

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 1–Santa Fe, New Mexico

November 16-17, 2015

Transcript: Panel 5—Views from CJA Panel Attorneys

Judge Cardone: I am going to go ahead and introduce for everyone both the Committee members that will participate on this panel as well as the panel participants: um, Honorable Judge John Gerrard, uh, Mr. Chip Frensey, Mr. Reuben Cahn, and the Honorable Dale Fischer will be our Committee members, and our panel participants are Ms. Cori Harbour-Valdez from the Western District of Texas, and my understanding also from the District of New Mexico, is that correct?

Cori Harbour-Valdez: Yes, your Honor.

Judge Cardone: Um, Richard Esper from the Western District of Texas, um, Mr. Phillip Sapien from the District of New Mexico, and Ms. Melanie Morgan from the District of Kansas. Um, we are going to start with opening statements so we will start with, start with you, Ms. Harbour-Valdez.

Cori Harbour-Valdez: Thank you, your Honor, and thank you to the Committee for allowing us to be here this afternoon and participate in this very important study that you have undertaken. Just a little bit about my background, I have had my own firm since 2004 in which I practice civil and criminal appeals and criminal defense. I do have the privilege of serving on both panels for the Western District of Texas, El Paso Division and the District of New Mexico. Currently, about 50% of my cases are CJA panel appointments and that is both at the trial level and the appellate level. The vast majority of my cases being on the border involve immigration cases and drug cases, but I have handled everything from RICO, to sex trafficking, to extortion.

Um, and in 2006, I was appointed to handle a capital habeas appeal and in 2010, I had the unenviable task of watching my client die by lethal injection. That was a pivotal point in my career. It changed me not only personally but it changed the way that I looked at every court-appointed case that I handled going forward.

Um, I, I believe it is a privilege to serve on the panel; however, I do think improvements can be made, and I hope to address some of those with you today. I know that you have received my written testimony but I do want to highlight a couple of things. There are obviously differences in the way panel works in El Paso and in, I practice in Las Cruces, New Mexico. In El Paso, I get on average two to three cases a year. In Las Cruces, I get at least that per month, so my, my practice

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

currently is much more robust in the District of New Mexico and I will speak primarily to that, except when I am highlighting some differences that I wanted to, the Committee to be aware of.

Um, one of the things that in speaking with fellow panel attorneys and you have heard it over the last two days, um, is the problem with vouchers, vouchers being cut, uh, attorneys not having any recourse to address these reductions, attorneys self-auditing and just not charging for things that they know the judges either will not pay for or in going back and reviewing vouchers that you know the clerks are going to cut before it ever even gets to the judges. So, a lot of that is going on. It is unfortunate, um, because as you know, the hourly rate is already significantly lower than what we would charge in our privately retained cases and to have a voucher further reduced is very disheartening and discouraging.

In some districts, we will receive notification when our vouchers are being cut and given the opportunity to respond to that. In other districts, we don't know until we receive a check in the mail. I have a very capable paralegal who keeps track of all of my billing. We have a, a chart that she has created for the amount that we have billed and then the amount that we were ultimately paid and that's what I reviewed in preparing my testimony today that I can say that 60% of my cases this calendar year have received a reduction of some sort. Um, the times that I have been given the opportunity to meet with the judges, I would say about 50% of the time, those are still reduced.

Recently, I had a situation where a magistrate judge was reviewing a voucher because a visiting judge actually was the one who, um, covered the sentencing hearing. The magistrate judge sent me an email and asked me to explain why I billed a particular amount for meeting with my client's family on so many occasions. I made my case that I thought involving the, the client's family, in not only during the litigation, but specifically during the sentencing, I thought that was a very important part of my representation to get letters from the family, to get insight from the family. She informed me that that was not compensable under the Criminal Justice Act and she reduced my voucher accordingly. I accepted that reduction, no questions asked. That is her philosophy. I found out about a week later that she had instructed the clerk's office that when she was the duty judge, that I was no longer to get appointments while she was the duty judge. That is the kind of retribution that we face if we speak up about our vouchers being cut. That is the kind of things I want this Committee to understand. I know you have asked for hard evidence. You have asked that we not give you anecdotes but that's what we are facing.

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

Those are the kind of choices that attorneys make. Do we, do we raise an issue about our voucher being cut and then face the delays that are inevitably going to come in getting paid and then maybe even face what I faced with this particular judge. So obviously, I know that is something you all are going to have questions about and I am happy to speak further to my experiences there.

Compensation, I touched on a little bit. I think we do have to consider increasing the hourly rate if we are going to attract and keep the highly skilled attorneys that need to do this type of work. I don't know what a perfect hourly billing rate is, but something more than what we are getting now would, would definitely be appreciated and I think it's, it's deserved.

The next thing I talked about is resources and I know the Committee has heard a little bit about that. Adequate funding is crucial. There has been some discussion about parity. We all I think can agree that there is no way CJA panel lawyers will ever be on par with the U.S. Attorney's Office. We are never going to have those kinds of resources but sadly, we don't even have the kinds of resources that our public defender's offices have, and I think that needs to be addressed. When an attorney is scared to go in and ask for an investigator for some of the reasons this Committee has already heard, um, it puts a chilling effect on our ability to advocate for our clients and that that is a concern.

Um, in some, in the Western District of Texas when I know it is a complex case, I submit a case budget and I, I have been very successful in getting my expenses met, my investigators, my experts, and ultimately not having my voucher reduced until it gets to the circuit level, um, and that's a different story. Um, but in the, I think just for the run-of-the-mill cases as I call them in my, in my written testimony, attorneys are hesitant to go and ask for it because the judges are going to ask why, why do you need it. This is just, I mean this is just a reentry case, why do you need an investigator? This is just, you know, a possession of marijuana with intent to distribute, why do you need an investigator? And so, they are hesitant because they don't want to be blackballed and they don't want their voucher to be ultimately reduced or some other retribution to come.

And then finally, I think training. Training has to be addressed. Um, I know the AO does provide some very good training opportunities but I think on a local level and I spoke with one of our district judges. In preparing for this testimony, I spoke with, um, two district judges and one magistrate judge to get some insight on, on their, their thoughts

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

and, um, I think we need to do more localized training specifically when someone is new to a CJA panel.

I never received any training on how to fill out a voucher, what can we bill for what can, I mean I went and took it upon myself to go and look at the CJA Act and read section 230 and find out what all I can do and what I couldn't do and how to do it but some attorneys don't have time to do that or don't take the time to do that and I think if we could do more basic training, I know Judge Junell talked about a Criminal Law 101. I mean, something like that when you got someone new to the panel because we want to continue to attract talent. We want to continue to attract skilled attorneys but we also have to continue training them to keep them up-to-date with all of the changes that inevitably happen in this area of law.

One other thing, um, I do want to stress back on vouchers is I agree with just about everyone that has testified that I think we do have to take it out of the judges' hands. I don't know what a perfect model is. I, I agree with Stephen McCue. I think it's, it needs to be with someone who does this type of work on a daily basis that understands what a criminal defense lawyer has to do to defend to this type of case and in my meeting with one of the federal judges regarding one of my vouchers, he candidly admitted that he had never practiced. In private practice, he had never done criminal defense. He had me explain things to him that he really did not understand as far as the criminal defense process and had been reducing vouchers because of that lack of understanding. Um, so I think that educating, if it is going to stay with the judges, I think educating the judges as well is going to be helpful but I am wholeheartedly in favor of being completely removed from that function, and I will yield my time for questions. Thank you very much.

Judge Cardone:

Mr. Esper.

Richard Esper:

Good afternoon Committee members. My name is Richard Esper. I practice law in the Western District of Texas, uh, where Judge Cardone sits as one of our five sitting district judges. Uh, I have been in the practice of law, and I think you read it in my statement, uh it's kind of an unusual situation that most people don't find themselves in. Uh, but I practiced for twenty-three years actively, uh, and then saw the criminal justice system from a very different light and it opened up my eyes significantly to what I thought was the most important about the practice of law. Uh, after an obstacle field, uh, recovery period, uh, I have been practicing since 2009. I immediately got myself

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

qualified very quickly onto the CJA panel and qualified to handle mega complex, uh, cases.

I think that the thing that is important to me, uh, and I want to stress is that handling cases on the border I think is different than anywhere else in the country, uh, because there is so much diversity in the cases that you have, and in the clientele that you have. Uh, number one, we have a multitude, I think we have probably, and Judge Cardone can tell you, if not the biggest docket in the country, one of the biggest dockets. Uh, the majority of cases are either illegal entry or reentry cases that involve, uh, non-English-speaking defendants and number two, we have a multitude and probably way too many drug cases.

Now, the drug cases range from fixed immigration checkpoint cases, uh, to what we call bridge cases. Those are relatively simple. They are not necessarily complex. But we also have a multitude of what I call mega complex criminal cases where you have historical investigations that are going on by the United States Attorney's Office. Uh, many times, they result in multiple defendants, multiple counts, title-free wire interceptions, multiple cooperators. And those are the cases to me that are the most challenging, uh, and I know multiple defendant cases exist in every jurisdiction but it seems like in the Western District of Texas, we get a lot of them simply because of the investigative resources that are put on, uh, put into United States Attorney's office in trying to stem the flow of drug trafficking into the United States, and of course, El Paso is one of the major entry points, uh, for drugs into the United States.

But handling one of those cases, a mega complex criminal case, is very, very challenging, uh, and I think that is where the problem with resources comes into play especially when you are talking about parity, uh, with the United States Attorney's Office. Because what inevitably is happening in these cases is that there is a viewpoint from the judiciary that okay, if I've got all these lawyers appointed, uh, I am going to get a big CJA bill from every single lawyer. So, one of the judges proposed to the U.S. Attorney's Office just give each lawyer, um, their discovery as to their particular client. And uh, I, I guess maybe fearlessly spoke up and said, no that won't work because as I, as I had many times happened to me or clients happened to me, uh, you get stung in trial by the so-called exception, the co-conspirator exception to the hearsay rule, where your client all of a sudden is talked about by other codefendants. And so, if, if you have been trying to limit your discovery to, to limit the CJA bill, that limits your effectiveness as a lawyer, and one of the things that really drew my attention, uh, during my, in between phase one and phase two of my

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

legal career was just how much in the dark a lot of defendants are, uh, simply because a lot of lawyers are not properly trained, uh, a lot of lawyers don't take the time, uh, to explain to clients, uh, what is going on and especially the non-English speakers.

Now, I am aware that with respect to funding, uh, for example I think one of the lawyers earlier this morning talked about non-necessary expenses. You don't have to ask the court for it. You are allowed up to \$800 for non-necessity services. And uh, I, not because of fear, uh, but I always take an interpreter with me whenever I meet with a client not because, uh, I don't speak Spanish because I do. In fact, one of the forms in whenever you are qualifying, you have to state whether you are a Spanish speaker or not or whether you have, you have the services available for translation purposes. Uh, so I don't ever bill for that interpreter not out of fear of a voucher getting cut, but I do have a concern that I am raising a conflict about whether or not I should even be representing Spanish speakers.

Now, here's what the problem that I saw fifteen years ago was that lawyers, there are Spanish speakers and then there are real Spanish speakers. Uh, I am a Spanish speaker. I am not a real Spanish speaker. I would gratuitously give myself a C+ which means that I can converse in Spanish with a non-English speaker. I can, I can carry on a conversation. I can understand things. They understand me but when you start talking about, uh, explaining to them what are their available paths, what are the particular nuances of evidence that exist against them, explaining to them these federal Sentencing Guidelines, of course they were mandatory at a time and now they are advisory, which means you got to explain even more what that means, explaining adjustments, explaining offender characteristics, explaining the § 3553(a) factors and variant sentences and grounds for it. I believe you really have to have someone that is a real Spanish speaker with you so that they understand what's going to happen to them or what likely will happen to them in the path that they choose and what will likely happen to them when it comes to sentencing, so that when it is all over with, they may not agree with the sentence and they might not like it but at least they know and they understand what is going to happen to them.

The same thing applies in the, some of these mega complex criminal cases where you are trying to explain Title III wire interceptions to them. Uh, you need the services of an interpreter. And uh, I feel and I, I take my own interpreter but again, that's a, that's an expenditure that I think can be covered under the Criminal Justice Act. Technically, you can bill forth up to \$800 and not have it cut, but I

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

know a lot of lawyers are afraid to ask for that because you are going to get a voucher cut, number one, and number two, you are going to be questioned about, wait a minute, you are a Spanish speaker, what's the problem here? Why do you need an interpreter? And, uh, I think that that's an issue that is particular to border cases that a lot of the judges in different parts of the country, with all due respect, are not probably honed in on. Uh, and so consequently, I think that that needs to be provided so that effective representation can apply.

Number two, we do a lot of traveling and I know, uh, Ms. Duncan in the earlier panel talked about access to clients. Uh, you know, the closest facility that we have is a forty or fifty minute drive each way just to see a client. Uh, more and more, they are placing clients in Sierra Blanca, Texas which is ninety miles away. And consequently, uh, as she had indicated, Ms. Duncan indicated, uh, a big complaint is clients don't have access to their lawyers or they show up the day before. The bigger problem is the location of where these pretrial detainees are kept. Now I know that the courts don't have any control over that. I know that's a problem that I know every judge hears from every lawyer, uh, but I think the, the possible solution to it is number one, there needs to be more adequate funding.

I do believe that a pay, that an increase is appropriate. I know in the state court system in El Paso County, they just raised their hourly rate by \$15 an hour. Now, their hourly rate is much lower than the, than the CJA rate but, uh, I think there should be a rate up to \$144 as, as advocated or as stated earlier but I think in mega complex cases, the rate should be \$165 dollars an hour because there, you are fighting the entire United States of America, the prosecution, and they have been investigating these cases for years and you are supposed to get prepared and ready within a very short period of time and be able to provide effective representation and I think it takes, uh, a lot of skill, a lot of hard work, um, and so therefore, I think in order to stay competitive, uh, I think the rate needs to, uh, increase.

Ms. Harbour talked about a death penalty case. I don't think there, we have ever had any training, uh, to take a state habeas death penalty case. I know Judge Cardone appointed me to one recently, uh, that came through the state system and when I got it, I thought I was going to pass out because I, I had never handled one. And so, what I did is I reached out to some colleagues in Austin who had done death penalty cases and got some guidance from them and tried to figure out how I should navigate representing someone, uh, whose, um, the death penalty has been imposed and now, we are weaving our way through the federal court. And uh, I think perhaps, well I don't think we had

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

anybody in El Paso that has had adequate training to handle, uh, state habeas death penalty cases. That is another area that I wanted, that I wanted to, that I think needs to be addressed, um, by the Committee members.

Finally, I believe that because border cases are unique and because of the, the volume of mega complex drug cases that exist in the Western District of Texas in particular El Paso, uh, I think there needs to be more funding, higher pay rate so that we can stay competitive. I do believe that the panel lawyers in El Paso, I believe that there are a handful that are hands down probably the best lawyers in El Paso, uh, as criminal defense lawyers, uh, and, and are much better than anything the public defender's office has to offer. But there is also a number of lawyers that aren't in that league either and that's why I think those young lawyers need some training, need to attend programs and training that occurred locally because if you are going to go to a training program that is 2000 miles away, you are not getting a paycheck while you leave. You are not getting a paycheck while you are gone for a week or two weeks, uh, but I think training that is local level would benefit the younger panel members. I know in our division, we have a mentor-mentee program, uh, and I know every mentee I have really enjoyed the entire process and I invited them to make sure that they check with me and know my schedule every month so that they can follow me around like a little puppy dog. Maybe they learned something, maybe they learned how not to do something. But adequate training is a necessity for especially the younger panel members so that we can keep pace with not only the public defender's office but hopefully keep phased with our adverse service in the U.S. Attorney's Office. Thank you.

Judge Cardone: Mr. Sapien.

Phillip Sapien: Thank you Judge. I want to thank the Committee for the opportunity to speak today and answer questions on the very important topics that you've been tasked to consider and to report on to the United States Supreme Court. My name is Phillip Sapien and next October, I will celebrate practicing law twenty-five years. I was raised in a small town just south of Santa Fe, the town of Bernalillo, New Mexico on the way to Albuquerque. My, uh, family history involves ancestors seven or eight generations back, Spanish ancestors that my mother can trace back to prior to 1848 before this part of the world became part of the great United States of America. But my paternal grandparents were from Mexico and they came here less than 100 years ago fleeing the Mexican Revolution but I think that is some of the drop back that some of us that practice here in this district have when we relate to

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

cases that occur here on the border that, that have been mentioned in terms of the family dynamics, the family impacts, the separation of families that occur, and really the difficultness of those cases. Certainly we have laws in this country, immigration laws that need to be respected, but those cases are not anymore simple I think or easier to conduct than uh, than say drug or other case in the federal system.

I am a former board member of the New Mexico Criminal Defense Lawyers and I am also the former president of the New Mexico Hispanic Bar Association here in New Mexico. I think I started my career with the naive belief that I could help people in need and still make a lucrative income, and although I do enjoy a comfortable living in private practice and as part of the CJA panel, I think I've come to learn that really the people most in need of our help in this country are the indigent, and that those are really the most vulnerable in our criminal justice system.

I spent five years at the New Mexico Public Defenders Office where I gained valuable trial experience from some of the best lawyer's money can't buy. And after a trial, where my client turned an acquittal, a state district judge who I respected very much, who had been a state public defender, he had been a federal public defender, he said, "you know , you really need to get into the federal court, I think it will make you a better attorney." And so about fifteen years ago, I did apply for the CJA panel. I was fortunate enough to be selected and I've been reappointed multiple times but I certainly believe that experience has enhanced my ability and skill as an attorney and I do value those experiences and what that has thought me.

I will tell you that other than raising children, running a private practice and a small business has been the hardest thing that I have undertaken on a professional level. I spent ten years as a solo practitioner and then almost ten years ago, one of my brother's left; he was the second in our family to become an attorney. My younger brother, he left the defense practice and we formed a partnership that engages in civil and criminal litigation. Over the past seven, eight, nine years, we survived through some very tough economic times as the Committee knows we all experienced. The CJA appointments that I received during that period were really a valuable component to us surviving as a business. Uh, to help pay overhead, they help keep our staff who also have families, uh employed, and uh, certainly was an important part of maintaining our doors open.

During my career as a CJA panel attorney I have handled Indian country cases, bank robberies, single-defendant drug cases, and many

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

complex multi-defendant cases, and I generally average probably about eight to ten appointments a year. Some of the things that I would like the Committee to consider, I don't think are, are any novel ideas, I think it has been a theme that has kind of developed over the past couple of days.

One of the things I want to emphasize is that I think locally we have a very good working relationship with the district defender. Um, Mr. McCue has done an outstanding job I believe in providing communication to the panel, updates on, on cases, a various panel issues or application deadlines, notifying us of a various CLEs that are offered even through the New Mexico Criminal Defense Lawyers, the winning strategies CLEs and things of that nature. And I always know that I can contact one of my colleagues in the federal defenders office should I have a, a question on a case issue, some perplexing legal issue, a sample motion, anything that uh, that we may need I think, the, the various federal public defenders are available and are willing to help. Certainly, I think there always is room for improvement and so the second the point I would made is I think is, as has been stated already now and earlier uh, in this public hearing, is that we do need to expand the training opportunities.

I think when I first join the panel, it was really trial by fire and uh, you just got in there and basically handled the cases and, and uh, kind of uh, sank or swim uh, as the case may be. But I do think we need to expand the, the local training opportunities. I think it is often difficult for solo or small firm attorneys who are on the panel to attend some of the out of state CLEs. It, it may not just be a cost issue, it maybe their schedule uh, I am, speaking for myself because we maintain a civil and a state court practice as well, sometimes, the schedule just will not allow attendance of, of uh, a CLE that, that uh, maybe something that we are really interested in. So I think if we can expand those opportunities on the local level that would be important. A suggestion might be to have perhaps maybe monthly brown bag CLE sessions that the district defender helps to put on with the panel, the panel rep and uh, you know there may be some push back from panel members but to maybe make at least two or three of those mandatory throughout the year. So that we stay abreast of, of changes in the law or, or trends in in sentencing, use of experts uh, things of that nature.

It has been discussed whether or not uh, for example having an outside person review vouchers could be done without compensation, and unfortunately, I think the answer is no, and I think the same would be for trying to expand these training opportunities. I think something would need to be sought out in terms of either enhancing the

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

defenders, the district defenders budget, or perhaps providing some compensation for the panel rep. to help organize these CLEs on a regular basis. I know that it is often difficult to get a group of, of attorneys of various busy schedules together but I think if something could be scheduled on a regular basis, that would, would certainly uh, help enhance our training opportunities.

I think the last point I would, would make is, is, is uh, a theme that is already been emphasized about judicial independence with respect to the um, the panel. I think that the selection and appointment of attorneys as well as the approval of vouchers is something that needs to be considered um, on an outside basis from uh, the judiciary. Certainly, the courts have a vested interest in, ensuring that competent, if not zealous legal representation is provided for defendants, but I think from a public policy standpoint, public confidence requires that there is a certain amount of independence from the court and the United States Attorney's office and the defense bar uh, to ensure confidence in our, in our system.

I think that is, is one thing that, that our own, our professions always struggled with in terms of a public confidence, and I know when I was a state public defender and even at times, uh, as a CJA lawyer, a criminal defendant will basically believe that because I am being paid by the government, I am essentially working for the government and I think that's always a, a dynamic that we have to kind of overcome in representation of our, of our clients.

One thing I know that, um, Damon Martinez, the New Mexico U.S. attorney mentioned yesterday, and I will preface by saying I've known Mr. Martinez over thirty years, uh, when we were young college students, but I would respectfully disagree with his suggestion that U.S. Attorney's Office should be involved in vetting of defense council for the, the CJA panel. Um, and it's really, for the same reasons, uh, as having independence from the judiciary.

I don't know that I can provide you what right balance would be, um, I think that, uh, certainly I'm hopeful at this Committee at the conclusion of the various public hearings will be able to, uh, ascertain proposals or some type of plan that will sustain the CJA program. Certainly, I think the viability and relevance of this program is more important now than ever to help maintain the public confidence in our legal system. And I think one of the things I would ask the Committee to, to take away to future public hearings is the believe, the ideal, the concept that really those of us on the panel don't do this for the money or because it's the popular thing to do. Certainly I think those of us that'd been in private practice, and certainly on the civil side, will tell

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

you that we can make much more money with somewhat less stress and anxiety, I think in other, uh, areas of law.

I often have to engage friends and family in conversation as to, “why do you do this, how can you represent a criminal defendant?” And certainly, um, just outside this Committee room, um, one of the office walls, you may see my last name out there, and that’s because my youngest brother is a state senator here in New Mexico. And uh, and, uh, certainly, I entertained ideas of politics as a young lawyer, but as a private practitioner and a CJA lawyer, there is just no way I could leave the practice long enough to be able to engage in that kind of endeavor. And I think also being a criminal defense lawyer, because it’s not the popular thing to do, is obviously something that’s hard to overcome in the, in the political realm. But I would leave you with is that, you leave with the understanding and the belief that we do this because we’re committed to the indigent representation, of the representation of indigent clients and to making sure that the Constitution and the Sixth Amendment mean what these documents say they mean and what they stand for. Thank you.

Judge Cardone:

Ms. Morgan.

Melanie Morgan:

Thank you. On Monday before I left, the federal defender in my district emailed me and she said two things: “good luck,” and I thought to myself, oh Jeez, does she know something that I don’t know? And then she said “two of the new defenders are going to be down in Santa Fe while you are there,” and let me know that they would be staying in a nearby hotel. And I thought about that for a minute, because these two new defenders were not baby lawyers. One of the lawyers has as much as much experience as I do. She has almost twenty-three years in practice as a very seasoned criminal appellate lawyer, and the other person has been in practice for about fifteen years, um, and doing all retained and CJA criminal work. The idea that our federal defender thought that before these two lawyers actually join forces with her team that they needed additional training, that they have a certain basic foundation before they came on board, I think is really what I want to stress with this panel.

In our district, um, we have a model plan and this is the standard that our attorneys are supposed to practice too, our CJA attorneys. They are supposed to provide services that will commensurate with those rendered if counsel were privately retained. Imagine what that means if you are somebody who has got intellectual property issue, are you going to go to a real estate lawyer and ask them to help you out? Imagine if you are somebody with a healthcare problem, are you going

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

to go to somebody that specializes in wills and trust? I mean that answer should be obvious to everyone that's sitting here, and yet the level of care and expertise and experience that we expect of our CJA lawyers does not necessarily rival, um, what we would hold for other people in private practice.

So in our district, I just want to share with you briefly, um, what this means to us, how it is achieved and how we are working on maintaining it. Um, and I will note right here that I practice in two different districts. I, I practice in Kansas City, um, my office, um, because it's on the state line, I practice in the District of Kansas as well as the Western District of Missouri. They function very differently. I am the panel rep. in the District of Kansas but I want to talk to you what we do in the District of Kansas. Because some of the things that we do, I think are really, really good and in a day of hearings, where we hear a lot of bad, where we hear, we need to do this, we need to do this, I would like to give you all some ideas of what things actually are working.

So, one of the big, uh, things that I have noticed is that, there is truly a disparity between defender, um, and CJA and that disparity comes in training. It comes in terms of organizational structure, um, obviously, it's run like, like large law firm, as supposed to 100 mini law firms that are out there.

Um, there are differences between defenders and the CJA in terms of funding, um, you don't have to explain to a judge why you need services, you don't have to talk as I did, just last week to a, a clerk, um, who asked me to explain on a case that was three years old, what the copies where that I had made, um, in that case.

Um, there are enough differences that when, I think it was, um you Mr. Cahn, that had indicated that, um, our CJA council and, and, uh, AFPDs, is, is one higher than another? That I think that given some of the resources that are allocated to AFPDs that you can say in many circumstances, yes, that office enjoys a very high caliber of lawyer that practices there. But the positives that have occurred in our district since we revamped it about eighteen months ago, where we created a structured system where lawyers now actually have to apply to be on the CJA panel where we have contained the size of the panel so that attorneys know that they are going to get enough cases, that they can remain proficient, um, in the panel, where we have set up a lot of, of training for those lawyers and required them to go through that training. We are seeing an increase in performance and practice among our attorneys, and I think a level of content about the kind of

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

work that they do. I think this is important because if we want to recruit new lawyers, young lawyers to come into what is a very difficult, very stressful, very high level of practice, we have to give them the tools and the mechanisms to make them feel good about the environment in which they are practicing.

So in our district we do eVouchering like a lot of other districts do, but we also do in our own vouchers, so the lawyers don't have to wait two or three years to get paid, or to find out that their voucher is going to be, to be slashed, you know, down to a, a third of maybe what they would have submitted. We have a buffer in terms of a CJA administrator. Our, our CJA administrator is the one who appoints, um, attorneys to the cases on a rotational basis so it is not based on a magistrate who makes that particular decision. That CJA administrator is also, administrator, is also the one who reviews our vouchers preliminarily. As a former criminal defense lawyer that is highly respected among the bar and the judiciary, she has the ability to red flag things that she knows might cause the judge some question or concerned and talk to the lawyer about that. She also then is a conduit with the court, when the court says why would this attorney think it was necessarily to spend all of this time? And she can, she can get that information. So we are seeing our vouchers, uh, enjoy a higher level of approval in many circumstances because, um, we have this buffer system. We have also enjoyed the benevolence of our court, and I think this is very, very significant.

We have a very strong bench bar committee, um, that is led by one of our, one of our judges and it provides the financial support to, um, fund a lot of this training. We have six hours of mandatory federal criminal defense training. Um, this past year, the federal defenders office provided twenty-eight hours for free and provided a meal in conjunction with that. So for example, uh, when we had the *Johnson* case that came down and uh rendered the uh residual class of the ACCA void for vagueness, there were many lawyers that wondered, okay, so how, how, what are the practical effects of this. The public defender's office put on one of the meatiest most substantive trainings about the impact of that particular case.

These are things that the federal defender can do because she has the connections. She has the resources, and she is willing to devote them. So in sum, I would say having a benevolent, uh, and supportive judiciary has been important to our success. In the converse you would see why that could very influential and why you would not have a successful panel. We have a federal defender who believes in the CJA, and believes in a strong alliance and yet does not want to

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

dominate the CJA panel. Uh, and that we have also, I would like to think of myself as an engaged panel rep., so that we can work on more collaborative such that we do a fed. talk which is just a take on a Ted talk where I will host a group of lawyers at my office. It won't be for CLE. It will be for, uh, a light lunch or late afternoon snacks and we will talk about something that's new, that's going on in the district. It is an opportunity for people to engage in with one another. So those are my comments and I am happy to entertain any questions that you might have either about the District of Kansas or the Western District of Missouri.

Judge Cardone: All right, we will begin with Mr. Cahn.

Reuben Cahn: Actually, I would like to start with a question directed to those of you who practice on the border. You know, I hear often as somebody from San Diego, I hear people talk about handling simple immigration cases. You know, I either cringe or laugh, depending upon my mood at the moment. Um, but I'd like to ask you some specific questions about resources. You know, does the system allow you, and I'd like a comment from each of you, in, in you know, in your run-of-the-mill § 1326 case, to engage in, in an adequate investigation on derivative citizenship. Will that be funded? I will start with you Mr. Esper.

Richard Esper: I have never, uh, had a § 1326 case where that issue arose, on whether or not derivative citizenship was an issue in the case. I know I've appeared at docket calls in all five courts, and those issues are raised frequently. But I see that they're being raised by, by the federal public defenders offices because they somehow end up with those cases that have derivative citizenship claims, and I believe they have, they do have the resources to adequately investigate derivative citizenship claims. I've never, I've never handled one to where the issue presented itself to where I had to make a claim for, for investigative expenses.

Reuben Cahn: How about you?

Cori Harbour-Valdez: I've had one recently, and I went to the judge about it and it was suggested that the client's family hire an immigration attorney to look into it. Uh, in lengthy discussions with that client's family they decide, well, and the client decided he did not want to sit in jail and wait for that process, that he would simply be deported back to Mexico and would fight it at that point. I explained the ramifications of having that felony conviction and then all of that and they, they chose not to. But I've never, that was the only time I've had that arise. I have one currently, in a separate case. It is a drug case, but I believe my client

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

has a claim to derivative citizenship. Obviously, it is not a defense to the charge and her client, that client's family has hired an immigration attorney to work with me to try to get it done. Expeditiously. Of course that's out of our hands. But that was my, my one experience that it was suggested that the client's family should investigate that and pay for it.

Reuben Cahn: Mr. Sapien.

Phillip Sapien: I, I think I have had it arise once that I can recall specifically, perhaps twice. But they were at a time I think when this district was being overwhelmed with border cases. And, uh, as I recall, it was really incumbent on me to attempt to investigate that as best as I could on my own, through the family, and somewhat discouraged from, well, you know, this is an immigration case, you don't need an investigator for that. You know, you can interview the family yourself or, or have them try and attempt to find documents and things like that. But again it was at a time I know the district was, was being overrun really with, with uh, immigration cases. I mean there was a time when we were receiving, Las Cruces was getting the bulk of the cases and they were transferring hundreds literally to Albuquerque to be handled up here just to um, to kind of relieve the uh, the pressure. And so I think there was a tremendous amount of pressure on the system to resolve those cases as, as quickly as possible and, and that any issues like that you needed to basically trying to investigate that on your own without expending uh, you know a large amount of resources.

Reuben Cahn: I would have the same question about motions under § 1326(d) given room to investigate, to engage in legal research, briefing those motions, you are shaking your head, Ms. . . .

Cori Harbour-Valdez: No.

Richard Esper: I have not either, Mr. Cahn.

Reuben Cahn: That is simply, and is it your sense that the federal defender office does have the resources?

Richard Esper: Absolutely. They do. That is another disparity that, that exists between the panel attorneys and public defender's office because they have resources available. Whereas if we want to seek those resources, except for that little cap for non-necessary services, which I think all services are necessary, but um, well we don't have to ask for it is one more, that's less than \$800 dollars, you know we have to go and ask the judge. And I'll tell you we, in our division we have uh, uh,

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

borrowing counsels term, we have a very benevolent uh, court and all our judges are very, very gracious. They are very uh, accommodating to us as lawyers because they, they not only do they have challenges in, in handling the cases and in managing their docket but they realize the, the difficulties that we have uh, as panel attorneys in representing people so for the most part uh, by-and-large the judges in our division are, are very gracious and very benevolent as far as if you go to them ask them and explain to them why you need certain services. Uh, I have never had one that has been turned down, if, if so long as I got, put it in writing and why I want it um, I have never had one denied.

Reuben Cahn: Let me ask you, you already touched on a question in regards to, let me start by saying in my office, we have a large staff of all certified, federally certified interpreters, and they are used not only by our non-Spanish speaking attorneys but by our native Spanish speakers as well, because no one should be explaining complex legal terms without the assistance of someone who is a professional interpreter. I, I gather your experience is you are not going to have those resources, is that accurate for you, Ms. Harbour-Valdez?

Cori Harbour-Valdez: No that is, it is the complete opposite in the District of New Mexico. There is a list of contract interpreters and whenever you are assigned a non-English speaking client, there is, it's just, it's going to happen, there is an interpreter that comes with it basically.

Reuben Cahn: Okay.

Cori Harbour-Valdez: I, I work with one or two on a regular basis, and when I get a case in El Paso with a non-English speaker I pay them out of my own pocket to come with me and, and handle the El Paso case, because in El Paso, you are not going to get an interpreter.

Reuben Cahn: And are you also able to get those interpreters for you in a case where there are Spanish language transcripts, that sort of thing, can you get that work done?

Cori Harbour-Valdez: Yes, yes he does all of that for me.

Reuben Cahn: And in El Paso, no?

Cori Harbour-Valdez: No, I pay for it out of my own pocket.

Richard Esper: I, I have a case right now it is really comp, uh, really, really varied uh, one of my clients is actually from Romania, in Judge Cardone's court

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

and we are trying to find Romanian translators. Well in El Paso that is a real challenge.

Reuben Cahn: I could imagine [LAUGHING].

Richard Esper: And uh, and I got another client who is a U.S. citizen but she is Vietnamese and she got arrested at the checkpoint, at the Sierra Blanca checkpoint and uh, I have had to get creative uh, to get, to get the interpreter services. Um, sometimes I have to reach out, fortunately with the Vietnamese client she has a cousin who is a second year law student at UCLA so I have been able to use her as an interpreter [LAUGHING]. Uh, so that my client understands the complexities of the case and defenses that are available to her. So sometimes you just have to get creative uh, it, it you like to bill for those things but uh, in those cases um, they are not, they are not charging me anything but um, sometimes you, you really need, and I think interpreters are also important because they serve as a witness to a lot of what is going on between you and the client so that later on, a client can't make a claim of ineffective assistance of counsel because you did not explain things to them we all know about the § 2255 petitions that frequently pop up. Um, many of them are frivolous, some of them have some merit, but if you have an interpreter that's interpreting complex issues, that is going to eliminate some of those points, I think.

Judge Cardone: Can I ask a follow-up question, Mr. Cahn? Just real quick . . . uh, uh, about, I am at a loss to understand how you get a interpreter with a case in a federal court, um, I, I, I don't know of, I mean maybe other courts in the country do this, um, but you know, there's a budget for our interpreters, um, we have interpreters in our court but to supply a court to a, uh, uh, an interpreter to a criminal defendant, um, it, is paid through the court, you don't, not a CJA attorney . . .

Cori Harbour-Valdez: He files the, he files a CJA 21 and I sign off on it. Now, through the eVoucher system I basically submit it for him, and my electronic signature serves as my certification that what he did on the case was supervised by me and I approved his amount.

Judge Cardone: And so, it is . . .

Cori Harbour-Valdez: But, go ahead.

Judge Cardone: It is done completely it's through a CJA 21 that is then funded?

Cori Harbour-Valdez: Correct. And I don't have to ask for it it's just, uh, there. Like I said, there is a list of contract interpreters that had been approved, approved

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

by the district. I work with one particular one and when he is unavailable, I have a backup, uh, and that's, that's how they do it in District of New Mexico. And it doesn't matter if, if you're a Spanish speaker or, or not, um, they just assume that you're going to use an interpreter to explain those complex legal terms to have that person there because, it's necessary.

Phillip Sapien: Judge, if I may address, I think my experience had been a little bit different maybe because of Los Cruces to Albuquerque and we don't get an interpreter with each case, there's the court interpreters that are obviously there for court hearings and things like that but, uh, one, one experience I've run into before is in terms of, I am comfortable communicating in Spanish verbally but in terms of translating, uh, and needing assistance we would often use the court employee interpreters, but there were times when they were really overwhelmed and busy themselves, and they said "you know I just don't have time, you have to find somebody." And the problem, at least in Albuquerque, was finding a contract interpreter that was willing to do it for the, the rate of, of pay that, that is offered to the, the CJA program.

Judge Cardone: So Ms. Harbour-Valdez, this uh, why don't you ask for a CJA 21 in, uh, in El Paso, I mean you, you do cases there, um, why have you never asked for one?

Cori Harbour-Valdez: I was instructed when I first went on the panel that, um, we have to check the box whether you're a Spanish speaker or, or not, and if you are not a Spanish speaker, it is your responsibility to provide your own interpreter that is not something the court will provide. I was . . .

Judge Cardone: And you were instructed?

Cori Harbour-Valdez: I was told that when I went on the panel, and I missed and so I've never asked and, and maybe that's my fault, but that's, that was kind of made known that it was not going to be provided for. If you were on the panel you needed to either speak Spanish or provide those services yourself.

Judge Cardone: And do you know who instructed you so?

Cori Harbour-Valdez: Someone in the clerk's office told me that.

Phillip Sapien: Judge, but you know one thing, I also think is that even as, as a Spanish speaker I think sometimes, and this maybe more perception than reality, is that the, the idea is you know, why do you need an interpreter if you are a Spanish speaker? But you know, if you are

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

representing a Cuban defendant say in a drug case, I mean that you know, uh, uh, that Spanish is faster, spoken much faster sometimes difficult to understand, and so there are times when I would want an interpreter to assist me just to make sure they are not any communication issues, uh, you know or something gets, gets missed in terms of translation of a plea agreement or something like that. But, I think that, it's somewhat also the, the court kind of looks like at it like well, you know, I, I don't why is this necessary if you are a Spanish speaker. [LAUGHING]

Reuben Cahn: I spent seventeen years in south Florida I'll vouch. [LAUGHING]
They're two different languages.

Phillip Sapien: Absolutely.

Judge Fischer: We've been hearing and reading and I think we will continue to be hearing and reading about the suggestion that the CJA or various aspects of it be taken out of the judiciary or out of the hands of judges. Uh, can anyone think of any aspect of it that should remain with the judiciary. Uh, and if the answer is no, we can't think of, of anything, what's your second choice if we can't, if, if we decide it should be taken out of the judiciary but we don't think that's practical, what would be our second line of recommendations that you think we should be making, Mr. Esper?

Richard Esper: Uh, I think that, uh, obviously I, I feel that the CJA should be uh, independent, but I do feel that there needs to be some judicial gate keeping that needs to stay in place. Uh, and I know this might be anecdotal but, uh, I was involved in a public corruption case where there was bribery allegations and one of the other CJA lawyers in the case, uh, asked me whether or not, uh, or suggested to me that, uh, that lawyer was going to read *Citizens United* and bill for legal research. And I told him that is absurd. You can't be billing to read a ninety-seven page opinion, that has nothing to do with this case, uh, and then bill for it.

So from the standpoint that I think the judiciary can at least keep the, the voucher gouging at, at a minimum, I think is important. But, and, uh, and maybe there needs to be some sort of uh, advisory role I am not sure, but, I, I do feel that the criminal justice, uh, attorneys need to be independent, uh, of the judiciary but I do feel the judiciary needs to stay, um, kind of as, as, as ,the the watch, kind of as Mr. Morris said, you know, you got the fox has to be watching the chicken house because there are people that are abusing the system, that are, they are on the CJA panel, uh, and I think it is sad, but there needs to be some gate keeping done, uh, and I don't know what exactly the mechanics of

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

how it would work. But I think the judiciary will be the ones to manage the system, so that you don't have billing to read *Citizens United* in the case as legal research, um, when it has nothing to do with your case.

Chip Frensley: Um, um, I'm not to interrupt, but, I mean, what makes the judiciary so uniquely possessed of ability to be able to do that any better than anybody else could and particularly in the case in the example you're using, I would assume that that lawyer would submit an invoice that said "legal research" not, uh, "I read a case that has nothing to do with this case". [LAUGHING].

Richard Esper: Right, it would, it would be legal research and then would be able, uh, uh, 5.7 hours.

Chip Frensley: Right.

Richard Esper: And, uh, yeah, I mean, if the, if the person was fool enough, foolish enough to say, I read *Citizens United* at ninety-seven page opinion, uh, that voucher, that, I think that's going to get cut . . .

Chip Frensley: Yeah.

Richard Esper: It has nothing to do with the case so I think the judiciary would know that, uh, where. . .

Reuben Cahn: Wouldn't an experienced lawyer know that also?

Richard Esper: Absolutely. An experienced lawyer would know that as well, I mean, I picked up on it right away, I said you're out of your mind, uh, to do something like that. So granted, uh, maybe, a buffer, like they have in the District of Kansas or Western District of Missouri, uh, could serve as an independent auditor, if you will, uh, on vouchers.

Cori Harbour-Valdez: I would like to see it completely out of the hands of the judges. I, I disagree with, um, with Mr. Esper. I don't think that voucher gouging is as big of a problem as maybe, you've seen, I, I haven't seen that and maybe that's because the, the practice we have in the District of New Mexico is, I mean, there is a very, there is a panel appointed I happened to just, have been recently appointed, that screens and selects the attorneys that will be on one of four panels in the district. There, uh, Chief Judge Armijo sits on that panel, Mr. McCue sits on that panel, uh, one of the magistrate judge sits on that panel, and I, so I think there's already a screening in place to get good people on the panel. I would like to see that continue over to someone, to a panel or

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

even the public defender that reviews the vouchers. Someone that knows the practice that knows what we're doing that has somewhat of an independence from the case.

Judge Fischer: So there is a value to having, uh, chief judge Armijo and the magistrate judge on the panel because?

Cori Harbour-Valdez: There is a value to having their input because they see these attorneys before them.

Judge Fischer: So you would want that taken totally.

Cori Harbour-Valdez: No, I like, I like having their input. I think it's important because what we see our colleagues do in court is obviously viewed differently then maybe with the judges see, and also the judges are the ones seeing at that time the vouchers and they know if there is gouging going on, and there's a mechanism to correct that, the way the panel is set up in New Mexico. We also hear complaints, um, disciplinary complaints and other complaints, and, and, and make recommendations to the judges for disciplinary issues, but I would like to see the vouchers completely taken out, taken out of the judges hands.

Judge Gerrard: So you would see selection and removal having judges have input in that.

Cori Harbour-Valdez: I think that's important because the, those are the lawyers that are practicing before them.

Judge Fischer: Okay. Ms. Morgan?

Melanie Morgan: Um, I would have to agree with what, um, Ms. Harbour-Valdez said, um, in many respects. One of the things that I think is, um, very problematic is the judicial review of the vouchers and let me just give you an example in the Western District of, um, Missouri as the court or as all of you know, that case budgeting is becoming more and more prevalent and, um, there is a, a fair amount of time that you take to actually budget out your case. It actually requires you to organize your case and think strategically through at least at that phase of the process, what you are envisioning that you will do. And it takes quite a bit of time to do that.

Um, we have a judge in the Western District in Missouri who has been very vocal about the fact that it doesn't matter that budgeting is provided for within the CJA and that you're supposed to be able to bill for it. He has absolutely said he will not pay for that, and he has made

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

it very clear when an attorney challenged him on this, that um, that that attorney should think about whether he challenged him or perhaps he didn't want to be on the panel any further.

This is the kind of thing I'm, that I'm concerned about is because we don't have a real review process. So maybe we have a, a grumpy magistrate on a particular day or, for particular type of work that's being performed. Um, but the review process that we have when an attorney challenges it, not only do you have maybe the kickback in terms of consequence to the lawyer, but it's not a significant, in my opinion, appeal process, because where does it go? You tell the, you, you say something to the, to the judge and you explain why you did it, and the judge have goes, "eh, all right," um, so to me, the way that it is just set up right now because there is no valid mechanism for review, what I can say are valid mechanism for review, I think it is very problematic.

I also think that what we have done in our district um, have and I say "our district," in the District of Kansas, having um, certain members of the court involved in the selection process, I think has been beneficial. It has been helpful. It also has allowed them when they have some perhaps criticism of a particular attorney for us to um, talk with that partic, particular attorney and find out is there something going on? Is there an issue? Discretely, of course. Um, but to enable that person to be aware that um, you know, maybe that there is, maybe that there is a problem or that there are resources available because maybe they just didn't know there are resources available.

Um, so I do think that there has been a benefit in having the court on that initial selection process, but the buffer that we have in place with our CJA administrator, which is not in every district, um, has been that she is the one who handles the appointments. And that has been great, because there are some before we did this, there were some attorneys that got um, you know, eighteen, or nineteen, or twenty appointments per year and there are other attorneys who got one or two. And you cannot be proficient in federal practice if you do one or two cases every year. So taking that away and kind of removing that potential for favoritism, I think, has been, has been significant.

Reuben Cahn: Ms. Morgan, who is paying your CJA Administrator?

Melanie Morgan: Um, it comes out of I believe, the federal defender budget.

Judge Fischer: Mr. Sapien.

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

Phillip Sapien:

Well, as I mentioned, um, you know, I, certainly think the court has a vested interest in competent representation on the panel. I think the perception from some of the CJA attorneys I've talked with is a concern, that the, the judiciary has uh, undue influence, I think on who gets to sit on the selection committee so to speak, and so that, uh, does the court really have one vote or does it have multiple votes because of, of who has been appointed to this uh, to the committee that considers uh, the uh, applications.

Now, you know, I have never sat on, on the committee, I know attorneys that have, they've always taken the responsible, responsibility very seriously and so there's never been any disclosure of specific discussions, but I think there is a feeling that uh, at least among the CJA lawyers I've talked to, that it would be better to uh, remove that influence if you will, in terms of the selection and appointment of attorneys. I do know of situations where there are Article III judges in this district who will seek out certain uh, attorneys to handle uh, cases which I think uh, well, you know, I, I wouldn't question necessarily the experience of those attorneys that are being sought out, I think that that also creates the, a perception of favoritism perhaps, in, in, in uh, in certain appointments that, that take place.

Uh, in terms of the voucher, um, the voucher uh, approval. You know, I do think it, it is difficult, I guess I'm torn on that because I think that the judge that uh, the trial judge would at least be able to go back and see you know, or have from their own memory what was actually done in the case um, you know, what pleadings were filed, and, and things like that but I certainly think also a, an outside and experienced attorney would be able to, would be able to do that as well in terms of considering vouchers.

Because I think what has happened particularly with the, the budget issues that arose in the past for years, I think that certainly the uh, the courts uh, judges as public servants have felt uh, certain amount of pressure to be stewards of the public money so to speak and that it is their role now to try and reduce or limit that and, and uh, one of the easiest ways to do is to cut to cut vouchers. I think, if they feel well, that was, you know, unnecessary, that was not necessary in this case, and, whether, you know, and I think a lot of times though I, I haven't had it happen to me uh, personally uh, I did have a voucher cut one time by the trial judge because he felt I had spent too much time communicating with the family of the defendant. And I sought a meeting with the judge to explain, well you know, judge would deal and oftentimes with a client that has absolutely no criminal history and you're having to tell this person now, you're looking at a minimum ten

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

years in prison and the best deal I can get you is maybe going to be five years and so certainly, in communicating with the family, that helps in terms of client control and really helping to resolve this case without an unnecessary trial. I didn't win the argument, my voucher was still cut, but I think those are some of the, the things that I think, as, as trial lawyers, um, it, it, it's the idea well the judge really didn't understand what, what was involved in this case and perhaps another attorney that, that has the experience handling these kinds of cases would.

Judge Fischer:

On that note, that the, do the attorneys, and if you know, do the judges know what resources are available to them? For example, uh, our district, which does have a managing attorney/supervising attorney who does the vouchers, will regularly call defenders services and say, "we've got someone billing for this, what did you think of, about it?" Do the attorneys ever communicate with defender services? Do they know that something they can do? Do you think that some kind of greater training because we get zero training on, on vouchers uh, would be helpful or are you mostly encountering judges who simply say "I don't care what the rules are, I don't care what 230 says, I, I'm not going to pay for this kind of thing." Do you have uh, a thought on, on that?

Phillip Sapien:

I, I think my sense is the judges decide what they, what they want to do on it. I, I, I've called before uh, with the uh, the uh, person that was in charge of the CJA um, vouchers submission. She is leaving the position now uh, to go to Department of Justice. But most of the time, my communications would be actually, "can you give me an update on where this voucher is at because it has been 90 days, or you know, 120 days since I submitted it." But generally, not uh, communicating directly about reasons for the, the voucher being cut.

Melanie Morgan:

Um, yeah, I was just going to say just personally, um, as high up as I've ever gone, is just to our budgeting attorney and just had a discussion with her um, about whether or not something was approved or something along those lines and certainly that person has had um, suggestions as well um, just from her broad experience in, in criminal defense. But higher than that, I have, I have never, was not even aware that there were budgeting people or billing people that were available to us.

Cori Harbour-Valdez:

Neither was I. I, I, I've had meetings with judges about vouchers and they answered. Like I said, there was a, a learning curve for one of our new judges and he appreciated the fact that I came in and sat down and explained some things and he was just trying to get a feel for what's

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

reasonable. Um, uh, but then you've got other judges who, like you said, frankly don't care and they are going to cut it.

Richard Esper:

I spend a, a signi, significant amount of time communicating with a couple of, two or three CJA panel lawyers who are, who are experienced and so if I had a question about something I'm, uh, trying to do, I will reach out to them and, uh, get their input on whether they have encountered something of a similar nature. I also communicate frequently with one of the uh, public defender's in El Paso. Uh, I get his intake on how they may handle uh, a certain issue or certain uh, request for uh, services. Uh, and of course, they don't, they don't have to explain or justify their reasons but uh, there is, I reach out to not only the public defender's office, well to a public defender there, uh but I reach out to two or three other uh, seasoned CJA panel lawyers and frequently talk to them about uh, specific fact scenarios, uh cases, and, and I know they reach out to me too, uh, just to try to get a better feel for what we think needs to be done.

Uh, but I think every cases stands on its own, own two feet and you have to do what you feel, uh, is, is important for that case and for that client and, uh, I, I've never, I've always listened to what other lawyers have to say, if I've asked them but the bottom line is, is at the end of the day, I have to make the call what I think is necessary to represent my client, and if I get a push back from a judge then I get a push back, but that's going to happen.

Judge Cardone:

Mr. Frensley

Chip Frensley:

Thank you. First of all, I want to thank each of you for being here. Um, I understand that you know, your time here is giving up time away from your practice and from making money for your families, to support yourselves and so I really appreciate that and totally understand it. Um, also, uh, I recognize that, uh, you know, it takes a lot of courage I think for you guys to talk about the things that you are speaking about. But I hope you recognize as well that your input is vitally important to the mission, mission of this Committee as you can tell from the subject matter involved, uh, certainly the sort of, uh, to borrow a phrase from, um, the former, uh, the former chairperson of the Defender Services Advisory Group, panel attorneys are the redheaded stepchild of the, uh, criminal defense system, and so the input that you give in this Committee is very, very vital.

Um, when you talk about the administration of the, of the program, there are really two components, I think. One is just that management component, who is going to do what to make sure it happens when it

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

needs to happen and secondly, as with anything that involves the expenditure of public funds, there is an accountability or oversight function that is there and so, um, Congress saw fit to place those functions primarily within the judiciary and within the judges who handle the cases and that has been obviously a big topic that we discussed.

And so, I want to direct your attention specifically to the oversight component and have you think about that I would like to pose this question to each of you and that is, um, you know if, if, if there's nothing magic about who does that, uh, and there's nothing magic about a judge having that responsibility, is there any reason that you have to believe that if that voucher review function was placed into, uh, the role of the federal public defender, or some designee that is a part of the federal public defender's office as has been described by Ms. Morgan I think that, uh, uh, the CJA attorney administrator that you all use, if that's the kind of person that's involved with this, do you think that, that would cause significant or serious concerns that there, that there is no oversight, that now everything is just a rubber stamp and that, uh, you know the public funds are just going to be thrown out the window so to speak.

And the second part of that question is just uh do you think that, that particular process would have more of a benefit to the independence and other functions of CJA counsel if it were placed with someone who's, has more of a connection to the defense function as opposed to the judiciary. And just perhaps down the line, Mr. Esper maybe starting with you?

Richard Esper:

I would, I, I, I don't feel comfortable, uh, if it's, if the review process or the administrative process is being run by someone from the connection with defender's services. Now, from the standpoint of their understanding, uh, they are looking at a case through the same lenses that we are, uh, that is a benefit. But by the same token, you know, many of those individuals are in their office, they don't, they don't have the responsibilities of maintaining a law office, they don't have the, the responsibilities of paying overhead, uh, of paying for services that are necessary. Uh, so from that standpoint, I, I don't think that they would be good at administering, uh, our vouchers but from the, but from looking at a case through the lenses of the defense lawyer, uh, it would be beneficial. Uh, I still believe that, uh, and I think, uh, Cori said it pretty well, uh, I think if the judiciary administers from the standpoint of controlling who's on the, on the panels I think that would be a big help at least as far as serving these gate keepers, but I still believe that we need some autonomy as, as

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

CJA redheaded stepchild. Uh, we need some autonomy to, to grow and develop and, not be treated like a redhead stepchild, so to speak. I, I'm not sure I answered both parts but I tried too.

Chip Frensley: Thank you.

Cori Harbour-Valdez: I like the idea of having the FPD or a CJA administrator have oversight. I do, I think that if you have someone that's been in that position, that manages their own budget, I can't imagine what the outcry would be because they are going to be subject to the same review and audit that they are already subject to so I don't think there would be any outcry in that regard. Uh, I certainly think it's a benefit for the reasons that I've stated before. I mean, we have got someone who's done the work, who has done the practice, who understands. Uh, I think yesterday, maybe, I think yesterday, where, there, was the possibility of a conflict coming up, maybe they have a codefendant in the case and I think in that, in that way there's, there's got to be a mechanism setup just like there would be in any large law firm. You've got someone else that can handle it or there's an independent CJA administrator that steps in, uh, but I absolutely love that idea and I think it would, uh, remove a lot of the obstacles that we face.

Melanie Morgan: Um, I am still thinking about the question that you ask me about who pays for our CJA administrator and as I answered that question, I thought is that really the right answer? If it's not, I will get back with the Committee and let the Committee know the actual truth about that [LAUGHING], I didn't speak the actual truth, [LAUGHING].

Um, but I, I agree, I, I like the idea of having somebody, um, independently review it and I think, um, we have to get away from the notion that simply because perhaps, they are housed within the Federal Public Defender's Office that, that means that they are somehow controlled by the Federal Public Defender or that, you know, there's going to be a conflict of interest.

I know in our own system, um, the CJA administrator does not have, uh, any access to the federal defender computer systems and her computer system and her assistant's computer system is completely independent. Like no public defender and her, her office is set way down the hall from everybody else, and nobody else can, um, like get into her system and she can't get in into anybody else's so it's all, you know, very password protected and secure and that kind of thing.

Um, it, I believe that it works for us because we do not just make this, um, and it, a truly administrative function. We actually required

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

somebody who had a background in criminal defense so that they knew the kind of work that criminal defense attorneys generally need to do in the defense of their client. Because I think when the overall test is reasonableness, the only way that you can do that, is if you know what actually is required in, in circumstances given that there is an amount of deference that has to be given to the attorneys to manage and run their own cases.

So I, I don't think that it's an issue to have, in fact, I like the idea of having somebody separate, um, uh, do that, I think it still does provide, uh, the oversight because I don't know that. I mean unless we want to say that, um, you know, we think that an Article III judge has, um, you know, more credibility than, you know, a criminal defense lawyer of twenty-five years, um, who's conducted herself with the high level of integrity and, if you, if you want to say that you can't measure those two people equally because there isn't a process, you know, that you have to go through, um, to become an Article III judge and therefore only Article III judges can have sort of that level of oversight, um, then I suppose that the answer would be that you lose oversight, but I don't believe that, that's true. I think when you hire people that have the level of integrity and, um, expertise and education, um, to do a job, I think you can be satisfied that they are doing the job that they are tasked with.

Chip Frensley:

I'd like to ask just with respect to that process in the, in the District of Kansas, um, does, even though right now that CJA administrator cannot statutorily have the final word about approving that voucher, does the existence of that position even in the current system where the judge has the ultimate signatory authority, does that increase the level of comfort, if you will or, um, or credibility of the vouchers when they actually do go to the judges?

Melanie Morgan:

Yeah, I think it works, um, in both ways. I think one, um, it gives the, the CJA lawyers a, um, feeling that, that somebody who knows what the work is required, um, to represent somebody who is accused that, that, that there is somebody who actually understands and appreciates that function reviewing it so it gives the lawyers a sense of confidence.

But, I also, um, think that, the court because our court, um, is definitely very supportive of this position, um, that they are very supportive of this particular individual, um, that then, if, if she has given it like her green light that I think that they look at it, um, and, and only if there is something that really jumps out at them will they say let me have, you know, let me have another question or let me find out a little bit more information about that.

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

I will also say and I think that this is important, is that when you do have sort of an independent person in that process, it makes it harder for the court to say, I am not going to pay for budgeting hours or I am not going to pay for travel to and from the jail that is an hour and a half away from your facility, because they then are talking to someone who says, well judge, the rules require you to do this that way. So there is almost a measure of accountability on the court's part taking away sort of that, um, arbitrary I am not going to pay for something when you have a separate person that's in the middle like that, so I think it's a great solution, at this point

Chip Frensley: And do you think that structure has any impact on the quality of representation in the District of Kansas and perhaps maybe compare that to your other district that you practice in where they apparently don't have that same structure?

Melanie Morgan: Um, you know I think that the quality of representation that we have in the District of Kansas is, is not just because of having a CJA administrator position. Um, I think it is because we have a federal defender who believes in a very strong collaborative alliance with the CJA panel and is working to make sure that they have the training resources so that they can, that they have the skill level to represent, um, various individuals, and to make sure that they have the training to know what resources are available. Our courts, um, will periodically pop in at our training and say, look you guys, we know that you are not using investigators to the extent that you could be using them, we want to see you start using investigators, and you know, in essence saying, hey start spending money. No, they are not saying that, but what they are saying is like, look, we want to support you in doing your job to your very best of your ability, um, and I think, um, the dynamic of having all of these different pieces together really serves to, um, make the relationships between the various stakeholders in the process, um, more collaborative where they can be.

In the other district, in the Western District of Missouri where I practice, I feel like there is a complete disconnect. Um, every judge kind of operates, um, separately in terms of what they think that they are willing to approve or not approve. Um, the administrative folks, that first level of screening when we submit our eVoucher are more clerical in nature. They've obviously gotten a directive from the court about what they are okay with and not okay with and, um, that doesn't filter down necessarily in any kind of organized fashion to the CJA lawyers, it just gets a clerk telling you, um, "be more explicit on your voucher," instead of saying, "travel to and from the courthouse, say it

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

was roundtrip travel from your office to the courthouse for a meeting.” Um, you know, so it is, you get some interesting, um, feedback when you have more of a clerical person in, in that person. And I think overall, the sense of lawyers in the Western District of Missouri and there is a lot that practice in both districts, is that they don’t have, um, they don’t have the support, um, they don’t have the training and then you get like I don’t give a . . . I don’t really care that much. Um, you really start to see kind of that trickle-down effect, whereas in the District of Kansas, the lawyers who are on that panel, they want to be on that panel. They want to take care of those people whose lives have truly been entrusted to them.

Phillip Sapien:

I think from the CJA lawyers I have talked to, there is, um, a feeling that there isn’t consistency necessarily in terms of how vouchers are considered. That there are certain judges that will never cut a voucher and others that you need to be very vigilant or even reduce your voucher, um, before you submit it. But I agree that, you know, whether it is through the defender’s office or an independent person, I think as long as that person has experience in handling these types of cases and they look at it through that lens in considering a voucher, I think that, that, um, is preferable to the current system. If anything, particularly if there is going to be, if there is an entry or sometime that has been challenged or questioned, I think the attorney that has submitted the voucher at least feels that there may be someone on equal footing where they can go and meet with this person to, to review that or, or make an argument, uh, in support of it. Where I think that currently under the current system, there is somewhat of a feeling of intimidation, you know? You are not really going to go back and challenge an Article III judge too extensively on if the judge is saying, you know, that they are going to cut your voucher. In fact, I think a lot of attorneys probably wouldn’t even take the, the meeting if it is offered. They will just be “no your Honor, thank you, I appreciate what you are approving,” and just go with it like that.

Judge Cardone:

Judge Gerrard.

Judge Gerrard:

Mr. Frensley, I do want to thank you. I know you have, if not better things to do, you have other things to do today and so we appreciate it. One of the reasons for the public hearings is so that we can, uh, hear from those on the ground, in, in the field you have been very forthcoming today and that’s, that’s helpful to us. Um, one of our charges is, uh, to make sure that we understand what are issues and maybe what aren’t issues. Um, one of the things that I heard you say Mr. Sapien and, and I have heard it a couple times today is that voucher review is maybe taking longer than that it should, that it may

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

be exceeding 90 days or 120 days, um, and I guess I would want to ask each one of you is, is that an issue, um, is that a common issue, um, because that's one of the things that we haven't necessarily honed in on at this point in time but we may be doing some of that.

Phillip Sapien:

Well, so let me, I will address it since I brought it up. I don't think that it is a significant issue necessarily in New Mexico. Certainly, I think that um, most of the judges and of course, they are busy as well also and you know, as some of the judges have already stated, they would gladly give up that, uh, part of the, the process because certainly, I think it takes away from really what their charge is in terms of, of handling their, their caseload. But, so I think overall, it is not, uh, that big of an issue necessarily in New Mexico. I think it may be just a couple of, of instances or a couple of judges who take a little bit longer at times, uh, to a, to have vouchers, um, reviewed and, and approved than others. But I think overall, at least in my experience, most of the time, it, it flows pretty smoothly. I mean, you know, certainly um, I think we'd all like to get paid within thirty days, you know, if possible. That does not always happen but certainly I think for the most part, it is not more than sixty days that I, I have seen, um, you know vouchers take and, and it is, it is the rare occasion where it is, it is taken somewhat longer. And, and again, some of those are also, if the voucher is over the statutory limit, you have to submit an explanation letter on, I, I think the court takes a little bit more time in, in, in that review. That has been my experience.

Judge Gerrard:

The second part of the question that I am going to ask each one of you would be the timing, and also whether you have, whether you have had the eVoucher system yet and whether that has helped or hindered. Hopefully it has helped.

Phillip Sapien:

We, we have had the training and so, we are, uh, there was a deadline. I think we had September 30th of a deadline to get in any outstanding vouchers in so that we could then, uh, move to the new system. Admittedly, your Honor, my office worked very hard. We didn't get them all in but I think we submitted like thirteen or fourteen vouchers that had been pending, uh, we had been somewhat short staffed. We got those in, but in terms of the eVoucher system, I think I was a little bit leery of the, of the process because I was used to using an Excel spreadsheet which we would go in, you know, punch in our time and, and now having to log in but as I have gotten used to the system, it is not really I think that much, um, more difficult and I am hopeful in the long run that it, it makes things, uh, run a bit more smoothly from submission to approval.

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

Judge Gerrard: Ms. Morgan?

Melanie Morgan: Um, well I use eVoucher in all the courts both at the district court level and in the appellate court, um, level and I love it. Um, so it has been a great system. In the Western District of Missouri, we are still in the, um, transition phase of that and so I am hopeful that, um, some of the delay that we are seeing in vouchers maybe is going to be eliminated. Historically, that has been a district that had a very slow turnaround time for vouchers. Um, it is still slow. I mean I can tell you right now, I have voucher that, um, is sixty days out and it has not even made it up to the circuit yet. So, um, to me, that is slow especially when these cases, um, um, are just being paid at, at the end of the representation. Um, we do have an interim as I mentioned previously in the District of Kansas.

Judge Gerrard: I am going to ask you about that. Tell, tell me about that.

Melanie Morgan: Yeah, in the, in the District of Kansas, we have set up a function so that, um, when your, the amount of time that you have in a case and now, it so much easier to track for a lot of lawyers because of the eVoucher. Um, when it hits a threshold amount, um, and . . .

Judge Gerrard: So just dollar, the threshold is dollar amount?

Melanie Morgan: Yeah the threshold is, is dollar and, and two months and so, you basically can submit a voucher every, every two months, um, when you hit, um, I think it's in like \$2,000 dollar, um, increments. So, it helps lawyers who, especially if they have a large number of them or especially if they have been in trial and if, if they put in a ton of time in that particular case that, that they are not then strung-out financially because they have to wait, you know, six months, nine months, twelve more months before their case is, is ultimately resolved.

Judge Gerrard: Thank you. Ms. Valdez?

Cori Harbour-Valdez: I will say historically, the payments in the Western District of Texas were much more delayed than I've experienced in the District of New Mexico and that could just be a function of the number of cases; I, I don't have an explanation for that. Um, with the eVoucher system, we have been doing it for a couple of months now in New Mexico. I looked back at my paralegal because she is the one that is in charge of helping me keep on, on track with that. Um, and I, I've noticed a much more rapid turnaround in getting paid. Um, I have not yet submitted one in the Western District of Texas so I can't speak to that but I hope that it increases. Uh, one of the examples I gave in my

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

written testimony was about a voucher that was cut, um, for, because the trial judge did not feel that it was, I guess he reduced it because he thought that I charged more which was still under the statutory cap than what a retained lawyer charged for a codefendant in the case. Um, that voucher sat on his desk, I was told, by the, uh, clerk's office for seven or eight months. It was just, every time I called to check on it, it was under review, under review, under review and when I finally received a letter with his explanation of why he was intending to reduce it, I, you know, now I've got to wait, because I was going to challenge that. I, I didn't feel like him comparing my voucher to privately retained counsel was proper. Um, I don't feel like, you know, what, maybe that private lawyer did compared to what I did was the same, I mean there were all kinds of issues and so that delayed, I ended up not getting paid until thirteen months after that case had been completed. So that's another reason you don't always challenge because you know that that's going to cause delays. Now I will say in complex cases in the Western District of Texas when it's, uh, you've done your case budget, you, interim payments are something we always ask for and I've never had one denied. In the District of New Mexico, anytime it's declared a complex case when the judge signs that order, they put interim payments will be allowed and so that helps tremendously because that really, I mean, you can't wait for a two-year case to wrap up to get paid.

Judge Gerrard: One of follow-up questions I had for you at your testimony earlier today was that 60% of the time, your vouchers have been cut . . .

Cori Harbour-Valdez: That was my review in preparing for this and, and I admit, some of those were clerical, some of those were, uh, and I say clerical in that it's a clerk reviewing it. And again, I have a problem with that because you have a clerk who doesn't necessarily understand maybe what it takes to do one of these cases and they're, they're reducing something because they think it's personal in nature, when I called the jail to set up a conference call. I don't believe that is personal in nature. I am not calling to chitchat and have lunch with that person that's . . .

Judge Gerrard: That's somebody that is clerical?

Cori Harbour-Valdez: That's a clerical reduction that we don't have the chance to address. We, we have, we are never given a chance to address those types of reductions.

Judge Gerrard: And so the follow-up question is have, have you changed your practice at all . . .

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

Cori Harbour-Valdez: Yes, I have.

Judge Gerrard: And all as a result?

Cori Harbour-Valdez: I, after sitting down with the, the new judge in our district and, and kind of getting his, what he wanted and you know, he wants more detail. He wants to know why, what are you talking about when you talk to the client's family? What put that in your voucher? When I took that back to some of my colleagues, they said, I am not going to put that in there. That's going to violate, uh, some confidences. That's going to, I, I'm just not going to do it. I just want bill for it, is basically what I heard from the majority of them. But he just asked for more detail and so there, there's, you either don't bill for it because you know they are not going to for pay it or you get creative in the way that you, you do your description.

Judge Gerrard: I guess my underlying was have you, have you changed . . .

Cori Harbour-Valdez: I have.

Judge Gerrard: But, but have you changed the nature of your practice, for example, when you were removed from at least one judge had removed you because you talked to a family member, in his or her opinion too much? Um, have you changed your practice?

Cori Harbour-Valdez: No.

Judge Gerrard: Okay.

Cori Harbour-Valdez: I still take client's calls, uh, family members' calls. I, I just think that's important. To keep the client happy, you got to keep the family happy a lot of the times and it, they, they go hand in hand in representing your client.

Chip Frensley: One of the, one of the items in your written submission was about this cap on misdemeanor cases, \$200?

Cori Harbour-Valdez: That was the time, and Judge Cardone can speak to it if it's changed, uh, it's been several years since I've been on the misdemeanor panel. But yes, that was the cap that was in place for just a simple, a simple again, um, illegal entry case. Um, the way that it was done, the Western District is that you would be appointed four, five, six clients at a time and the, I guess the thinking was that you would go to the facility, would interview them all at the same time so you would bill

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

one trip there, one trip back, uh, and they felt like that was enough to compensate you for your . . . because the hearing would be held, the plea hearing would be held on the same day for all the clients if, you know, if everything went as planned, um, and I just, you know, I got a call from one of the judges, like “I think you’re billing too much.” Um, you know, well I, “unfortunately, I had to talk to this client a little bit longer than I had to talk to that one, or this, this one unfortunately got moved to a different facility that’s a hundred miles away and I had to go,” and it just, I felt like I was having to explain more than it was honestly worth.

Judge Gerrard: Okay, Mr. Esper?

Richard Esper: Yes, Judge Gerrard. I have a, I do like the eVoucher system. Uh, it, it seems like it’s a much smoother transition. Uh, it, it kind of had a little few glitches getting off the ground, uh, but in the Western District of Texas, I historically have never had, uh, a voucher take longer than sixty days to be paid. Uh, typically, they are paid in, in that timeframe. Very rarely they are paid within thirty days but usually, it is thirty to sixty days they are paid. Uh, the eVoucher system, uh, I know I talked to one of the reviewing clerks just recently and she was thrilled with it because, uh, now, she doesn’t have to read my handwriting anymore . . .

Judge Gerrard: [LAUGHING]

Richard Esper: on my worksheets, uh, but, um, I am I guess fortunate in that I’ve never had a voucher cut by a federal judge. Uh, there was an attempt made by one of the federal judges and, and I will relate this story, uh, to cut my, my budget and the reason was is that there was, there was like eleven defendants and it was a sex trafficking case and you had a defendant number one and you have, uh, five lower-tier level, uh, individuals, all males, then you had five lower-tier females, all defendants. And I was representing one of the females. And, uh, the judge as, as a justification for cutting my voucher said it wasn’t consistent with the vouchers of the other four lawyers who represented the other four females. And so I took the time to look up and see what I did differently and number one, I, uh, my client was arrested out of district, uh, was granted bond, but the government, uh, you know, uh moved to stay the bond for review by the court of original jurisdiction. So I had to file, and, and did file an eighteen page memorandum, uh, under § 3145 why my client should get a bond, and then number two, I, I also pointed out to the judge that I filed the twenty-five page sentencing memorandum, uh, going through all the § 3553(a) factors that U.S. Probation does not really go into depth about, uh, at least in

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

our, our division. And, uh, and so I pointed out to this judge, look these other lawyers didn't do that for starters. Uh, and number two, I don't think that, uh, any lawyer's services should be compared with another lawyer services just because you're representing similar defendants in a case and I put it in writing, took the time to do it, and the judge reversed himself on it, so.

Judge Cardone: I, I want to ask a follow-up question about vouchers and I want to ask for each of you your experience with the circuit courts. In other words, we've been talking a lot about district courts. Have any of you had any experience with circuit court vouchering and, um, whether those have gotten paid, cut, how long they take, what problems or successes have you had? We will start with you.

Phillip Sapien: Thank, thank you Judge. I have had that experience, uh, a couple of times and it's actually with the same Article III judge and what I, what has usually occurred is I would get a call from the courtroom deputy, um, asking that I prepare a letter that explains why this particular voucher was over the limit, um, because the court was going to submit it to the, the circuit for consideration and then the court, uh, then incorporated the information I provided in a letter. But my experience have been very favorable. The, the judge in both instances recommend approval of the, uh, the voucher and, and the vouchers were approved. Uh, one is still pending actually payment now.

Judge Cardone: It went up to the circuit?

Phillip Sapien: Yes, it went out, right, and so that's been, that's been my experience. It's, it's only happened a couple of times.

Melanie Morgan: Um, I have submitted, uh, several vouchers to the circuit either for direct appellate work, um, that I was doing or because it was a voucher that was in excess of the cap. Um, my experience in, um, the Tenth Circuit, um, they have, uh, approved all of my vouchers that have been submitted. I haven't had anything cut in the Tenth Circuit. Um, in the Eighth Circuit, um, I have had cuts in the Eighth Circuit. And the Eighth Circuit, um, I will say historically, um, had a, um, did not approve excess vouchers. Um, I have not in recent times, um, had a voucher cut now that there has been a change, um, in, in the judge that administers those. So I think in terms of what the, the Eighth Circuit does, um, I at least personally have not seen that. However, um, my, uh, law partner who does do, uh, death penalty representation or litigation, um, has her death penalty vouchers cut. Um, we have challenged those. Um, one time it was by about a third, um, and when

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

we challenged it, we got a little bit more money but not the vast majority of it, so . . .

Judge Gerrard: And what was, what was the reasoning?

Melanie Morgan: Um, it was just questioning whether the work that was done in end-stage litigation was proper or not. There is a real split on the court as to their views on the death penalty generally and I think sometimes it is reflected in the voucher.

Judge Gerrard: And you are referring to the Eighth Circuit?

Melanie Morgan: Yes.

Cori Harbour-Valdez: In my direct appellate work with the both the Tenth and the Fifth generally my vouchers are not cut. I, I've been pretty, again, clerical here in there, point one, point two, maybe. However, when it is a case that exceeds the case maximums, I referenced one of them in my written testimony where the circuit judge said that I spent too much time preparing for sentencing and that was one where my client was facing life in prison, did get life in prison. It was an eleven-day trial and ninety-page PSR and there was a lot of things brought up in the PSR relevant conduct that they were, the U.S. attorney was attempting to enhance the arguments for sentencing. And we spent quite a bit of time fighting that and requesting documents and, and the circuit judge ultimately, I guess somewhat reversed himself. He gave us I think half the time that we had asked for, he reversed it, but I still received a reduction and that is just one specific example.

Richard Esper: I have had one voucher cut in the Fifth Circuit, and in historical context, it was, it related to a prior case, well it wasn't related to a prior case but I was court appointed on a case. There was an appellate waiver that they wanted, the individual wanted to appeal his sentence and so what I did is I filed an Anders brief saying that there were no non-frivolous issues here. The U.S. Attorney's Office, I already contacted them. They are going to rely on the appellate waiver as a bar and so I filed an Anders brief and I got, I got an order from the Fifth Circuit, saying "no, we think there are some issues here, you're going to need to file a brief." So I did, I filed a full-blown brief and I challenged that there, that his plea was not voluntary. My voucher got paid. So the next case I get which is almost the same thing, guilty plea, plea agreement, appellate waiver, so this time I said I am not going to file an Anders brief. I am just going to file a full-blown brief because I don't want to kickback again and of course the U.S. attorney office filed motion to stay the briefing period. They filed a "Motion to

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

Dismiss” citing the appellate waiver and of course my brief was about forty pages long and, uh, so the court granted the motion to dismiss. And so, when I submitted my voucher which was about \$7000, it got cut to \$2500 because they basically stated “well, the opinion was only a one paragraph opinion, and you didn’t need to write such a lengthy brief.” So, I guess I’ve learned it is better to file the Anders brief so you don’t get your voucher cut but that, that was reason that it got cut.

Judge Fischer:

Are you facing issues with regard to the, the definition of the extended or complex statutory maximum? Do you have some judges who just think that every case in the district is the ordinary case and so virtually nothing is extended or complex, or are they not agreeing perhaps with what you might think the definition should be? Is there a suggestion that we should make about either getting rid of the statutory maximum or changing or may be, uh, broadening that definition so that judges would be a little bit more free if they don’t feel free now to say, yes, this is something the exceed that can exceed the statutory maximum?

Phillip Sapien:

I recently had a court question on a supervised release case because that exceeded that statutory maximum, which I think it is \$2100, or \$2200, I don’t know. And it was, it was one of the rare times that I have exceeded on a supervised release case, but there were, uh, there was some issues that I explained to the court about that. So I don’t know, on the statutory I mean on the supervised release cases if that there should be some review of may be that, uh, statutory maximum being increased. I think on the cases where I’ve found that there is an issue obviously on the complex cases, it is not as long as they are deemed complex but there is certain drug cases that I have had which may be, uh, you know two or three defendants not designated as complex, but still involved significant legal issues, legal research, sentencing issues, where I think my vouchers have been questioned more often. I generally will always try and submit as detailed a letter as possible. I try on all my vouchers to put as much detail as possible. I am not going to put, if it is legal research, just legal research. I usually will spell out, you know and it may be two to three lines on the entry as to what, what was the issue that was being researched. But I think those cases sometimes present some difficulty both for the attorneys and the courts when they are reviewing the vouchers, that you know, why did you go over the, the limit? Um, even though there are you know valid reason for doing so, but you know the case wasn’t complex. I think that has been my experience where is an issue in terms of the statutory limit.

Melanie Morgan:

I think the reality is that more and more cases in the federal system are extended and complex and so they are not the exception anymore that

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

they are really the norm. Um, in any given case, I mean it is rare for me to represent a single uh, you know a one defendant case uh, most of my cases that I have I would say end up being um, anywhere from ten to twenty-five defendants in the case. It doesn't necessarily get declared complex, but the work is complex and it is extended. And I think some of the problem that you start seeing is when this becomes the norm and this is the definition for what is above the cap, it is supposed to be more exceptional, um, then you have judges that are, are put in kind of a quandary of how, to deal with that. I am somebody who does believe that um, that the cap that we have right now at least in, in normal litigation not speaking to um, you know misdemeanor cases, or anything else, I don't believe that, that um, I don't believe that, that accurately reflects the type of work that has to be put into criminal cases. And I think that any case that requires any kind of workup at the trial level, and if you are doing your job as an attorney and representing your client as an individual in that sentencing process, there is a lot of work that needs to be done to make sure that your client um, has every opportunity to get something other than a guideline sentence.

Cori Harbour-Valdez: I agree with everything she just said. I, I think the complex cases more the norm then it used to be. The only time really that I have a single defendant case is when it is uh, an illegal re-entry case. Um, every other time, it is it is a multi-defendant drug case or, or whatever. And, and so getting them does not mean a complex is, when it is a wiretap case is just automatic. I mean the judges going to grant that for example. But when you've got a three or four defendant conspiracy case um, they don't necessarily view that as complex, and so it is something that what I do when I submit my voucher, is I'll submit a letter and I'll detail why, I had to go a little bit over the case maximum in this case or why it presented a different issue or more difficult issue that needed additional research. Um, and the judges have been pretty perceptive to having that done if there not going to deem it complex at the outset. But, I do think the case maximums need to be raised.

Richard Esper: I agree with Melanie and Cori and also I just wanted to add to the fact that many times uh, you have, and I think this is something you have to make it known to the, to the trial judge if, if the trial judge does not already know it. Is sometimes you get difficult clients uh, that, that you're appointed to represent. Uh, and I know that uh, I've gotten, and I know in our division the judges have the authority you know, they will pretty much cap it at three, three appointments and uh, for some reason I get calls all the time for that third appointment and they are usually difficult clients, and so you have to invest a lot more time, a lot more patience and sometimes you have to get a lot more assertive

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

with these individuals, and so sometimes that does take up a lot time. You have to explain that and that, will take it over the statutory maximum many times and so when you factor that in and I think that is a lot times when a lot of judges don't see is that. You just got a difficult client uh, that is just fighting you at every juncture. Not only are you fighting with the United States Attorney's Office many times uh, but you are having to fight with your client and uh, and that can present some real problems and some real challenges and it is very time consuming and exhausting and I think uh, you need to be compensated for that.

Chip Frensley: You all spoke to the, the um, I believe there is consensus about the, the uh, the case maximum caps being too low, but do you have an opinion about the, the, maximums on expert services, the caps?

Cori Harbour-Valdez: They need to be raised.

Chip Frensley: I agree.

Cori Harbour-Valdez: I don't know to what, I mean I very rarely honestly ask for them or have them granted. But what, what I hear from um, for example the interpreters I think the interpreters um, hourly rate needs to be increased. It is not commensurate with that they can make it they were in private practice doing it and I think that, that needs to be uh, it is particularly the interpreter that I work with, I mean, he's seen a slight increase in the CJA panel attorney rate and that, that interpreter rate has remained the same for I don't know how many years. I think that needs to be taken into consideration, I know they are not granted in all districts but in the districts in which they are using, they need to be compensated fairly and, um, I would agree in raising the maximum across the board.

Phillip Sapien: I agree, I'm sorry, I agree as well I, I don't know what it should be raised too but as I have mentioned earlier about interpreters, I had difficulty on occasion finding a contract interpreter that was willing to do it for the CJA rate so.

Melanie Morgan: Um, I was going to say that I, I look at the type of expert services we use, and in a couple of different categories. We use them for investigative purposes, and then we use them for interpretive purposes, and then we also use them for what is true expert services, lots of time in the area, um, you know, some kind of forensic science or some mental health issue. When you start going beyond either interpretive or investigative, or you need multiple types of service in each type of, in, in the representation, I think that's really where you run into a

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

problem with the cap, especially with mental health professionals, um, that you know can charge, um, a, a significant amount of money.

I have one person who is not truly an “expert” in my case yet but that’s how I’m submitting it. She’s the treating physician and every time I talk to her it’s in fifteen minute increments, and she charges me seventy-five bucks. Um, I, I can’t control that, I have to have that information from that particular individual, and yet I’m mindful that she is eating up what I might need for investigative purposes.

So, um, I’ll give you just one example in the Western District of Missouri and again, we have a different, a different judge administering at the circuit level, but obviously the opinion of the circuit level filters down to what the district court judges and the magistrate judges do. And I had a person who I believed had significant mental health issues that needed a full psychological workup, not just something piece meal, and I was told that I could have, um, you know, at, at that time it was \$2000 bucks, and I had bargained and negotiated with this person, um, about her services and she would not go below four. And so what the judge said was well, you can do it, we’re not going to, we’re not going to get approval in advance, um, but you’ll be on the hook for that, that \$2000 dollars. I can’t afford to be on the hook for that \$2000 dollars and so, I do think that, um, the need for expert services is becoming greater and greater as, um, as technology becomes more sophisticated, um, as just forensics become more sophisticated, but that also is driving up the cost and so I think that cap must be addressed.

Richard Esper:

I would agree with Melanie especially, uh, with respect to expert services involving a technology, uh, because so many more and more court rooms are going to, uh, technologies, introduce evidence and you know when you’re an old school lawyer like myself who likes paper, the transition is not necessarily an easy one. And so I try, uh, especially in retained cases, and I’m trying to push forward in, in, uh, CJA cases, is when you have a complex case with thousands and thousands of documents, uh, that you need to have retrieved in a, in a heartbeat, uh, a lot of the younger lawyers at least I know, two or three or four of them that are really good at, they may not be skilled lawyers in the court room yet but they are really good with the technology portion of it and they may not necessarily have to be a lawyer, they just have to be someone who is really, uh, uh, extremely good with technology, uh, I think there’s, there’s a need for those types of services.

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

And I do believe that there is a need for expert, uh, witnesses testimony with respect to punishment, uh, because more and more, uh, it was certainly over 90% of cases end up with some increment of punishment, and, uh, I think that so many individuals, uh, don't have, uh, the level of expertise that they need to create the proper evidence to present to a judge that reflects why § 3553(a) factors are important. Why a non-Guideline sentence is important, and I think that if you have expert services and, and sometimes you just have to push, uh, for somebody to come in or present some sort of documentation or an affidavit or, or report as to why this individual, uh, merits a departure or a non-Guideline sentence. You know, you need to have the funds to do that and, uh, I think it's crucial especially since so many cases like I said over 90% end up with some, uh, type of sentence in a criminal case.

Reuben Cahn: Just a question to that, I just want to ask Ms. Harbour-Valdez and Mr. Esper about your experience in the two capital § 2254's that each of you did. The first question I'd ask each of you is when you were appointed on, I, I think it was only one each of you took, but where you appointed together with an experience capital habeas lawyer?

Richard Esper: I can answer that. The, the lawyer that was appointed with me had experience, trial experience, uh, as, uh, in representing death penalty cases.

Reuben Cahn: But not capital habeas.

Richard Esper: But not capital habeas and, uh, and so we were both kind of, uh, grasping for whatever we could to, to figure the right way to do this.

Reuben Cahn: Understood and you Ms. . .

Cori Harbour-Valdez: I was appointed, um, with another lawyer, neither one of us had, um, capital habeas experience, um, we learned as best we could as we went along. We sought the advice of attorneys from all over the state, um, and, and did the best that we could.

Reuben Cahn: The other question I had was about funding, um, in each of those cases, the question I would have for each of you is did you prepare budgets and did you request experts services and what happened to those requests?

Richard Esper: Okay well, the case I have is pending.

Reuben Cahn: Okay, then?

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

- Richard Esper: And we have prepared a budget, uh, that's been submitted to the court, uh, it, it, and we, we actually, um.
- Reuben Cahn: Yeah, I don't mean to inquire about anything that's confidential so, I, I didn't realize the case was still pending.
- Reuben Cahn: No it's still pending but we, uh, we did get, we did seek the services of a third lawyer who has expertise in death penalty, state death penalty writs, and the court was gracious enough to allow for a third lawyer to come into the case. We've submitted an extent, and this person really has some expertise, uh, in that area and we have submitted, uh, extensive budget plan, uh, asking for funds for expert witnesses. Uh, it really opened my eyes, uh, to the necessity of training for somebody in the, El Paso Division, uh, to receive some really comprehensive training to handle these types of cases.
- Cori Harbour-Valdez: We did not submit a budget. At the time that just wasn't the practice in the district, um, but we were instructed, ordered, to submit monthly interim vouchers and that's how the judge kept control of the budget, I, I would guess.
- Judge Cardone: All right, um, let's go ahead and is there anything, uh, that you Mr. Esper would like to tell us that you're haven't had the opportunity to tell us?
- Richard Esper: Uh, I think that, uh, the main issue that I think, uh, is important, uh, for this Committee to understand is that training is, is very important, uh, for the CJA panel members and, and not just, not just panel members who have experience. I mean, uh, I can say, um, I learn every day, uh, something new that, that perhaps I didn't know before. And, but I think certainly for the younger lawyers, uh, in that way by getting the training you get better lawyers involved, uh, if they have adequate training and they do a better job but if the funding is not there, not only for the younger lawyers but even the ones that have been doing this for a long time. Uh, we constantly need training, we constantly need updating, uh, because not our entire practice even though the majority of my practice is in federal court, uh, you know, we have to handle other cases as well. Uh, so I think the training, funding for training, and training where you can get or you can go through that training in the, in the jurisdiction in which you practice and not have to travel 2000 miles to go to a, a week long seminar, which is great, if you can get into it, uh, but you know, you leave behind your law office. Uh, so I think that is crucial number one, and I think the, the increase in pay is crucial to keep the good lawyers that are on the CJA panel to keep them on the panel.

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

I think there needs to be a pay, a pay increase, uh, and panel has been discussed, uh, just to keep the good lawyers and to attract the good younger lawyers to want to come on. I know, I think it's an honor to, to, to be a CJA panel lawyer. I didn't use to think that, uh, but I do now and, uh, I know a lot of lawyers feel the same way, uh, and I, I hope that everybody that is a member of a CJA panel, uh, has the same attitude. But in order to keep that attitude high, I think there has to be some, some better training and certainly, uh, a higher pay rate/scale, uh, that is commensurate with you know, retained council or at least maybe halfway commensurate with it. That's what I urge this Committee to consider.

Judge Cardone: Ms. Harbour-Valdez

Cori Harbour-Valdez: I, I agree with Richard on training and there's got to be adequacy of funding. Um, I also echo what Mr. Morris said about independence. I think we've got to have that element and keep that at the forefront and I think it was Judge LaGrange yesterday that talked about discouraging advocacy by withholding funds that, that really resonated with me and I, I couldn't agree more, um, it, it's, it's just disheartening when we can't get what we need to defend the cases that, uh, you know, the public defenders are able to defend to the way the retained counsel is able to defend. And, um, I think that's also got to be kept to the forefront to this, and thank you again for the opportunity.

Judge Cardone: Ms. Morgan?

Melanie Morgan: Um, I think the only thing I want to touch on is, um, the lack of, uh, competent capital habeas counsel. Um, that is a problem in our district, um, our federal defender is trying to address it by recruiting some of us to, um, take on that responsibility. The problem is when it is just so infrequent, um, it is, it doesn't become cost-effective to maintain that. Um, but then you are finding people who are thrown into, um, really end stage, end-stage litigation who don't have, um, the extensive knowledge base that is required, and I think that's a huge issue that the CJA has to, has to take, uh, a look at.

Judge Cardone: Mr. Sapien?

Phillip Sapien: Thank you judge, I think, uh, I agree that uh training is probably one of the most important issues, um, I, you know, I think, um, there has, in some districts, kind of a culture has developed about trying to do more with less and, uh, but there really does need to be training, particularly on use of experts, use of investigators. But also, you

Transcript (Santa Fe, NM): Panel 5—Views from CJA Panel Attorneys

know, for us to stay relevant, uh, in terms of, of maintaining, uh, our skills, you know, the, the number of appointments needs to stay, um, adequate, uh, you know, adequately high as, um, as we mentioned more than just one or two appointments a year. I think for, for attorneys to stay, abreast of situations. Within the past ten years, they're been so many changes, uh, in terms of sentencing issues with *Booker*, with the *Johnson* case, with, uh, Guidelines changes, uh, and, uh, and for the attorneys to be able to stay on top of those, additional training is needed at the local.

Judge Cardone:

Well, thank you all for being here today, um, I know as, I think we've heard a couple times here, you are all in private practice and you, where away from that during, uh, this testimony that was much appreciated. Again, if you think of anything you didn't say, um, if you hear from other attorneys who have something that they want to say, we are soliciting comments, we want your comments so please, um, don't, feel free to get in touch, uh, thank you again and we will resume in fifteen minutes.