

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 2—Miami, Florida

January 11-12, 2016

Transcript: Panel 2—Views from Judges and a U.S. Attorney

Judge Cardone: All right. I don't know, judges, whether you were here and Honorable Mr. Ferrer, I don't know if you were here previously when we were doing the other panel, but essentially, let me welcome you all. Thank you very much for being here and taking your time to be here. The way we are functioning is that I would ask each of you to make an opening statement. We've gotten your written submissions if you've given us one so we've been able to look at those. We're not really asking you to read off of those, but just to sort of give us an idea of what it is you would like to talk about.

Then we're going to open it up to the actual Committee members to ask you questions about your concerns. Then at the conclusion of each of . . . and there's only four Committee members sitting here with me that will be asking you questions at the very end of the session, then I'm going to open it up so that if any other Committee member has a follow-up question that they might want to ask you after hearing your testimony, they'll be given the opportunity to do that. With that being said we'll start with you Mr. Ferrer. Ferrer?

Wifredo Ferrer: Ferrer.

Judge Cardone: Ferrer. Since you are first up, we'll let you go ahead and start.

Wifredo Ferrer: Thank you and good afternoon Judge Cardone and distinguished members of the Committee. I want to thank you for giving me this opportunity and it's a real privilege for me to address you today as the United States Attorney for the Southern District of Florida. I welcome your questions on our observations of the operations and the management of the CJA program.

I will tell you that I really do think that by . . . and I'm sure that by considering the unique characteristics of our district that will hopefully help all of us in our joint efforts to make sure that those who are eligible to get the CJA assistance get it and that they get effective legal representation so I thank you.

I will tell you that for the last five and a half years I have had the honor of overseeing the operations of the third largest United States Attorney's Office in the country. I will tell you that the Southern District of Florida, and these judges I'm sure will agree with me, we have a wide range of complex cases that come through this district. We are also one of the

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

busiest districts in the country. Our office, for example, handle more trials than any other district and it's been the case for many years. A lot of that is due to the nature of the cases and because we have a wonderful defense bar and so we are very, very active.

Just to give you an example, in a narcotics sort of section we handle, not just domestic, but many international drug trafficking investigations. Though the international cases, in particular, really always amount to a lot of overseas witness preparation, countless hours of translation and issues that we have with foreign speakers. In our economics crime section we are, unfortunately here in South Florida, plagued with a lot of fraud. Sometimes they call us the fraud capital of the United States because of the Medicare fraud issues, identity theft cases, and a lot of cyber issues, and other threats that we face down here in South Florida.

We confront them with the resources that we have and those cases always as well, because the schemes are so elaborate, they always will lead to a vast amount of discovery and evidence that needs to be analyzed. In addition to that we obviously have a very vigorous issues here and prosecutions of public corruption, and human trafficking, and a lot of other terrorism and national security cases that we have to face. As the cases in South Florida have evolved to more complex schemes, and much more elaborate schemes, so to I believe the demands on the attorneys that have to handle these cases in the Southern District of Florida have increased as well.

Now as being in the United States Attorney's Office we are obviously not in a position to be able to really know about the costs and how those decisions get made, but I can just assume because of our cases getting more complex that the costs and the resources needed have obviously increased in the last couple of years. Again, be mindful that this Committee is looking at a court program and that we are an adversarial system. I'm not here to presume or veer out of my lane on how such a program should be run but I am here, definitely, to give my observations and to support this effort and to make sure I can, to the best of my ability, let you know what we are seeing so that we could improve and make the system even better.

Because if there is something that I have no doubt about is that for both sides of the aisle we need the best and most qualified attorneys who can handle either more single defendant cases but also the multi-defendant types of cases. Attorneys that are diverse and, again, well qualified and able to intelligently, and carefully, and thoughtfully advocate for their clients. I will also say that just as the department of justice seeks to recruit the most qualified lawyers, the same would hold true for the CJA panel.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Finally, having practiced, I've been a line AUSA here for over six years and now it's been over five and a half years as a U.S. Attorney, and also having canvassed the office before appearing here today, I will tell you that the CJA panel here in the Southern District of Florida has a very solid and good reputation in having attorneys that are thoughtful, professional, and who do a very good job in court. Thank you for giving me the opportunity to address you and I welcome any questions.

Judge Cardone: All right. Judge Cogburn.

Judge Cogburn: Okay. Thank you. Glad to be here today. I'm sorry that I had . . . I started taking medication for pneumonia at the end of last week. I would not be here except that we sort of thought that it would be important that we have someone here today. I can see everybody separating from me. I understand. I hope that I'm understandable today.

My background is that, shockingly, I began practicing law in 1976 in private practice and I practiced until 1980 when I went with the United States Attorney's Office as an Assistant United States Attorney. I stayed there for twelve years doing various things. At that time in the Western District there were no divisions. I did civil and criminal work, was head of the drug task force for a period of time, was chief assistant to the United States Attorney and tried numerous cases.

Because we had to eat what we killed we took all of our cases to the Fourth Circuit individually and wrote briefs. I appeared numerous times before the Fourth Circuit Court of Appeals. During my time there I am probably most famous for having pushed the boundaries of harmless error to their natural outside limits. Then in 1992 I went back into private practice and at that time represented numerous criminal defendants in the state and federal court.

I spent a great deal of time doing criminal work. I did some plaintiffs work as well when the opportunity arose but most of it I would say is criminal work, state, and federal. During those two stints: both my stint before the U.S. Attorney's Office and during that stint I did indigent work. I did a great deal of it at first, albeit not very well I don't think in looking back on it, and did some from '92 to '95. But I had so many cases coming to me that I got paid in that I had to watch and be careful that I didn't take someone who didn't pay and miss out on someone who would pay, quite frankly.

Then in 1995 I became a United States Magistrate Judge. I did that from '95 to 2004 at which time I went back into private practice. Practiced doing civil and criminal work until 2011 when I was appointed by President Obama to the bench and successfully navigated through the

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Senate process. I'm here primarily today out of necessity on behalf of the judges in our district who want to make it absolutely clear that in our switch over from a CDO to and FDO all we want to do is take care of criminal defendants and see to it that they get they get the best representation that they can.

The reason that I am here is that is has been published about, and it's continued to be published about, is for some reason we wanted someone with one year experience out of law school, a law clerk, to get the job and that the only reason we did that was to control the local CDO. That makes a lot better story in getting the masses up and together than the fact that the judges chose the only experienced trial lawyer that was before them at that time. The only truly experience trial lawyer that was before them at that time, right or wrong, when they made their recommendation to the board of the CDO but it is untrue to say that that person had one year of experience. That person had been a federal defender for over twenty years, had appeared in numerous criminal trials, had appeared before the Fourth Circuit Court of Appeals on a number of occasions, and had argued before the United States Supreme Court.

In place of that person the board wanted to put someone they knew who had only, during their entire time with the defender office, had not tried a criminal trial. Now there may be some who think that an administrator needs to only be someone who can administrate and has to have no trial experience but if you're going to administrate trial attorneys you may not need to be the best trial attorney, but you need to have been in the courtroom and know what these other folks are going through. I've been there. I've had arrogant prosecutors who have mistreated me. I've had judges who have mistreated me. I've had to try to convince juries of very difficult things. I have had defendants that have lied to me.

Until you've had all of those things occur to you, you can't know what those folks are going through when they're out there and they're going through a tough time. It is hard to be a defense attorney. It is very, very hard to be a defense attorney. I've done it and those who have done it for years, and years, and years like the gentlemen who've done it for fifty years are to be commended for their dedication and for what they do for the system.

But that's all we care about in our district is to have that happen. When I first came on there was some complaints about our defender services but it really wasn't much of a moment to me. Shortly after I came on there was a new director picked and they told us they were picking from these two people and that they selected one of the two. One of the people was the one who ultimately was selected director by the CDO later on. On this occasion they picked the other person who was the most experienced

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

person. Sounded good to me. They weren't asking me anything, really, except did I have any comments to make and I didn't. Moved on.

There was some complaint from one of the judges. Judge Conrad kept saying "Why when I ask for someone as a paralegal . . ." excuse me, "as a pro se law clerk I get a hundred plus applications for that job, and for federal defender in this district we get twelve applications?" I didn't have an answer for him and really didn't think about it until this second week came up. With some of the troubles we had had with the CDO which do not need to be gone into at this point because it would take too long.

We thought the best decision needed to be made the next time and when given the opportunity to interview the candidates that the board gave to us we looked at who the candidates were. We made the best decision that we thought for the district and they went the other way. They were going the other way. It was clear from the very start. We were just a stop in the road. At that point, once again, Judge Conrad said "look at how few applications they had." We said "let's look an FDO and see what that is."

When you look at the FDO, rather than be a situation which is under the control of the judges, under the current CDO the judges are able to pick or are able to veto who is on the board. The judges can continually veto board members until they take control of a local CDO. Under an FDO it is the function of the court of appeals to insulate the FPD from involvement in the district court. They want the committee who selects it to be persons knowledgeable in federal criminal defense issues not including: probation, pretrial services, law enforcement, prosecutorial personnel, members in good standing of the bar of the state admitted to practice, a minimum of five years of criminal practice preferably with significant federal criminal trial experience.

If those rules had been in effect at the CDO neither of the last two directors we had would have been selected. That is why we did it. Right or wrong. We cared about criminal defendants that were coming before us having good representation. That's all we cared about. That story has continued to go forward. A federal defender came back to me from Santa Fe to say that two federal defenders that she had spoken to had come up to here to say "we hear these terrible things going on with your judges in your district." She said "you're wrong." They said "well, didn't they want to get a law clerk with one year experience appointed?" She said "no. It's Tom Cochran. He has over twenty years." They knew who he was.

The fact that that rumor has not been squashed brought me down here and we felt like we needed to come down here. Now, I do have some opinions on some of this other and I'll be glad to answer question but that's why

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

I'm down here. If this matter is about the truth then it needs to be told and that's the truth.

Judge Cardone: All right. Thank you Judge Cogburn. Judge Scola.

Judge Scola: All right. Judge Cardone and distinguish members of the Committee, thank you for this opportunity. On behalf of the judges of Southern District of Florida I want to welcome you to our district. I started out as a prosecutor for Janet Reno when she was our state attorney and was there for six and a half years. Then I was a criminal defense attorney for almost ten years. I had a significant federal practice but I also did a lot of court appointed cases in state court.

One of the things that I learned is that when somebody gives you twenty-five thousand dollars or fifty thousand dollars to represent them you're starting out, that active payment is a statement of trust that they have in you. That's yours to lose. But when you're appointed by the court and you're sent over to the jail, or have the person come to your office to meet you, there's a lot of skepticism. You have to earn the trust of your client, and I think it's very important, and we as a court, and as a system, it's very important that we make sure that we have people who are serving in that role not only who are competent and capable, but who have the passion to want to fight on behalf of the defense.

When I was appointed to the federal bench after sixteen years on the state court bench four and a half years ago. The one thing I asked our chief judge to do is to appoint me, if he could, to the CJA panel committee as our liaison because that was an issue that's very near and dear to my heart. As Willy Ferrer told you we are very fortunate that we have an abundance, almost an overabundance, over very qualified criminal defense attorneys here in South Florida.

I think part of it is because we have so many complicated cases and complex cases that go to trial and we have a lot of lawyers that end up having trial experience both in state and in federal court. Three years ago, when we started a new process for and applications for the wheel, there were eleven openings on the panel and we had eighty applicants. Some of the people who did not get on the panel were literally twenty and twenty-five year lawyers who had been public defenders, or state attorneys, and had over two hundred trials as a prosecutor or criminal defense attorney and they did not get on the panel because we had eleven other people who were more qualified and more experienced than they were.

We really do have a great depth and breadth of qualified lawyers here in South Florida and I think our bench is committed to making sure that those lawyers are supported and have the resources to do the job that they

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

are called upon to do. I was here for most of the previous panel. I know there's a lot of issues and concerns that people have about what type of supervision, or involvement at all, judges have in the process and I'm sure those will be the questions and I'll wait to answer them during the course of the presentation this afternoon.

Judge Cardone: And Judge Graham.

Judge Graham: Good afternoon Judge Cardone, Committee members, staff members. Welcome to the Southern District of Florida. We're sorry it's a little chilly today. For some of you that may be a good thing. We really appreciate your efforts. I have served on a judicial conference committee and I know the time and effort that you have to spend in this type of venture is difficult. You do have another job and so we appreciate you all being here and working as hard as you do. We're also grateful that the Chief Justice had the foresight to commit to this project. I'm sure there are issues nationwide that you will resolve for us.

I have listened to too many lawyers read opening and closings, so I'm not going to do that. I know that's the least effective way to communicate, but I'm certainly happy to answer any questions you may have. I do have a fairly unique perspective. Like my colleague Bob Scola I was an Assistant U.S. Attorney, he was an Assistant State Attorney, for about four and a half years. I was a criminal defense lawyer for ten years practicing primarily in federal courts throughout the country. I've been on the federal bench for twenty-five years so any questions that you have I'm happy to take a stab at it.

The judges in the Southern District of Florida are very serious about our CJA panel. We have done this for the last fifteen or so years. We have a selection committee. I've served on that committee in the same position that Bob is serving now. I know that the lawyers and the judges are very, very careful in making recommendations to the judges about who is qualified to be a member of the panel. The judges take it very seriously. We actually have a judges meeting where we review the qualifications and applications of all of the lawyers. We have approximately one hundred and seventy members on the panel and we review annually one third of those individually. As you might imagine, judges are not very shy about expressing their opinions about various lawyers and their work product.

I think we have a very, very fine panel. We attempt to get skilled lawyers, ethical lawyers, and we don't have lawyers who are on the panel because they can't get work elsewhere. We have very prominent individuals and I see a number of them here. I'm not sure why we always have to preach to the choir. There are a lot of other folk I would like to see here but I want

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

to thank those members of the panel who are present. You do an excellent job.

Now, not everything is perfect in the Southern District of Florida. What are some of our problem? As I see it we have a very diverse community; ethnically, based on religion, et cetera and we could do a better job. I know as far as women of color, most of the women of color are with the Federal Public Defenders Office. Judges and the panel members attempt to recruit people to become a member and they also invite lawyers to second chair trials so that they can become qualified. We also try to take a look at experience levels. We don't want everyone on a panel with twenty-five or thirty years of experience. We want some new lawyers who can learn, some mid-level experienced lawyers, and of course the very serious lawyers who have been with use for many, many years.

Of course not everyone wants to do criminal work and then everyone who does criminal work doesn't necessarily want to be on a panel because of the finances. So, we need to work, I think, on the diversity of our panel and do a better job there. We have some problems with getting lawyers in our Fort Pierce division on the panel. We sometimes have to recruit lawyers from West Palm Beach or Fort Lauderdale. This is very costly to the criminal justice system so I know . . . and we've had problems in West Palm Beach, frankly, as well. I know that some of the judges in that division have gone to bar luncheons to speak about the problem to try to encourage people to participate.

Vouchers. That is probably an issue that you hear a lot about. Some defense attorneys contend, and maybe rightfully so, that judges cut their vouchers unnecessarily. That is a problem. Some judges, who practiced thirty-five years ago, they think that a ten thousand dollar fee is a lot of money when today it's perhaps not such a great fee. We need to make sure that the lawyers understand what is happening and I suspect that we probably need a national approach in looking at establishing guidelines for making a determination as to what should happen with our vouchers. Was the case extended? Was it complicated? Were the legal issues complicated? Those are all considerations.

Now I may be a person that some of the lawyers have complained about. I hope not. I do give every lawyer an opportunity to respond. If I intend to reduce a voucher I will send a letter to the lawyer explaining that I'm considering it and I'd like to hear from you and what you have to say. What troubles me is that lawyer "A," who is the lead attorney, who is very skilled, who does a great great job, who is very efficient, submits a voucher for, let's say, thirty thousand dollars on a very complex case. Lawyer "B," who didn't file any motions, who followed the lead of everyone else, who did a competent job, but files a voucher for sixty

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

thousand dollars. I have a problem with that. I have to analyze, what is it that caused this divergence in fee requests? I have to analyze it and make a determination.

I would be nice if we had national guidelines in that regard. Of course every judge has to make a determination. Some people think judges shouldn't be making this determination at all but we're the ones who view the trial, and I think we have the public's trust in mind, and that the judges should be able to make a fair determination as to what a reasonable fee is. But I do think, as I stated, guidelines are important.

Another area that I am interested in is the discovery area as it has an impact on the Criminal Justice Act. As an Assistant U.S. Attorney back in 1980, the defense lawyers all complained about the lack of discovery. We had all of these hearings, in my mind unnecessary hearings, about the government not turning over discovery as they should. I was appalled at that. I remember as a judge, first case on the bench, there's an argument about discovery with the defendant's family in the spectator area. Can you imagine their impression? "Oh, the government is trying to hide this or hide that, they're trying to railroad me, et cetera," which is probably not the case at all.

But I do think that the discovery issue is an expensive one for us. Thirty-five years ago we talked about the lack of discovery. Today, in 2015, we have too much discovery. With electronic discovery, and tape recordings, et cetera, defense attorneys complain "we have too much." They talk about the dump truck method. The government drives up the dump truck, dumps off all of the discovery, you know, five thousand documents, fifty tapes, and now we have to go through all of that to make a determination as to what's relevant or not.

I think the judges have a role in that. The defense council have the obligation to have access and to review all of the discovery but I think that the judges—and I do this—I ask the government "let's narrow the focus. Tell us the three hundred documents that you'd likely will use. Tell us about the twenty-five tape recordings out of the five hundred that you're likely to use so that you can narrow the focus." Sure the defense has an obligation to look at everything but you know nowadays with the Guidelines and the sentences, the first defendant in the door, as they say, is the one who gets the apple. We have a lot of cooperation created by the Guidelines, et cetera.

If you narrow the focus and give the defense attorneys an opportunity to see what the case is all about. When you listen to those first twenty-five tape recordings where your defendant is talking about committing the crime, that gives a defense lawyer an opportunity to figure out what he or

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

she wants to do and to make a determination. This can save a lot of money as was stated by some of my colleagues and others, Willy in particular, we have a lot of fraud in this district.

We have a lot of cases that are document intensive. We have a lot of large scale drug cases with hundred of recorded conversations. Narrowing the focus will save the public a lot of money. As we have new civil rules, which became effective December 1st, wherein they discuss proportionality. Judges now in the civil arena have an obligation to fashion discovery and to consider cost, et cetera, in making determinations about what is to be discovered, the manner in which it's to be discovered, in accordance with Rule 26. It may be that some rules in the criminal law area may be effective as well.

Now, of course, no one is going to preclude the defendant from their Sixth Amendment right and the ability to view every document should they desire to do so, but I do think that we can narrow the scope and save time and effort. The new civil rules also address case management. They require judges to have early case management conferences, et cetera. Query whether this is necessary in the criminal law field to be honest and direct. I do not know what happens in other districts. I think in the Southern District of Florida the items that are created by the new civil rules are things that the judges in this district have been doing for years.

We don't really have a problem with case management and getting cases to trial expeditiously. That may be a problem in other districts and if it is then it may be that similar case management rules as in the new rules of civil procedure should be implemented in the criminal sphere as well. I'm happy to answer any questions you might have. Thank you for the opportunity.

Judge Cardone: Thank you. All right. We're going to start with Judge Fischer.

Judge Fischer: Thank you. Thank you all for being with us. I have a couple of questions for each of you. Let me start with Mr. Ferrer because we've heard some things, both in letters we've received and a little bit in testimony, about a lack of parity, or a perceived lack of parity with the U.S. Attorney's Offices and in various things. There's some questions about whether the pay levels are the same and whether the staffing is the same.

I don't think there's much we can do about those issues but with regard to the discovery issues that have been mentioned and the accessibility to experts. I think the thought is that, with regards to discovery, there is this dump truck concept and I've heard anecdotally that there are actually directives from main justice about how you're to turn over discovery and also that there are limitations on the amount of money that you can spend

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

and the kinds of experts . . . maybe you need to go get permission from those for that. Could you shed some light on those issues? What kind of directives do you get and are there really realistic limitations or do you basically get whatever you ask for?

Wifredo Ferrer:

In terms of our budgets, and what we get, and what we can ask permission for: every U.S. Attorney's Office gets a certain amount of money that we can use for litigation expenses. That's a historical approach depending on the size of the office. We, as being the third largest right now in comparisons to other U.S. Attorney's offices, we get a pretty sizable budget. Our budget is around \$42 million dollars, but ninety percent of that is for personnel, is to pay for our personnel and our staff. The remainder is for these litigation expenses.

In terms of the staffing that you were talking about originally, about the differences, there is right now discussions within the Department of Justice about different pay scales, if that's what you were talking about, in terms of assistant U.S. attorneys on the field and then Department of Justice attorneys within main justice. They actually use two different scales. In terms of disparity there is an analysis and a review right now, ongoing, about where those disparities exist and about those issues. But just again our office is, each office is given an amount of money and they tell us you can spend up to that limit and that's it.

In some exceptional cases, if we're running out of money during a certain budget cycle and we need to ask for more we can make a special request but it's all going to depend on how much they have in their general pot, so to speak. Now as to discovery, just to follow up with what Judge Graham was saying, the management of discovery is a real issue. It's absolutely a real issue. Nowadays as opposed to decades ago we have the ability, because of the internet and all of the electronic discovery, we actually have more than we used to have and access to more information, and we also have an easier ability to disclose it, and to turn it over.

Our approach has been . . . because we do not want to ever appear to be hiding any ball, which we do not, and in our office we ask our assistant U.S. attorneys to go beyond what's statutorily or constitutionally required in discovery. That sometimes leads to the argument of "oh my goodness. Now you're giving us way too much and you're not directing us." Our approach is to disclose, what we have, within the rules, and even beyond that, and then to help guide the defendants and the defense attorneys to the documents because we're also fine tuning, as we get the discovery it's also very daunting on us because we also have access to terabytes of discovery. We also have to go through it, so our approach has been you turn it over, we as well start fine tuning it, and as Judge Graham said . . . We have worked with judges, and we have worked with . . . when I was practicing

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

that's what I did is that I would start narrowing it down and start looking at, we called them, the hot documents and I would make a hot document index at the appropriate time, when I actually was able to figure out what they were myself, and then we would start at least pointing the defendants in that direction. Because we understand that, we understand that it's an impossible task.

We also have, specifically now speaking of CJA issues as well, when we realize that there is a case, like Judge Graham said, where there are those twenty-five tapes and it boils down to a certain subset of that discovery. We will do reverse proffers which means we will ask the defendant and the defense attorneys to come to us, they are not to say a word, and we will then give them a presentation of what we think are the hottest pieces of evidence. We have tried to do that and we're doing actually that more often, frankly, because of this problem that we're seeing. That's how we're trying to navigate this.

One thing that I will throw out there because I've heard it from other U.S. Attorney's offices and something that may be helpful in multi-defendant, complex cases is to have a discovery coordinator. If that is something that the CJA would want to have. Someone where the defense council doesn't feel or doesn't have to come to us for assistance because with this discovery issues comes a lot of technological challenges: different softwares, how to access it.

Now at the Department of Justice, speaking of directives, starting this Friday there's going to be more encryption on discovery that we turn over in removable media in order to protect witnesses, or victims, or of that information getting misplaced or whatnot, and for the safety of a lot of victims and witnesses.

We're actually learning how to make sure that that burden, because that's something that exacerbates this problem, a discovery coordinator could possibly be somebody who could help navigate that for the defense bar and make sure that the software is working, that they're able to access it, and we can all work together on that. That's just one idea that I've heard floated around and I think may not be, actually, a bad idea to help us with this discovery. I'm sorry, I'm speaking too much but . . .

Judge Fischer:

That's all right. Are there cases in your district, or maybe you've heard from other districts, where your assistants looked at a case and wondered why the criminal defense lawyer, panel lawyers mostly, didn't have a certain kind of expert where you were thinking "gee, if I were a defense lawyer . . . I wonder if they didn't think about it or why they didn't get one." We're hearing a lot about CJA lawyers being concerned about

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

asking for experts or maybe being denied experts. Are you seeing anything in your cases that might support that?

Wifredo Ferrer: Judge, I canvassed the office. I reached out to all of our section chiefs and division chiefs and I asked them specifically that question, because I know that that was one area that Judge Cardone had mentioned in her letter. We have not. I have not heard anyone say that a CJA attorney had been denied an expert in a particular case. Again, there may be some instances I'm just not aware of them, but I did ask and I have not heard of that being an issue in the Southern District of Florida.

Judge Fischer: Thank you. Judge Cogburn, you came here with a specific purpose of clarifying something so I want to make sure I understand what you said.

Judge Cogburn: Yes, ma'am.

Judge Fischer: You indicated and I think you were saying that one of the reasons, or the main reason, or maybe the only reason why your district asked to change from CDO for FPD was that, regardless of the particular person, you didn't approve of the choice of director.

Judge Cogburn: No. That was the impetus that caused us to do it. What we did was when we looked at the FDO we came up with a number of things that we looked at. We were not getting the quality of applicants and we found that most of the districts are FDOs. CDO is a small percentage compared to the FDOs, in fact, our district is the only district in the Fourth Circuit that is not an FDO. I heard the two FDO folks from the Middle District of North Carolina and the Eastern District of North Carolina could only wish we had FDOs of that quality. But, we were not getting people to apply, we were not getting assistants to come in.

All of the agencies, U.S. Attorney's Office is inundated with people wanting to move to Charlotte and Asheville. The FBI is inundated with people wanting to move to Asheville and Charlotte. Lots and lots of the federal agencies want to move to Charlotte. If we put an application for a law clerk or a pro se law clerk to come in and do the work we're inundated with those. The CDO applications we're getting twelve to fourteen people. Most of them really not qualified for the position. Because of the fact that you have to give up a federal retirement to come to a CDO which does not have a federal retirement. You have to give up the protections of being a federal employee that you have. They're not huge but you've got employment protections there to come to a CDO where you're an employee at will.

We found that we were being denied the quality of applicant we needed, not only for the directorship, but also for the assistant positions. We, in

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

looking into it, found that there's a conflict of interest which occurs between the panel that runs the CDO and the CDO when a panel attorney appears in a case with one of the members of the CDO. I heard the last group of attorneys talking about conflicts of interest. When an attorney appears with either a panel attorney or a member of the CDO and they're representing folks there is a potential conflict and as soon as one of those people is offered a plea in order to testify against the well healed client of the panel member you've got a real serious problem. That does not exist in an FDO.

We also were subjected to an embezzlement of money by the administrator of our CDO. The judges didn't find out about it for a long time. It was kept from the judges. In an FDO that would have been reported to the circuit chief but in the CDO that was kept from us for a long period of time until after the investigation was done. You cannot embezzle from an FDO. It's run just like any other federal. You put in a voucher and you get paid or you don't get paid but there's no cash money to take. A CDO is essentially a block grant to criminal defense attorneys. Easy to embezzle from. Easily taken. We decided an FDO was better.

We think it's also better for the employees because they're federal employees and they're protected and they're not at will. I cannot mention the names of some of the members of our CDO that talked to me because they're afraid that they'll be fired. They're afraid they can't say anything because they're at will employees. For those reasons we wanted to go to an FDO. The fact that they picked somebody other than who we were going to pick was the impetus for us to look at it but that was not the only reason we went with an FDO.

Judge Fischer: You mentioned the circuit choosing the FPD, which of course is the way it's handled and . . .

Judge Cogburn: Right.

Judge Fischer: In our circuit at least we're asked what our thoughts are. I think you were contrasting and suggesting that perhaps the judges would have less influence over a Federal Public Defender's office then because the choice would be more insulated than . . . is that what you meant to say?

Judge Cogburn: It seems like it isn't. The way our CDO worked, and I don't know whether every CDO works that way, the judges have veto power over the panel. You could theoretically take over the panel by just vetoing every time they said "okay, these are the new people we want to veto." Eventually the panel goes off and disappears so the judges essentially could take it over by the appointment of people that were friendly to their views. That cannot be done with an FDO. With an FDO the judges . . . certainly their

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

recommendations are taken into consideration but the circuit makes the pick. The judges are completely insulated from that.

Judge Fischer: Would you otherwise see the two different types of offices operating in generally the same way with . . .

Judge Cogburn: I would hope that they would. As far as I'm concerned, again . . . I had no interest in it when I came. It was a defender organization. I called it the federal defender. It appeared before me. I had no interest in it. I heard some complaints along the way. I noticed some things myself but was never overly concerned but when the opportunity came, when we had these problems that had come along, and the opportunity came to pick someone good I thought we ought to try to do the best that we could do.

Judge Fischer: Thank you. Judge Scola, I'm interested in your interest in the panel because I was in the same position. We have a lot of similarities with staggered three year terms in a panel selection committee and they serve a the pleasure of the court. Things like that. You do seem to have an embarrassment of riches though in that it sounds like there are qualified people who can't get on the panel. It's, in some ways, a closed panel.

I'm glad we're hearing from sort of the other side of the story. You say that judges are in the best position to review vouchers. Some of the concerns that we've heard from attorneys and others is what about the concept of judges learning, especially if they're interim vouchers, about strategy or finding out something, for example: a lawyer wants a certain kind of expert, maybe to check the purity of the drugs, and then that expert doesn't testify. Don't you have in the back of your mind then that clearly that expert wasn't going to be helpful or another kind of expert, you don't see them at sentencing, so clearly that didn't work out well.

That was one concern and then the other concern is is there some kind of an in terrorem impact of judges looking at vouchers and is there an involuntary self-cutting of vouchers because the lawyers don't want to displease judges. Do you have any concerns about that or any sense that that's a concern from the lawyers in your district?

Judge Scola: In answer to the part of the question about whether the judge is going to have some information in his or her mind that's going to later taint them in something else they do on the case: all the time they trust us to listen to or perhaps grant the motion to suppress evidence, or we suppress evidence so we know the person confessed and then I throw it out as being involuntary, then somehow I'm able to be fair and go forward and make other rulings in the case. Whether evidentiary rulings during the trial or sentencing. I don't really see that as being a difficult chore for judges.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

In terms of our ability to make appropriate decisions. In terms of the vouchers and whether they're accurate and reasonable, in fair labor standard in that case, is that we're required to review the settlements and approve the attorney's fees that are a part of the settlements and class action lawsuits. We're required to approve the settlements including the amount and reasonableness of the attorney's fees. In contested civil cases there's a prevailing party and certain circumstance we make decisions about the appropriateness of attorney's fees. It's something that I think we do on a regular basis.

I've been only here for four and a half years so I can't give a history before that. I'm sure my colleague, Judge Graham, has a better sense of the last twenty years before I was here, and I don't know what happens in other parts of the country, but having been the liaison to this committee for the last four and a half years one of the things that we do . . . and we're very fortunate that Michael Caruso, our federal defender, does an excellent job, not only with his office, but kind of shepherding the CJA panel and he's the chair of our committee and he puts on a two day conference every year. Part of it is education but part of it is a town hall with several of our judges and it's just kind of an open forum with the members of the panel opening up to those questions. They're not shy about complaining to us about issues. I think it's not a systemic issue, at least in our district, of judges routinely reducing vouchers for no reason whatsoever or I would hear about it.

I think the discovery issues are something that come up. I don't believe that judges in our district are willy-nilly just reducing fees for no reason whatsoever. When I started I had five trials that last over two months, and in many of those cases there were other codefendants who plead out, and I think Mr. Caruso told you one of the tough things to do is if you did a two month trial you were there every day. You know exactly what the case was about and what the lawyers did in the case but if there's a five codefendant case, and two of the people had plead guilty before the trial, it's a lot more difficult to discern what they did.

One of the other panelists talked about the trust that we have, and we should have trust, and my philosophy is that I do trust the lawyers and if I look at the vouchers . . . unless there's some reason, as Judge Graham pointed out, you have another codefendant on the case with a very diligent lawyer whose voucher was half as much as that lawyer.

Again, there could be a very good reason as to why the other lawyer's voucher is twice as much but it certainly raises a question. I think in our district a lot of the judges will either bring in the lawyer and talk to him or her and say "look, why did you have to go see the client so many times?"

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

To me usually the problem is “why didn’t you go see the client more?” Otherwise you wouldn’t have all these complaints from the client.

Judge Fischer: Yes.

Judge Scola: Whatever the question is, the person can answer it hopefully to the judges satisfaction, and a lot of time what the judges do if it’s a complicated case, they will refer the voucher issue to a magistrate judge and the magistrate will talk to the attorney and prepare an R and R for the district judge to review, so I think . . .

Judge Fischer: I’ve read many, many of those from your district.

Judge Scola: There are incidents of some complaints but I don’t think it’s a systemic problem.

Judge Fischer: Do the judges . . .

Judge Cardone: Judge Fischer, can I ask Professor Kerr and then we’ll move back to you but we’re going to run out of time if I don’t. Okay. Professor Kerr, do you have any questions?

Prof. Kerr: Yes. First, thank you all for your very helpful testimony. Judge Graham I wanted to focus on something you said that struck me as interesting and helpful. This idea that maybe there should just be more uniform standards. That some of the problems that CJA lawyers have identified are the absence of something written down to say exactly what should be compensated, what shouldn’t be, what the standards should be.

I think that’s a promising idea but then that prompts the next hard question which is what should those uniform standards be? I was hoping members of the panel might be able to help us identify to the extent that is a helpful path from saying here’s what should be covered, not should be covered, here’s what the standard should be, and the role of the judge in reviewing voucher requests and the like. Can you point us towards what you think of as helpful standards for the role of the judge in those cases?

Judge Graham: Sure. I made a reference to some of those issues so obviously the judge should be looking at the complexity of the case. Was it a routine case? Were the legal issues complex? Were there a number of experts which require extra time for the lawyer to be able to get up to par? Some areas are very complex and very complicated. Did the case require that type of analysis? Was it a six month trial? Was it a five day trial? Those are some of the considerations that the judges should be looking at in determining how to analyze the voucher. I think some of those things are very typical.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

It may vary from district to district. For example, we've talked about lots of documents. Maybe in some districts, like a border district, I know they have a lot of illegal entry cases. They bring them in, they enter pleas primarily, then deported, et cetera. Was it that type of case or was it a different type of case. Those are all issues that the judge has to view and determine if it should be considered as a factor in what's a reasonable amount.

Prof. Kerr: Maybe one way of thinking about it that would help me is what is that ultimate standard? You mentioned at the end, what is a reasonable amount? Should judges be trying to say "well, this kind of case deserves X dollars?" Or should it be more "this is how much this lawyer actually did work and this was genuinely billed." We can all agree, for example, that fraudulent billing is bad and that should be cut out but what about the lawyer who says "I'm going to spend some extra time because I think I have an idea and I want to pursue that." Do you have a sense of to the extent that there are written standards for whether that should be compensated or not, when should that be compensated?

Judge Graham: I don't think that the amount is an issue because the amounts are national. You get a hundred and twenty, what is it, a hundred and twenty nine dollars. The amount just went up January first. A hundred and twenty nine dollars for none capital cases and a larger amount for capital cases. Judges shouldn't be trying to determine what's the appropriate amount. I think it's the quality of the work, the requirement of the work, how many hours were required to do something.

Is it one lawyer charges double the amount? Had legal research for twenty-five hours. Another lawyer had legal research for fifty hours. Why is that? I want to hear from the attorney. I want the attorney to have the opportunity to explain to me. He may have a valid reason for having spent fifty hours. Maybe the group decided that lawyer A should do the legal research on a particular matter. That's a perfectly legitimate reason for having utilized fifty hours. I think it's just a matter of analyzing the quality of the work.

Prof. Kerr: If anyone else wants to weigh in on those questions . . .

Judge Scola: I just think it would be very, very difficult to have national standards. I think it would be too burdensome for the lawyers to figure out where they fit in, for the judge to figure out why this is different. Every case is so different. You can have the most simple case in the world and your client could have mental health issues or developmental issues that cause you to have to spend a lot of time talking to them just to explain a simple plea.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

You can have an incredibly complex case where your client right away says “Look I want to be,” somebody said, “be the first person to beat the other codefendants to get a plea to get out of this with as little trouble as possible because I know if I wait too long I only know information against codefendant A and once he pleads I have no use to the government.” There’s just so many individual factors that I would think would be very difficult to try and establish, and more importantly, to enforce those in reviewing the vouchers.

Judge Graham: I’m not sure that you can enforce it but all of the things that we are talking about, these can be factors that the judge should consider in determining what’s an appropriate fee.

Judge Cogburn: I would say that it’s going to have to be just the experience. I know that what we do in our district, and what I do, we know what the average for a particular kind of case is. We have that amount of money. Now that average goes up as people have found out what that average is and they know that if they charge close to the average but a little above it it’s probably not going to get called in. If it’s above a certain percentage above the average they get called in and they get asked “explain it.” I think most of the time they can explain it.

It seems to me to be very reasonable to do that. Somebody has to do it. I know when I came on the bench I did not remember and did not think about the fact that I would have to review vouchers. I hate it. I hate it. I can’t stand looking at other lawyers work and trying to decide if their work is worth what they say that it’s worth. I hate it. I can only think of three vouchers I’ve reduced. It’s certainly going to be five or less.

It was after people were warned that they were consistently above the average and needed to get within line or explain why they were above and when they couldn’t they were slightly reduced. No big reductions, by me. I don’t like it. I think it would be fine for somebody else to take it on. It’s going to have to be somebody that cares about the tax payers’ money because this is the taxpayers’ money.

This is money that’s being spent for certain things and we’re not going to be able to take people just at their word if they are not within a certain area of how much they’re charging vis-à-vis their peers. Somebody’s going to have to do that and it’s probably not good to have other lawyers because they’re going to have the same problem I have. They’re not going to like to look at other lawyers work and cut it. It’s going to be very, very difficult, so it’s fine to find somebody.

Judge Cardone: I think Judge Prado has a follow-up.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cogburn: Yes, sir.

Judge Prado: I hate to go out of order but I just had a follow-up question to that. We've heard some complaints about the vouchers take forever and they're cut and we don't know why. What about some regulations that would put a time limit on when they have to be done and if it's not done by that time then it goes through. Or asking the judges to explain why they cut them. We can ask the lawyers "explain this to me", but some lawyers complain I never find out why my voucher was cut.

If there were some regulations that say the judge should at least explain "this is way over the limit. I'm not satisfied with the reasons you gave me" or after six months or nine months that voucher goes through because the judge has sat on it too long. What about regulations of that type?

Judge Scola: I would have no problem with that. I know I'm a clean desk kind of person. If a vouchers on my desk for more than two days that's unusual. To me the only legitimate reason why a judge wouldn't do it right away is that maybe there's a codefendant. He's waiting to get the bill so they can do them all together to do that comparative analysis, but I think in most cases it should be easy to do them fairly quickly. I also wouldn't have a problem if there was some kind of review above us. You say "I'm cutting your bill" . . .

Again, I've only been here four and a half years. I think I've cut one bill. If the person disagrees with my explanation as to why, I would have no problem with having some other person, whether it's on the Eleventh Circuit Court of Appeals, somebody else to review it to give that person some relief because I know just anecdotally that there appear to be some judges in other places that just routinely cut bills without explanation. I think that's not fair to those lawyers.

Judge Cogburn: Best thing to do would be to find somebody else to do it but next to that your rules, Judge Prado, sound pretty good to me.

Judge Graham: We may be unique, I'm not sure, but we have an administrative staff member that reviews all of the vouchers for correctness in terms of amounts, and hours, et cetera. They do the multiplication, et cetera. We receive the voucher with at least the numbers properly done and I don't think it sits on my desk, like Bob, for more than a day. Having been a criminal defense lawyer I understand how important it is to get paid timely. I think most judges in this district take it very seriously. I don't know if they have to wait in the other districts. I don't think that's a problem here.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Scola: With the eVoucher that's going to be coming into effect, I think it was supposed to come into effect at the end of last year, but whenever that comes in it's going to be so much easier because you're going to have it right on your desktop. You'll be able to go from the voucher to look at the docket sheet if you have questions. It's going to be very easy for the judge to answer his or her questions quickly and to get the bill approved more quickly.

Judge Cardone: Okay. No. Are you done?

Prof. Kerr: Yeah.

Judge Cardone: Professor Kerr? Dr. Rucker.

Dr. Rucker: Let me follow up, if I may, on some of those points. Particularly, Judge Cogburn, with the dissatisfaction with this. What about an alternative. We've heard a number of things at our other hearings and earlier this afternoon too of taking this away from the judiciary or at least taking it away from the judges. Maybe having something like the federal defenders do the voucher review, approval, and everything so the judges would not have to be involved in that. I'd like to hear what all three of you judges think about that then also, Mr. Ferrer, from someone who gets money from outside in a totally different way than what the panel do.

Judge Graham: I don't know. That seems to be a problem for me. How does the federal public defender know what happened in a particular case? The judge is on the frontline. He knows what was done. He knows the efforts of the lawyers. He know the motion practice, et cetera. It seems to me that someone has to be knowledgeable of the quality and quantity of the work in making that determination.

Frankly, most lawyers submit a voucher that's honest, and ethical, and it's not a problem. Like Bob, I've only cut very few, very few. It's usually when it's in comparison with other work. How does the public defender or someone else make that determination? That would be pretty difficult. It seems to me it would then just be an administerial act. If you want an administerial act that's one way of doing it. I'm not sure that's the way it should be approached.

Judge Scola: I think Mr. Caruso pointed out a couple of problems with having the federal defender do that review because a).they may have a conflict with the defendant and now they're making decisions about the payments to the lawyer and also fighting over their budget versus, versus the CJA budget. Even if you found an independent person, not a judge and not the federal defender, there's really not a problem with that person doing it assuming that they're qualified.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

But, in a contested voucher, after looking at the case and talking to the lawyer, who's the first person that that independent person is going to go to, to say "hey, did this person really do this or do you think they really deserve it?" They're going to come to the judges and say "hey, what's going on. This lawyer is charging twice as much as the other three lawyers in the case. Is there anything you remember about the case or what?" I can't imagine that we would be completely out of the loop. I have enough work to do, as Judge Cogburn said if somebody else wants to do it and they're competent and capable that's fine. I just think that loop is going to come back to us on those contested matters anyway.

Judge Prado: Do you see a possible conflict or an un-comfortableness, I guess, you don't get to tell the prosecutor who his experts are going to be yet the judge is asked to pick the defense experts through the voucher system; when there's a request for an expert the judge gets to review and decide if they're going to approve that expert or not. Do you see yourself in an uncomfortable position being the trier of the case and then deciding who the witnesses might be for a particular side of the controversy?

Judge Graham: I've never felt uncomfortable making that decision. We are sworn to uphold the law and be fair and just to both sides. I take that very seriously and I know lawyers need experts. I don't have a problem making that determination as we do any other determination. We are the judge. We are the fact finders. We decide what the law is that's part of our responsibility. I don't know any machine that can do it. I don't know how we can change that. I don't have a problem.

Judge Cardone: I want to follow up to that, to Judge Prado's question and your answer then, Judge Graham. Because the committee is presented with numbers that indicate, for example I believe in your district, and somebody here who's a number person can correct me if I'm wrong, but in your district the panel attorneys use experts in thirty-seven percent of their cases. Let's use that number but in other districts panel attorneys use experts in one percent of their case, or in five percent of their cases, that tells us as a committee that there's a difference in the way you may treat the application for an expert than the way they do it in another area of the country.

As a committee . . . I hear what you're saying, I hear what all of you are saying about "we're the best people to judge what a case is about and how much work is put in." But if a judge has that kind of control over whether an expert is used or the decision is made and they have a different philosophy than you have. What do you suggest is a way to resolve that nationwide. We're not talking about just the Southern District of Florida. We're talking about other judges who may not see it the way you see it.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

- Judge Graham: That issue may require further investigation. Is it one percent or five percent because the lawyers are requesting it in one percent of the cases or is it the judges are denying the expert in a certain percentage of the cases. I'm not really . . .
- Judge Cardone: Or is it a cultural where they're afraid to ask because they've been denied so many other times.
- Judge Graham: That would really be scary. I hope that's not the case.
- Judge Scola: That would be a great place where you could have national standards. No, because the standard shouldn't be whether the judge thinks this person should testify or not. The standard should be if there's an issue in the case that the defense attorney has identified, and it's not a frivolous thing, and wants to hire an expert to advise him or her about that issue then the judge should approve that expertise as long as it's within in reason in terms of the expense. It's not somebody who's charging two thousand dollars an hour or something like that. It's not for us to decide "okay, the government has a fingerprint expert. There's no reason for it, everybody knows experts don't make mistakes in fingerprints. I'm not giving the defense a fingerprint expert." If they want a fingerprint expert they should be able to get one.
- Judge Cardone: I guess a follow-up to that is how would we, number one, as a Committee, how could we possibly determine that, because we don't know why a judge is denying. Even when we're talking about vouchers, for example, often times judges won't explain why they're cutting a voucher. They're asked to but they don't always do it or when they deny an expert we have no data to tell us why they're denying an expert. How would we possibly remedy that problem if there's no way really to know why an expert is being denied?
- Judge Scola: Maybe, if the defense attorney asks for an expert and the judge denies the request the judge has to articulate with specificity why he or she is not allowing it and then, again, have some review process for somebody else to decide whether that person should be able to hire an expert even if the judge says no.
- Judge Graham: There is a review process if a judge denies a particular expert. It seems to me that is an appealable issue in the circuit courts.
- Judge Cardone: It has gone up on appeal and it has more recently gone up on appeal but the standard is a pretty liberal standard.
- Judge Graham: Right. Right. Is it, in fact, that in the one percent and five percent is it because judges are denying the right to an expert?

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cardone: That's part of what we're trying to determine.

Judge Graham: I see. I see.

Judge Cardone: But that's why I'm asking the question. All right. Judge Fischer, do you have any further questions?

Judge Fischer: No. Orin covered my questions for Judge Graham.

Judge Cardone: No. But you can go ahead because we have some time.

Judge Fischer: Okay. Again, the two of you talked about the selection of your lawyers and a closed system and first you consider all the renewals. Is that creating any kind of problem with an aging panel? We're hearing some issues about that. Problems with getting new people. Are you not having problems with younger people?

Judge Scola: When I first started we had people who were appointed to two year terms, but they were just automatically renewed. Unless you committed some act of misconduct and were removed by the judge you just stayed on the panel forever. Now the system is every year one third of the panel has to reapply, and so we consider them fresh, and we have the committee that's chaired by Mr. Caruso and there is fifteen lawyers. They make recommendations to the court as to who should be approved.

I think the first year eleven openings were created. The second year seven and this year five. Once those openings are created then it's open to anybody to apply and we really do make an effort to have more geographical, gender, and racial, and ethnic diversity on the panel. But understanding it's important to have lawyers from Fort Pierce but I never want to say to some woman "listen, I know your son got sentenced to ten years in prison and the lawyer really wasn't that good but he was from Fort Pierce."

Judge Fischer: Yeah.

Judge Scola: The bottom line is I want the best possible people to represent the defendants.

Judge Fischer: Alright, have you decided the size of the panel to get them a specific number of cases per year to keep them up to par?

Judge Scola: The panel is from 1992, I think, or 1994 whenever it was formed was a hundred and sixty-five attorneys. In fact, one of the things we're considering is that in the northern part of our district where there are fewer attorneys and it's harder to get as many really qualified people . . . we

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

don't have that issue but in Miami, in particular, we have so many lawyers on the panel that the lawyers are only getting like one or two cases a year. Our court has asked the committee to look at, I think we're having a meeting next month, to look into whether the panel numbers should be reduced in size. I guess we would just do that by attrition.

Judge Fischer: You mentioned a number of removals. You said four to eight removals at one point plus one to three voluntary resignations. What kind of reasons are there for the removals and are you providing those to the lawyers or you just say it's at will and . . .

Judge Scola: When people apply and don't get admitted there's no reason. It's like if you apply to be a magistrate judge and you don't come out of committee nobody sits down and explains to you why. The people who are removed, we have a conduct review panel that consists of Judge Cook and myself and together, in consultation with Michael Caruso, the federal defender, we will notify the person "look, there's a specific complaint about you for this." If you would like to come in and meet with us on a particular day you come and explain what your response to that is and so we have those hearings and if Judge Cook and I decide what the proper remedy should be. Whether to not find any discipline, or to suspend them, or remove them if we both agree on that after consulting with Mr. Caruso, then that's the end of it. If we don't agree then the chief judge makes the final decision.

Judge Graham: Sometimes these problems emanate from alcohol, or drug abuse, or other issues like that.

Judge Scola: Right.

Judge Graham: Sometimes the defendant, I can remember in particular, brought it to the courts attention and we investigated it and that attorney was removed.

Judge Scola: There was a case that Judge Graham had where the person, the lawyer, had never gone to see the defendant or something, one time. The family was in court saying "look, the lawyer doesn't go." The lawyer's explanation was, believe it or not, "this case is a hopeless case so there's really nothing I can talk to the defendant about so I'm just doing legal work to see if there's something I can do." I'm like that's a hopeless case, he's looking at a mandatory life sentence, that's when you should go to jail more often to . . .

Judge Cardone: Yes

Judge Scola: To get him ready for the bad news.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Graham: Unfortunately, in that particular case, the attorney was arrested for drug usage soon thereafter. So, those things happen unfortunately.

Judge Cardone: I believe Professor Kerr has a question.

Prof. Kerr: Thank you. At the risk of repetition I wanted to go back to something . . . maybe I'm just stuck on this point but let me try it again which is in trying to figure out what the standard, perhaps, should be for review of either vouchers or requests for experts. One answer is that it should be some sort of general reasonableness answer, although as a law professor, I know with my students you can see the first year students within about a month of law school they realize the easiest way to answer any legal question is to say that it should be a reasonable standard. Because then that sort of means that the answer will be filled in later and so I'm wondering are there other ways of doing it that you think might be better.

One might be, for example, to say that as long as a CJA lawyer billed that time in good faith subject to some cap as to the number of hours . . . a higher cap than the, I think, fairly low cap that we currently have as a statutory matter. That that's what the review should be for; or, maybe as long as the judge is persuaded that the CJA lawyer was not intentionally delaying and sort of just padding the bills by saying "I'm going to fiddle with fonts for five hours on this memo just to add more time and therefore more money." I guess what I'm wondering is, what's the ultimate standard that we should want judges to apply? I think a lot of the disagreement, and a lot of the uncertainty, and concerns from the CJA lawyers is the inability to know what that standard is and concerns that that standard is too subjective in different judges reviewing them in different ways.

Judge Graham: At the risk of answering the question the same way, whether it's good faith, or reasonableness, I'm not sure that that is the crucial factor. Sure it has to be in good faith, sure it has to be reasonable, but it seems to me what you should concentrate on is what are those factors, what are those points that the judge should consider in determining good faith or reasonableness. There's not just one standard that covers every scenario. It is a general good faith or reasonableness, but you should consider complexity, et cetera, et cetera, et cetera in making that determination.

Judge Scola: Obviously we shouldn't be looking at the number, whether it's twelve thousand or six thousand, saying well that sounds reasonable or it's not. If you're going to review the voucher you look at the underlying hours. You say, "Wait. This person said they did seventeen hours on legal research and writing. Let me look at the docket sheet and let me see what motions we filled on their behalf."

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Now, there could be seventeen hours resulting in no motions because they reviewed a motion to dismiss issue and decided not to file one, but that's something that might raise a question in your mind. Or "I went to see the person seventeen times in jail" and, again, that would raise a question but it's not the end of it. If you look at the individual entries on the case and each one of them appears to be reasonable that should be the end. The fact that it adds up to six thousand or sixty thousand shouldn't matter. That's the only way I can look at it.

Judge Cardone: Judge Prado.

Judge Prado: Mr. Ferrer, We've heard testimony this morning that the sequestration maybe targeted public defenders, or CJA, or that they were adversely affected. I don't know if you can tell us or not but how was your office affected by sequestration?

Wifredo Ferrer: The biggest affect that we had was resources of AUSAs, assistant U.S. attorneys and professional staff members in our office. We were in a hiring freeze for a very long time so if we lost a lot prosecutors we were not able to back fill and fill those positions until later. Sequestration also affected us by the fact that we had less money to deal with our litigation expenses and we had to . . .

There were instances in the office where we had to remind ourselves to continue to recycle every bit of, whether it was red wells, or notebooks, or whatnot. It affected us in a very day to day operation sense. We were, though, very lucky that our particular office and the U.S. Attorney's Offices in general did not have to have furloughs like some of the agencies had. But some of the agencies did suffer from furloughs which meant it was more drain on resources for them. That was sort of the kind of affect that we had because of sequestration.

Judge Prado: Let me ask the judges, as a result of sequestration do you feel like you got any directives from the AO about how to treat vouchers because of the budget situation or how to cost containment with regard to public defenders? Did you feel like you got any type of restrictions of any type that told you to be careful, or to look at vouchers more carefully, or anything of that type?

Judge Graham: I never received any instructions or directives in that regard.

Judge Scola: I agree.

Judge Cogburn: No.

Judge Cardone: Dr. Rucker, any questions?

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Dr. Rucker: One more question about e-discovery if I can. We've heard a lot about the massive amounts of e-discovery that are taking place now. We're talking about many terabytes of data being dumped on, not dumped but given over, sorry about that. Old term, archaic.

One of the concerns I have about that is that the technology is changing so rapidly now that the data is not always in the same format and we've heard panel attorneys complain that they can't access it, or if it's provided, even, in .pdfs each document is a .pdf and they all have to be opened and it's time consuming to do things like that. Do you feel the resources are there for the panel attorney to be trained to handle this or that they can hire the paralegals and other people that they need to access and go through this data?

Judge Graham: I've never noticed that to be the problem. It's usually a technical problem. The way the disk is formatted on one computer, it doesn't work on another computer. The fact that the paralegals and the attorneys can view it and intelligently decipher it once they are able to access it, I haven't see that as a problem.

Judge Scola: I think whatever your judicial philosophy is, no judge wants to have people spend money unnecessarily. I think I mentioned at our town hall a lot of people complained "oh, so the government just gives you, sometimes not a thumb drive they just give you a hard drive." "Here. Here's everything on this hard-drive now you figure out how to connect it to your computer and figure things out." "What are we supposed to do?" I'm sure if he's like "I want to hire a forensic expert to open up this and figure out a way to format it to my computer." I don't want to have the taxpayers pay all that money.

I don't think any judge does. To me, if they came to me, I would sit down with a prosecutor and say "you have to have this information in a format to work in my courtroom with these computers. You have the ability to get it in a format that it's usable by other people besides whatever agency is or your office. Get it to this attorney in the same format so they're not going to spend thousands of hours and have to hire a forensic expert just to get to the information." The same thing with giving three terabytes of discovery without identifying what's there in a very detailed way.

Even if the government does give you a detailed index, and even if they say "these are the hot documents or these are the documents that we're going to use." That fulfills their obligation to tell you what they're going to use that helps their case. But they can also say "by the way in that three terabytes are all the *Brady* and *Giglio* materials as well." I think they have an obligation also to identify with some specificity that information as well. I have never had one case where one lawyer has come to me and said

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

“judge, please give me help to get this information in a better format” other than people griping at this town hall. My answer to them was “go to the judges,” and I hope they’ve been doing that.

Judge Graham: I agree with Bob. This may be a credit to the U.S. Attorney but we really don’t have a lot of problems with that issue in this district.

Wifredo Ferrer: It’s a challenge, like I said . . .

Judge Graham: They work together. There are problems but the parties work together at solving the problem, I think. Of course there are defense lawyers here who might have a different answer. I don’t know. But I don’t . . .

Judge Cogburn: Defense lawyers always have to have a healthy suspicion when the government tells you “it’s right here” when really it’s going to be over here.

Judge Graham: Right.

Judge Cogburn: They’re always going to have a healthy suspicion about that. This whole idea of terabytes of data is creating a real problem in terms of that. I know I’ve got a case that could be a capital case right now. It’s being considered by the department, and there’s material on there and they’ve gotten together, and they’ve gotten a specialist to deal with the documents and things like that. Some of the other things to put together. They’ve got one person that handles the discovery stuff.

There’s going to have to all sorts of things that are thought about of what to do about these cases with lots and lots of documents that are on these discs that are creating a real problem. Because the government may be honestly telling you all of these things but as a defense attorney there’s other stuff that you’re interested in other than what the governments doing.

I know I noticed on these things in all these panels, the one in Santa Fe and the one here, has got defense attorneys on one and judges are all on here with the U.S. attorneys. We like U.S. attorneys but we like defense attorneys too and judges are not part of the U.S. Attorney’s Office. We may be put on these panels for whatever reason with U.S. attorneys but we are the one neutral in the courtroom. We are the one neutral party in the courtroom.

Judge Cardone: Judge Fischer, any other questions? Anybody else?

Katherian Roe: May I ask a question?

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cardone: Okay. Let's go to the Committee and we'll allow Committee members.

Katherian Roe: I have a question for Judge Cogburn.

Judge Cogburn: Yes, ma'am.

Katherian Roe: Judge, I'm glad that you were willing to come here today and talk about the situation in your district. You had mentioned that the reason the judges of your district were concerned with FDO versus, versus the CDO and wanting to pursue an FPD, I'm sorry, an FPD office, FDO office versus a community defender is because you felt like you weren't getting enough applicants. I know that you said kind words about the fine North Carolinian gentleman who are in the other districts in North Carolina, Mr. Small and Mr. McNamara.

Judge Cogburn: And Mr. Allen. Louis Allen from . . .

Katherian Roe: Mr. Allen.

Judge Cogburn: Yes.

Katherian Roe: All right. I'm sorry, Mr. Small I believe is a South Carolinian.

Judge Cogburn: He is but he's also . . .

Katherian Roe: Sorry. I'm not from the south as you probably guessed.

Judge Cogburn: Top notch federal defender.

Katherian Roe: I know that you said very nice things about them. Both of those gentlemen have been the defenders for over a decade, closer to two. So it has been quite some time since there was a search in their districts. My question to you is: when you and your colleagues were making this decision, and thinking about the fact that you wanted to have a larger pool, did you go to other districts or did you go to defender services and get information about the difference between how many people apply for FPD jobs, federal defender jobs, versus community defender job? Did you do that research?

Judge Cogburn: We did not.

Katherian Roe: All right. My understanding is that the person that the judges recommended for this position, for the federal defender position . . . I'm sorry, for the community defender position, was an assistant federal defender who had been let go during the sequestration period. Is that correct?

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cogburn: That is correct.

Katherian Roe: You or one of your colleagues, I'm not sure who, then hired that person to be your law clerk.

Judge Cogburn: One of my colleagues.

Katherian Roe: All right. That person was a judge's law clerk when the court recommended that person for the federal defender position.

Judge Cogburn: That is true.

Katherian Roe: Correct? All right.

Judge Cogburn: That is true.

Katherian Roe: Judge, I'm sure you can see that when the Board chose someone else, you can that folks would look at this and see, if nothing else something that we're always concerned about as lawyers and judges, is the appearance of impropriety.

Judge Cogburn: That's not what the head of the board told us. The reason that they hired her was they liked her, she had been there before, so they decided to leave her there.

Katherian Roe: All right.

Judge Cogburn: That was the reason they gave. They never mentioned impropriety at all.

Katherian Roe: I'm not asking . . .

Judge Cogburn: That may have come from Ms. Clark, up in the Defenders Office, but it didn't come from those folks at all.

Katherian Roe: All right. Let's go back to that then. You said that the reason they chose her is because they liked her. Correct? Assuming that they would say something more professional like "they thought that that selection would be a good choice and do a good job for the office." Fair to say?

Judge Cogburn: I don't know. I don't know. They didn't say that.

Katherian Roe: They said they liked her and so they chose her.

Judge Cogburn: They said that they liked her, she had been there for a while, and they were going to keep her there. They understood how the judges felt. It was very, very odd to the judges because although Mr. Cochran had been hired

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

by one of the judges . . . and judges pretty much know this. We don't have any great love for the law clerks of the other judges. We don't have any close associations with those law clerks necessarily.

This person had given their life to federal defense, had transferred to the district for whatever reason that he transferred, and was let go in what I think was very odd in that he was the most experienced person in the office, by the person who ultimately was fired from that position during an embezzlement. I think he had some criticism, according to what we understand, of the office and the internal workings of the office under the leadership of the person that came before Ms. Richardson came.

He was fired by that person. Some of the defenders could not believe that and offered to take cuts in pay over this firing and said "you don't have to fire him. We'll take less money. Leave him there." But he was taken off. It had nothing to do with his qualifications. We don't know why he was let go by that district. He had trial experience, he had lots of experience as a defender. We saw him to actually be qualified to do it. Under the guidelines of federal defender, Ms. Richardson would not have qualified for the job. They selected her but she would not have qualified for the job. We wanted to change and we asked for help from the defender organization in Washington but the defender organization was more busy with defending a CDO over an FDO than it was in helping us. We got no help. There's been a lot of talk about transparency, and I don't know that today is the day to get into all of this, but there was no transparency from the defender organization in Washington.

We were stonewalled. We got as much transparency as a brick wall from them in what we were trying to do. We met nothing but resistance. They sent people down to talk to us and when they left . . . they wouldn't talk to us about anything they were saying. They wanted to get information from us. Then they went and met with the defender, the community defender, and the defender board. If you want to talk about independence: they were certainly not working for the Administrative Office of the Courts when they were doing that. They were working for the Defender Organization when they were doing it.

What should have been, in my opinion, what they were worried about was the quality of representation in our district and not under what format that it was. We don't want to pick who the defender is. They can pick anybody that they want to at the circuit level but whoever we have will be Federal Defender Organization, with federal employees, without any problems with conflict of interest, and no chance to embezzle funds.

Katherian Roe:

I understand what you're saying, sir. But ultimately what I hear you saying is that the court chose in their mind a better candidate than the defender

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

board, then the community of defender board. The court chose a better candidate. The community defender board chose a candidate that was not acceptable to the court and so the court, excuse me sir, and so the court decided that it was now time to change the organization and to take the steps necessary to change the organization. Would that be a fair summary of what you just said?

Judge Cogburn: That would not be a complete summary of what I said. I understand that that is what the position that you wish to take with regard to that. Obviously you have a lot of information about it. But what we did was we had a period of time where there had been dissatisfaction among the judges with the defender organization which we thought that with the change of the defender was going to bring about real change.

We were surprised. We were surprised at the lack of candidates for the job and that probably the only qualified candidate under federal defender rules was Cochran. We were surprised at that. We were really surprised, certainly, that he was not chosen. We thought that we were going to get more of the same from the Federal Defender Organization which was an unsatisfactory representation for our district.

I have been asking Ms. Richardson since she came on to let me run something like they run at the NAC (National Advocacy Center). For the assistant U.S. attorneys, for the panel attorneys. That I would be glad to sit as a judge and do moot court to try and train some of these folks to be better lawyers. She kept saying "that's a great idea, we're going to do it." Nothing happened.

We have some good lawyers on the panel and we have some that aren't good. I don't know that we've cut any off the panel but I have to make motions for variances, sua sponte sometimes, that lawyers should be making. They might make those if they were better trained and better lawyers. I have to do it. We felt like we needed a change and I think the judges are entitled to the format that they want to have. The control of it is within the defender.

Katherian Roe: But if I understand you correctly those are CJA lawyers, not lawyers that are hired or employed by the community defender. Correct?

Judge Cogburn: But, there are lawyers on there that are still not strong. She has chosen, as her first assistant, a lawyer that could not be a panel attorney. He's not qualified. He's second chaired one criminal case. Her top gun in the Asheville office is her appellate chief who has never been in the courtroom. The trial attorneys are chafing because they were not selected for these higher positions. She has shown a bad judgement in selecting

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

people to run her office as well as other things. It is a mess. We need a change. We need somebody new. That's all we've done

Judge Cardone: Judge Cogburn . . .

Judge Cogburn: Yes, ma'am.

Judge Cardone: Can I ask a follow-up question? That is, my understanding of the way the CDO worked in your district was essentially that there was a committee that oversaw, like a board of directors, that oversaw that, whatever her name is, Ms. Richardson, or whatever. There was a board of directors that would have been appointed by the judges and then they oversaw that CDO office. Is that correct?

Judge Cogburn: That's correct. Originally they were appointed by the judges and then they select their own new members. The judges have . . .

Judge Cardone: Then you approve . . .

Judge Cogburn: The judges have veto power.

Judge Cardone: Okay. How long would you say, in your opinion, there were problems in that CDO office?

Judge Cogburn: Since the director before the director now, was there.

Judge Cardone: How many years would you say?

Judge Cogburn: I don't know. I've only been there, I would say, probably since eleven is all I can talk about.

Judge Cardone: 2011?

Judge Cogburn: 2011 is all I can talk about.

Judge Cardone: Okay. When those problems were developing, and the judges had a concern about representation, do they meet with the board that oversees the CDO to say "board of directors, we have a concern about the way the CDO is functioning?"

Judge Cogburn: Judge Conrad, when he was the chief judge, met some and I think Judge Whitney met, when he became the chief, met some. I directly did not. I did talk to Ms. Richardson, but I did not talk to the board. I pretty much stayed out of things because I didn't want to get lawyers in trouble, I didn't want anybody to lose their job, I just wanted people to be represented.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

I do not understand. I do not understand, other than the fact that we walked into the middle of this [holds up NACDL report], why there is such a fight over whether it's an FDO or a CDO. I really do not understand that because we have control of neither and don't want it. I don't want control of that. I don't want control of the vouchers. I want to do my job and I want them to do their job. But we have been wrongly accused and we're not happy about that at all. All we want is representation. We think we need better representation in our district.

I note in here there are lawyers that apparently say that they're worried that if their vouchers are cut that that's what they're worried about when they don't get in the face of the judge. I think two things about that. Number one: I never thought when I was a defense attorney that getting in the face of the judge was a good strategy for my client. I don't know that I ever got in the face of a judge and did anything that was going to cause my client a problem.

I also think that my fee and whether the judge was going to cut it was not anywhere in my mind, anywhere, in my mind when I was representing my client. I worried that if I made the judge mad that my client might get hurt. I worried that if I made the judge mad that U.S. government might be badly served if I did it when I was on that side. I never was worried about anything like that about a fee. I think if lawyers are worried about their fee when they're representing a client, we need different lawyers.

Judge Cardone: Yes. Judge Walton

Judge Walton: Based upon what the three of you have said it doesn't appear that voucher cutting is a problem, and from what I hear from the judges in this district it's not a problem in this district. But, have heard from others that it is a problem and some say a significant problem. Judges don't like to be told that they have to do anything, but should we, because there is a problem, if we determine that there is, require or at least recommend to the Judicial Conference that they require it. If you're going to cut a voucher you have to articulate why you're going to cut them. If you're not prepared to articulate why, in writing, you're going to cut a voucher then the voucher can't be cut.

Judge Coghurn: I have no problem with that.

Judge Graham: I have no problem

Judge Scola: I don't either. When you're doing attorney's fees order in a civil case you have to set forth these are the number of hours, these are the reasonable rate, and you're giving an explanation . . . it's something that we do anyway so there's no reason why we shouldn't do it in those cases too.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

- Judge Graham: We actually do that now. If I call an attorney in to discuss it, when I make the final decision, I let him know why. I don't have a problem with someone else taking a look at that and making a decision.
- Judge Cardone: All right. Anybody else?
- Reuben Cahn: First, let me thank everybody for being here and especially you Judge Cogburn, for coming down with pneumonia. I do have some questions for you, and you'll pardon me if I don't shake your hand afterwards.
- Judge Cogburn: You're forgiven.
- Reuben Cahn: I do have some questions for you about the conversion. Let me start by asking you . . . I've heard you talk about problems you saw with management of the Federal Defender Organization. The community defender organization. I haven't heard you talk about problems with the quality of representation. Did those exist also in your mind?
- Judge Cogburn: You talking about panel or attorneys only
- Reuben Cahn: No. No. The attorneys at the federal defender office.
- Judge Cogburn: There were some but there were weaker folks than some. Some are strong, some are weak, but it's that way in everything. It's that way in the U.S. Attorney's Office. There's strong prosecutors and there are weak prosecutors. I would say there are certainly no incompetent federal defenders at all.
- Reuben Cahn: Right. You talked about not being able to get help from the Administrative Office in this process and I want to ask you some questions about that. Did you ask for help in determining what were the potential benefits of a Federal Defender Office versus a Community Defender Office?
- Judge Cogburn: I think we knew what those were, generally, and discussed those and came to the conclusion on a couple of others but, no. We received immediate feedback that that was not something that needed to be done from the officer. Judge Whitney received immediate feedback that that was a problem. We have been fought tooth and nail since then.
- They came up with an amount of money, which they originally said was going to be very costly, to do a conversion. When most of that money was retirement benefits, vacation, and things that were already accrued and really were not part of the conversion. They now admit that money is not a problem with the conversion.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Reuben Cahn: Let me delve a little bit further into this and I'll tell you a little bit of my background so you understand where I'm coming from. I am the head of a Community Defender Organization, and for ten years before that I was the chief assistant of the Federal Public Defender Organization here in Miami, and for three or four years before that an assistant federal public defender in the same district, and before that a state public defender.

I think I know probably as well as just about anyone the differences between Community Defender Organizations and Federal Public Defender Organizations in real on the ground terms. We can talk about this afterwards, rather than wasting time, but I disagree with some of the differences you felt exist so that's why I'm asking the question about whether or not they provided that information.

Judge Cogburn: Some may disagree. I agree. Some districts may have Community Defender Organizations that they love, and that's fine, but some don't, and the main thing we need to be worried about is, are the defendants being represented. It's not whether somebody is listed at the head of a letterhead or not it's, are the defendants being rightfully represented, and that's the main thing.

Reuben Cahn: I agree with you but there's a couple components that go into that so . . . One of the first ones is you asked a question a minute ago about you didn't understand why there was such angst over this change over. I'll tell you my view and then I've got a follow-up question just to understand which is it. From the point of view of defense attorneys we see it as an attack upon the independence of the defense function which we value highly which I know judges value highly. You've said you value it. All the judges here have said they do.

That being the case it concerns us when a change is made with what we don't believe is a good reason. That's why I'm trying to follow-up to understand some of these things. I guess what I'd like to know is, did the district seek from anyone else, other than the Administrative Office, information about the differences between Federal Defender Organization, Federal Public Defender Organizations, and Community Defender Organizations?

Judge Cogburn: I don't know who all the judges talked to. There was some discussions made. Judge Conrad's been very interested in this for a long time, Judge Whitney may have made some, but there were numerous discussions between the judges about the problems and the benefits of making the change. You and I can be here for all night and we won't agree with this.

Reuben Cahn: I'm not trying to agree with this.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cogburn: I'm not saying that we were right, or that we were wrong, but it was the best call that we could make at the time. And we are all interested, one after another, in the defense function being done properly. We're not interested in doing any damage to anything. In fact, I probably wouldn't be here if not for this fight that they wanted to make about us wanting to change what is going on and we wouldn't even be a part of this question. All I'm saying is that we were wrongly treated in the way that that played out as to why we moved it.

I've made this argument before, if the truth will set you free then tell the truth. If the truth is, that we made that pick, then why did they have to tell the story that it was a one year law clerk? That is wrong, wrong, wrong. It was told as late as Santa Fe and I can give the name of the person it was told to.

Reuben Cahn: Judge, I'll tell you I'm a member of the Defender Services Advisory Group as well as a number of other committees that function as part of the defender governance structure. I think I'm pretty cued into what goes on in the defender offices, and even what rumors are floating around, and I have to tell you while I've been told over and over again that the judges were unhappy that a present law clerk of a judge wasn't selected as the head of the office, I've always heard this individual described as a prior federal defender in two different districts and have never heard the individual described as a one year lawyer.

Judge Cogburn: Was just done in Santa Fe to a specific defender who's glad to be, unlike a lot of other people who don't want to be identified who have spoken to me who fear their slots being taken away, a person was in the room when that rumor was allowed to leave the room and that person does not want to be identified because they fear defender slots being taken away as revenge. That lie was told, and that lie was told again as recent as Santa Fe. I have the person specifically, their name, that does not mind being identified as to who that lie was told to.

Reuben Cahn: I'd be happy to talk to them, because I was in Santa Fe, and never heard any such statement made by anybody.

Judge Cardone: Can I clarify something, about, and then I think Mr. MacBride has a question. Judge Cogburn, are you saying . . . I know that when we were there for our public hearing there was also a separate function going on?

Judge Cogburn: Yes.

Judge Cardone: Okay.

Judge Cogburn: It was at the separate function.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cardone: It wasn't at our public hearing.

Judge Cogburn: No. This person was teaching at the baby defender school.

Judge Cardone: Okay.

Judge Cogburn: That's when that occurred, at the defender school.

Judge Cardone: Because I want to make it perfectly clear and make sure we're clear that this Committee operates on facts, not rumors, and we question And like you've seen here because you're getting quite a bit of a questioning, we're doing it because we want facts, we don't want rumors. I want to clarify for the public, that I didn't hear anybody say anything about one year. You're saying at the separate meeting or whatever it was

Judge Cogburn: That was at baby defender school. Yes it was.

Judge Cardone: Okay.

Judge Cogburn: Baby defender school.

Judge Cardone: All right. Mr. . . .

Reuben Cahn: Can I ask one last question?

Judge Cardone: Sure.

Reuben Cahn: I just want to correct one thing that I think we can probably come to an agreement on which is you talked about job protections for FDO staff as compared to CDO staff. The Judiciary's policy is that all federal public defender employees are at will and are entitled to no civil service protection. Can we agree that that doesn't differ from Community Defender Organizations

Judge Cogburn: That doesn't differ, but there are protections you can go through as a federal employee in terms of being able to work, to be able to, if you're fired, use that you don't have with the other. We'll agree with that though.

Reuben Cahn: Can you tell me what those are because I'm unaware of any such

Judge Cogburn: I can't right this minute. No.

Judge Cardone: Okay. Mr. MacBride.

Nel MacBride: Thanks, Judge. I was going to move to a different topic, if that's okay?

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cardone: That's fine.

Nel MacBride: A question for the United States attorney. Mr. Ferrer. One of the issues that's on the agenda for today, we talked a little bit about it, but I'd love your thoughts and that's the Department's increasing pursuit of extraterritorial investigations, and prosecutions, and the impact on sort of the intersection between extraterritorial discovery and resources, particularly for CJA panel attorneys who may be asked to defend those cases. Your office obviously has been a real leader in extraterritorial cases, starting with the counter narcotics work in Columbia some years ago, but you guys really span the globe and, as I understand it, have cases on dozens of countries, multiple continents.

My understanding is that the Southern District, like my old district, often looks to the federal defender as sort of the first in line if there's a defendant that's being brought back for prosecution in your district but in multi-defendant cases, obviously, then CJA or other attorneys would be asked to come in.

Just curious, in your experience, if you have thoughts on whether as DOJ is looking to detect, and disrupt, and mitigate threats on the far side of the globe before those threats come here to U.S. shores, whether the AO and appropriators who fund the public defenders and the CJA panel need to step up funding to provide resources for, whether it's discovery or going abroad to do investigations; whether in Columbia or the Middle East or so forth. Would just love your thoughts on that topic.

Wifredo Ferrer: Sure. No. Happy to. Yes. We are seeing an increase in a lot of our international work, just as you said. There's a lot of different statutes, the long-arm statutes, that we're using more effectively now. Even, human trafficking, is one instance, for example, that we are doing that in addition to the narcotics work. Those schemes which seem to be elaborate, involve witnesses from all over the world will, necessarily, involve increased costs and a need for more resources. You have the issue of translations. Foreign language speakers. That's going to always incur extra costs and more resources.

That is the scenario that you described, Mr. MacBride. That's exactly what we see here. The federal public defenders and the CJA attorneys, who are very strong and very good, working together on a lot of these cases. There's a lot of expenses. We work it out with the judges in figuring out how to deal with those expenses. We have rule fifteen in the criminal procedure which says that now, really, depending on . . . It doesn't really matter so much anymore about who's making a request for a deposition overseas, these issues are going to come before the judges in figuring out how we share those costs.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

That's a big challenge that we're absolutely seeing. It's only going to increase. The complexities of these cases are going to increase. The world is getting smaller. Especially the area of cybercrime. We are seeing now that someone sitting in a kitchen in a foreign country can cause havoc anywhere in the United States. The more that we see of that and the more that we, as we should, be more aggressive in making sure that that is not permissible and being accounted for, it's going to require more resources.

Right now, I will say, we're fortunate these issues are getting resolved, but the more expensive it's going to get and if we, unfortunately, ever have a situation like sequestration again, that's only going to make things worse. I always feel that in these kinds of cases the more that we can get in terms of resources on both sides can only benefit our efforts.

Judge Cardone: Chip has a question. Mr. Frensley.

Chip Frensley: Thank you. You were speaking earlier to the judges about the role and, to a certain extent, the rationale behind the judges role in voucher reviewing and that rationale being that they're the ones who are overseeing the case and see what's going on in the cases. I'm just curious, to the extent that so much of the time, I would safely say, a majority of the time that submitted vouchering is out of court time, not time in front of the judges. Do you think that rationale still holds true, with respect to voucher review, in that the judges would be in a better position than someone who is not involved in the case on the day-to-day basis in reviewing that, primarily out of court time, where you really don't know what's happening? Secondly, as sort of a continuation of that, what do you think of that rationale with respect to the review of excess vouchers at the circuit level where it goes to some circuit judge, or designee, who really wouldn't have any involvement in the case?

Judge Scola: I don't think I said that it was my rationale. I'm basing it on what's happening in front of me. I just think, we are as capable as anybody else, we do it all the time in other cases, so I think we're equipped to do it. If some other independent person did it, they would have zero information about the case. Every single criminal case, I shouldn't say that, the vast majority of criminal cases don't disappear by a motion to dismiss. They either go to trial, so you see it, or the guy takes a plea or the woman takes a plea and you see it. You're there for the plea colloquy, you're there for the sentencing, you know what the factual basis is, you have arguments about mitigation. Every single criminal case that's not dismissed by the government or still in motion you are seeing a lot of things that are happening. So again, you're not seeing everything but you have some sense and you certainly have more sense than some other person that has nothing to do with the case.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Cogburn: It's complicated. It's a mess. You and I don't want the judges doing this. You'd rather somebody else do it but who else does it? It's got to be somebody that knows what's being done. It's got to be somebody that understands the work that needs to be done. So that's lawyers. If it's defense lawyers that creates another issue of one defense lawyer looking at another defense lawyers work. How are we going to get that done?

The tax payer has to be protected all the way along the way so that the money is not misspent. I'll agree. Defenders do a great job, at the present time, of doing their job but what happens when it's candy time and every voucher is being signed. What do you do when July gets in and there's no money? You come to the judges and say turn everybody loose. We have constitutional violations. We can't represent these folks anymore. It's a complicated situation. It's not an easy situation. I sympathize very much with it. I don't want to do it. Find someone else to do it who can do it and is not going to be conflicted by it and I'd be very, very happy about it. But it's got to be somebody that has the taxpayer in mind.

Judge Cardone: I believe Judge Walton has a question.

Judge Walton: Mr. Ferrer, you indicated that you receive, as all U.S. Attorney's Offices receive a certain amount of money for a fiscal year, but if you run out of money or if you need certain services beyond that amount that you can petition DOJ to get that funding. Do you know of any situation where your office has done that and it's been denied or any other office that's made that request and it's been denied.

Wifredo Ferrer: I don't know about other offices. We have, during sequestration for example, there were situations where we had to ask for big case litigation expenses type of cost. It wasn't very frequent, I got to tell you. In my five and a half years we might have asked maybe once or twice. It's not something that really, for an extra-large office that has more of a bigger budget than smaller offices, I guess we're fortunate in that sense that we have a budget that allows us to do our job.

Smaller districts, I will tell you, they have a real challenge because as I said before that when we get our budget depending, the number may sound like a large number, ninety percent usually is for salaries. It's for personnel. If a smaller district has a much smaller range in terms of their litigation expenses that can be wiped out if they've got a couple of real large cases that they weren't foreseeing. More of those districts I can see them asking DOJ for help. We, in the Southern District of Florida, haven't had to do that very often at all. But it is a reality and as Mr. MacBride was telling us . . . I was thinking about his question about how complicated these extraterritorial cases are getting. In human trafficking there are situations in order to even to find the witness is a real expense. Going in to

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

finding victims in jungles, in real remote areas. When you talk about lodging and travel expenses, it's increasing now.

Judge Walton: What do you feel about the perception of, at least some of the defense bar, that the playing field when it comes to resources is unequal?

Wifredo Ferrer: Like I said, we get a certain amount of money and a lot of the offices run out. From the extra-large districts I just haven't had . . . we've had situations where we're running up against the line, so we're the fortunate ones I think. That's why, perhaps, in this district we haven't seen too many issues, especially when I canvassed the office and asked them if they knew of situations where experts were not being used in certain cases because of a lack of funding and they did not see that. I don't think that's the case in every part of the country. I'm sure all of you are looking at and asking, but I would venture to say that in the smaller and mid-sized offices you may get a different answer.

Judge Cardone: Mr. Ferrer, may I ask sort of a follow-up. When your office uses experts in a case, and the CJA attorneys are out trying to decide if they're going to get experts, but when you use experts do you actually go out and find experts and pay experts or do you have sort of in house experts because you have the FBI and you have the homeland security? How does that work for your office?

Wifredo Ferrer: It's a mix. It's a mix.

Judge Cardone: Okay.

Wifredo Ferrer: We do have experts that are agents. Some of them who are former agents who can come in, have been qualified as being experts, that's the vast majority.

Judge Cardone: Does it always come out of your budget then? Does it come out of your budget?

Wifredo Ferrer: Yes. It comes out of our budget.

Judge Cardone: If you're doing an FBI case do you have to take the money out of your budget to have an FBI expert.

Wifredo Ferrer: Okay. No. No. In that case not necessarily but we use a lot of retired agents. If they're local police officers who are coming in as experts we pay that from our budget. Anything that's outside of DOJ. Outside of the United States Attorney's Office.

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Reuben Cahn: Can I ask Mr. Ferrer a quick follow-up. There's something you said earlier about the increasing cost of cases and we've all seen it. We've all seen how discovery increased and everything. I wasn't aware of how your budgeting worked until you explained it. Now that I know that I know you've got a certain amount of money and you know how many indictments you bring in a given year. Are you able to give us any rough sense of the rate of increase year-to-year on the cost of prosecution. Is it increasing five percent a year, ten percent a year, or could you do that if you went back and looked at your budgets and your numbers of indictments.

Wifredo Ferrer: Right. The problem is our budgets have actually been getting smaller. I've had the fortune in these last five-and-a-half years of having to deal with sequestration . . . our budgets actually have been shrinking with all the cuts coming from Washington. The increases having . . . obviously there's always going to be an increase which is what makes it difficult and makes it challenging for all of use to do our jobs, but I wouldn't be able to tell you right now. I can look for that and find out if I can get a hold of that number but I wouldn't know right now how much the costs have been increasing year by year.

Reuben Cahn: It would be very helpful information if you could give us that.

Wifredo Ferrer: Sure.

Reuben Cahn: Information in the future.

Judge Cardone: We're at five forty so we've run a little bit over time. What I do want to say, on behalf of all of the committee, thank all of you for your time. Thank you for your candor. We are here for facts and to discover the facts. I don't know exactly where we go from here on some of these issues but we may follow-up with any of you if we have further questions to try to get the facts and flush them out. I hope you'll keep your doors open to us. Thank you very much for your time and we appreciate you being here.

My understanding is that there is a reception outside. I believe it's right outside these doors you guys would probably know better, Judge Scola and Judge Graham, but I do want to . . .

Judge Scola: Yes. Right outside.

Judge Cardone: Invite everyone. It's my understanding that you're all invited and the Committee is certainly thankful for that and we would love to be able to talk to people and have . . .

Transcript (Miami, FL): Panel 2 -- Views from Judges and a U.S. Attorney

Judge Scola: All the attorneys that are here and any observers are welcome to stay for the reception also.

Judge Cardone: Thank you. All right. We stand in recess until tomorrow morning.