

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 1–Santa Fe, New Mexico

November 16-17, 2015

Transcript: Panel 6—Views from a Mixed Panel

Judge Cardone: All right, it is time for our last panel and it is a mixed panel. Our Committee members for this panel are the Honorable Mitch Goldberg; Katherian Roe; Neil MacBride; and Dr. Robert Rucker. Our panel participants are Judge Orlando Garcia from the Western District of Texas; the U.S. Attorney Richard Durbin from the Western District of Texas; the panel rep. John Convery from the Western District of Texas; and the panel rep. from District of Arizona, Mr. David Eisenberg. Um, so with that said, we will start with you, Judge Garcia, if you would like to make an opening statement.

Judge Garcia: Okay, yes, thank you Judge Cardone and thank you for the opportunity to be here before you and the Commission, and thank you for the leadership you have shown thus far, and I know you will continue in this important area of concern. As a Judge of the U.S. District Court for the Western District of Texas, I am honored to serve in one of the largest and most diverse districts in the United States. Our district is the second largest in the country encompassing 68 counties and 92,000 sq. miles. It is only the district to stretch over two time zones. It is known as a border court with more than 800 miles of international boundary with Mexico. And one of the largest border cities in the nation is El Paso, Texas. But border court doesn't begin to describe our district.

In addition to two large divisions on the border, El Paso and Del Rio, we also have divisions in San Antonio, Austin, Waco, and Midland-Odessa, four major metropolitan areas that are many hundreds of miles inside United States. These metropolitan areas present all the challenges and complexities faced by other urban courts around the country. The Western District's criminal docket is like the district itself, large and diverse. It is similarly belies the border court stereotype.

According to the most recent published statistics from the Administrative Office of the U.S. Courts, the Western District is the busiest in the nation, prosecuting more felony defendants than any other district in the country. These prosecutions included a large number of immigration offenses but that is not the, all they include. For example in calendar year 2014, our district was the second in the nation in the number of defendants prosecuted for fraud, second in the nation for federal sex offenses, and second in the nation for firearm and explosive offenses.

Given our district's extremely busy and extremely varied criminal docket, it is a little wonder that we face a wide range of challenges in ensuring adequate defense for indigent defendants. Appointed lawyers in the smaller, more remote divisions like Pecos, Texas, serve on undersized

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CJA panels overburdened with cases and distant from needed resources and training. In major urban centers like Austin or San Antonio, face numerous complex cases with demanding needs for high-cost services like investigations, investigators rather, and forensic experts. Large single dockets like in our Del Rio division, with more than 1700 defendants charged in 2014, stretch resources to their breaking point, placing additional pressures of time in docket management on appointed lawyers. And throughout the district, thousands of defendants are detained in remote facilities, have limited or no English-speaking abilities, added dimensions that put even greater demands on defense counsel and the courts. In all these ways, the western district of Texas demonstrates the diverse and extremely difficult challenges this Commission must confront in making recommendations to reform the Criminal Justice Act and to improve the delivery of federal defense services to the indigent.

In light of these diverse challenges, I encourage and urge the Commission to avoid general one-size-fits-all prescriptions for reform. The challenges our system faces in meeting the requirements of the Sixth Amendment are complex and they differ from district to district and sometimes, they differ from division to division within the district. The Commission must take these differences into account in making its recommendations allowing for a variety of solutions to fit the needs of a variety of local situations.

More importantly, I urge the Commission to focus on the pragmatic solutions to the problems our system faces. What our district needs most is access to adequate resources distributed fairly over a large region with our collected different challenges. If the Commission can make practical suggestions that help a district like ours, it will make a real difference in the defense of thousands of individuals. Meeting the constitutional requirement for indigent defense presents major challenges for our courts both in the western district and throughout our country. But however complex and great the challenges, the goal remains the same, to ensure excellent representation for every defendant charged in federal court. I wish the Commission every success in achieving this essential goal. Thank you, Judge Cardone.

Judge Cardone: Mr. Durbin.

Richard Durbin: Good afternoon, Judge Cardone, distinguished members of the Committee. My name is Richard Durbin. I am the United States attorney for the Western District of Texas. I have served in that capacity under appointments since about late December of last year. I have been an Assistant U.S. Attorney in the district since 1983 and I have had a number of supervisory positions as well as a position as a trial lawyer during that thirty-two years.

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Um, I have provided testimony to the Committee. Uh, what I thought I would do with this, this opening is just sort of focus on a couple of areas informally. Um, one is as Judge Garcia has pointed out, we are wide-ranging district geographically. We have a number of different geographic regions within the district and geography basically governs what we do. We are along the, the border with Mexico which generates, um, probably the large percentage of our cases. We do according to our numbers and fiscal, um, during fiscal year 2015, we filed almost 5400 felony indictments against over 6300 defendants. In addition to that, we prosecuted somewhere around 14,000 immigration misdemeanors, um, in seven different divisions and as Judge Garcia stated, two different time zones. It's, but it is an interesting district because although the challenges are great, um, I think both our office, the Federal Public Defender's Office, the panel lawyers, and the courts and all the agencies that work with the courts have a can-do attitude, um, and it's remarkable how much we can get done with the resources we have. That is sort of the background.

One of the observations I would make, um, to the, to the Commission, um, that is, that is not in my comments is I, I, find I, I yearn for, for data, for information and I don't know how much information is out there. I tried to clean some information about for example, how many of our cases are handled by court-appointed counsel or the public defender's office. Um, the numbers aren't clear but the best I can come up with is something like 80% of the cases which is a large number of cases against independent, and indigent defendants. I would, I would be interested in knowing what types of cases they serve, they, there are appointed in, um, the number cases they do, and one of the things that has occurred to me in getting ready for this, is a question about what is the typical cost of a voucher.

I have read the prior report. I have talked with Mr. Convery, with the judge, and with other lawyers in the district and, and one of the questions I have is how much, how much does this cost? What does the voucher cost? Is there sort of an average voucher cost? Um, one of things the crosses my mind is would it, would there be some way to systematize that instead of making them itemized, take a look at the type of case that is involved. We do 80% of our cases, probably are immigration cases and most of those are relatively straightforward cases. I won't to say they are all simple, um, but they're, most of the, them are not complex. They involve relatively straightforward elements. Um, and, and they, they take a certain amount of expertise but once you have done them, you, you know what, what the issues are and if the issues arise, you can get to those and most of them, they don't arise and I bet you 98% of them plead guilty. So, they move very quickly, they move very efficiently, and that's a large amount of what we do. Um, and I don't really have a sense of what the distribution is, um, of assignments among panel attorneys. I, I can't give

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you a sense of whether not that is a, that is a fair distribution. I can tell you what, what it appears like. It appears like it's, it's there is, there is a number of competent lawyers that appear regularly.

I mean overall, I think my comments in my testimony were that I think it works pretty well. I think it's, it's a good system. We don't have problems with a lot of bad lawyers, um, there is some tinkering probably that could be done. I am not quite sure I understand how the screening and review process works for panel attorneys. Um, it seems to be a little bit different in every division. In one division, there is none at all. There is, there is no plan in the Austin division. Um, yet the judges seem satisfied and, um, the lawyers in our office for the most part seem satisfied with the competence and effectiveness of the lawyers that are appointed and appear in the courts. Um, I mentioned vouchers.

Um, with the respect to the quality of representation, as I say generally, it's very good. Um, we don't have problems. It seems that in an almost organic fashion, if there are problem lawyers, they get worked out of the system. It's a mystery to me. It's a black box. I have had some of it explained to me but they seem to get worked out of a system and I don't think that we have an inordinate number of cases, um, that get broken in some way or busted based on ineffective assistance of counsel, so I think that the representation is, is generally very good. I would say about the Federal Public Defender's Office that their representation and the kinds of cases they are appointed to, is absolutely outstanding. They are some of the best lawyers in the courtroom consistently year after year.

One area where we do experience some difficulties, and I know the court has experienced some difficulties, is the availability of sufficient numbers of qualified counsel in some of the more remote divisions, especially Del Rio. Del Rio is a town on the border of about 35,000. It doesn't have a huge and enormous lawyer community, um, but we have a lot of crime. We have a lot of crime that comes out of the drug cartels who are very active these days, uh, with Los Zetas organization in that area. We also have a number of prison-based gangs that operate. We have had, within the last several months, we have had a series of indictments out of there involving thirty and forty defendants, um, involving such gangs as the Latin Kings and the Mexican Mafia, and I understand that the courts have had difficulties finding sufficient number of local lawyers who are qualified on the panel, um, to, to serve in those kinds of cases to the extent that we have even been informally asked to consider in some of those cases if we have venue in a different division, in an adjacent division, could we consider bringing indictments in those divisions such as the San Antonio division where we have a much deeper bench as it were among the panel attorneys.

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Those are, those are the main issues that that I've seen that I would, that I would call to your attention. I have a limited perspective because I don't deal with vouchers. We don't see them. We don't vet the panel lawyers and in many ways, I think that's good. Um, my, my experience is some AUSAs understand what defense lawyers do some AUSAs don't. Um, I'm not sure that always, their input would necessarily be, um, independent or objective. They need to come up with some way to figure out how to make sure you're getting good reason and informed as opposed to some of us who get angry because we didn't like the motion that was filed against us last week, um, as well as the, uh, the, the, uh, the possible appearance issues that arise from getting us too closely involved and deciding who should be practicing and who shouldn't be practicing. Um, those are, those are what I call the, uh, the panel's attention to and I look forward to answering your specific questions.

Judge Cardone: Mr. Convery.

John Convery: Judge Cardone, members of the Committee, I'm John Convery. I practice in San Antonio, Texas with Hasdorff & Convery. Um, my law partner and I are both members of the panel. We will be back in the trenches, if you will, tomorrow doing cases in federal court. We also do state court work and we also have a niche where we do military work. We both have military backgrounds, so we do court-martials and various admin boards in military courts. Um, I have been a member of the, uh, Criminal Justice Section Council with ABA, as the at-large member years ago. I have been an Assistant District Attorney and an Assistant United States Attorney in the Western District of Texas where I had the pleasure to work for Richard Durbin, uh, in the drug, in the drug unit. Uh, I have been the CJA panel rep. in the Western District of Texas since I believe 1998. Uh, we were blessed and still are blessed with a great public defender's office. Lucien Campbell was the Federal Public Defender for I want to say thirty years and just did a remarkable, outstanding job. Um, as you know the system, I am also in, in terms of putting forth any conflict, although it is not conflict, I say that because, I'm under contract with the Administrative Office for U.S. Courts as a member of the Defender Services Advisory Group. Um, they take, uh, panel representatives who then become, I'm the representative for the Fifth Circuit. Um, and that, in that capacity, I sit with, uh, Chip Frensley and with, uh, Katherian Roe and Reuben Cahn on the Defender Services Advisory Group and have done so for quite some time.

In my remarks, I think this is part of the road to independence and I'm not exactly sure where that road is going to lead but I'm absolutely positive that you have a historic opportunity, uh, to have some serious input into the issues and problems surrounding the CJA program. Um, I liken it to maturity, that in the 60s when I was a child, this was a child, meaning that

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the Kennedy administration went to Congress after *Johnson vs. Zerbst*, we got lawyers in federal court, instead of just pointing at the person in the, in the courtroom saying, “why don’t you do this, Joe,” we started this process.

And think about it, for many years through the teen years, uh, the people at the Administrative Office of the U.S. Courts are very competent, very professional people. Ted Litz, Judy Mroczka, Steve Asin, Dick Wolff, please have them testify. These were people who made it their business, their life, their professional obligation to get a public defender in each district. And what you saw yesterday in the panel of federal public defenders, is the culmination of all those efforts. Outstandingly competent professional people and all along that way, they were supported by the bar and by the panel, that redheaded stepchild who even in that process perhaps did not get the attention it deserved.

Then we turn around in the 90s and we have a professional, organized cadre of flagship of the Federal Public Defender’s and some thought is given maybe we should go beyond that and work on this hybrid system. All along that, independence tension has always existed. It has always existed, but we worked within it because as that tension existed, the Administrative Office for U.S. Court convinced the judges to begin the CJA panel representative program. So, each chief judge appoints a panel representative in each district, then we start getting together and having meetings, yearly meetings. What do we talk about? Well, I get there in, in, uh, 1998.

We talked about quality of representation. We talked about subjects that most people in their day-to-day activity don’t really talk about. We talked about resources. We talked about voucher cutting, okay? We talked about fees. At that time for a long time, the major push of this system was to bring the fee structure out of the bargain basement and bring it up to at least an acceptable level. Keep in mind, if you drill down at the district level for much of this time, when I started practicing law, many lawyers still did not put in vouchers. They did it as an act of, just well, I take retained cases and I should help the courts. Uh, when I became the CJA panel rep in ‘98, there were still lawyers who were doing that on the panel, 1998, lawyers who just didn’t even submit a voucher, okay?

That begins your collection of data problem, for those who are either academics or judge, I know you are data-oriented. Oh, my gosh, when I got to the DSAG, my colleagues here will tell you and I said, “where is the data on voucher cutting?” “Well, we don’t collect any.” Oh my gosh, you don’t collect any? For any of you who are in the system who deal with the Administrative Office for U.S. Courts, they are the most statistically, analytical data-collecting organization that we have in the federal

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government. There's no good reason that they haven't collected the data that you would like to have, Judge, and I pointed that out to them and I point it out to you. Be critical, be very critical because in my humble opinion, it's intentional. It's anecdotal by intent, and that's wrong and it still proceeds today.

We've set up now to the district of Nevada a system of eVouchering that I was at the [INAUDIBLE] that they had in San Francisco eight years ago or more to begin the program, and they showed us what they were doing in Nevada and we, panel members said, well, "how can you account for voucher cutting?" I know judges don't care about that, it is not designed to it. It is designed to, to smooth the voucher process, yes, but where can it show whether the person actually did the work and what was done? "Oh no, no, it just don't do that." It still does not do that. Today as we sit here, that's just wrong. So when you talk to judges, good judges say, "I don't cut vouchers, I can't imagine anybody cutting vouchers." And I don't know what the bad judges say, but they don't say it to anybody of any importance. They are not required to provide any information and you heard ample testimonies today about, about just, I don't know if is an uneasiness, fear, whatever you want to call it, of doing that. But I do know what a financial hardship it is.

And then we hit the wall, that probably caused the creation of the task force with an NACDL, and I am an NACDL life member, and with the Administrative Office of the U.S. Courts that resulted in the creation of this Committee. And that wall was sequestration. As we approached budget issues, we kept having more and more problems with the fact that the defenders and the panel could not go around the judges or get the judges to go to Congress to ask for the resources, the resources necessary to try these criminal cases in federal court. So when sequestration happened, it even pitted us one against the other. We had a terrible situation where the defenders got cut into the bone and so Michael Nachmanoff, and Reuben Cahn, Jon Sands, I don't blame them, but they went to the Congress and they said, look we got to share this pain, and so they cut, they cut the rate, that is already artificially low. They cut the rate for panel attorneys and then they have and that's with the history. And by the way, I was part of the group we voted among the panel reps on the DSAG. We voted that we would take up to six months of deferral of our vouchers. Six months! To let Congress do what Congress does. Because this had happened before, there was historical precedent. The judges did not want that. No, no, no. We don't want to do that. We will cut the rate instead. And so the rate was cut.

Then Congress, as it often, or as it has in the past done, came to its senses and, and passed the budget and reinstated things and the only, and one of the only people who got left completely out of the cold in that is the CJA

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panel. They just did not get reimbursed for that lost time, that lost hours, these small business people, these independent contractors. They would care so much. They just took it in the face. Please try to do something about that, it would be wonderful. So that's voucher cutting, and that's the structure, the systemic issues.

The final issue I want to talk to you about is something that you brought up Mr. MacBride, and that is parity. Parity is what it is all about, a level playing field. I was trained by both of these individuals on either side of me that a good lawyer can try either side of the case. Well not without the resources you can't. If you go in the court, you don't have smart board or you don't have the access to it or do you don't have the proper technology or you don't have the ESI capability that Mr. Esper talked about in terms of discovery, you're just in the ditch. You are not dealing with parity.

So what we did at DSAG is we said and other good lawyers by the way for those who are on the Committee who are on the court, think of those lawyers who may have come in front of you or historically come in front of a judge and said I need to know what the prosecution spent on investigation? I need to know what the prosecutions spent on discovery. I need to know what prosecution resources were assigned to this case so I can do my, my budget. Very good judges I would respectfully suggest, just don't deal with it, it's just part of discovery. It is just not what the court believes it's there to do. I've never in my career had a judge try to force the U.S. Attorney's Office to up the amount that they spent on any particular case so that's at the local level. At the national level, we don't get . . . the AO and the defender services committee, does not get any data from Justice. We, we are, we are trapped into comparing a system for parity against another side that we don't even know what resources are being spent. I suggest to you that is fundamentally wrong. I accused them before of having some kind of good old boy agreement, or whether they just wouldn't ask each other because they go to separate Congressional Committees, I don't know if that, that is the case or they are just a bunch of well-meaning wonderful people. But I do know it is fundamentally wrong to not compare.

So what are the cost comparisons? You Judges have seen these missives from the AO. Let's try to get cheaper investigators out there without looking at what the prosecution spends. Let's try to get cheaper experts. Cheaper experts?! The only question in the system is, "what does the prosecution spend for experts?" That is the only question, if you are looking parity. If anything else just compares to see each other and finds the, they guy that got a cheapest expert and let's all use that expert. And that is not really I don't think a direction that we want to go. I think you all are at a crossroads. I commend you for your service. I thank you very much um, for it and I, I um, I would be happy to answer any questions.

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Judge Cardone: Mr. Eisenberg.

David Eisenberg: Why do I want to see me please the court?

Judge Cardone: [LAUGHING].

David Eisenberg: Well I'm not from the Western District of Texas, and I am not even from Texas, but I'm close enough.

Judge Cardone: [LAUGHING].

David Eisenberg: So I am going to give you all the prospective from uh, not just simply Arizona. I am going to change the way I was going to approach this because I think it may be helpful for you all to get war stories. I don't like to use that term, but incidents that have happened to me, or to my colleagues in the District of Arizona, concerning two areas, particularly in terms of the CJA programs. So this is um, I guess real world down on the, down on the uh, actual practice of law where I am the CJA rep. Uh, and I just say this parenthetically, I have had the opportunity to be a prosecutor for almost thirty years. So I am looking at my ten plus years as uh, defense council from the prospective of what I have seen available to prosecutors and the resources that they have, and that we do not.

My two main uh, ideas to convey to you all, is that the budget is too low for what we do, both for ourselves in terms of our hourly reimbursement, and it's too low for the support function that we seek to help us in our cases. Be it experts, paralegals, investigators, or whatever. As I see it, the consequences of a budget that is too low, is that the appearance, and perhaps the reality is inadequate representation.

Not one of us would ever admit to that, yet, I think that in any given case, the fact that a lawyer did not have enough investigative resources, or the right "expert," or enough paralegal help to put together a motion, makes you feel, makes us feel, somewhat insecure. I have not come to the point where I agree with what I have heard that this may lead inevitably to a waiver of trial, in other words, instead of taking the case to trial, we'll punt. However, I can see, I can see that as being a potential possibility. So now you've got ineffective assistance of counsel.

My second point that I wish to make to you all is that I do think the judges on the district court level are too involved with that we do. They approve attorney vouchers which I think is a systemic issue. There is cutting by some and I will perhaps in terms of what are the questions you all want to give me, respond to that. They are involved in approving the appointment of our experts. In a moment I will tell you why I think that is a problem. Well, I'll say it right now, because judges are involved in what we do in

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terms of our pay and the appointment of experts, we have attorney client and work product privilege issues that in effect, I'm not saying we waive them when we talk to judges about issues, but sometimes I believe we crossover the line.

In addition, I think it's proved and has been proved probably for several years, that judges do not participate in settlement conferences. They do not get involved in the disposition of cases in the sense of, you sit down like I have, have experienced in the state court and judge will participate in that effort. Judges in the federal courts do not want to do that because they want to avoid a conflict. Um, yet it's ironic to me that they are participating in my thought processes and inherently have a conflict when I have to talk about, why do I need a given expert?

So, the solution as I see it, is that this function should be taken away from the judges. Our budget, our CJA budget in a sense of, I should say approval, should be handled by a court executive. I am not willing to say it should be handle[d] by somebody totally independent. I understand that the judiciary has a budget and it needs to control it, so I do not have any problem with someone who is a court employee, handling the approval of vouchers, the approval of experts.

I think it also will take away from judges what I think must be an extremely frustrating experience. To sit there, hour after hour, and I know most judges do this, and they go over the vouchers. I think if I were a judge I would rather be doing whatever other things judge, judges do, but I'm sure wouldn't want to be reviewing the mathematical aspect of the voucher, and then trying to decide did he really do this kind of work, such that he or she deserves this kind of remuneration. That's not something that I think judges really want to get involved with.

I have heard others remark about the fact that there are district court, um, executives who do this function. I was not aware of that, but I do know from my circuit experience in the Ninth Circuit, Peter Shaw is the commissioner, and Peter Shaw is the person who approves all the vouchers that go to the Ninth Circuit, uh, for the, for the CJA panel. Mr. Shaw is fantastic. He does it quickly, he does it with dispatch, and if there's an issue it gets, I do believe it gets referred to one of the judges who heard that case. But it is resolved, your voucher is resolved quickly. I understand they are not nearly as complex in many cases as district court vouchers, but nonetheless, um, I believe that, that is a workable function, that is a court executive.

I'm going to talk a little bit now about experts. Um, we have had the situation were judges will ask us why do you need this expert? If we put down in a motion that is sealed why we need the expert and we take pains in order to say specifically, these are the things that my neuropsychologist

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will look at. These are the areas, the accounting records of the forensic accountant will look at, and the reason why I think the forensic account is helpful, for example, is because I think that the forensic accountant can tell me the flow of funds such that, if a conspiracy began on x-date and we've got a flow of funds that go before that date, that are allegedly moneys that are laundered, then perhaps I have a theory of the defense and approach. Now, um, sometimes, I feel that in that process, I'm giving up more than I should be.

One reason is, suppose a forensic accountant comes to me and says, such as happened to me very recently, "Dave," we're on a first name basis, "Dave, your client," I'll put it this way, is, "the money laundering is there, all these transactions are inconsistent with this business, they are loaded with smurfing etc., etc., etc., so an indirect circumstantial way, he is guilty as whatever," and the feeling is that having been paid to have Mr. X give me this information, and then we come to trial or we come to, uh, the end of the case, and we don't have a trial and the judge must be sitting there wondering, but I wonder what happened to the \$4000 worth of forensic accounting expert, the monies that I've paid. Hey, must have been it didn't work out. And so I feel like, I have given up something that I'd rather not give up. I believe judges are fantastically good at making the intellectual compartmentalization that it would take to look at this type of issue and not come to an adverse conclusion, but nonetheless, we are all human and sometimes I feel like even the best of us, inevitably come to the most logical conclusion or the most, in my case, adverse conclusion.

Another thing that I have seen happen in, uh, that goes along with this, it isn't really experts. Um, I have a colleague who, um, wanted to call witnesses from out of state, um, many witnesses from way out state, let's say the East Coast, and as a consequence that would have been expensive, travel, uh, up keep. It was a long case, the defense didn't know when it was going to go, so they would be, uh, witnesses would be, uh, in Phoenix for a long, long time. And there was a discussion between this attorney and the judge as to why these witnesses were needed. How many witnesses were needed. Um, so I believe that the discussion went something like, this person will say this, this person has this defense, this is where the alibi comes in, or something like that, um, so, I, I don't think that, that would have been, would have made, may very comfortable.

Um, part of the expert issue has to do with budget. I give you, uh, an example of something that unfortunately, um, goes back to our 2009 standard if you will, of what our experts are charged and we are still working off of that. One of the things I've tried to do is to come to 2015 budgetary rates, forensic accountants for example are \$250 to \$450 dollars an hour in my district and, uh, a neuropsychologist is at least \$250 dollars and probably more. A good investigator, a good white collar investigator

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is not \$55 dollars an hour. My best investigative resource, and they are terrific, they charge more for their time in retained cases than I charge as a CJA lawyer. So the response to me in recently was, we're on a first name basis, "Dave, we're not going to take as many CJA cases anymore because we can't afford it." Um, but we go to the budget for experts. Um, we're getting our budgets cut both and by the way, I don't mean to say this is, perhaps I'm implying it, it would be unfair to say this is systemic, this is episodic, and what I'm giving you is what people have told me. I don't mean to, uh, say this has all happened to me. Um, their rates of pay are being cut back to the 2009 level.

I will give you something that has happened to me. I will show, by my own research what expert Y in my community will charge and I'll try to get three or four experts and they will give me their charges and I'll put in their, uh, their curriculum vitae, and I will ask the court, will you approve this over what is in the, our rate, our standard rate for 2009, and some judges will do that and some will not. What is the end result for the expert who will not get that rate? That expert will say, um, "I can't do it, I just can't afford to do it," or they may do it and as I have heard, one of my colleagues say, that person paid the difference. A lawyer paid the difference.

Um, but now, I'll give you another example of, of, um, paralegals and then I'll stop on this. I think most of us have a retained paralegal. I don't see how any legal practice in this day and age could ever function if the lawyer just tried to do it uh, with his sister-in-law or whatever, it is just cannot be done. I pay my paralegal a straight fee. Whatever she can be compensated for, for CJA work, I will [inaudible] as well. If her fee is cut for the CJA case, we book her hours and that has happened, then I will make up the difference, because I don't want to have a disgruntled employee. I don't want to lose this paralegal. But that has happened and, um, I think I am not the only one that, that has happened too.

Here is an irony for us, at least in my county, which is Maricopa, uh, now again I will go to the forensic expert who really is a very good friend of mine, and I asked him, "Do you work for the county?" This is a long time ago and he said, yes. He works for both the county prosecutor and the three different public defender organizations that we have in Maricopa County. They pay his standard rate. He doesn't work for the U.S. Attorney's Office, but I know from the reputation of the experts at the U.S. Attorney's Office gets, that they are getting paid a lot more than what we are budgeting for, in terms of our own expert witnesses. I am going to leave off on that and try to go to a second area of, and that's the rate of compensation for the lawyers.

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Um, I think it is, at \$127 dollars an hour going off of the recent survey that was done by the Administrative Offices, you know, one of their functions, if, if the overhead that the average CJA attorney has is \$84 dollars and I don't know how, that may be comparing a little bit of apples and oranges, but if you want to just go with that as the general average, it comes up to about \$43 dollars an hour in terms of what a lawyer would clear on CJA cases. Um, I, uh, it is a little hard to project what that means in terms of an overall income if one does 800 hours of cases, 500, 400, whatever it is, if my gut tells me though that that is too low. I am not so sure that it is going to discourage people from doing this kind of work, because truth to tell, it is fantastic. Anybody who likes the fact, who likes trial work, and who likes the process, would want in my estimation, to be in federal court. I don't think there is any better place to be, and I am not here to make it glorified for the people sitting in front of me. That is just my experience of practicing for as long as I have. I do think what it does is it causes people to uh, be discouraged, and perhaps to go to other county func, I'm sorry, other public defender functions that we have in my county, and spend more time doing those cases. What it has done for others is to make us go out, as perhaps we should, and seek retained cases. In any event, it just, uh it seems to me that, that is a very small price to be paying for the quality of legal defense that people expect.

Uh, I am not going to talk about budget. I think, I mean budgeted cases, complex cases, I sat through your all's questions for the last panel and I think a lot of that those questions were answered in just the same way I would answer them.

And I don't mean to loop back, but I realized I forgot one, one episode that I think is important to discuss and that is discovery. The United States Attorney's Office has now gone, uh, not borders are viral. That is not fair. They put their discovery into disc and computer format. We are required to come up with hard drives which means we lay out whatever a hard drive costs these days, \$100 or \$150 dollars out of our pocket. We won't seek compensation for that until the end of the case. These are complex cases. In many instances, they have done a great job in trying to index their cases. In many instances the really good AUSAs will say, "Here is where your client is in the discovery." I am a little apprehensive about relying on indexes and relying on where somebody who is on the other side of the equation to tell me where to go to look for the salient parts of my client's defense.

Moreover, I think that is to some extent an approach that perhaps some of the judges have taken in terms of looking over a voucher that has a lot of time given over to discovery. The response given by us is how else do we know where our defense lies, if there is a defense in the first place, and how, what do we tell our client. You, if you are going to sit down with a

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client particularly in the complex case who has a brain, that is the white some white-collared type mentality, if they think they can fool you, they will and you will wind up spinning uh, your feet and wasting resources, and perhaps coming out with a bad result, a worse result. You need to be prepared, and yet I think sometimes the feeling is, is that we are, way over extending ourselves in terms of the analysis that we do on discovery and the time we spend.

I would have my paralegal sit down with me as she has done, and my client, once I figured I knew where the case was headed, and say, “okay Loraine you do this, you know how to work the computer” and did that I think it is \$45 dollars an hour and yet ah there a times when I think that, that is still too much time for a judge to approve. So um, perhaps I am a little more pessimistic than some of the others who have given you their views in terms of how the CJA program has run, um, but that is my perspective from having done at ten years, I have been the CJA rep. now for I think three years.

Um, and I do want to finish by saying it is, it’s always been a pleasure for me to go to a judge and talk to the judges in my district. I think they are uniformly open to listening, but I think we also have issues that because of the way the system has run, need to be changed, and so I have given you my views and what I think what we have done. Thank you.

Judge Cardone: Great. Mr. Mac Bride, we’ll start with you.

Neil MacBride: Thanks Judge Cardone, um, I uh, I’m actually not sure where to start uh, real smorgasbord and thank uh, each of you for your, your testimony and um, I wish we had, you know, more time, and uh, than the clock says. But I will start with you, Judge Garcia, just to go in order um, and, and if I could just start with the issue of um, of uh, independence, of the CJA program. And earlier today we heard from the, the president of the National Association of Criminal Defense Lawyers, Mr. Morris, um, and, and this is the report that the NACDL put out a couple months ago, and I will just read two sentences from it it’s, it’s really just sort of a theme that is baked into this report and you, you’ve heard um, some of your fellow panelists speak to this but uh, this organization with I think 9000 members across the country uh, concluded that, “the defense function must be insulated” . . . the CJA defense function . . . “must be insulated from the pervasive involvement and control by the judiciary. At the trial level, the appointment review and reappointment of CJA panel lawyers should be overseen by committee of lawyers knowledgeable about and committed to indigent defense, and not by district court judges who often have a much different focus interest and background.”

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So that's a pretty strong statement um, as somebody who spent most my career in DOJ, I spent very a little time thinking about these issues um, and so those words kind of pop off the page to me as sort of almost a layman coming to this. I am just curious from your perspective Judge, you've been at this is a long time you know do you, what is your sense about the current uh, role of, of the judiciary in the "oversight," and using air quotes, but the management of CJA, do you think on balance, it is a good thing, a terrible thing, uh, about in the middle, do you think there are any you know improvement or changes that should be made.

Judge Garcia:

I agree with the statement made. I think the judiciary, I may get in trouble with my colleagues somewhere in the world and I may need a Marshal or two to help me. [LAUGHING]. Um, I think the judiciary should have very limited effect, or rather impact, or involvement, or role in the process, especially in the budget. Um, we get to determine the amount of a fee for an expert and the like. We make no determination with respect to the prosecutions' budget, and nor should we, therefore, I see no need, or I don't see the, the rationale why we would involve ourselves in any part of the budget dealing with the defense. Um, I just don't see that.

And, uh, in terms of selection of the lawyers I suppose we could get some input uh, from well the prosecution, but like our U.S. attorney mentioned, then we could run into some serious conflicts. Um, I just don't see I would hope that the time in the future whether near or in distant, um, or judges . . . you know, the idea in the twenty-one years that I've been on the bench, I've never denied or rather reduced a voucher.

On one occasion I had a question for the, for the clerk in the clerk's office brought to my attention that she thought this was a little excessive that, that issue I referred to a magistrate judge who conducted an informal hearing to gather all the necessary facts, and I think revised the amount but not substantially. I don't want to consume my time in my chambers looking at a voucher and whether this lawyer . . . if the voucher indicates that the lawyer went to see his client at a detention facility three times, I am not going to consume my time and make a judgment call and say, "well that lawyer didn't really need to go see this client three times, should have gone two times," or "he should have gone one time," and then cut his money off. Um, how would I know, how would I know whether he needed three times or two times, what am I going to do? Bring the lawyer in and ask him okay, "why did you go the first time, what was the necessity of going of the second time and why did you go the third time, couldn't you have resolved those issues the second time?" That's going to take my time and I'm going to interject myself and try to tell the lawyer, well you could have done it differently, that's none of my business, as far as I am concerned.

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Neil MacBride: Mr. Durbin, I'm, I'm curious, um, you know, your, your thought about that the, the other, uh, part of this report that, uh, was discussed earlier today is, is a portion from, uh, um, a Congressional Committee report in 1970, I think the last time the CJA was, was amended and the Congress said, and I'm paraphrasing, but essentially, you know, the notion that, uh, the Federal Defender Service has to be uh under the judiciary is this wacky, as if the Department Of Justice, you know, was under the judiciary, just doesn't make any sense. There, you know, there should be service, a symmetry there, that they are officers of the court but not necessarily they don't necessarily work for the court. Again, I, I spent very little time, ever thinking about this in the four years I was a United States Attorney, but just curious in getting ready for this, uh, this, this, this hearing or just your, your, you know, two plus decades if, if you have any, you know, conclusions about just, just a matter of organizational behavior, uh, or, or the org chart where the federal defender service should be?

Richard Durbin: Well you, you accurately observe, I have not spent hours and hours, thinking about this. Um, but it, it does, but I, but, I've had a lot of experience with management over the last twenty years, and it does not make a lot of sense to me that the defenders are part of the U.S. Courts. Um, which, which raises the question, where ought they to be?

Um, and I, I don't want to, uh, get in trouble with the Department of Justice [LAUGHING] but a couple of thoughts come to my mind and I'm, I'm sure they are not unique to me and I'm sure that you, all will think of them yourselves if you haven't already, but one of them is, the danger of creating them as an independent agency, in my view is, then you've got defenders of criminals who are now going to go to Congress to try to get a budget. And if you think you've got budget problems now when you were within the courts, my guess would be just watching the way the Congress works, and watching for example Planned Parenthood for the last several months, if you have the wrong case that's in the public at the time that the budgeting process is most heated, um, the defenders may find themselves all alone, trying to figure out how to, how to get it funded.

One of the things that, that I've mentioned to, to Mr. Convery, who smiles wryly at me when I say it, but, you know the defenders who are involved as are we in the justice process. There's a whole lot of stuff in the Department of Justice that I don't, I can't tell you what it is, but I don't have any to do with it, um, so far as I know, um, we work at odds at various times. I don't know why you couldn't put the, the defenders under one of those parts of the Justice Department that has initials that I don't what they stand for, OJP, DMJ, MJD, whatever the heck it is, um, you could, you could create walls within the Department, uh put them over, under the Associate Attorney General, for example. Because, does

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anybody know what all that office does, anyway, I'm not sure, uh, but there are ways that you could, you could structure it, um, and then they would be part of the Department of Justice budget, uh, and, and then I just throw that out.

There's probably other ways to do it. I am not sure Justice would leap on it. I know that most defenders would probably not leap on it. Um, but at least you're taking it out of the courts who are the referees and, and what you got is the referee who's also in charge of, outfitting, budgeting, keeping track of, monitoring, and apparently vetting and deciding whether the player should even play in some circumstances, and just from, uh, sort of, uh, a logical standpoint that, it doesn't, it doesn't make sense to me and knowing the little that I do about what judges do. Um, it, it wouldn't surprise me that, that falls pretty low on their list of priorities.

Um, and also as I pointed out in my written testimony, I, I suspect that part of the, the parity problem with experts is, it, when you're in position for a period of time, you learn to think from that perspective. I learned to think from different perspectives as I moved through the office and that's sort of what dominates me. Judges are not thinking in terms of how advocates approach a case, and so the, the thought to me that a judges would be deciding what kind of expert would be needed at the front end of the case, where the judge doesn't really know what the facts are, shouldn't, really know what the facts are, doesn't know what the issues might turn out to be. I'm not sure how a judge could reasonably make that kind of determination, "oh, yeah, you need this kind of expert, um, and it should cost you no more than X."

I sign expert, um, authorizations all the time, not for the criminal side interestingly, for the civil side, and I'm amazed at how expensive it is. Absolutely stunned at how expensive it is and, and, and I'm not in a position, I don't have the knowledge where I sit to say this expert is too much, except every so often, there's one we've been signing \$45,000 dollar ones and one comes across for \$90,000, and I go, what? Why is everybody else \$45,000? But beyond that, it is a, it is a very ham-fisted, very crude sort of review. Uh, and so, uh, I did, it makes, it just makes sense to me that that's not something that should logically, or practically be placed on judges.

Judge Cardone: Alright, Dr. Rucker.

Dr. Rucker: I'd like to follow up on that and ask you, uh, if from all of you, uh, what your thoughts are about, uh, changing the structure of, of CJA. Mr. Eisenberg mentioned, uh, maybe a court executive like Mr. Shaw that we have, an appellate commissioner in the Ninth Circuit. We've heard from other people that perhaps it should be under the Federal Defenders, uh,

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maybe something like what you have with the FJC, or or the Sentencing Commission. We would like to hear your, uh, your thoughts about that or any other ideas you have that would take it away from the courts?

John Convery: Okay, um, um, a couple of things, when I suggested to Richard that we put it under Homeland Security for better budget position.

Judge Garcia: Or, border security.

John Convery: We would finally get the resources that we need, uh, to try the cases.

Dr. Rucker: But, how about the pentagon?

John Convery: The pentagon, there you go and I'm going to talk about that in the second, that, that's an interesting example Dr. Rucker, of, uh, because I have experience there, I know that the entire process takes place within the military, you have the judiciary, the defense, and you have the prosecutors, and they have separate chains of command and the only place it comes together, it, it doesn't really come together, but at the very top is the appropriation. The appropriation comes over and it's, it split up basically to where it is needed. There is no con . . . I can tell you, there is no conflict in the field. There used to be in the bad old days, you'd have what they called command influence, and you know, when you didn't have the separate chains of command.

When I was a young lawyer, uh you may remember it as at the Brooks Army Base, when they had the, the scandal of the testing, urine testing back in the late 70s, and had to throw out uh thousands of uh, uh Article 15's. Non-judicial punishments that were following individuals around for positive urinalysis testing. Well, the young defense lawyer that just, just blew up that whole system was Lindsey Graham, okay. Captain Lindsay Graham uh, was the lawyer who did that, he did a fantastic job as a defense lawyer. I worked with him on cases on the other side when he was the regional uh prosecutor in Europe in the 80s.

Uh, one could make an academic argument, a very strong academic argument that we are moving more and more to a European-type administrative system. Trials? Come on, what trials? Generally speaking, the Western District of Texas in the San Antonio division with its 1700 or so many filings, had twelve trials last year. Twelve. Criminal trials. Trials are at an all-time low throughout the whole system because the Guidelines punish you for a trial. There are different things that are built in where people are not going to trial. So the administrative process becomes the only process that people know in the system. Hence, the importance of plea bargaining in the system, and that type of thing.

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So in terms of resources, whether or not you use a separate entity as the Prado Commission suggested. Whether or not you use the Federal Public Defender's, you know, I'll stop right there, because I have mixed emotions about that. I love the Federal Public Defender's but if you do that, there has got to be some independence. We're not joined at the hip. We have different interests. These very sophisticated individuals who testified in this panel, who is going to adjust the percentages, who is going to determine what percentage the panel gets of cases and what percentage the defenders get, because that has a lot to do with budgeting. Are you going to have a board of directors? I suggest to you that you look more to the community.

In San Antonio, we are blessed to have a very collegial atmosphere and we have a panel classification committee that I am on, that the Judge is on. There, we have lawyers from the community that are willing to do the selection of the panel and do those kinds of things. But within the San Antonio Bar Association, we also have a Federal Courts Committee, and the judges are members of that committee, the judges. We have civil lawyers, bankruptcy lawyers. We have um, the, the hierarchy of the Bar Association and the hierarchy of the Federal Bar Association. I cannot tell you and, and representatives in fact, I believe the, the chief of the criminal division, city chief, from the U.S. Attorney's Office. We get more problems solved there in that community-based meeting, whether you think of it as a board of directors, or whatever you think of it.

And I am sorry if this answer is so long but if you do nothing else, if this, if this does not get the traction that say the Prado Commission report did not get, if it is treated in much the same way, for goodness sake, represent, recommend to your colleagues to undo the horrible decision to demote the Defenders Services Office. When they stripped the Defenders Services Committee of judges from, with budget authority and, and certain amount of policy authority in general, that, that's what soured, that's what really tilted the whole independence problem. That was our board directors. Those were judges who were on the committee that, of judges that were, who would recommend policy changes and who would deal with the budget issues and we were developing and maturing our relationship. I would say it has only been within the last five or six years that we have had joint meetings of the Defender Services Advisory Group and the Defender Services Committee of the judges. Oh my gosh, where, progress is being made, and in the midst of that progress, the judges decided to strip their own committee of the authority to continue to run the program. What a terrible, terrible mistakes that has been.

David Eisenberg: Doctor, I think um, the idea behind the public defender becoming involved in reviewing vouchers creates problem at least in a district where you have many conflicts. In other words, our panel is so big because we have a lot

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of cases and the, and the public defender's office can only take one defendant per multi-defendant case. So what would happen is there is um, I would think that whoever does review the voucher in the PDs office wouldn't have any connection with a particular case, but I feel a little bit uneasy about that process.

Um, also I think it is being it is, that review would be done by someone who is a co-equal to me, rather than someone who is whom I think should, I, I should feel is more in control of the overall budget. I think there is some, because we're talking about two different budgets. To go to Congress and ask for money, I don't think any defense counsel would be doing that, I think that is the judicial branch of the government and to segregate the moneys for CJA within their budget. That's fine, I don't have any problem with that, just like I don't have any problem with the district executive like a circuit executive reviewing my voucher, I just don't think the judges should be doing it.

I also think the district executive, that methodology could be set up so there is uh, an appeal and I have a feeling that when someone who knows what they are doing who has been a defense attorney and who is perhaps done CJA cases at some point or another, you are going to wind up with a lot less misgivings about this whole process. But we have, currently, we do not have an appeal process built into the system.

Judge Garcia: Yes, if I may I would like to concur in our U.S. attorney's comment, and that is the idea of having a separate entity of um, and having that entity go to Congress, to lobby for lawyer fees of given the, the rhetoric that we hear often in the community about immigrants and immigration. Well, Congress is not going to appropriate a whole bunch of money for lawyers to go out and defend, uh immigrants. I, I concur in Mr. Durbin's comment that perhaps the idea of placing the structure within the DOJ and build a tremendous firewall, um, might be the solution but to have a separate entity and then have them go fend for themselves for moneys, I have never been a member of Congress and am not likely to be, but you don't have to be, just read what is happening out there in the wold, and um, I don't think it, um, it is, it doesn't look well to have a separate entity.

Judge Cardone: Ms. Roe.

Katherian Roe: Judge Garcia, you were talking earlier about the fact that you don't believe that the, the court or judges should have any control or any say over the budget of the Federal Defender's program or the CJA program. I want to ask you about staffing. When you spoke just a few minutes ago one of the things you talked about is that your district is the busiest district in the, in the country and that what you really wanted from the study was to get

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more resources. I, I couldn't help but think about the work measurement study that was done by the federal defender program.

Judge Garcia: Um-hum.

Katherian Roe: Or, of the federal defender program if you will and in that, as a result of that study I think the folks who did it also recognize how busy your district was in the fact that you needed more resources. And they recommended that, and authorized, that the defenders office in your district receive twenty-five more employees.

Judge Garcia: Um-hum.

Katherian Roe: Some of them um, would be uh, attorneys obviously, assistant federal defenders based on how many the federal defender thought they needed. And, as you may know the Fifth Circuit has indicated that they will not give them any. So my question is this. Do you believe that judges should be involved in the staffing of the Federal Defender Offices?

Judge Garcia: No.

Katherian Roe: And is that something that you or your colleagues have been able to address with your circuit, you know, in an effort to try and convince them that the resource, first the study gets done which takes I don't know, a year and a half, then the determinations are made, and goes all through the Judicial . . .

Judge Garcia: Um-um.

Katherian Roe: Conference uh levels to get approved.

Judge Garcia: Right.

Katherian Roe: And then at the end, still nothing happens . . .

Judge Garcia: Um-um.

Katherian Roe: to assist your district. The, the, uh, folks who can't afford counsel in your district or your courts.

Judge Garcia: Uh, to be quite candid with you, I have not had a discussion with any of my colleagues in the district. Um, I'm soon to be the Chief Judge of the district come January, and I'm contemplating of, um, of forming a committee of judges to undergo a review of these, of all these issues so that we can come as a district and let this Commission know what our thoughts are, especially from a huge district like ours.

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Katherian Roe: Mr. Convery, I'd like to ask you a question with . . .

Judge Cardone: Yeah, absolutely.

Katherian Roe: We heard from one of the judges in your district yesterday who indicated that he had never cut a voucher or if he had maybe, maybe he looked at it one or two, it was unclear, but mostly he kept saying he has never had any problems with vouchers. And it became clear that what he was talking about were vouchers that were under the case maximum anything that was \$9900 dollars or less he had never had a problem with and yet when you look at the case maximum, it's \$9900 dollar voucher means that the attorney spends 78 hours working on the case, yet, we consistently heard from CJA attorneys during these hearings and you may have heard some of the testimony, that cases are becoming more complex. Certainly not all cases while we, we heard from Judge Garcia that they are very complex cases in your district, that there are fraud cases that are complex especially in Austin and San Antonio; that there are sex offense cases that are more complex, and yet judges seem to think that that case maximum is the high watermark.

First, I'd like to ask you whether or not you think that's, uh, a fair number for a case maximum and second whether or not you believe that some of the voucher cuts that you're seeing in your district and we're, we're seeing nationally are a result of that case maximum.

John Convery: First, I think the case maximums are way too low as are the maximum amounts from investigators and experts, part of what we are talking about is the \$2400 dollars before we have to go to the circuit. Come on, in what district or division, rural or urban is, is that possible?

With respect to the case maximums, the system is set up so you have to go to the circuit after that amount so the individuals are talking about the letters that they provided well, the judge has to send the request to the circuit so first, you have to get through the district judge and it would behoove you to provide that judge with a memo of why this case meets the requirements for going over that case maximum. If that judge doesn't do it, well, you are just out of luck. We don't even keep statistics on that.

In this statistics generating administration, uh, uh of the Office of U.S. Courts that we have. We cannot tell you, uh, what, what that means and that's just, it's rude, if nothing else. And we don't even give it back to the lawyers, we don't even report it to Congress. We don't even have the good sense to tell Congress that of all these cases, this many volunteer man hours give, or, or were put on it, it has to be pro bono work if it's not fraud. So I do all this pro bono work and then as Reuben Cahn was

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talking about, under the water line is the real problem, the culture that came up from that child to that teenager to that adult where, and still remain professionals in the legal profession who want to assist the courts. This is not a bunch of greedy grubby people that just want to make a buck, uh off of the system. These are highly qualified individuals, many of them solo practitioners, um, think of them as independent contractors.

If you want statistics or data, please go and look at any independent contractor attorney in the entire federal government and if you can find one for \$127 dollars an hour I sure would like to see it. But what I would like to see presented to in this report is what those numbers are. I have friends who have represented assistant U.S. attorneys who've gotten in trouble where the DOJ actually wants to come to their defense. Those of you who have been involved in prosecution know what a difficult area that is, um, for the department. So they hired one of the best criminal defense attorneys and pay him \$455-\$500 an hour. The irony of that by the way folks is not lost on us criminal defense attorneys, that when DOJ wants to defend an assistant U.S. attorney, it's more than willing to pay the going national, you know, the going rate for retained counsel. But when the system wants to defend someone who is indigent, they want it at \$127 dollars an hour then you pay your own overhead.

This spills off, over into training by the way, which I know, in, in this particular, I know you're going to have seven meetings I believe. Training. The Administrative Office for U.S. Courts in this maturing process now offers significant training. Bob Burke just retired. He was a fabulous director of training, put together numerous things, and has opened up to Federal Public Defender's training to panel lawyers. Opened it up. Free tuition, if you can get there on your own nickel and stay at a hotel on your own nickel, and, and do that. And many people take advantage of that but it's, it's patently insufficient.

And I also heard from, uh, uh previous panel member, I want to impress upon the Committee to suggest again those, those relationships between the like, the New Mexico Criminal Defense Lawyers Association the woman that, that testified earlier. The Texas, I'm the incoming president, president-elect of the Texas Criminal Defense Lawyers Association. I'm not here to testifying on their behalf, but I will tell you that if you join those individuals together to federal bars association, the Texas Criminal Defense Lawyers, or the Pennsylvania Criminal Defense Lawyers, or New Jersey, and you work with the Federal Public Defender's, you're going to get outstanding CLE work to raise the level of the panel, and I think that the difference is often time just a perceived, not a real dif, difference.

You might ask the Administrative Office of the U.S. Courts about that Harvard study that is touted about being so different. They don't like it

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themselves. They know what I mean by don't like it, as they don't think it was accurately done, and they don't think it adequately reflects whose either better or whose, uh, more or less expensive. That unfortunately got brought out in sequestration in the, in the midst of this fight where we were, uh, unfortunately pitted against each other, um, and should not in my opinion be relied on for any such suggestion as to which is better than the other.

Judge Cardone: Mr. Durbin

Richard Durbin: Your question to me raises two, two separate issues, I think, uh, but I don't have, uh, stake in it, but one is a question of who, who approves or authorizes payments for CJA work? I think the other question that gets mixed into this, is what should the amount of fees be? And I hear the, the \$127 that Congress came up. I have no idea where that number would come from. I don't know what it is supposed to encompass, um, is, is Mr. Convery has said several times, there is, the, the AO for U.S. Courts doesn't keep data from those vouchers but, you know, my first question would be, wait a second, what, what is the, what is the cost, what is the value of handling a § 1326 prosecution to guilty plea? There, there is, uh, there is, there's, there's a reasonable cost to that. I don't think it's \$450 an hour. I don't know what it is. I don't know what the standard payment has been for that, but it, it seems that somewhere in the Commission's work is delving into, what are, what, what is the reasonable pricing for attorney representation and the, the medical profession has, is, is had the, the fee for service model and, and then modified to basically, you know, this is, this is the fee that you're going to accept from the insurance company for this kind of service performed, and I'm a little bit familiar with it because my father has been ill recently, and I've seen more medical bills than I care to, to see, and I, this is sort of deviating from the, the point, but I have a hard time figuring out where the fraud is because it's the, hospital says we're charging \$280,000 and it settled for \$64,000. Well, I can't figure out, what was the real, what was the real price here?

Judge Cardone: Mr. Durbin, uh, I hate to interrupt but, but let me ask you a question, as a judge who sees these cases, um, I hear what you're saying but isn't what any defense attorney is doing in their case totally reactionary to what you're doing? I mean, you, you say, you know, let's take a § 1326 or let's take a drug case. I see two, three, four superseding indictments. How is it possible for me to say, oh this is a reasonable amount in any given case, because I very rarely see two cases the same. Even backpacker cases or, or you know, we talked about N600 in illegal reentry cases. There is no way that I can look at a case and say, oh this is just like the last one I had. It just doesn't happen that way. So when I hear your, your, and I hear what you are trying to say but it is something that we struggle with because I think Ms. Roe's question is we have this sort of figure that

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somebody came up with of \$9900 but, but, but where does that come from, number one, and number two, you as a U.S. attorney, you would never be held to that standard. I mean I understand you have a budget and you have to stay within that budget but if you get a terrorism case, nobody is going to tell you, oh, well, you got \$9900 and you better do the best you can. I mean I, I'm just not understanding what your . . .

Richard Durbin:

I don't, I don't disagree with that but I mean, I make \$75 an hour not including all the overtime I put in. Now, I don't have overhead and I have some benefits that come on, on top of that but I can put a dollar figure on what I am making per hour. Um, now I don't know how they came up with that number. I mean I came up with that, took my salary divided by 2,080 and I figured out what I am making an hour. I am going \$127 sounds pretty good. Um, I don't have overhead. I don't have to pay support staff and all that stuff comes out which gets into the parity question and I don't really want to go from that.

I think my point was, there ought to be some systematic look at what is the service performed and historically, what is paid for that? I don't know what the answer is and I don't, I don't see this as from my perspective, this isn't a zero sum game. They get more money and I get less money. That's not what the issue is. It's an, it's an issue of what is a reasonable compensation as opposed to, well, we are going to have a really complex case and the sky's the limit. The sky is not our limit either. I don't know what the limit is, but we don't have the sky's the limit, and you talked about parity and the cost of prosecution, I don't know how you figure that out.

We spend a lot of time working on things that don't go anywhere. It doesn't get counted. We look at all kinds of cases and put time into. Nobody ever gets charge. There is never a defense lawyer. Does that get counted in the cost of prosecution? Um, I mean I don't know where, I don't know how that parity issue is going to answer your question.

I think, I think the issue is looking at what defenders do, what are the kinds of things they need to do, what kind of leeway do they need to have, who is going to oversee it, and based on what we paid in the past and what the market is bearing, what should, what should the government be paying for that? And I think those are in part data-driven questions and it isn't there. The \$127 like, like you say, it comes out of the air. Somebody said \$127 that is what it is. I don't know what it's supposed to represent. Is that overhead, support staff, as well as lawyer time? I don't know, I don't know how you tell whether that is a reasonable number, and as you point out, the \$9900. I don't know that is a reasonable number but I don't know how you find it unless you start looking at what is the, what is the practice in the industry and somehow quantifying it.

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John Convery: We, we do, we do have studies that indicate and you've heard testimonies today about how difficult it is to find panel members. We have studies and data that shows that people who answer the surveys will point to the fact that the fee, that the inability to recoup their losses, so to speak, is the reason they won't take CJA cases.

Also, I wanted to point out that in that most recent study of CJA panel representatives, and I am not sure it is public yet, so I am little mildly uncomfortable to tell you, but it is 39, am I, 39.3% of CJA panel reps. There were two surveys done and it is a pretty significant amount of the CJA reps throughout the United States and they reported 39.3% of individual panel attorneys, not just CJA panel reps. It was a sampling of just the, the line rank and file people, reported that over the past two years, they have had a voucher, uh, non-capital or capital, reduced at either the district or circuit court level for reasons other than mathematical or administrative inaccuracies, so 39.3%. That, that, that exists.

Again, we haven't kept the kind of data that anyone would want to know, and what Mr. Durbin's talking about, I do know some of the answer and, and Chip knows this and other individuals that, there is a formula that Congress, that the judiciary went to Congress and Congress passed, uh, I guess part of some budget act some time ago, that put in a formula for the CJA panel rate. They never followed it. So, it should be \$149 dollars an hour. It was based on, by the way, surveys of overhead and increases and then and a margin of inflation, all those things that, that budget and, uh, individuals do.

The problem is for instance, this past year, and this came up at the Defender's Services Advisory Group. It was a hotly debated issue within the Administrative Office of the U.S. Courts and the judges in, in the Executive Committee just simply decided not to approach Congress. For 11,000 CJA panel reps, the judges decided not to even approach Congress and ask for what the rate should be right now. Think about that. Who does that benefit? Now, they did it for our own good. Well, thank you. I really appreciate that, um, but I don't feel very good about it, uh, as you can tell. I, I feel like and, and my limited knowledge of, of Washington D.C. budgeting is that's silly. If, if you, if you come in, for instance, some of the judges will go ahead and say, "oh no, no, it's okay, don't give us any more than this, just give us, in fact you can, if you are going to cut us, cut us here, cut us there, in the defenders or in the panel." Um, oh my goodness, I have sat through budget committee hearings with other departments that, and I have never seen a single one ask Congress to cut their budget or to say, well yeah this the program is a little bit out of control so, you know, feel free, you know, not to, to fund it.

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At a time especially when the people out in the field don't even have the resources to get the job done and, and so it is a small wonder that, that there is concern out there among, and it is, it is a brewing, bubbling kind of thing that we don't have the resources to get the job done.

Judge Cardone: Judge Goldberg.

Judge Goldberg: Um, my first question is for Mr. Convery and Mr. Eisenberg. So, we have heard a lot of anecdotes and a lot of stories and this is just our first hearing. We have read a lot, um, about voucher cutting and the one I heard today really I thought was alarming where a lawyer got their voucher cut because she wanted to charge I thought she said for writing to, um, or having the family write in and meeting with the family and the, uh, magistrate judge said, "well I am not going to, I am not going to approve that and by the way, you are not getting any more cases from me." That was very disturbing.

So, we are hearing a lot of problems, but our task is to figure out, is how big is the problem, so to use your metaphor, is it the, is it the tip of the iceberg or is it below the water? What is below the waterline and you are sure what is below the waterline is judge, improper judge voucher cutting. I mean, your, your statement says, um, "unwarranted voucher cutting remains a court problem with the administration of the management of CJA program." Uh, I think you use the word "systemic."

So looking below the waterline and I'm asking the CJA panel attorneys this, are there any anecdotes, are there any stories, is there any conversation amongst your colleagues where, um, judges are doing the opposite of improper voucher cutting that is, um, some judges are saying, we trust the CJA lawyers so much if they submit a bill, approved? Are there, um, judges who um, agree and have concerns when they go into a courtroom and they see the U.S. attorney with all their resources and say, "Mr. CJA lawyer, can we talk about resources and investigators for you and experts?" Are there judges that do that? Are there judges who will call up as they are required to do under the Guidelines and say, "Mr. Eisenberg, I'm, I want to talk to you about you know, some of your, some of your bills, come on in, let's chat", and maybe a little bit is cut. And maybe there's a discussion and dialog where Mr. Eisenberg says, "you know what judge, you have, you have a point there."

Um, is there any, um, anecdotes about CJA lawyers, uh, and we heard one today about *Citizens United* and charging for that, and I would say that had to be at least 100 hours to try to understand that case. Um, but, uh, I'll tell, I'll tell one quick story that is going on in my district. I am involved in the, in the criminal courts committee where a lawyer submitted a voucher, a respected lawyer, and he billed for reading one letter, two

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paragraphs, from the U.S. attorney and he billed five times for doing the same thing. So, are there any stories about voucher cutting that was appropriately done by judges? Are there any anecdotes to that end, because that will give us a better picture as to what lies beneath a surface?

David Eisenberg: Uh, Judge, I can give you one going to your last point, um, where three or four lawyers billed so much in our district that it could not possibly have been humanly, could not have been humanly possible for them to have worked that many hours. And I am sad to say, that's, apparently that's a real story. There's also been, um, a story about lawyers billing the very same thing on the very same case for the very same amount of hours, which theoretically would be impossible.

To answer another one of your questions, there are judges who will respect what they see, and they will not lower the boom, they will not cut vouchers. Uh, I think they perhaps look at who is applying, and by nature, those judges, and I know because they have told me this will say, I'm not interested in getting involved in this process, not that they are abdicating it but they don't want to get underneath what we say. And there are other judges who will say if it took you that long to do something and you have given me the, what do you call it, the list of cases that you Lexis Nexis will allow us to Xerox off and hand in with our voucher, pretty soon they will learn to trust that person.

There are, on the other hand, judges who will, uh, uniformly cut and it's a little and, and I'm, from my own perspective and from others who have told me this, it's hard to say why. I am not interested in fighting over a relatively small amount of money for a variety of reasons. I have come to the conclusion though that maybe that conclusion is wrong, and maybe I ought to be, at least in my own vouchers, come in and asking. The judges are very responsive to us. No judge will ever shut the door, not pick up the phone because anyone of us have, have called and, and want to talk about a voucher. However, when I've been told that you're not going to get that kind of money you want because it's just too much money for discovery, ask your client what he did, then you'll find out where to look. Go to the U.S. Attorney's Office and ask them and, um, that happens so, and it happens in complex cases.

John Convery: I've had the opportunity to be, even if my testimony doesn't seem so, fairly diplomatic for four chief judges as the guy in the middle, you know, the CJA panel rep between the rank-and-file lawyers and the judges. And the rank-and-file lawyers' complaints are division by division.

We have one division that cuts vouchers all the time. For a variety reasons, none of which make, are worth really worrying about because they don't make a lot of sense. It's just, the only sense I can make of it is

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it's kind of a budgetary tool. Um, you know, you go to see the family too much, or you went, there are different reasons, it's a sliding scale of reasons.

But in, in that same division, um, that judge has contacted me and had individuals who are going to the federal detention facility, panel members, seeing three lawyers at the same time and, and billing, like for all three separately, you know? And, uh, or people do that with parking, with a, there's an audit by the way. There, there are audits periodically conducted by the Administrative Office of the U.S. Courts that would show you what those issues are that I think that, that you're talking about, Judge.

But anecdotally, I, I know of two people who did a, a, uh, a federal, uh, death penalty, uh, habeas writ who weren't paid in over a year, that the, that the, the judge argued with them and didn't want to pay them for it, and they went to the chief judge who said, I don't, I don't involve myself with the decisions of other district judges because I'm not going to tell that other district . . .

Judge Goldberg: Sorry to interrupt but we're back to anecdotes about bad voucher cutting again. My question went to, is, is that really a systemic problem or . . .

John Convery: Absolutely.

Judge Goldberg: Can you, are there no stories about . . .

John Convery: 39.3%.

Judge Goldberg: Managing vouchers or it, it's just a problem?

John Convery: I think by and large, well, if, if 40% then in 60% of the cases, the judges are properly, one can say the judges are properly managing vouchers. Please don't get me wrong. I think the judges by and large do within that systemic conflict that exists, they do a very good job of judging cases. I just simply think that in, in terms of resources, because the voucher cutting is also inextricably intertwined with experts and investigators, the budget for the thing and then you come back and you have individuals . . .

There is a case that's current, that some of the Committee members can tell you about out in San Diego, where an individual tried a case. Um, the case was, I think the billing was \$50,000 which in Texas would never happen in, in a million years and, uh, and Judge Real, uh just said it wasn't worth that, don't, don't pay it. Um, the individual panel member is, is, uh, is an African-American who's a very good person, who absolutely tried the case and everyone is snapping to and coming to their assistance, but there's no appeals process. So if that, if that stands, it's just, I don't know

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if the court could, if, if any judge would want to take a \$50,000, um, shot like that so to speak or we'll give you \$9000 instead of \$50,000.

I know I am not answering your question. I think the answer is self-evident. Yes, that, but I think fraud waste and abuse is a red herring. It's a big bug-a-boo. I'm perfectly willing by the way as a panel attorney to undergo audit scrutiny, to undergo legitimate type voucher cutting for work that either wasn't performed. For instance, for those individuals who are over-billing, for billing three times for the work of one event, when the district judge called me as the panel representative and said, what should I do, I said it's fraud, prosecute them. Right? It's pretty simple answer.

Um, but if it's legitimate and it, and it's righteous and then, I don't think my experience with the number of district judges is I'm not sure, uh, this is done in chambers if you will, and I'm not sure that every judge burns the midnight oil working on these vouchers by themselves. And so that, and then and it's done as many things are within chambers, and it reaches the judge and the judge makes a decision.

Judge Goldberg: So my point, I don't mean to be redundant but and I'll, I'll turn it over to Neil but my point is, are there judges go, "you know what, I don't want to burn the midnight oil, . . . I trust Eisenberg and I trust Convery and if they billed 100 hours, it's approved, absolutely." Does that, does that occur?

John Convery: Absolutely.

Judge Goldberg: Your opinion to what extent?

John Convery: I would say at least half the time.

Judge Goldberg: Okay.

John Convery: At least, if not, if not more than that. It, it works. When I first went to the national group, the Defender Service Advisory Group and compared my experiences in the Fifth Circuit and the experiences I was aware of—like with the Southern District of Texas, you already heard about the Austin not even having a panel and you haven't even heard about the, McAllen and the division down there and, and issues and problems that are similar—but when I first went and I heard from panel attorneys in different parts of the country who were like, "I love the current system, my judges, I, I get resources, they, they, they are good to us, they are collegial, they pay on time," you know what I mean? That, that, that I think in many places is the norm, the problem is that when judges change, it can change overnight.

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David Eisenberg: Judge, I think the, the answer to your question is the more complex, at least in my experience, the more complex the case is, the more likely there will be a cut and that there are individual judges who inevitably will not cut. It just depends on the circumstances of the case and the circumstances of the judge.

Judge Cardone: Mr. MacBride.

Neil MacBride: This is a question for Judge Garcia and Mr. Eisenberg, and I am going to switch gears away from vouchers, and organizational, and independence, as important as those issues are. But one thing we are charged as Committee to do is to make recommendations on, to ensure best practices across an incredibly diverse landscape of, of CJA panels and FPDs.

Uh speaking again from my DOJ experience, that was a pretty easy issue for me and, and while maybe not as diverse as your district, Judge Garcia. I mean in Eastern District of Virginia we had four divisions, it felt like we had four districts within one district. You know, Alexandria was terrorism and financial fraud; Richmond was public corruption and gangs; Newport News was all adoptive cases from the state DA because of problems with the local system; and Norfolk was armed export and, and you know healthcare fraud. So I had no problem, I spent no time worrying about how do I come up with a, you know system that thinks globally and acts locally within the district. I had full freedom and ability to move resources around and, and the law enforcement agencies had priorities that really were targeted and dialed in on each of those divisions.

In your testimony, Judge Garcia, you encourage us not to, to, you know pursue as one size fits all approach. We have heard that from many other witnesses in the last couple of days but just I am just wondering if, if you both could speak from your districts diversity prospective Judge, and Mr. Eisenberg you are an alum of three different U.S. Attorney's offices, and now you are in a diverse state obviously, but what, what does that look like on the CJA side to come up with something that, uh, tries to, uh apply best practices and lessons learned in some coherence while being flexible.

Judge Garcia: Well, again, to be quite honest, uh, in our district I don't think, we don't communicate with each division. We have seven divisions but only six CJA panels in those six divisions, and it would be wise to communicate with each other to find out what are our common problems between those six divisions, and what are the unique problems for whatever, however many divisions there are.

Uh, the, the, I think the most crucial part that would be common would be training of lawyers for all those divisions because whether a lawyer in San Antonio or Del Rio are representing on a § 1326, that should require the

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same kind of expertise and knowledge when you are talking about complex cases in Austin, San Antonio that may require a heightened level of expertise, that's what I would say.

David Eisenberg: Well, I think the answer to your question is I would like to see a uniform approach not so disparate that we become bogged and tangled in the minutiae of trying to operate on four or five different platforms or systems. I don't think it is impossible to do. After all, an indictment is an indictment. There are more complex indictments than others and districts have more cases than others of the same nature and I think what you find is that it is sort of . . . I'll take my district, we do a lot of border work in the Tucson division and reentry cases are legion, and it does not take a lot of, of, there are not a lot of different approaches that one can take. You really need to know the background of the defendant and the criminal history and where she may have what function she was performing if her reentry is mixed with something else.

But to go back to a big picture, I would prefer a uniform approach so we all have standards that we understand would be applied and I still go to my basic idea that it should be handled by an executive and not a judge.

Dr. Rucker: I would like to shift just a little bit. One of the things that I have heard over the last years and we heard some uh, yesterday and today uh, is that uh, the panel is aging and I think that is an issue and that we need to recruit new people and that we need to train these new people. Um, I, I was particularly concerned about um, and, and some of the big cases uh, that we don't have the, the skills that we need among the panel attorneys and I wanted to get some thoughts from you about how we can recruit new people and how we can train them to work on these big complex cases and even like capital habeas cases. So I would like to hear from the panel representatives about that and Judge Garcia as well.

Judge Garcia: Well if there is enough money we can train enough lawyers um, that is one issue. Uh, it all comes down to a budget, now in some areas like Pecos Texas and Midland, you are not going to have enough lawyers and you are not going to have enough lawyers in Del Rio. But it requires money for adequate training for enough CLE courses um, and um, I would imagine we could go to the present CJA lawyers on the panel to, to go out and recruit or suggest other lawyers or names of persons that could be encouraged to become a panel member. Of course, there are so many discouraging factors in becoming a panel member one is the rate of \$127 um, so, I, I would um, imagine that is a function of a budget in terms of getting adequate lawyers, in adequate number and adequate competence.

David Eisenberg: One approach, Sir, might be um, to have monitor um, mentors, I'm sorry. And to some extent that is done in my district but it is, it is also done on a

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volunteer basis. We don't really have mentor before, however, let's say you are getting like white collar cases that you have never done before, and it is something like tax, or some other hairy thing, uh. We can pair an experienced attorney who has seen that kind of thing with a newer attorney and you're donating, the mentor is donating his or her services. They are not going to be put on the voucher, but that does happen, and I think it is relatively successful if you have enough people who are willing to do it.

A second approach is to have a second chair, a second chair, so the new attorney becomes at a second chair to a more experienced attorney. I don't like to use the term older, just more experienced attorney and that, and, and so you share the experience um, I don't know whether that, [LAUGHING] it always goes back to budget, I don't know whether the budget, really allows for that.

A third approach to take is that uh, to some small extent recruiting private attorneys for really a complex cases has been done before. It does not give you uh, they, they are not, they're not retained on the panel if you will, but it might be a one case answer to, gosh we don't have enough attorneys in, in any particular type of situation. And the last thing is for people who have been around awhile to go out and look for people who, I mean I get calls all the time from people who want to join the panel and uh, they, they do go through a vetting process. Um, but I think most of the CJA reps are willing to steer new people in the right direction, but there is no, in my district, there is no organized program for this.

John Convery:

My district is different, of course. I want to break up my answer into both mentoring or diversity and the panel itself. Um, I think if you look at uh, Federal Public Defender Roe's District in Minnesota. In fact, I know for a fact uh, you will find a mentor program that is building to the plan. In the Southern District of New York, the then panel rep. Tony Ricco and some other individuals built in a mentor program into the CJA plan uh, the judges then and the Administrative Office for U.S. Courts actually, signed off on paying the mentees. At kind of the investigator rate, but a wonderful situation. So again, through these national meetings and through the Defenders Services Advisory Group, that's how I found about it. I took it back to San Antonio then um, then um, Federal Public Defender, Henry Bemporad, who is now a Magistrate Judge. We put a plan together. It's in the west, in the San Antonio division, our divisions have plans. Our district plan is like one sentence from 1976, it is just you know you do the right thing and defend indigent cases. And then our different divisions have very specific plans, except for Austin which still does things as it was done in the 1950s and 60s.

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Um, but diversity, one of the reason we created that, is we take people, many who have, who have no federal experience but who are leaving the DAs office or have a lot of state experience, and we're able to select people and we're able to be judicious about, uh, minority individuals, people of color, gender, all the diversity, kind of things that this aging panel member wants to see come into the system and we are able to reach out and put them with very good, very professional people, mostly it's the people who are on the panel classification committee. The, the chief judge in our district did it for a year. We did it for free meaning that the mentees did not get paid, um, now we have and I call your attention, there is a standing order that pays the mentees, but not for dual hours. So if we both go to the detention facility, only one of us can bill for it, and all of the mentors are fine with that. I know that in federal defender Roe's system I believe it's the, it's the fund it's the non-appropriated fund, uh, which is rather large in many, many districts throughout the country that helps to pay for that program.

Um, with respect to the panel itself because we speak in such a large diverse district, it's different in New Jersey or Rhode Island it, it is different in all these areas, and that does need to be taken in the consideration. In Texas, these, these divisions that the, I, when, uh, soon to be Chief Judge was talking about, that they don't communicate, um, they do things the way they would like to do it in El Paso, or in Del Rio. It's, it's, if, if we have, we don't have another risk of complex case cadre that can even go district wide.

We have major arguments in, in our district, CJA arguments. We have, we have in the Del Rio division where there's so many cases, the District Judge wants San Antonio panel members, and needs them often to come down and try the cases. But even though the judicial policy and procedures manual says you are to get paid for travel within the district for your time and your mileage, that judge will not pay people until they come in to her division. Well, a whole body of judges argued and had committee meetings like this and decided in the policy and procedures manual that it was appropriate to pay people district wide. I tell you this because then you can't, you, you, it makes it silly to have like a complex group in an urban area who is willing to go to the rural division for a complex case that doesn't have enough lawyers, if you're not going to be paid for it and ultimately if your voucher is going to be cut. So that presents and that takes place at the circuit level also.

I highly endorse the defender's request that you suggest that there be CHU's or capital habeas units, this is another example when you're looking, when you're looking locally when the problem is more global than that or more regional than that.

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Uh, We had a terrible situation in the Western District of Texas where, uh, uh, a federal district judge invited someone from a Capital Habeas Unit in I believe Arizona or California because they had the time and they had the resources to come, but they didn't ask the then chief judge of the circuit, and the lid blew off of the whole issue. To where that judge under our current system that chief judge of the circuit felt like her territory had been invaded by defenders who were doing capital habeas work. Um, I, I think we need to get, I think we need to change that and get above it, she was absolutely correct by the way under the, the letter of the way things were done, but it just didn't serve the purposes of the program.

Judge Cardone: I, I have a quick question because we're running out of time, but for you Mr. Convery, and you, Mr. Eisenberg, because one of the problems the Committee has had is, we have tried to put our fingers on the CJA panel, I mean, it's what, 11,000 attorneys. You guys are, are panel reps. We were trying to come up with an e-mail list. We were trying to come up with some form of communication, how do we reach out, um, how do we find these people, um, we were told while one way is you follow the check but we had to go to the Department of the Treasury to get a list. Um, so my question to you Mr. Eisenberg and Mr. Convery, um, you are, Mr. Convery, I know you're in a huge district, um, I know, you have a lot of attorneys, just because of the, the nature of, what goes on in Arizona. I want to know as the district panel rep, as the district, how do you talk to all of your CJA panel attorneys?

David Eisenberg: I have a list-serve that has every panel member on it, and the public defender's office, uh, adds to, or subtracts as members leave or get added in. And along with that, I also have a telephone an address list of every, uh, panel member and if I don't have that I can get it. So communication for me is, not a problem, and if you need that information, I'm assuming you, I can get it for you.

John Convery: Um, it, my situation is similar except for the republic of, of Travis County in Austin Texas, where, uh, I can't communicate with them. Who would I communicate with unless I go look at, who filed vouchers, you know, which you heard earlier, you know within the last couple of years. Um, I either, through the, um, clerk's office through the same system now, you know, the electronic system of appointments. If something is really significant, it comes from the Administrative Office for U.S. Courts. We have the chief judge or someone sends it out. If, other than that, I communicate with my panel through the Federal Public Defender.

Judge Cardone: So how, how was it that we're being told we can't get a list. If you have a list, do you have a list, I assume all panel reps have a list? Why are, why can't, when we ask for a list, why we can't get one?

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- David Eisenberg: I, I wasn't aware of that, if there was any policy against disclosing either the identity of the CJA lawyer or their public points of contact, it's public, so, I, I don't know.
- Judge Cardone: So if we were to reach out to the panel reps, you are saying, they should each be able to give us a list?
- John Convery: Not again, it's not a one size, uh, fits all type thing, Judge, I think in some areas that's true. I think the best thing that if you contacted the Federal Public Defenders in, in all except the district, that doesn't have one, then I think you would have the best chance of trying to, to get that information. But having said that, I also believe when I'd heard about the Committee wanting to reach out to the rank and file, I think that's a great idea, but I would also highly recommend that those people are in communication with the, the panel rep., um, in, in, on a pretty regular standard basis, and, and so anecdotally at least, because the data doesn't exist. It's just doesn't exist. So anecdotally in future hearings, it, it, if the panel members come prepared, you'll big, you also get a little bit of that anonymity that we were talking about but, you will get, uh, a vehicle to hear from as, as many panel reps as, as possible.
- Judge Cardone: Anything that you would like to say Mr. Durbin that you haven't had an opportunity to tell us?
- Richard Durbin: No, I think I've covered the points that I can contribute to. Um, I appreciate the opportunity to come speak with you all. I hope that's been helpful, um, and I'm grateful that I don't have your job.
- Judge Cardone: Mr. Convery?
- John Convery: Um, we're at that mature place where recommendation should come to, to make us cooperate with more, even more in a partnership with the Federal Public Defender's. I don't want to work for them, and those issues need to be addressed, but I absolutely love working with them. And I hope that we can find a way to get this within the defense function, uh, and, and get, uh, better independence with, but I'll take more resources, even at the expensive of independence.
- Judge Garcia: These are, uh, you know, challenging times and I know, you have a challenging task ahead of you. We always must keep in mind that every defendant has a constitutional right to an adequate defense and it ought to be given to him because that is his right. And I'm hopeful that this Commission will crystallize the things that are necessary and important. Not, not just achievable but what, what must be achievable, and I'm hopeful to looking forward to reading your report.

Transcript (Santa Fe, NM): Panel 6—Views from a Mixed Panel

David Eisenberg: Uh, your Honor, I've sat here for four hours and what I've noticed is the attentiveness that the people on the panel have shown us and shown the people who have come forward to testify so, um, I just want to thank you all for being here and getting this ball rolling. Thank you.

Judge Cardone: Well, gentleman, we appreciate you're being here around as, as I've said to every, uh, panel we had, you know, you have to take time out of your schedules and get here, I know some, for some the travel has been difficult but we very much appreciate it. We have six more public hearings. We would encourage you to go back to your districts and get people to give us information, that's what we need and want, um, and, we have a website. It is called cjastudy.fd.org. Please, um, if you have any commentary or people that want to comment, we want to hear from you. Thank you.

Panel: Thank you.