but talk to lawyers that you know, you can’t do this. You need to, you know be involved in your client, you know, setting [INAUDIBLE].

One of the things I think would be helpful, um, of course, you know I graduated from law school about five years ago so I remember this very well. Uh, you know one of the things that would be helpful I think would be is to have a Federal Criminal Law 101 kind of a deal that perhaps can be I mean because a lot of these are saying and I have lawyers who come in that they are handling their first sentencing and they’ve never asked, you know for safety valve. Why you did not ask for safety valve, or what’s safety valve? I mean some, some kind of basic particularly a lot of what they do is on sentencing and on you know what’s Rule 11 have to do, did the magistrate judge ask you this question particularly in the border map, uh, did you discuss with your client that he is going to be deported if he pleads guilty in this case which we all know is something that we all see now down here on the border. Uh, and so I think having kind of across the board, you know Federal Criminal Law 101. Just to have something that we would have something rather than each district come up with their own or each division coming up with their own. I think that would be really helpful for getting new lawyers onto into the CJA again.

Chip Frensley: I am curious to know how much time each of the judges spend per week, per month, however you want to calculate it, uh, dealing with uh or involved with uh CJA matters uh, and I guess the natural follow-up to that would be obviously if that time was available for other things, how that could help the administration of justice in your district?

Judge Junell: Mine is pretty rare. I mean mine’s signing the vouchers that’s signing the vouchers and we have gone to a new electronic way of doing it. I mean in the Western District, I guess there might be everybody has gone to this now but, uh, I don’t know, it is just reviewing and again, don’t review all the paperwork that goes with the voucher, reading voucher, sign it and date it.

Chip Frensley: So regardless of the, the high volume of cases, you still don’t spend a lot of time with the vouchers?

Judge Junell: No.

Chief Judge Armijo: Every judge has his or her list of “dos and don’ts” and uh one of my “dos” is I encouraged uh status conferences and so I am very open to having an

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attorney call me on CJA matter. I generally will initiate a call if I have questions about a request that has come in, especially involving experts or maybe not so much the need for experts or the investigator but sometimes the hours that they represent. I am trying to figure out why these number of hours, these number of hours at this point, so I do spend time on, on the, uh, CJA telephonic status conferences. I found them very productive.

Chip Frensley: Do have any idea how much time you spent?

Chief Judge Armijo: Oh, I probably will have maybe . . .

Chip Frensley: To review related matters

Chief Judge Armijo: May be eight a month on the phone and now that we have gone eVoucher, I have done my training as of a week ago uh, so that's not going to take much time, I don't think, uh, oh, historically maybe an hour and a half to two hours on voucher review . . . I think.

Chief Judge Collins: There's not much that time reviewing vouchers and yeah, on the CJA issues and they pop up they are not that time consuming.

Judge Goldberg: It is a follow-up to Chip's question, the guidelines, the CJA guidelines call for an opportunity for the lawyer who is going have a voucher cut to be heard by the judge, chief judges do you know, is that, is that happening?

Chief Judge Armijo: Oh yes. In fact in our court, we actually, it is our policy. They got that due process built into it so, yeah. They've got an opportunity to be heard.

Chief Judge Collins: It happens.

Chief Judge Armijo: Yeah.

Chief Judge Collins: They don't get uncut but it happens.

Judge Goldberg: [LAUGHING] At their day in court . . .

Chief Judge Collins: At their day in court . . .

Judge Walton: We have had complaints ah, ah, about circuit judges who cut vouches even though the district judge hasn't done so. It that a problem that you all have seen?

Judge Junell: Not that, not that I am aware of.

Chief Judge Armijo: I am not sure how you know about it. I sent a voucher to the circuit that needs to be approved gets hopefully approved or if it's cut, I am not sure

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I'd know about it. It would then go directly for payment to the uh, to the administrator so I don't know that I'd know.

Chief Judge Collins: And I haven't heart of complaint about a circuit judge cutting one either, that doesn't mean it doesn't happen but I haven't heard of the complaint.

Judge Junell: Maybe we did have some complaints about circuit judges but it went on voucher that [LAUGHING]

Judge Walton: Only from judges did that, right?

Judge Cardone: I, I have a question for all of you and that has to do with appointing in capital habeas cases that Judge Junell, you brought this up, um, and I'm also from Texas and finding counsel in those kinds of cases is very difficult to my opinion, um, and we don't have the expertise, um, in El Paso, certainly I don't know that you have in in Midland so my question for all of you is when you get that kind of a case, what do you do? How do you figure out who, who's going to be the counsel to represent in those very serious capital cases. I, I don't care where we start, Judge Collins, let's start with you.

Chief Judge Collins: When we have to appoint someone outside the federal public defender's office, we consult with the federal public defender and get their suggestions about who should be appointed.

Judge Cardone: Okay, let me follow up. Do you, does your federal public defender do those kinds of cases?

Chief Judge Collins: Yes.

Judge Cardone: Is that what you're saying?

Chief Judge Collins: They do.

Judge Cardone: Okay, so to explain if you could for all of us, how, it would go first to the Federal Public Defender?

Chief Judge Collins: It will go first to the Federal Public Defender automatically. If they can't handle the case and it needs to be outside the federal public defender system, they would then try to recommend someone do handle the case. And we will listen to their recommendation.

Judge Cardone: Do they have a particular office, portion that the office that handles it, I mean, because you, you're on a very busy district, how, how is it possible that they're doing all these immigration cases and those or do they have special unit?

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Chief Judge Collins: They have to CHU setup.

Judge Cardone: Okay, it's the capital habeas?

Chief Judge Collins: Yeah, the Capital Habeas Unit.

Judge Cardone: And that has been approved in your circuit?

Chief Judge Collins: Yes.

Judge Cardone: And you have that as part of yours?

Chief Judge Collins: Yes.

Judge Cardone: Okay. Judge Armijo

Chief Judge Armijo: I have not experienced with that but, uh, our federal public defender office about a year or so after many months or trial represented, uh, a defendant in a death penalty case, um, I know of other situations where they've not been appointed that may be they declined it or it was private counsel that were brought in but they're always, uh, uh, vetted through the federal public defender's office. They come up with those recommended names.

Judge Cardone: And are you able to find people locally to do that?

Chief Judge Armijo: Uh, well, Mark Donatelli, I think that people here know him nationally, internationally level; he does this kind of work. He is here in Santa Fe but, uh, uh, to a certain extent yes, but we also have, uh, on more than one occasion lead counsel from out-of-state. We know who these people are.

Judge Cardone: So, it, it, if you need someone you just bring them in?

Chief Judge Armijo: Oh yes, absolutely.

Judge Cardone: And do you have any problems with the circuit when you do that?

Chief Judge Armijo: Never.

Judge Walton: Ms. Otto, what is the situation in your district?

Susan Otto: We have a Capital Habeas Unit in my office and, uh, our district also has a Special Capital Habeas Panel with the panel selection committee that's, uh, it's from all three districts. We handle all of the death penalty work in all three districts all that habeas stuff.

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- Judge Walton: Do you have the sufficient number of lawyers who qualify to do that type of work?
- Susan Otto: Uh, we have a sufficient number of lawyers up to this point, um, our panel is aging. We are extremely busy, we have a lot of executions and some of the lawyers are getting a little worn out.
- Chip Frensley: What are the biggest concerns you have in terms of replacing those lawyers and impediments to replacing them in the future?
- Susan Otto: Qualified people period. Uh, just because you've tried a capital case in state court does it mean that you're capable of doing capital habeas work in federal court?
- Chip Frensley: And do you think that, that's there is an absence of qualified people or do you think that qualified people aren't willing to do the work for various reasons? And what are one of those reasons.
- Susan Otto: It's extremely difficult. For one thing. It's, its very time consuming. If you take one of these cases it can consume your practice. A couple of the panel attorneys essentially lost their practices because they did capital habeas work. It's, it just takes so much time to work it out. We don't always get evidentiary hearings in state court so, you have to do a complete . . . it's not like you get a good record, you have to complete work on it and they're expensive and difficult, difficult cases.
- Judge Cardone: So and Judge Junell, so in your case because I'm in your situation, what do you do, we don't have a CHU in the Fifth Circuit, how do you find lawyers, um . . .
- Judge Junell: All of mine have come with lawyers. They had handle the state habeas and then continued into this . . . continued on, in fact, we have one group that came from California. They were part and I will want to say they were California public defenders but somehow, I am not sure that I don't . . . is California's death penalty still on going right now?
- Speaker 1: Yes, it is . . .
- Judge Junell: Okay, okay, anyway, they, they came from the federal, uh, now, I don't think that, well, they came from a public defender's office in California and they're still handling the case now. It's up at the Fifth Circuit now, it's gone through me up through the circuit.
- Judge Cardone: So they were state federal defender?

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Judge Junell: I, I assumed they were, I know they were from California and I, I think they were involved or, or they some sort of defenders office in California that, uh, took this case and -

Judge Cardone: So they just continued on?

Judge Junell: Uh, they just continued on it, done it in the state and other one I have had over done if the state and they just continued it on, in Texas, uh, I think they do, uh, it's my understanding to do state habeas, death penalty cases, there's a lot, I know, it's not a license, but there is a certification program I believed for that, by the state courts, by . . . done by the state.

Judge Goldberg: Ms. Otto, do you have any suggestions for the, the problems that you that you outlined? We're, we're actually going to have an opportunity to make suggestions to the Congress, whether they will listen or not, but we are here to get your suggestions.

Susan Otto: Well, um, I won't start with the obvious which is to abolish the death penalty, that seems to work fairly well, failing that, uh, I think what we need to do is start, uh, some really serious outreach in a lot of different areas, um, people can do this work. It just requires educating them about the nuances. It is a Byzantine area of the law. It takes a lot of time and perhaps if we offer people the opportunity to associate with more experienced attorneys and compensated them, sort of as a mentor or paid mentee, mentor program that would be of some assistance, um, every place is a little bit different and just because, you know, the nuance of California law, it doesn't mean you can hop over to Texas or Oklahoma and it just doesn't translate that seamlessly and I really think that we need to, uh, probably think about having habeas units of some sort available in every circuit that seems to be the best model. Now, I know that they are some circuits who didn't want to do that and who haven't done that. Uh, but in those places, it is really difficult to get a cadre of qualified attorneys to continue taking these cases. Capital Habeas Units are good for that. They will, uh, provide that structure and training, uh, with just a group of highly specialized lawyers with whom, younger attorneys can associate.

Chip Frenshley: I want to ask, uh, Mr. Martinez. With respect to the three, uh, items that you identified in your written remarks and, and opening statement, uh, the second one dealing with this issue of appointment of private, uh, counsel under CJA, um, first of all, uh, could you speak to the prevalence of that issue or, or, or, why it is that in the panoply of issues that, that the survey of, of your office could have reached out at, that that one became one of the issues that you spoke about and, and also may be addressed what the concern is, is it, uh, is it a quality concern that maybe private lawyers who are not on the panel or taking cases that they're not getting enough money

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to start with to, to do the representation and that sort of back-dooring their way in or is there some other type of concern that, that you have?

Damon Martinez: Well, the latter part of what you are saying was a concern. I, uh, as I said we've seen this on the national scope but we also have a concern that may be happening here but, uh, I have to be candid with you, there is very little specifics that I can talk to you about because, um, this is a part of a system that from the U.S. Attorney's Office we really don't have an overall perspective on. We, we have a concern at this point, um, and if, if it is occurring, uh, what we're hoping is that, uh, here's the, here's the concern . . . is if that private, uh, defendant hires that private attorney, that attorney may not be qualified to be working in that area and the court may be appointing that attorney once the money runs out. And as we spoken earlier with the specialized areas whether its immigration or other types of areas, that attorney may not be the best qualified to be appointed but yet still jump into there by uh, that is the concern we have.

Reuben Cahn: Susan, can I turn back to get . . . I ask you a question about, you are talking about the difficulty of this capital habeas cases difficult to, difficulty of getting the right people on them and cost, and I guess I would like to know, are you seeing increasing difficulty, and cost post-*Martinez* when there is this obligation to re-examine fully the priors state habeas proceedings, and what is that doing the your practice, and to your ability to appoint people when you cannot take the case?

Susan Otto: All right that is a compound question and I'll try to answer one part at a time.

Reuben Cahn: Yes.

Susan Otto: One for the time for clarity. Um, okay first thing in the Western District of Oklahoma, we have um, a case budgeting process for the panel attorneys. That goes through a magistrate judge and it, there was a lot a sticker shock right after the first group of cases came through.

Reuben Cahn: Were they post-*Martinez* cases?

Susan Otto: Yes and now everyone has sort of adjusted to this new reality. It's important to get these cases done, and the Western District we have one magistrate judge who does all of them. He has developed a real feel for it and real expertise at this. Things don't work quite as seamlessly in the Northern and Eastern District as they do in the Western District um, it seems when you have a case budget and you can discuss this matters upfront, it's a lot easier to get that, get people thinking about it, get people planning ahead and get people budgeting for this. So I think the case budgeting process really facilitates that um, Judge Purcell has a really good sense of what it takes to get this cases done properly. We have a

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very experienced cadre of death penalty litigators in the Western District and they know what it takes um, some of them have practiced in state court for years, they know the prosecutors, they know what facts need to be developed uh, we have pretty culturally diverse state. One size does not fit all even for county to county and I think that uh, the case budgeting process has facilitated that enormously. There is no surprise at the end of the case for the judge and there was no surprise for the lawyer. You can go back and request additional funds, that's a possibility too. Things don't work quite as clearly at the circuit that in the western district the case budgeting has seemed to alleviate most of those difficulties. Did that answer your question?

Reuben Cahn: I think so. One just quick follow up, is it anymore less difficult to get appointments, to get people to accept appointments, post-*Martinez* and does the case budgeting process also facilitate your ability to appoint people to the cases, are you able to say, you can get things set in advance, and so encourage people to take the cases.

Susan Otto: I don't think *Martinez* has increased the difficulty factor exponentially, it has increased the difficulty factors or what.

Reuben Cahn: And what about the second question, does the case budgeting process also help you with the appointment?

Susan Otto: Yes, absolutely.

Judge Cardone: Um, Ms. Otto you weren't here at the beginning. . .

Susan Otto: I am sorry.

Judge Cardone: And so um, we've had a discussion about a number of things . . . but um, and it is fine. Judge Miles-LaGrange was very articulate and we've had all kind of discussions. Um, but I guess one of the questions that was asked that you didn't have the opportunity to answer is, we're here as a panel, trying to look at the CJA program and study it's strengths, it's weaknesses, and I think it was Mr. Frensley who said "no it is sort of a blue sky." If you uh, what do you see um, as a practicing attorney um, looking at the program um, do you have any thoughts about the program itself? I, I guess you are, are you primarily with the Capital Habeas Unit or is the, the whole program. . .

Susan Otto: Well I am the Federal Public Defender for the Western District.

Judge Cardone: So in your, in your role as the Federal Public Defender in this blue sky, what do you see, what, what, what would you like to tell us about?

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Susan Otto:

I think the most important thing in Judge Miles-LaGrange and I talked about this extensively when she was preparing her comments uh, the case budgeting in the capital habeas cases really started us thinking about what would make things better. Uh, I have a CJA panel administrator, a lawyer who checks for conflicts and who is answerable to me but is separated physically, separated from my office and operates independently. Having that buffer between the panel and our office and the panel and the court adds a layer of transparency, I think, in the appointment process. I think eVoucher should help us if it is everything that it's cracked up to be. Supposedly, you are going to be able to put in some parameters in eVoucher that will help us create a tier of panel attorneys.

We have some very, very experienced attorneys who practice in large law firms in Oklahoma City and they just can't take certain cases, bank robberies. Their law firm represents all the banks. They can't take bank robberies, I get that. But we want to encourage them to be on the panel. We can hopefully select them out and the panel administrator will just find exactly the right person. I think that's really a cost-saver. If you can get the right person first time and get that person appointed, no conflicts and a perfect fit, things work really well.

The second part of it is the money. I think that one of the reasons the judges were so enthusiastic about having a CJA panel administrator, that person is going to do a reasonableness review. The judges who met with me all expressed how much they hate that part of the CJA process. They hate going over the vouchers. They hate having to get down in the weeds with the lawyers on how much time they spent on this, that, or the other, and balancing when you have a multi-defendant case, these widely disport vouchers. It's time-consuming and very uncomfortable for them. I think Judge Miles LaGrange and I kicked around the idea of maybe having a case budgeting process not for complex but just for routine cases, or maybe the CJA panel administrator and one of either our magistrate judges, or perhaps one of our senior judges who is out of the criminal rotation, would actually be responsible for the vouchering on all the regular CJA work. That way, the district judge who is presiding over the merits wouldn't have to be talking to the lawyer about the money. That's an uncomfortable part I think of the CJA process. I know that I, I really hate it when I have to go into a judge who is going to be listening to my evidence and I have to ask for a subpoena and it's inevitable. It's always, why do you need this witness, and I always end up having that conversation with them. If there, if we have in our district just kind of a management layer that was separate from the merits layer, that would work for us. Would it work for everybody, probably not but either separating out in the statute those two functions or changing, as Judge Miles LaGrange said, changing the model plan and the guide to judiciary policies and procedures to give districts the flexibility to do that. I think

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would benefit everyone. I think the panel attorneys would like it and I know that my district judges would love it if they never had to do those vouchers again and all that math and all that stuff.

Judge Cardone: I have a question about your, um, the person that does the selection of CJA. You said there is a, um, a person in your office that actually assigns the cases?

Susan Otto: Yes.

Judge Cardone: At what stage does that happen? In other words, you've got a person who is arrested, ready to appear before a judge, usually, you know, they are going before the magistrate and the magistrate will appoint. Um, how, what stage does your employee get in there and say, okay there is no conflict here, we are going appoint this person? How does that work for it? Could you explain that for us?

Susan Otto: I sure can. The CJA panel administrator is notified sometimes ahead of time by the United States Attorney that they are having a big round up and warns them, I got ten people coming in, five non-English speakers, three people, and sometimes they know upfront there is a conflict with their office, and would say the federal defender can't take this one. If we could take it, then we just take the first person who is arrested who comes into the building. The Marshal Service, lets the CJA panel administrator know when the people actually get into the Marshal's holdover. The CJA panel administrator goes over there and assists the person filling out the financial affidavit to make sure that it is filled up completely then takes it to the courtroom deputy of the duty magistrate judge. This process should take about twenty minutes. Then the appointment process starts. So, we try to have a lawyer over there in the holdover before pretrial services comes over for the pretrial services interview. So, that's how works where I live.

Judge Walton: Mr. Martinez, do you have any notification systems similar to that if you know there is going to be an indictment coming down that you will notify the court or whoever is making appointment so that they have that information available?

Damon Martinez: Uh, Your Honor, we have a, uh, I want to say we have an informal system in place where we will notify the court if there's, um, serious cases coming to, uh, for example with a, uh, if there's a large indictment coming, uh, that's going to take a lot of search warrants or, um, as far as pretrial services, we will notify the courts so that they will be ready for this.

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Chip Frensley: Ms. Otto, what, what do you think the advantage is to having the panel administrator have some connection to the defender organization as opposed to being a court, clerk employee or some other type of, um, bean counter, if you will?

Susan Otto: Well, I can tell you that, uh, my efforts to have a CJA panel administrator in my district were 100% dependent on them being my employee. The clerk's office said no, they give me some space but they weren't going to pay to have the employee in their office. They were not going to pay for them. I, I think it does help. So far, it works well because if you're, if you are associated with the defense function in some way, I believe that when the person goes in there and says, I'm with the Federal Public Defender Office, I'm an attorney but I won't be representing you, um, I want to talk about nothing but the financial affidavit. I think that helps. If it's, um, and we have a substitute person who backs up our CJA panel administrator, it's a court clerk employee. That person is very, uh, hesitant about becoming too involved in the financial affidavit process. Some of it does require a certain amount of discretion and judgment and to make sure that it's filled out, it's complete and accurate. I think it's best for that to be an attorney. I've never had an experience with, um, a staff member being in the clerk's office trying to perform this function. I understand it happens in some places and I also understand that there is some federal public defenders who think it's just crazy for the federal public defender to have anything to do with this process, um, and they are really two schools of thought. Part of it is just our history. When the office was established, the first federal public defender asked the court, what you want me to do about this. Do you want to continue with the judges' courtroom deputies doing this process or do you want me to help, and of course it was unanimous; now, you do it. And, uh, we did that for the whole state until we established two pro groups. Um, so it's partly history with us. There may be another model that works just as well someplace else. I do think the person needs to be an attorney, though.

Judge Cardone: We would like to see, um, and we will start again with Judge Armijo, is there anything else, um, that you would like to tell us today?

Chief Judge Armijo: What surprised me a couple of months ago when I was interviewed by two representatives from the AO defender services was that, uh, uh, they provide training upon request and I don't think anyone on our court knew that. We have a pretty healthy bench and bar fund and, uh, we, uh, put together CLEs. In fact, we did one just a few months ago and we do it with the idea of having a component that would be attractive to the criminal defense practice, one on civil and, and then one on just good skills evidence. We had a section on Sentencing Guidelines. We do that and we're very conscious of that. It's very well-received. We do that on the convention center in Albuquerque and, uh, it, it's extremely well-

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received. That's our bench and bar funds that go to that. Judges participate, all of our judges, actually our magistrate judges, our article three judges and, uh, we bring in speakers but it surprised me that there were resources available through defenders services that I was not aware of and not of my judges were. Um, judge if you need a training in this one isolated focused area, just let us know and we'll come down and do it. That was just a gift and so perhaps better communication, uh, to the courts, uh, about what is available, I think that would be tremendous because that was a surprise to me.

Judge Cardone: All right. Judge Collins? Anything?

Chief Judge Collins: I will just say that as you do your work, do whatever you can to maintain independence for the, uh, defenders. They need to be seen as not part of a system but separate and apart from the system.

Judge Cardone: When you say that, you mean separate and apart how? Um, what's the concern?

Chief Judge Collins: There's always this thought of client. If he is getting, if the lawyer is getting paid by the government, he must work for the government; therefore, he is part of the government even though he is called the prosecutor, he is called the defense lawyer, but they're all the same. We give you something to promote independence so people don't look at them that way. It's transparent but people don't look at it that they are all money out of the same barrel.

Judge Cardone: Judge Junell?

Judge Junell: Well I have heard some great ideas today and I think, uh, I think go back to one size doesn't fit all and yet we need to give some options. I heard a lot that perhaps Judge Cardone and I can go to our chief judge and, and talk about, and, and have some discussions within our own district. Um, and I think that's, when you publish some of these ideas to get some of these things out would be really helpful because I'm not sure, um, you know, we have a wonderful public defender in the Western District of Texas. They may not be aware of what's going on in Oklahoma or going on in other places that can be really helpful, so I, I think trying to get these ideas out and, and letting us know to try to make this, keep the system where it's supposed to be.

Judge Cardone: So I ask follow-up question to both of you and Judge Armijo because I don't disagree with the concept that having more information could be wonderful. Why, why don't we have that information? I mean, what, what, what could we do to make people more informed about the system and the things that are available to the system? Any thoughts? I mean

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why, where do you think it's, where do you think that blockage is occurring that, that all this information isn't being shared?

Judge Junell: Well, I didn't know there was a complaint about, um, court-appointed judges and judges doing their vouchers until I read this article. I mean, until I read the article that came out and, and it's very, um . . .

Judge Cardone: NACDL report?

Judge Junell: Yes, the [INAUDIBLE] and I, you know, it was interesting to think, I said well I don't know that but I understand that but you know, you see things there that perhaps, yes this may be happening in Pennsylvania but, uh, it could be happening [LAUGHING], it could, it could be coming to Texas, uh, you know, as well. So I think sharing, um, these ideas and I'm not, um, again, even within our own district, what Judge Cardone has in El Paso is completely different or, or her division there is completely different to what I have in the Pecos division which is right next door, just simply because of space and numbers and things of that nature and, and population.

Judge Goldberg: Judge Junell, you are officially invited to our Philadelphia hearing and I will [LAUGHING] show you around.

Judge Junell: I want to be there when the, when the Eagles play the Cowboys, okay? [LAUGHING] Because neither one of them are doing very good this year, so [LAUGHING].

Judge Cardone: Mr. Martinez?

Judge Goldberg: Hand that out as a sentence [LAUGHING]. . .

Judge Cardone: Mr. Martinez, anything you would like to add?

Damon Martinez: I just want to briefly thank, thank the committee, the panel again for letting me speak before you this afternoon. Uh, I would just mirror that what, uh, the Chief Judge Armijo has already said, you know that education is important. Um, one of the very nice things about New Mexico is we have strong advocates on both sides or, you know, that all parties will advocate. But we also realized that New Mexico is smaller and I think we come together as a group for example, the federal bench bar or the bench bar conference that the chief judge referenced. That was a place where a lot of the community came together for some wonderful education. And where I think I see the, uh, for example in the future is, uh, one of the priorities of the Department of Justice has is for reentry programs and that's for people coming out of incarceration. How do you keep them being solid citizens once they come out of incarceration? This

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is one of those areas that from a Department of Justice perspective, U.S. Attorney's perspective, we are hoping to, um, help bring defense counsel into where we want to go in the future to, to maybe educate on what a reentry program is, something to that effect.

Judge Cardone: Ms. Otto? Oh I'm sorry, Ms. Armijo . . . Judge Armijo.

Chief Judge Armijo: Well, I was going to say that, uh, so much of what we are exposed to is anecdotal and that's not always a good thing. I appreciated the visit from the two representatives from the AO, um, and I also appreciated the time that our judges spent with your former case budgeting person from the Ninth Circuit. I think that more direct contact, I mean our courts are very receptive to that, presentations directly to the court, I think that would help to bridge the gap.

Judge Cardone: How long have you been a judge, Judge Armijo?

Chief Judge Armijo: Uh, fourteen years.

Judge Cardone: And how often has someone come and communicated like that to you in those fourteen years?

Chief Judge Armijo: In, in what sense?

Judge Cardone: Well, you said that somebody come from the AO . . .

Chief Judge Armijo: Yeah and this happened, you know, uh, I got the call probably ten days before they came. They met with Mr. McCue and certain public defenders. They met with our clerk of court. They met with our CJA administrator of the court and they met with me. One was on, on, he was borrowed from California. He was in Washington and the other is full time with the AO and I don't recall their names at this point, two women. And uh, I invited my clerk of court to come in and sit in through the meeting me and I learned a great deal. I was very receptive to it, yeah can I take some time to meet with you judge? Absolutely. I think more of those kinds of outreach, it will be well-received.

Judge Cardone: But how many times would you say that when an outreach has happened?

Chief Judge Armijo: Only time I, well it has not happened since '12. Uh, that's when I became Chief and I don't recall it happening as a member the court over the many years, uh, really at all. And so, so much of what we get is anecdotal, and that is just not the best way to do business in my view.

Judge Cardone: Ms. Otto, anything you would like to add?

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Susan Otto: Just very briefly I, I think Chief Judge Armijo has just hit on a very important point here. Um, you know the last time other than cyclical audits the last time someone from the AO has come to Oklahoma City was during the bombing. That was twenty years ago. Um, there seems to be a huge disconnect between the people in Washington and what goes on out in the field. Um, I think that if we had more communication and it were clearer to the folks in Washington that the federal defender program is operating responsibly. If you saw us in the field, if you saw what we do, if you saw how hard the lawyers work day in and day out, you would have no question about the money being well-spent and the management of these offices being responsible and responsive. Um, I think there is a disconnection between the administration and the people in the field. Um, I would love to see that change in a very, in a positive way. I think that the administrative office has a lot to learn from folks in the field.

We had a small taste of that when we did our workload measures and one of the people who was participating in that actually came to the offices, came to various offices and watched what we did and how we did it, and was convinced that we were doing a responsible job with the public's money.

Um, the CJA is such an important program. Um, I can't, I personally can't imagine what federal court would be like without it. I know that the judges in the Western District, some of them remember what it was like before it, and they did not like it very much. And um, because it was literally catches catch can, and this is just too complicated and too important and too consequential to leave that to chance anymore. Um, I think that if we just fine-tune CJA, we can move it forward, um, and I think part of that is making the administrative office a full partner in instead of a thing that exists in a roof.

Judge Cardone: Well on behalf of all of the Committee, I want to thank our panel, our first panel, um, for your participation today. We are going to take about a, we are scheduled for a fifteen minute break but it is going to be more like a ten minute break because we are going to resume at about 3:30 with another panel, um, but I want to thank you all for being here for your travels here and your participation and we may be following up with some of you because we are really trying to get all of the issues, so thank you.

Panel: Thank you.