

## **Ad Hoc Committee to Review the Criminal Justice Act**

Public Hearing #5—San Francisco, California

March 2-3, 2016

### **Transcript: Panel 4—Views from a Mixed Panel**

Judge Fischer: Welcome to the second day of the hearings of the Committee to Review the Criminal Justice Act Program. I'm Dale Fischer from the Central District of California. I'll be chairing the hearings today. Our other Committee members and excellent staff were introduced yesterday. We'll be shifting around the main panel who will be sitting on either side of me, but I'll be asking if all of our Committee members have questions, so they'll have an opportunity to get all the information that we hope to get from everyone today.

Before we proceed, please, all of you and anyone else in the courtroom, silence any electronic devices that make a noise, so that we're not interrupted because we are, as some of you know, on a live video feed, and that will be posted eventually on our public website, as will the written testimony that we receive from people today.

Again, everyone was told yesterday much more about this Committee but just briefly. We were appointed by the Chief Justice and we're on a two-year mission to gather facts and submit a written report with our findings and, thank goodness, we have a reporter to do that, and that's Professor John Gould who may ask some questions as well. The members of the public have also been offered the opportunity to submit public comments. We think getting those in, I hope we continue to get some as we proceed with these hearings.

This is the fifth of seven hearings to be held around the country. We've had hearings in Santa Fe, New Mexico in November; in Miami, Florida in January; in Portland, Oregon in February. Then we ran across the country to Birmingham, Alabama, also in February. We're back here in San Francisco, and so far, the weather has been wonderful for us. Thank you, Judge Hamilton. We'll be heading for Philadelphia in April and Minneapolis in May.

Let's just go ahead and begin with our first panel of the day. The people on our panel are . . . I'll wear my glasses because I can't . . . I need one set of glasses for this and one set to see those nameplates, so.

Mr. Daniel Albrechts, the CDA District Representative, CJA District Representative from the District of Nevada; Franny Forsman, former FPD from the District of Nevada; Lynn Panagakos, CJA District Representative from Hawaii, welcome; and Rob Personius, the CJA District Representative from the Western District of New York. Our committee members sitting with me are Reuben Cahn, Judge Gerrard, Katherian Roe and Judge Walton.

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We have read all your written submissions and we thank you for those. If you'd each like to make about a five minute opening statement, we'd be happy to have you do that, and then we'll all have some questions for you. Mr. Albrechts, would you like to make a statement?

Daniel Albrechts: Thank you. I would first like to express my sincere thanks that the CJA panel members have been included in this process. The inclusion, from our perspective, is always good, and so I want to thank the entire Committee for allowing us to have this time.

I'd like to take a couple of minutes on mega cases and tell you about my recent experience on what I think was the mega case of all mega cases for the District of Nevada. I have tried at least two or three other federal cases that lasted a month and had voluminous material but nothing like the mega case that we just had.

The case was a mortgage fraud case that had been investigated for years. I was appointed the lead defendant who was facing and received an extremely long sentence. I just want to give you a feel for what it's like as a CJA panel attorney. Like many, I'm in practice by myself. When I first met with the prosecution team, I met with: four lawyers, two full-time agents—one a Las Vegas Metropolitan Police Department financial crimes expert and an FBI agent—they had a financial analyst, two or three paralegals; and, on the other side of the table was me.

It's a bit overwhelming, as you might imagine. It became more overwhelming as the discovery started to be provided. I started to try to put together my team. Luckily, I was able to get a paralegal. I was able to get a very qualified law clerk in Franny Forsman who was extremely helpful and a couple of investigators. I just can't express how overwhelming that is as a small practitioner to try to get your arms around the case, and then there were times I don't know if I ever did . . .

Talk about some solutions today as well, but one of the biggest issues, and I'm not sure how we would or how you would propose to address it, is how the discovery is provided. The biggest issue was they would provide it in waves. Many times it was duplicate. Many times it was very difficult to search. We were appointed Mr. Aoki and his office, which helped a lot.

One of the things I pride myself in in these cases is to be able to know the case backwards and forwards; all the evidence; everything they have. Even with the help of the support staff that I was able to get in this case, I never really felt like I had my arms around the facts of the case. I just don't know if it could ever happen, and part of that was because of the discovery was provided in waves over the course of many, many months. It was, like I said, it was hard to manage. There was a lot of times it was duplicate.

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I would hope that today we are able to maybe address some of those issues as to how we deal with discovery in those cases. Having Mr. Aoki was extremely helpful. But, he was in Seattle and we were in Las Vegas. I don't know if there's ways that in the future we can find people like Russ Aoki and his firm closer to home where we can sit down and meet with him rather than do it over the phone or over the Internet.

Really, I don't know that I can express anymore the difficulty in dealing with a case like that. I would pass it onto Franny to kind of continue on with what we did on that case.

Franny Forsman: If you've read my comments, you know why I was the law clerk. I was the law clerk because the motion to appoint co-counsel for Dan on the lead defendant was denied because of the government's opposition. We wrote papers saying, "Why are you even weighing in?" Ultimately, I was appointed as an associate but was not able to make court appearances.

That's not a common problem, I have to tell you, in the District of Nevada. I think, for the most part, in the District of Nevada, panel attorneys are getting the resources, but I do think that there is a lack of understanding on the part of the bench with regard to the imbalance in resources when we're talking about these kind of cases, and so enough said on that.

I want to talk about two things, and then, of course, answer any questions you may have. I testified in front of the Prado Committee twenty-one years ago. I took a little recess and now I'm back. I was one of the defenders when the Prado Committee was in place that did not want the Federal Defender's out from under the judiciary, did not see the issue of independence. I am also an old legal services attorney.

I'd been through the Legal Services Corporation. Barry Portman made just a beautiful speech that touched me with regard, because I went through the Legal Services Corporation thing, if you create this separate agency, and it scared me to death, because I had finally found a place as a public defender where there were adequate resources. I think one of your earlier witnesses testified that the Federal Defender's might become the next playing parenthood in terms of targeting in Congress, and I think that's a concern.

Let me focus a little bit on mega cases. I also spent five miserable years in a civil litigation firm. I know how big firms would do a big case like this. Although the electronic stuff wasn't in there, but I would know how it, I can imagine how my old firm would have staffed up the case. I think the critical thing for these large cases, and you know when they're coming down the pike, is that you have to have some . . .

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Judge Goldberg: Move your microphone a little closer because I'm having trouble hearing you.

Franny Forsman: Oh, I'm sorry.

Judge Goldberg: Thank you.

Franny Forsman: You have to have a managing attorney for the whole group. You have to have some lawyer who would be like the senior partner. Even though you're codefendants, you have to have a senior partner who's managing it. My opinion is, is that should be the Federal Public Defender.

I think this is true across the country. There are very few Doug Mitchell's across the country who are in firms that have staff. Most of our panel attorneys, as you know, are in very small firms or sole practitioners. I believe that even when, for some reason, the Federal Public Defender is conflicted out, that there should be resources given to the Federal Public Defender's to be the managers of this. They know where the resources are. They can share staff with other FPD offices if necessary. They can provide the leadership and the experience on the large cases.

The budgeting process in the District of Nevada, I think, works very well, but I don't think it should be done by judges. If we move the management to the Federal Public Defender, the budgeting process, that would be part of the job description. It would be to handle budget.

The regular budget meetings, and I don't know if they're going on all over the country in these large cases, but they're excellent for keeping the case on track for educating . . . it's usually a magistrate judge in the District of Nevada for educating the judge with regard to the resources that are needed. It also keeps the other, the lesser defendants, the lawyers for the lesser defendants, it keeps them on track. It keeps them understanding what should be done on a case.

I think that there should be additional . . . the FPD or somebody needs to give management of large case training. It's not just learning the technology. I'm pretty open to technology but I had a heck of a time in this large case finding stuff. Russell Aoki's office couldn't have been more helpful but I had . . . the databases change for each of these cases, and without a really highly skilled paralegal which we did have, we would have been in real trouble in this case.

Let me . . . that just sort of leads into my change in position with regard to the independence of the FPD and the independence of the panel. I think the panel needs to be completely removed from the judiciary. I think, although I know that I'm going to have some of my former colleagues not too happy with this, but I think this is a change in position for me. The panel needs to be managed

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by the FPD from soup to nuts, from selection, creating a selection committee, chairing a selection committee, to voucher review, all the way through.

If I could come up with a better solution than that, I would, but I can't. I talked with Judge Boulware for a long time last night. We've been talking over time about it because he's attempting to wrangle the panel issues in our district. I just can't think of another way to do it. Maybe someone else will come up with a creative way to do it.

I worry about a judge-picked selection committee. I'm not sure of the true independence of a judge-picked selection committee. I am the only player that has the protection. If you have a judge who is just irritated by some panel attorney, once that panel attorney of the . . . even though the panel attorney is good, the only protection against that would be someone who's not appointed by the local judiciary and that would be the Federal Public Defender.

The big gap that we have, and this is not just with panels, lawyers are not great at, particularly public defenders, are not great at evaluating people. Even lawyers that worked for me for years, the best lawyers, not confronting a secretary with her deficiencies was . . . you'd go in there and you argue that somebody's got a death sentence but you can't sit her down and tell her what the problem is.

I think that, it seems to be me that either the Sixth Amendment Center in Boston or the Vera Institute, we've worked with a lot of those, that there must be an instrument that could be utilized for evaluation of panel attorneys, so that you would have actual real information that you're using; docket sheets and visits to clients; a method; a procedure for evaluation of panel attorneys.

Evaluation of panel attorneys is a little scary, but if the function was independent from the judiciary, and the instrument was trustworthy, I think you might have a better method of ensuring quality of representation throughout the system. I'm happy to answer any of your questions.

Judge Fischer: Thank you. Ms. Panagakos?

Lynn Panagakos: Good morning, Judge Fischer and members of the Committee. Thank you very much for inviting me to participate. I'm very happy to be here. I've had experience both in the District of Nevada and in the District of Hawaii handling panel cases. The fairness of the voucher review process in the District of Hawaii, I think, is accomplished because the Federal Public Defender reviews all the vouchers before they're submitted to the district judge. We're small enough that the Federal Public Defender can do that, but it has been, to my knowledge, an effective safeguard against any unwarranted or arbitrary voucher cutting.

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I sat through some of the hearings yesterday and learned that underutilization of service providers is an issue in a number of districts including the District of Hawaii. I know, from my own experience, in the District of Hawaii, I've become, or I had become extremely conservative in my requests for service providers, particularly paralegals and investigators. Experts, it's a little bit easier to know when you need an expert and it's completely outside of anything I can do.

My first, early on, as a panel attorney, I had a complex document-intensive tax fraud case. I applied for a paralegal. I got an increment of hours. Then when I went back in for more, it was met with some reluctance from the magistrate judge. Then a visiting district judge came in and took the case and that judge cut the paralegal hours in half. I ended up paying for some of it myself. I applied for witness fees and costs for trial subpoenas. All but one of the subpoenas was denied.

Then, through that process, I felt, and talking with other panel attorneys that it wasn't common to ask for such services, and I felt the strain on my relationship with that magistrate. From that, I became extremely conservative in my requests for services. I have requested services in other cases in discreet fashion and have been granted my requests.

Now, knowing that, the District of Hawaii, I've got an email from Ms. Samek yesterday about how low the usage is, that we can educate the bench and the panel attorneys that it's okay to ask for these things and it's reasonable and necessary to get them. I think that's a great thing that I can take back to the District of Hawaii, and Judge Seabright I know will be here later today, so that's great.

I mentioned in my comment that there was one case where I did get sufficient resources and what a difference that made, and that was in the District of Nevada. I was on two different trials, one where I was retained but . . . in both cases the Federal Public Defender's Office took the lead and managed everything, and it made all the difference in the world.

We had the kind of technology presentation that Mr. Mitchell described yesterday and it was just wonderful. It was so wonderful I actually gave serious consideration to taking another bar exam and moving to the District of Nevada. When I got back to Hawaii and, anyway, it was too much.

Fanny Forsman: Yeah, we understand.

Lynn Panagakos: It was that good. Their office . . . their district should be considered a model, in my opinion. I do have another case coming up that's complex and I'm glad to have sort of more confidence in going back and asking for the services I

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need.

Co-counsel—I just heard what happened in Mr. Albregt’s case. I don’t know what criteria there are for when a co-counsel is appointed. I heard Mr. Tritz reference a case with three attorneys yesterday. I know there was a capital case in our district which is different, and I’m not, wasn’t involved. Other than that, I know of several instances in my district where applications were made for co-counsel and they were denied. I don’t have anything to compare it to. It wasn’t me asking, and I don’t know what cases it’s granted and what not, but it was an issue that I was going to raise before I heard this story.

The other issue I heard yesterday about e-discovery . . . well, resources closer to home, that’s a problem in the District of Hawaii. We need technology in the big cases and hopefully . . . right now, I’m in the process of trying to find somebody that can do what the people I met in the District of Nevada can do in Hawaii for my case that’s coming up.

E-discovery, one of the things that I think Sean mentioned yesterday about providing meaningful access to inmates, that’s a really significant issue. I have one client now who says he simply does not have enough time. He’s not afforded enough time on the computer. He asked me to print everything.

I’m about to go see how much it costs to print, how much it is to print, but then, even with that, there are things that can’t be printed and can’t be reviewed. Like in this case that I’m referring to, there’s information on QuickBooks and other databases that it can’t be meaningfully reviewed just in hard copy and there’s no access to it in the facility. Just one example, I know, Sean mentioned it generally yesterday, so. That’s all I have. I welcome your questions. Thank you.

Judge Fischer: Thank you. Mr. Personius?

Rod Personius: Lynn, the Western District of New York has what many would consider a Camelot of CJA programs. If you want to consider coming to Buffalo, I’d be happy to move to Hawaii.

Good morning, members of the commission, I’m Rodney Personius or Rod Personius from Buffalo, New York. On the way over here, I was talking to Chip Frensley, and he mentioned, he said, “If I could give you any advice, it’s to treat this as you would a voir dire, except here, you’re not the lawyer, you’re a perspective juror,” so speak the truth; and I will do my best to do that.

Deficiencies in the CJA program undermine the vitality of the Constitution and those democratic values designed to render poverty inconsequential in the federal criminal justice system. Render poverty inconsequential. Now

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those aren't my words. Those words are taken from one of the observations that appeared in the Prado Report back in 1993. As I understand that, what that means is that, in lay terms, that being poor should not matter when you're charged with a federal crime, but the fact to the matter is it does. In my experience it does. In the experience of many lawyers in our district, it does.

*Gideon v. Wainwright* established the right of state criminal defendants to the guiding hand of counsel at every step in the proceedings against them. Implicit in the concept of a guiding hand is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.

Again, not my words; those words were from the 1981 decision of the Supreme Court in *Polk County v. Dodson*. As I understand, what the court meant in that case, an attorney's level of advocacy should not be affected by the fact the client is assigned rather than retained. Again, in my experience, it is affected.

As I mentioned, at the start of my comments, and as I set out in my written presentation, the Western District of New York has it pretty good when it comes to the CJA program. We have . . . the leadership of our immediate past and current chief judges has been extraordinary.

I mentioned to Chip on the way that it used to be, maybe ten or fifteen years ago, that it would be difficult to ride up in an elevator with a federal judge. You'd have to wait for the next elevator. It's gotten to a point now where the judiciary in Buffalo and Rochester regularly have breakfasts in the morning at the courthouse where there's an interaction between the judges and the members of the federal bar, both in Buffalo and Rochester.

As far as the CJA program is concerned, the assignment of cases is handled by the Federal Defender's Office. We have a panel selection committee that's very active, that is intimately involved in whether or not an attorney is allowed to join the panel. We have one of the best federal defenders in the country in Marianne Mariano. We have one of the best, if not the best, case budgeting attorneys in the country, at the Second Circuit, in Jerry Tritz.

My point is we have it very, very good in Buffalo. The fact of the matter is the two forms of representation are different. Almost all my work is in federal court. Almost all my work is involved representing federal criminal defendants. Most of it is retained but I handle the more complex assigned cases, and it makes a difference.

When you have an assigned case, it's almost like sleeping with one eye open. I think that the reason for that is it's not because necessarily our judges are

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bad or unfair, but it's just the whole concept seems turned on its head. What I ask myself is, would any of my privately retained clients that are paying me a good buck to represent them, would they ever agree that if we needed an investigator for the case or if it was a financial matter and we needed a forensic accountant? Or in those instances when the client needs to be evaluated potentially for a mental health issue, would one of those privately retained clients agree, that before we could retain those services, I would have to go to either the magistrate judge or the district judge presiding over the case and lay out part of the strategy of our case to that judge before we could get permission to go ahead and use one of those individuals? Of course, the answer to that is absolutely not. That would never happen.

The Prado Report commented on this concept as well. It's not the point that there's prejudice inherent in the system. It's that the optics of it are bad, and the potential for prejudice, that's what the problem is. What the Prado Report said some twenty-two years ago is the current system, back in 1993, creates a serious problem of perception and provides the opportunity for abuse due to the inherent potential for conflict and the judiciary's management function at the national and local levels with no prophylactic measures to identify and remedy any actual conflicts which undermine CJA representation.

What we return to that I started with is the comment that was made by the Commission in its report back in 1993 that the whole point of this exercise is to render poverty inconsequential. We aren't there yet. In Buffalo, I think we're close, but we're not there, and under the current system, with the judiciary, being involved as it is, I don't think we will ever be there.

I want to close . . . I reviewed a number of the recordings of these proceedings, and the one that stood out in my mind was the presentation that was made by Stephen Bright with the Southern Center for Human Rights. I think he testified in Miami. The one comment he made that struck me is he said that the . . . we throw around the word stakeholders. He pointed out that . . . he didn't put it in these terms, but the fact is the panel attorneys are not the stakeholders under the CJA program. Certainly it's not the judiciary and it's not the Federal Defender's. The true stakeholders are the indigent. That's what we need to focus on. We need to look at it from their perspective.

Again, are we at the point yet where retained clients, the treatment that they get, that in my experience, indigent clients get that we aren't there yet. Hopefully, with the work of this commission, we can get a bit closer to that goal. Thank you very much.

Judge Fischer: Thank you very much. Ms. Roe, would you like to lead off?

Katherian Roe: Ms. Panagamos, did I say that right?

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Lynn Panagakos: Panagakos.

Katherian Roe: Okay, Panagakos. I'm going to ask you a question about the experts and asking for experts in your district. You indicated that, in the past, you've been extremely conservative about your requests, but that when you go back, you're going to tell folks how low the request rate is for experts in your district and how it's unusually low. Do you think that's going to change . . . is it going to change anything that . . . do you think that folks will . . . do you think that other CJA attorneys will actually start asking, especially in light of what you told us, with the response from the magistrate judge and from the district court judge in your past?

Lynn Panagakos: I don't know. I know it's going to change for me now because my experience was, I think it was back in 2004. Since then, like I said, I've asked but been very conservative. I happen to have a case coming up for trial that needs resources. I'm going to ask for what I need. Now it's different when you talk about mental health experts or something that it's sort of obvious that it's needed and I can't do it, but it's the service providers where it's the paralegal, the investigators and now technology.

Whether other attorneys will do it, I don't know, but given how long ago it was from the experience I had, and also, the district judge involved was a visiting judge who's no longer . . . our judges in our district, they're very supportive of the panel. I think if they see requests that are first-time requests but are informed that these are resources that are given in other districts, I'm confident that the judges will be very receptive to it.

Whether other attorneys will ask, I don't know, but I certainly will. Then, it may just be that some of our cases just aren't . . . we don't have the mega cases that they have in the District of Nevada, but we do have some complex cases, some big cases, and we'll see.

Katherian Roe: Okay. Ms. Forsman, I wanted to ask you a question about structure. I know you said that, at this point, you would recommend that the CJA attorneys be or the CJA program be taken completely out of, out from the control of the judges. What about the Federal Defender program? What do you as . . . I don't know, I don't remember what your position was back in the day; back in the '90s. What's your position now as to, should the Federal Defender or should the whole program be independent, or should it be within judiciary?

Franny Forsman: Here's what I believe has changed and what has changed my opinion from the "Please leave us under the protection of judges" to "get completely out." I know that there's been discussion about creating something like the FJC which has got some independence or not. I don't know exactly what that

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independent agency or independent oversight, where it would be, but my position would be that we get it out from underneath the judges, and that the federal defenders be moved out from underneath the judges.

What has changed, and I think most of you know this is, back in the day, we had a lot of protection from the Office of Defender Services—it has changed titles several times. We also . . . most of us felt that, in terms of funding, that we needed the judges to go to the Hill.

I had wonderful timing on my retirement. It was just before sequestration. I never had to go through that. I would have been screaming and yelling. I think the sense of the defenders is, is that we didn't get that protection. In fact, we were actually competing with the judges under that, and the judges were going to win. That's what's changed my opinion about pulling all of it out from underneath the judiciary.

Katherian Roe: Are you familiar at all with this concept of case budgeting attorney and its . . .

Franny Forsman: I am. I think that there are probably some wonderful . . . I didn't listen to what happened yesterday. I wanted to hear that, but because I've had some thought about that you have to have . . . obviously, you have to have fiscal oversight on these large cases and the budgeting function. Defenders are very accustomed to budgeting and looking at what . . . I think we have a . . . my former colleagues and I had . . . I'm still a "we." My former colleagues and I had a very strong reputation for being fiscally responsible but also ensuring that adequate resources were given to cases.

The problem, I think, with case budgeting attorneys, is you can't control who is in that position. I think we've got probably some great former panel attorneys and others that really know the defense function and are going to ensure that adequate resources are provided when they're the budgeting attorney, but there's no guarantee of that. I would pull that function out from under the court too.

It's going to . . . if you do that, or if we do that, the additional resources would be required in the Federal Defender Office to carry out that function. I think Federal Defender's certainly ought to be trusted with that fiscal responsibility—even trusted with a lot of really big budgets—and done pretty well with them, so.

Katherian Roe: Thank you. Mr. Personius, I wanted to ask you a question about the requesting expert services and having to go to the court to request them on your CJA cases. Do you have a general feeling for the practice in the District of, the Western District of New York, for whether or not CJA attorneys do regularly request those services, and if so, if they're granted?

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Rod Personius: I included with my written submission as Exhibit D a graph that outlines what the activity has been in our district with experts over the past four years. Again, I need to trumpet our Federal Defender, Marianne Mariano, because she's the one that supplied that to me, and that just gives you an idea of the resources that we have in the Western District of New York, but yes.

What I also did is, as part of preparing my written submission, is I communicated with all the members of the panel in the Western District with a series of questions. One of those dealt with their experience with requesting experts and whether it was granted or denied. Almost 50% of the panel members responded which, based on my experience, was pretty darn good, because usually when I ask for their responses to questions, I get maybe 25%, so this was close to 50%.

What I learned from that is that, of those who responded, the experience has been favorable when third-party services have been requested. I only got three instances, interestingly, when it was denied, and it related to death-eligible cases where there had been two lawyers, learned counsel was dropped once the case was no longer in that status, and the request was made to add a panel attorney to replace learned counsel. Three applicants for that, their requests were denied.

What's interesting is all three of those were in the same case before the same judge; that case went to trial in January. A verdict came in last week and there were three defendants, and it was a gang case involving homicides in the Buffalo community. The jury was out for six days which was remarkable. They came back with a split verdict.

Even though there was only one attorney representing each of these three defendants, the outcome was extraordinary from a defense perspective. Even without the help of that second lawyer, and I don't know if that would have made a greater difference, the outcome in the case was tremendous.

The experience in the Western District has been good, as it is generally with the CJA program right now. We've got a good chief judge. Everything works well. The idea that it depends on who's the decider in these important positions? Who is the chief judge? Who is the federal defender? Who is the case budgeting attorney? Who is on the panel? We have a panel selection committee. Who serves on that? That's what seems to make a difference under the current system, but the experience has been positive.

If I had any thought, and again, I mentioned it in the submission, I will make it a point, now that I know what the usage is in our district, that one of our upcoming training programs that we have twice a year, to do a presentation on applying and using third-party providers.

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Again, my reservation with it is personal. I don't like the idea of going to whether it'd be a magistrate judge or a district judge. Even though we have a wonderful relationship, I don't like the idea of having to share where my case is at or what I'm thinking about doing with a judge who's going to decide whether it's the pretrial or the trial aspect of the case. I'm just not comfortable with it. That affects my usage.

Katherian Roe: Understood. There's one other question I wanted to ask, and that's about the statutory caps, the statutory cap for felony at \$10,000? I know that you submitted some materials regarding that in your written statement. Can you explain . . . obviously, there's a procedure to get around that. You file a memorandum or sometimes a form, depending on the district, then it goes to the circuit court. Can you explain what the problem is with the cap being so low?

Rod Personius: I don't have a problem with capping it. My concern is that the CJA guidelines and the definition they use for what an extended or a complex case is, and it's in comparison to what an average felony case. What's an average felony case in federal court that the guidance is just not there?

As I indicated in my written submission to suggest in 2016 that a federal felony case that has any level of litigation, motion practice, hearings, at the pretrial level, or heaven forbid, it go to trial, not many do, but when they do, and then if it's not successful, they have a sentencing. With all the activities that are involved in it, to think that the presumptive ceiling in a federal felony case should be \$10,000 in calendar year 2016, it just, it doesn't comport with reality.

With the assigned cases that I've handled, that have gone to trial recently, I've submitted vouchers that well exceed \$10,000. We keep meticulous track of our time, so we have not had a problem with getting paid on those. If there's . . . one of the areas that I think should be addressed, it's that particular guideline.

Two concepts: one, the \$10,000 is presumptively reasonable for a federal felony case; and number two, that the definition for how you get around that, whether a case is extended or complex, I think it needs to be addressed because I don't think it's all that helpful.

Daniel Albregts: Ms. Roe? May I address that as well?

Katherian Roe: Yes.

Daniel Albregts: In a mega case, there's a lot of practical things that happen with the cap that make it more difficult. That's not just the attorney cap but the provider cap. You have to do the written justifications. As you know, the justification that

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goes to the court, and then it goes to the circuit. There is always a delay in that. Not only does the delay occur while I'm waiting for the approval of the extra money that I'm waiting one second's approved, then I'm able to then submit the bill and then it takes a while for the bill to get paid and so as a small practitioner it just creates, it wreaks havoc with my small business model.

The payments then just take longer and with providers, you're also saying to providers, "Well, I've submitted it. I think it's going to get approved. Go ahead and start the work. The uncertainty makes it very difficult not only for the obvious reasons but in dealing with providers because oftentimes, you'll have providers that say, "Look, I just can't deal with this. I got to know I'm going to get paid. I got to know when I'm going to get paid." I have to explain that it's got to the court here, then it's got to go to the circuit.

The higher the cap, the less the administrative work we have to do and as you all know, we don't get paid for the administrative work. In mega cases, I found myself spending hours and hours handling administrative things that I don't get paid for. The caps directly affect that and when I first started this, I didn't have any idea that the caps would have all these ancillary effects and so, like my colleagues say, \$10,000 in a federal case in 2016 maybe 1990 but those should go up at least as much or more than cost of living and things like that.

The ancillary effects on the caps especially in mega cases are very large.

Katherian Roe: Do you have just . . . I don't know if you've thought about this but do you have suggestions as to the cap . . . what the cap should be for the expert services for the mega cases or I guess any case?

Daniel Albregts: Much higher just because . . . it depends on where you're at in the country. I think Las Vegas is probably in the middle to the high end of what people charge. That's the other sort of practical things with caps. What an expert's going to charge in San Francisco or Los Angeles is going to be completely different than what an expert is going to charge somewhere in Wyoming, North Dakota. I don't know that I have a quick solution. I just think the higher, the better only because it gives us more flexibility to handle the case on a day-to-day basis.

Katherian Roe: Thank you.

Judge Gerrard: Thank you. Mr. Albregts, Ms. Forsman, I wanted to start with you and talk about e-discovery in your case. On mega cases like that, there is no easy way of doing it whether it's retained counsel or CJA or otherwise but I want to talk to you about two things, the timing issue that you were talking about and the additional resources. I want to you to talk a little bit more about your

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case as far as any structural or systemic matters that we might be able to handle as a committee. First of all, with timing of providing discovery to you or whether that was an issue.

Franny Forsman: Dan, I think you can best respond to that. I didn't get in until later.

Daniel Albrechts: One of the big issues I had with the timing at least in our mega case was as the case went on, you get your first discovery dump early on and generally in our cases we'll have a magistrate judge involved in the discovery. It was as the case went on when you thought you would have a grasp of the discovery and what the evidence was against your client, you would then get another dump later on. They will continue to do that and in our case, in our district, I think it's because of some of the other cases and some court of appeals decisions, they're real sensitive about making sure that they're providing you everything.

They used this idea that we want to, out of an abundance of caution make sure you have everything so we're going to give it to you again. It just makes you go round and round as the later discovery drops come thinking, "Do I have this already? Why is this coming late? I know that investigations are ongoing." At some stage, I would think that the courts need to get a little more proactive in directing the United States Attorney's office, how to provide that discovery. Just so . . .

Judge Gerrard: That appears to be a case management issue.

Daniel Albrechts: Yes.

Judge Gerrard: I don't mean to cut you off but I mean it does. That's what that area appears to be.

Daniel Albrechts: Yes.

Judge Gerrard: As to additional resources, you were able to work with Mr. Aoki and, of course, we got the state of Washington to Las Vegas issue. Were you able to work effectively with the CDA in that particular case?

Daniel Albrechts: I think as effectively as we could. It wasn't as effective as I would have liked but I don't know what else we can do, other than like Franny said to make sure I have . . . we had one paralegal who was very good at using the material, using the program but like Franny, she's more technologically . . . she's better than I am at that stuff. It was just very difficult to find it with any ease.

Then, that translates into billing. Now, I'm trying to justify the fact that I sat for five or six hours with this program trying to find stuff and trying to run

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word searches and things and then you're left justifying with the court that it's taking me more time because I'm having a hard time working with the programs that we had. I think we work as well as we could with Mr. Aoki's office.

Franny Forsman: The paralegal issue is huge. Mr. Aoki's group has a great bunch of people but trial lawyers want somebody at their elbow that knows their individual theory and is able to say, "We need to find the documents that say X." If you're paying \$50 an hour to a paralegal, you're not going to get the freelance paralegals that have been in the construction defect cases and the MGM fire cases which is where I would want to draw them from.

I was one of the first defenders to really start using paralegals within the office because I saw what an advantage that was and a cost saver and everything else when I was in the firm. We pay our paralegals in the FPD program adequately. The panel attorneys are out there looking for somebody to do the work at the \$50 an hour. Now, there's also people who call themselves paralegals that are not really paralegals and they're probably . . . \$50 is probably too much.

That's a critical element I think in a mega case is that you have one or two local very skilled voluminous document paralegals to help the panel attorneys with managing the e-discovery.

Judge Gerrard: Along those lines, Ms. Panagakos, I did want to ask you about the practicality of obtaining experts and ancillary services. You're in a little different situation in Hawaii. Do you have issues with obtaining experts or ancillary services?

Lynn Panagakos: Paralegals and investigators we have. The technology issue, I'm not sure. I had one private case. After my experience in Las Vegas and knowing what effective technology in the courtroom looks like, I did have a private case and I found somebody in Hawaii that was able to do it. He is, no longer doing that kind of work and I'm looking for someone right now to see who I might apply to get funding for resources and I haven't yet found somebody, so I don't know about technology.

Now, when you talk other experts like obviously CPAs we have, but more narrow fields like right now, I need someone who's an expert in hazardous waste and explosives and that I'm going to need to go to the mainland for. There are situations where we need to go the mainland. The technology one is, that's a big one and I'm going to see if we can find resources in Hawaii.

You mentioned something about the timing of discovery and I heard that Chair Cardone yesterday talk about the increased cost that happens when the government produces things late. A couple of years ago, I had a case in

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Hawaii which should not have been a mega case. The fees ended up going up for, I think there was five CJA attorneys on it that went to trial; there was, I think eighteen defendants total. The case became so protracted because of the government's failure to provide timely discovery and failure to document what it had provided.

The result was lengthy recesses, what should have been a one month trial turned into a four month trial. The district judge was extraordinary in her handling it and giving us resources that developed the needs developed as the case progressed and she was very supportive of our efforts to get the resources that we needed. Ultimately, the district judge referred the AUSA to the office of professional responsibility, he has since resigned. I heard one defendant, most of the defendants were either dismissed or acquitted. One defendant was convicted and I heard that at the oral argument on appeal, the Justice Department said that they sent some people in to do some training in the U.S. Attorney's office in the District of Hawaii.

I don't know. Obviously, I'm not privy to what that training was. I know someone else yesterday asked about, is there something you can make the government do, so I think that that's something to be considered and whatever can be done would be great because it's just . . . it's so daunting. It's great that they want to have an abundance of caution and give us everything but when they give us duplicates, it creates so much work and yet, sometimes like in this case, you get the critical stuff never even came until during trial and it resulted in a mess of a case and vastly increased costs.

Judge Gerrard: Thank you. I want to . . . if I may just touch base on a couple of structural matters on both selection panels for CJA and in voucher review. Ms. Panagakos I believe you said the FPD reviews, does initial voucher review in your district. Is that for a full reasonableness review or for arithmetic mistakes?

Lynn Panagakos: No, it is a full reasonableness review, for the attorney time. I'm going to suggest that perhaps that you review funding request for service providers if he's willing to get into that. But it's a full reasonableness review for the attorney time.

Judge Gerrard: That has worked well in your district?

Lynn Panagakos: To my knowledge, it's worked well and I did send an email to all the panel attorneys saying that I was coming here to see if anybody had any complaints and I got one complaint about a Ninth Circuit appeal but that's sort of outside our district. So, no complaints from anybody.

Judge Gerrard: Mr. Personius, your FPD also does the initial voucher review?

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- Rod Personius: No, no. In the [CROSSTALK] . . .
- Judge Gerrard: works in Western District.
- Rod Personius: In the Western District, the vouchers are submitted to the clerk's office. Within the clerk's office, there is an employee of the clerk's office who does the initial review but it's just arithmetic.
- Judge Gerrard: Arithmetic.
- Rod Personius: Then it goes to the district judge. There is no review at this time through the Federal Defender's Office. That's one area where they're not involved.
- Judge Gerrard: Right. You said your panel selection committee, is that made up of both lawyers and judges?
- Rod Personius: Yes. The panel selection committee is made up of myself as the district representative. Two private attorneys . . . I'm sorry, three private attorneys. The federal defender and two magistrate judges. The idea of using magistrate judges on the selection committee has been great because we all have a very close relationship and we get the benefit by having magistrate judges on that committee of getting insight into what the attitude of the judiciary is on the one hand. Then if we want to make a proposal to the judges to change the plan, which the judges have been fairly receptive to, you have two people going in who are familiar with what the proposal is and can act as advocates when the judges meet.
- Judge Gerrard: All right. That makes sense. Ms. Forsman I believe you were of the position that judges should have no role in that panel selection. Is that correct? [CROSSTALK].
- Franny Forsman: I think no role is a little stronger. I think that judicial input is necessary. Because when I was first a defender where we wrote the local plan, we had nothing but attorneys and no judges on the selection committee and I realized fairly quickly that there was no way that those lawyers were going to know enough about whether somebody should be on the panel or off the panel. There should be judicial input and a procedure or process for receiving that; as well as there should be a procedure or a process for clients to be able to register complaints with regard to lawyers. I know as a Federal Public Defender, you have to take complaints with a grain of salt but when you start seeing complaints being made about the same lawyer over and over again, it gives you a way to evaluate.
- I don't think judges should be on the selection committee at all.
- Judge Gerrard: I may have heard two separate things then. You're saying they should have

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some role but not on the selection committee, because we've heard both ends of the spectrum where in the Southern District of California, the judges are the selection panel. There are others that say you should have no involvement. My eyebrows go up on both extremes quite frankly.

Franny Forsman: Yeah. As I say, I would adopt, my suggestion would be that there be a procedure adopted that would permit the input. I don't think you can have the judges completely out of it. I think there should be procedures that would permit for their input to the selection committee.

Judge Gerrard: I believe that's all the questions I have.

Reuben Cahn: Mr. Albrechts, let me start with you and I just want to clarify a point. You're talking about waves of discovery and receiving duplicate discovery in those different waves and that can mean different things. I've been in that situation myself. So do I understand it to mean though, in your situation you'd get wave one, one month, three months later, you get Wave 3. Wave 3 would have a subset of documents that had been received in wave one and they were . . . can you clarify for me did these have the same bates numbers? Did they have different bates numbers? What was going on with that?

Daniel Albrechts: They didn't have the same bates numbers. I'm not sure, Russ may recall as well. I'm not sure that . . . I'm not sure they were bates stamped all the time, either. It was . . . yeah. There was really . . . I've never been in a case where I felt so lost in terms of knowing what the world of evidence was against my client and that was part of the problem. I think in terms of waves, I think we ended up having twenty discovery productions over the course of a couple of a years.

It just seems to me that we spend so much time talking about fiscal responsibility from the defense side and all of those things; and the government just gets a pass on all that. Whether it's budgeting things, whether it's the discovery things, and then it falls to the defense that we need another continuance and I just . . . in those cases especially mega cases, I wish the court would get more involved with the United States attorney and say the reason we're doing this is because it affects like Lynn said, it affects the length of the trial when the trial is going to go and then it affects the cost that I'm billing the government to represent.

I guess in those cases, I wish the court would get more involved and say this is what we're going to do with discovery and here's the discovery cut-off line so that there's more rules than just the waves of discovery.

Reuben Cahn: Did you ever make a request to the court to intervene in this discovery process and begin to manage it more actively?

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Daniel Albrechts: Later on, no. I don't think we did. Quite honestly.

Reuben Cahn: I want to turn to you Mr. Personius, because I was reading your written testimony last week. I was struck by it because quite oftentimes, we see written testimony and it sets out: "Everything is wonderful in this district. Our magistrates are great. Our judges are great. Our CJA panel is great. Don't touch us." Yet, yours was sort of the opposite. You said, "Our magistrates are great. Our judges are great. Our Federal Defender is great. Our panel's operating well. It's all based upon non-rule-based norms and the right people being in the right place but we need to change the structure to ensure that things work well."

I have my own view about sort of what conclusions to draw out of what you said. We're very interested, and I'm particularly interested in structure versus norms versus personality. I'd ask if you could elaborate on how you arrived at that conclusion that we still want to move towards a more independent system even though your own experience is positive.

Rod Personius: I can say that if you go back to roughly ten years to the . . . not the past chief judge but the chief judge before that, things were different. If you go back to the time around the same time before the current Federal Defender was in place, things were different. The reason that I indicated we have a wonderful program in our district, and we do. It works really really well under, if you will, the constraints that we operate under. The concern is in your question which is it does well because of the quality of our chief judge, the quality of our Federal Defender, the quality of the, present company excluded, the quality of the panel selection committee, the quality of the case budgeting attorney and the Second circuit, even the quality of the voucher reviewer in the clerk's office.

Everybody works together very, very well. I've had experiences in the past where it wasn't the case where you didn't have the same chief judge in place who was sensitive to CJA matters. There was a different Federal Defender in place who was a nice person but not as active as the current one is. It didn't work as well then. I think we need to have a structure to the extent we're able that overcomes that variable and I understand you can have one that completely overcomes it.

As I indicated in my opening remarks, my major concern is this idea that what we should be striving for is that an indigent person who goes into federal court has the same rights, the same level of representation from counsel as a privately retained person and under this system where the judges are involved in these requests mid-representation for third party providers, interim payments, to some degree if it's a case budgeting manner, compensation at the end of the case, the judge who's involved in making decisions on the merits of the case should not be part of that process.

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It's taking a step back and a broader look at it. Yeah, it's good in the western district right now, but it wouldn't be if we didn't have the leadership of the current and the immediate past chief judges and if we didn't have the Federal Defender we have and so on down the line. I don't think the system should be so dependent upon who the personalities are that are in these important positions. Does that help?

Reuben Cahn: Yeah. That's what I thought you are driving at but I wanted to make sure that I understood what you were saying correctly. Let me talk a little bit about alternative structures with all of you and ask what your thoughts are. For instance, Ms. Forsman, you suggested that you really would want the Federal Defender in charge of selection, voucher review, all the management of the panel. We heard from my chief judge yesterday who said they were very reluctant to have the Federal Defender involved in the selection of the panel, or the compensation of the panel, because they felt there would be conflicts of interest. And not conflicts in the sense of individual case conflicts but that the Federal Defender's . . . they felt that in the past there had been a time when Federal Defender's as an institution was very hostile to lawyers who cooperated their clients and that sort of thing. He felt that that would continue to be a pernicious influence if defenders were involved in the selection and compensation of panel members.

Can you tell me what your view on that is and how you think you would want to insulate those panel lawyers who might feel uncomfortable with the idea of the Federal Defender who has a different approach to litigation than they do?

Franny Forsman: I don't have any experience with that attitude, Mr. Cahn. I really can't comment on that. I can remember Oscar Goodman at one point saying he never represents snitches and I said . . . he wasn't the federal public defender. I don't know of a federal public defender who could even approach saying that he or she never represents snitches to begin with. I don't know. It's hard for me to respond because I've never seen it. I don't know why they would be uncomfortable. I don't see it. I have to tell you that. I think we've grown. I think the program has matured.

Reuben Cahn: Do any of the others of you have any comments on that view that having the Federal Defender involved in the selection and compensation of panel members is either a good idea or problematic idea?

Daniel Albrechts: I think speaking on behalf of myself and my panel members in the District in Nevada, I think they would prefer the Federal Defender. Anecdotally just another thing that jumped out of me on that issue is our district has now started, we've been doing eVouchering forever it seems and everybody adopted ours. One of the things we started with that is interim payments where the court has said that any bill that's over \$500 and a couple months'

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old, you should do interim payments.

One of the things that helps the court, they've indicated as it helps them with budgeting and knowing where you're at on a case. From my perspective, that helps my little business model because it keeps my cash flow going and keeps the doors open. I thought about it then anecdotally is now I've got a district judge because our bills are reviewed by the judge after a clerk does the initial review and they know exactly what I'm doing on a case. They know what my strategy is, they know what work I'm doing. They know . . . I don't get ultra-specific in my bills but it's specific enough so that I don't have any questions about getting paid and so now, I'm in the only cases I have, every other case it's not like this but in my appointed cases I know a judge who can sit there and read everything I've been doing to defend my client during the course of time up to the trial.

Is there anything . . . do I feel like I'm at disadvantage because of that? No. I don't think a judge is going to use that against me necessarily but it's just the perception . . . in no other case that I have does a judge know the intricacies of what I'm doing to defend a client except in CJA cases because I submit the bill. I know the District of Nevada would . . . I wouldn't have any of those concerns with the Federal Defender handling the panel thinking that maybe they don't like the way I'm defending the case. It just wouldn't be a concern for me and we would prefer it to be at the Federal Defender's.

Reuben Cahn: I know, Ms. Panagakos, that's already the situation in your district, the Federal Defender handles it and you're comfortable with that situation, right?

Lynn Panagakos: Yes. The Federal Public Defender is on the selection panel too. The selection committee that selects the panel attorneys consists of a magistrate judge, the Federal Public Defender, and the district representatives.

Reuben Cahn: Mr. Personius, do you have any thoughts on that?

Rod Personius: The thoughts that I have and the point that you raised, I understand the point that you've made. No matter where you put that function, how well it operates is going to depend upon the personality of the person who's in charge of that. Is that system far better? Far better? Than having the judiciary involved in it? I think there's just no question but that it is. I would have two . . . they're not concerns but two observations. One is you could have instances where there would be a conflict because oftentimes, the cases we get assignments on are because the Federal Defender can't handle that matter because of a conflict. They could, for example, have represented a cooperating witness against the person charged. You'd have to take that into consideration.

Then my other question: and I don't know the answer to this, which is why

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you are where you are and I am where I am. I'm lucky to be here. I don't understand the politics of it.

Reuben Cahn: We're not in that different of a place, I have to tell you! We're all trying to figure this out.

Rod Personius: Yeah, I don't get the politics. I know there's a lot of talk about Congress and how will Congress react if the CJA program doesn't have whatever protection the judiciary provides. Franny mentions that she doesn't think that that ever really worked that way anyway. I don't have an answer to that, but from that perspective, putting a lot of these functions through the Federal Defender Office if that would from a political perspective work, I think it'd be great. Certainly with who we have in place right now in the Western District of New York, it would be desirable.

Franny Forsman: May I comment, Mr. Cahn? The review of vouchers, I know that in my district when a district judge is looking at a voucher, knows the lawyer and says "There's something wrong here. This didn't happen. I don't think . . . ." The judges have turned to the Federal Defender to do the review of the voucher to determine . . . for a reasonableness review because the tension of calling a lawyer in to go . . . or trying to figure out what should or should not have been done on it, you can't look at the docket sheet. You can't say, "Well, there's a twenty page motion or there isn't a twenty page motion for this particular conduct." They've turned to us anyway I think to do the reasonableness review.

Reuben Cahn: Let me ask you a question about a different area which is resources. A couple of you mentioned cases where there'd been requests for second lawyers or requests to keep second lawyers on and this is an issue that I look around the country and I see that increasingly on any more complex case, Federal Defender's will have two lawyers on the case. The U.S. Attorney's will often have two, three, and four lawyers on a case, and the panel lawyers are out there all alone by themselves. Should we be looking at asking for some sort of change in the approach of appointment where it becomes less of a presumption that there will be a lone panel lawyer on these cases?

Daniel Albregts: Yes! I would hazard to guess to the judges on the Committee here that when you thinking your minds eye about the trials that have occurred before you, I would guess that in the vast majority of them, there are more than one lawyer whether it's civil cases, privately retained criminal and the only one where you're flying solo that I know of is the CJA panel.

It gets particularly difficult not even in complex cases but cases that may go two or three or four days in trial and you have a United States attorney with a couple of lawyer and some other support stuff, and then, judges want

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something briefed or an evidentiary issue comes up. You end up as a sole lawyer trying the case working til eight, nine, ten o'clock at night trying to find the research, trying to get a memo to the court the next morning and that number of lawyers has been one of the things as I've tried cases on the panel that has always stuck in my mind that it just seems patently unfair to have to do all the crosses, all the research, all the instructions up against two and sometimes three lawyers.

I know I speak on behalf of . . . in fact, we just had a CLE—we get them every month from our public defenders—and that was brought up by a couple of different attorneys. The feeling that you're out there flying solo and it's us against the world and many times our clients are looking at huge time. I would urge the Committee to consider those sort of changes in cases especially ones that are . . . I'm not saying every time but in the cases that are going to trial and the mega cases having a co-counsel is absolutely necessary, I think.

Rod Personius: If I can respond and I thank you for the softball question. There's no question that that's important. Most of my trials are in Buffalo not Rochester. Every single case that I have anymore that goes to trial, there are at least two prosecutors. They don't try cases anymore with one. When I was there, it would be me and an agent and that was it.

Now, every case, there's two assistants in the courtroom sharing the work. Every case, there's at least one paralegal sometimes two. Every case, there's at least one agent in the courtroom. At minimum, there are four representatives of the government in the courtroom in every single case that I try in federal court. From a different perspective than Dan has mentioned, what I have found over the years and it's probably because I'm getting older and slower, you need a second attorney in the courtroom. You need someone who can take down notes of what the witnesses are saying so that you can focus upon what your cross examination is going to be and you're not preoccupied with writing down everything the witness says, when you're up examining the witness, you need someone who has a second pair of eyes who's watching the jury as you cross examine the witness.

The value of having a second lawyer in the courtroom . . . what I've done and I will not try another case anywhere without a second lawyer and the most recent experience we had in federal court with an assigned case, I took an associate over with me. I asked the judge if he would allow me to do that and at least give us the paralegal rate for that lawyer which he agreed to do, which was like forty bucks an hour. If we had to pay for the whole thing ourselves, I would have done it because I can't try a case anymore without having a second lawyer next to me and be effective.

Judge Walton: The case that you described I found very troubling and that you indicated that

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you felt the discovery was given in a manner that made it difficult for it to be understandable and what I found I guess most troubling was the fact that you said you were never, because of that, able to get your arms around exactly what the case factually was about. Did you raise that concern with the court? If you didn't, why not? If you had, what do you think would have happened?

Daniel Albregts: What I was trying to convey in terms of what felt about the evidence, I ultimately was able to get my arms around it enough to know that there were some evidence that was very difficult to get around at trial. It was the idea that more so that I would . . . in talking to my client and working on defenses would be . . . he would say, "Well I think these documents, there must be documents there that relate to that or there must be emails that we talked about these issues." That was the thing that I felt I couldn't get my arms around was to be able to say, "Well, if there's email somewhere, can we find them? Can we . . ."

We would go to Mr. Aoki's office. They would be helpful with the searches, and so that really was the concern I had was, "is there a defense in here that I can't find because I just can't get my arms all of this?" It was asked earlier whether on the discovery dumps, we went to the judge and after I finished my answer, I thought a little more about it and we didn't because I don't . . . I think at least our judge in that case would hesitate to tell the district attorney how to provide their discovery or how to do their case. I just . . . I didn't feel that the judge was going to get into it that much to say to the prosecution, you have to do this, this and this with your discovery.

I didn't and in hindsight perhaps, I should have been more proactive but the flip side is that as we were preparing and as we were finding documents, it was becoming more and more clear to me that my client had real problems in the case and there was going to be really no defense to the case. The other unease that I had about it was the fact that I felt like I had to rely on the prosecution to be able to say, "Look, there's this against your client and there's this." They did that. We had meetings where we would sit down with their team but it always got back to me thinking, "are there emails, are there memos, are there documents in here that I'm missing that might provide a defense that I don't otherwise see." The prosecution certainly wasn't going to sit down and provide that stuff to me.

Franny Forsman: May I comment, Judge? When we had the MGM fire cases in Las Vegas, now Judge Pro but then . . . actually, I think it was before he was a magistrate judge, was appointed as a discovery master for that this complex discovery process. Now that was not in the days of e-discovery but I don't know that all judges can be expected or do understand what we're coping with when you get four million documents because many of them in practice didn't have to deal with that kind of thing.

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Trying to even explain what we need and why these waves of discovery or a problem, is . . . I guess what I'm suggesting is, we might look to that model in civil practice where you have somebody who is familiar with the issues of e-discovery and the problems you're facing that's actually running the discovery portion of that case and not just assign it to the magistrate judge who happens to have been selected by the rotation from the clerk's office.

Judge Walton: I think from the things that we've heard and in my own experience dealing with mega cases, this is a real problem and it's a going to be a growing problem with technology. In that regard, I asked the question yesterday, what if anything could we as a Committee recommend either by rule changes or legislation or just court rules that may in some way impact on how discovery is provided by the government that would be of assistance in you understanding what their case is about and obviously to the extent that that would occur I assume, it would have some impact on the expenditure of funds. I don't know if you have any ideas about how the discovery could be ordered by the court that would be of assistance to you?

Rod Personius: Judge Walton, may I respond? I could be way off base with this but the reason I'm familiar with this is one of our magistrate judges who happens to sit on the panel selection committee used to be a Federal Defender which isn't a bad thing; sat on a committee out of Washington that came up with some document that's, I'm somewhat familiar with it. It's a model for e-discovery in federal cases and we use that in our district, so there's an existing document that's pretty good. It's always been the case, good days, bad days, good times, bad times in our district and I know it from when I was a prosecutor, as a rule our judges hold prosecutors to a pretty high standard.

You're expected to be, better, more prepared than whoever else is in the courtroom with you, or at least as prepared. And so we have not had significant problems with discovery for two reasons: One, because of that attitude of the judges, which is a good one; Also, because of this model document that maybe ten years ago or something, it was put together. I can't identify for you what it is, Judge but there is a document out there was put together with the participation of the federal judiciary that addresses that.

Judge Walton: Thank you. Ms. Panagakos, you indicated that in Hawaii, there's limited request or at least from your perspective, you're very conservative about requesting third-party service provider assistance. Can you identify any particular cases where you thought as a result of that perspective, you didn't get what conceivably would have been helpful to your case and as a result of that, there was a wrongful conviction conceivably?

Lynn Panagakos: The first case to which I made reference because of the denial of my application for subpoenas. It comes under a different provision than service providers because there is Rule 17, but it's only indigent defendants that need

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to go to the court and get orders authorizing the issuance of subpoenas because of the related need for the fees and costs associated with it.

The rule requires that you show necessity for the witness. The witnesses I asked . . . that I had applied for, well I believe were necessary, but they clearly were relevant and admissible and it gutted the entire defense.

Judge Walton: I think it would be helpful if we had those types of examples because I don't know what's going to be the most effective way in convincing the powers that be that change needs to occur and I would hope that if we were able to show that people are being wrongfully convicted because of the inadequacies of the system, that conceivably that will cause them to know that things have to change but I don't know what the best way is to do that but I think one of the good ways would be to be able to identify specific circumstances where people have had their liberties denied because lawyers were not able to provide the services they should have.

Lynn Panagakos: Well I'll be happy to provide follow-up information on that particular example. Now, I mean there was a lot of . . . I can't say that the person was not guilty. It was a criminal tax case. The issue was good faith. There clearly were violations of the tax code. The issue was whether there was criminal intent and I believe I had witnesses germane to that.

Judge Walton: I guess the only other thing, Mr. Personius, I understand your frustrations in reference to the fact that unfortunately we have at least a two-tier criminal justice system, one for the rich and one for the poor and I think that's unfortunate. I don't know how ultimately we address that because unfortunately money many times does make a difference in our society including in our criminal justice system.

I would hope that we're going to be able to recommend some things that will bring about systemic change but assuming we can't and we have to continue to operate within the system that we have, what would you suggest that we try and recommend be done in order to sensitize those who are making decisions to appreciate that difference and to try and take that into account when we handle these cases coming before us.

Rod Personius: Are you addressing that to me, your Honor?

Judge Walton: Yes.

Rod Personius: I thought you were looking at me and I apologize. It's difficult because I take very seriously what the commission said in its report and what the Supreme Court has said that there shouldn't be a difference. That's very meaningful to me. When I handle an assigned case, if I believe that going to the judge for permission to get an investigator will compromise my case. I don't have that

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confidence that I can do that. We'll pay out of our own pocket to hire the investigator to go out and conduct the investigation. We'll pay out of our pocket to serve subpoenas because it's more important to us that we do the right thing than anything else.

We do everything in our power to make sure that we do treat our assigned cases on the very same level as we do our retained cases. I was taught years ago that there's only one way to defend a criminal case and that's the right way. In answer to your question if what you're saying, Judge, is we're going to have to continue with the judiciary being involved in approving say third-party providers, to me, that's the biggest problem because it deals so directly with what your strategy in the case is. So, if it has to get down to horse trading and there's one area where you could remove the judicial involvement, it would be at that level.

It just doesn't make any sense to me at all that a magistrate judge or district judge that's going to make decisions on the merits should be privy to what your strategy is in a case. It doesn't happen with the government. Why should it happen with us? I just don't think that's right. I don't have an answer to that because I don't think there's anything you could do that would change that problem. That's a problem that's built into the system and all I could suggest is to consider if you have to compromise, that's the part of the system that bothers me the most.

Judge Walton: Thank you.

Judge Cardone: I have a two-part question of all of you. The first question is I know you're CJA Reps and former federal public defender. My first question is how long have you, let's start with you, Mr. Albregts, how long have you been the CJA District Rep?

Daniel Albregts: This time, I think this is my third year. In my first term, I believe I served seven or eight years.

Judge Cardone: All right. Ms. Forsman, how long were you with the FPD?

Franny Forsman: I was the federal public defender for twenty-two years.

Judge Cardone: Ms. Panagakos, how long have you been the CJA District Rep?

Lynn Panagakos: Just in my second year.

Judge Cardone: Mr. Personius?

Rod Personius: Your Honor, four years.

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Judge Cardone: The reason I asked is, as you all know, the CJA review was done twenty-two years ago, right? We're now playing catch-up twenty-two years later looking at the system that's been functioning for twenty-two years without any kind of review. When I listened to your testimony this morning, all of you are on the ground. You're doing the work and if anyone can network, it's you guys. You're federal public defenders, you're CJA panel reps. If there's a problem in this country, it would seem to me that you guys would be far more aware of it than anyone else; than the other CJA panel attorneys who don't have the connection you have or the other FPD line people who don't have the interaction.

Yet, it seems and it was kind of . . . I think Ms. Panagakos who brought it to my attention when you said you went from Hawaii to Nevada and you were like, "Oh my God. It's a different world here," right?

Lynn Panagakos: Yes.

Judge Cardone: Welcome to our Committee because everywhere we go in this country, it is a different world. My question, because for all of us on the Committee, we're looking for what's the answer here. But, one of the concerns, at least for me, is this shouldn't be happening . . . there shouldn't be such a surprise to people about what's happening. Can any of you explain or give me some sense of why this disconnect and what we can do for the future so this disconnect doesn't continue. Because it seems to me that there should be much better communication and it's not happening. Any thoughts?

Franny Forsman: I can respond to that. I also served as Chair of the Defender Services Advisory Group for a while and various committees with the defender service committee and office. I couldn't even count the number of times that when dealing with a gnarly issue with judges that they would say, "Well each judge gets to set the tone in their district. You can't go in and tell the judges what to do in their district." You know this, because that's part of the federal judge system.

We know the differences. Although there were some stories that I heard on the videotape that I think some things have gotten worse since the Prado Committee in terms of . . . when I listen to the Fifth Circuit defenders saying that they were approved for additional positions and couldn't get them because circuit judges based on what evaluation, I have no idea. I worked on the work measurement formulas as a contracted attorney and I know what kind of care and work when into determining what the work measurement should be.

When I heard those stories, it's gotten worse. But I do think it's because the structure, the way it is, is nobody from the AO or anywhere else is going to

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go into a district where the indigent defense system is controlled by judges and tell the judges to do something different. Except for you guys maybe, I don't know . . . that's where the disconnect is, and the differences.

Daniel Albregts: We struggled as panel reps forever on that and I, my first stint started I think back in 2000 and I was struck by exactly what you just said which was how different it was from district to district to district. I don't have an answer for how you do that. When we started, there were districts that didn't even have community defenders. They would just go back in 1999, 2000s, the private attorneys around town.

Judge Cardone: That's still happening.

Daniel Albregts: All I can say is in the years that I've been going to the panel rep conferences, it seems to have gotten better through the communication through the various districts what works in this district, what doesn't, what are the problems in other districts.

It's sort of like Franny said, I don't know with different judges and different areas of the country. National uniformity, every time I come to the conferences, I always leave thinking, "I just don't know how we'd ever get some national uniformity." Obviously there's, to some extent, there is. The divergence in the districts from, like I was talking about earlier, just the service providers what it costs in different districts. How do you have a cap for a district where the service providers say a psychiatrist might only charge \$2000 for an evaluation but you go to New York City and it's \$15,000. I wish I had an answer but . . . and we thought about it, struggled about it, I can't come up with one.

Lynn Panagakos: Last year was my first annual conference. I left feeling, "Well, gee, I feel very fortunate for the fairness of our voucher review process." Seeing the lack of uniformity there. Then the service providers is, I mean if you take it issue by issue the service providers is an issue where I know for example when, I think it came from the Ninth Circuit, there was a cost containment memo that went out and was an effective way of addressing that issue and getting the word out. Perhaps something like that for service providers to let people know that this is something that should be asked for and I know you're looking at presumptive rates.

They are, in my understanding too low across the board and there has to be some district by district mechanism for that. But a memo that goes out from the circuit or wherever that says this is something that can be used would help, I think. And in terms of the issue of service providers which is where I felt the, "Oh my God. What a different world in Las Vegas." It sounds like that that's something that's willing . . . that's already in place to be provided so just making people aware of that.

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Rod Personius: Your Honor, I think with . . . we all know that whenever you have a conflict or a problem if you can't communicate you're never going to solve the problem. And I think as long as the, and forgive me for saying this but I think you've probably heard it before, as long as the judiciary has the ability to have the power that it does under the current system, depending upon the degree of black robe disease that you have in your district, you're going to have this problem. We've had it, years ago we had it in Buffalo. We had one judge where nobody ever went into chambers. Nobody was allowed to go into this judge's chambers. What kind of a system is this?

As I said, riding in the elevator where nobody could ride up in the elevator because it was a judge. Are you kidding me? If you've got that kind of an attitude and the judges have the power that they do, as they do under the current system, you're never going to solve that problem. The answer I think is easy, the solution is perhaps impossible. The answer is, I think as Franny suggested, that the judges have had the ability if they choose to exercise it, to totally control how the system works. They shouldn't have that if, as I say politically it's expedient to change that. And I don't know that it is but as long as the system is as it is now, it all depends upon the judges and in particular the chief judge in a particular district because that sets the tone for the whole district.

Judge Cardone: All right thank you.

Judge Goldberg: I'll ask a quick follow-up. Sort of a hybrid of what Judge Cardone was asking. If we're led to the conclusion that the judiciary should be out of management of this entire system, if we reach that conclusion then we have to say, "Well, what's the alternative?" Both issues are mindboggling. Can you suggest concrete examples about alternatives if we recommend the Judiciary is completely out for all the reasons that you've articulated? Give us some ideas.

Franny Forsman: I think that . . . let me start with the more moderate proposal which would be that the judiciary is out of all of the panel stuff, all of the voucher review, all of the selection all of that and that task is given to the Federal Defender and you leave the appointment of the Federal Defender in the circuits. I mean the way that, I never would have been reappointed after my first term had the circuit not been the appointing authority. And I think the design of that is actually pretty good because it gets you out of the local, and the Federal Defender can be appointed . . . of course, we still got CDOs and I think, I don't know how that's working. I mean there used to be an attitude from the Federal Defender's that CDOs were the only way to be independent and then . . . until a judge had control of the selection of the people on the board of the CDO and could then get rid of the defender [CROSSTALK] . . .

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Judge Goldberg: Let me ask you a question about that particular suggestion. If the problem with the judiciary is every district is different and every district has a different culture, isn't the same true about Federal Defenders offices throughout the country and aren't we going to have to same . . . aren't we going to just shift the same problem to a different entity?

Franny Forsman: I think that used to be much more the case. I think that when I first came on in 1989, I think that was very true of the defenders. I can't tell you about it right now because there are a lot of defenders now that I haven't met. I think that with the increased number of the communication between the defenders, the communication of the standards for the defender offices, I suspect and I think Mr. Cahn and Ms. Roe will be able to know better about that. They're not . . . they're only different when for instance in Texas, you can't get additional lawyers because the circuit is denying you. The lawyers that you're entitled to have under the work formula.

I think you always have with defenders the ability . . . if they're tasked with overseeing the panel for instance, you have the ability when the defenders up for reappointment if they're evaluated on their unwillingness or inability to do proper management of the panel that could be one of the things that you evaluate the defender on. That the other idea that I have talked with several defenders who've been involved in this process with your Committee is, that's been floated is this FJC model idea. I understand from my days of travelling back and forth to Washington, D.C., FJC has a sort of . . . it has a different position in the federal judiciary than being under the auspices of the AO and so it has its own leadership. That's a model.

You've got the Legal Services Corporation model. I do a lot of work with legal services now; doing some training with legal services. They, although it took a long time, I think they have come up with ways to make sure their program is operating adequately even with that switch that went to the LLC model where you have basically an independent agency. I would leave it to the defenders who are involved in the politics of all this to be able to say whether or not they have confidence if they can protect the resources if you're completely independent. I still have that hesitation.

Judge Goldberg: I would say additional resources would be needed if we shifted it all to them. Anyone else on the panel have ideas for us?

Rod Personius: I think there is a role for the judiciary. I think in our district for example it is very helpful and advantageous to have the two magistrate judges on the panel selection committee because you get the insights of the court regard CJA issues, attorney performance, applicants. The point I was trying to make earlier was that I don't think that the judiciary should have no role. I don't think that as the current system is set up that the judiciary should have the ability to pretty much totally control how the program operates, so I like the

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idea of some judicial involvement. You also asked the question if it were under the Federal Defender, couldn't you have the same issues. The reason I think it's different, at least in my experiences there are some judges you just can't talk to because they're judges and I haven't ever had that experience with federal defenders, at least you can have a conversation and they'll listen to you and that to me is the difference.

Judge Goldberg: All the judges on the Committee are going to ride the elevator with you after we're done, okay? [CROSSTALK]

Rod Personius: I'll take the stairs!

Judge Goldberg: Any other suggestions on if we conclude, underscore, if we conclude the judiciary is completely out of management in this whole process, what does the model look like? What's the alternative? From this side of the room.

Daniel Albregts: I don't know that I have a suggestion, but I have an example. In Clark County which is the county which Las Vegas is in for their indigent, they have a different setup for the conflict but just focusing simply on the death penalty, murder, and life sentences they have an hourly rate contract panel. It's an informal panel and that's administered by a former public defender and defense attorney who works under the auspices of the county and the county commission.

That individual does all of the appointments. He has the freedom to choose so that if he thinks a certain case should have a certain lawyer with certain experience or certain dynamics he has the independence to make those choices and he really only answers fiscally to the county commission. He doesn't answer to the judge. So that when I am appointed a case, a murder case, that's in front of a certain judge in the state court, I go to this individual to get investigators to get experts, and he oversees everything.

I kept thinking about how would that work, could have worked in the federal system in anticipation of this testimony unfortunately I don't know that, there's a mechanism within federal court for that to work. It seems to work well at Clark County but like Franny and others have alluded to in some respects it works because of the individual that's in it. They just started that program about ten years ago and he's been the only individual that's been in it. When he retires or leaves and the next person comes along, I'm not certain how good it will work. I think that's the flaw with that system is it really needs a person in there who understands the defense function, has done murder cases and those types of cases and understands when request are being made what to do. I just . . . Franny and I were talking I just can't figure out a way to translate that into the federal system but that's . . .

Franny Forsman: That position that Dan is talking about grew out of the indigent defense

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commission that was form . . . that I've served on for about twelve years. It was created by the Nevada Supreme Court. What they did was to look to the ABA Ten Principles which I referred to in my comments, that came out in 2002, which their very first principle and the Sixth Amendment Center will emphasize this, is the very first principle is independence from the judiciary for the appointment and selection and retention of appointed counsel. That's how that position was created. It's got other issues because, of course, they're, he's working for the county commission and they're the ones with the money.

The minute you put him in there the resources available, I think Dan will confirm the resources available to appointed counsel went up.

Daniel Albrechts: Absolutely.

Judge Goldberg: We've heard, just by way of information, a suggestion I think it was from a judge, that there should be creation of Defender General position. I don't know if you folks have heard about that, but thank you. Judge Fischer, that's all.

Franny Forsman: I don't like the General part of that but I . . .

Judge Fischer: Dr. Rucker.

Dr. Rucker: Thank you, Judge Fischer. Let me pick up on a point that was raised in the written materials by Mr. Albrechts and Ms. Forsman, but we've also heard repeatedly in all of our public hearings across the country and we heard yesterday as well. That was the issue of having qualified counsel for the right cases. And what we've heard is, there's not always as many qualified counsel on the panel as there should be and that we heard yesterday is that some of the very best counsel are not on the panel. We've been asked repeatedly as well to consider the hourly rate that's being paid. Now we have Las Vegas represented here, Hawaii and New York so that's somewhat of a sample across the country. Is \$129 an hour sufficient? What should it be?

Franny Forsman: Now that I'm in . . . I have been in private practice for a few years, it's not even close. I think the practicality of getting it to what the normal hourly rate would be, which would be something like \$300, \$350 an hour for an experienced criminal attorney in our district. The other impediments to the really good experienced federal practitioners taking cases are things like the eVoucher program I have to tell you, because you're supposed to take the next case up. There's some feeling that if you don't take a lot of cases and you turn down cases even if you're really, really good, that you can't continue to serve on the panel. Therefore, you're going to shove out some people who are, the fellow who comes to mind is Richard Wright who's an excellent attorney in Las Vegas. But he doesn't take every case that comes

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his way and if you say to him “you are going to have to pick up the supervise releases” you may lose him.

So, the rates poor . . . we are lucky in the District of Nevada with regard to resources. In districts in which it is harder and some of the circumstances of not being able to get Rule 17 subpoenas, that’s going to cause at some point, even with the most dedicated panel attorney’s, as you’ve heard before you today, they’re not going to want to do that work anymore if they can’t do it right.

Daniel Albregts: I can make the panel hourly rate work because I’ve kept my overhead extremely low. I’m a small practice. When I talk to my colleagues there is, I don’t think there’s anybody that does it for the money, that it’s a cash cow. I don’t know how you do it in big cities. I don’t know how panel attorneys do it in New York at that hourly rate, in Washington D.C. and L.A. and San Francisco. Franny is right, the rate is part of it, in terms of we have other attorneys that don’t necessarily want to do it because they say we just can’t handle the overhead. I know of two specific attorneys, Mr. Mitchell is one and we have another panel attorney that are in large firms and I don’t know how they convinced their partners to take them, to allow them to take those cases, but they do.

What I charge hourly in Las Vegas and you may all be shocked looking at me wondering how that happens, but I get \$400 an hour on retain cases. When you look at the ancillary things like in mega cases where I spend hours a month just administering the case that I can’t bill for, you do a cost benefit analysis. I think that I do it because I started out as a PD in law school in a program, clinical program and was a PD until I hung out my shingle. I’ve been a criminal defense attorney since that time. There are a few of us that do it for the reason that we just like the work and want to work on that side. But the hourly rate, it astonishes me that it has been approved for whatever it has the \$149 and we get a \$1 a year. Every time I bring that up at our panel meetings it’s, everybody gets a good chuckle out of the fact that every year we’re getting our dollar.

It should be at least \$150 an hour in my estimation. Again, that may be a lot for the small districts. When you get into the districts with high overhead and everything else that that probably wouldn’t cover it but I do know that it’s kept certain attorneys and certainly attorneys in bigger firms from being on the panel because the committees, and for those law firms just won’t accept the rate.

Rod Personius: Dr. Rucker, my response would be—and I think Mr. Cahn used this expression maybe again at the Miami hearing—in the Western District of New York, we have a strong defense culture. When lawyers are in trial like this case I talked about that went on for about six weeks with a reasonably

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good result, everybody in town who does criminal defense work knew about that case and was following it and was trying to be helpful in any way that we could. We have an emeritus panel in the Western District and we have about a dozen attorneys. That's the panel that I serve on; I'm not on the regular rotation, and we take the more challenging cases when they come along.

I'm only speaking for myself following Mr. Frensley's advice that I speak the truth. It's more important to me that we get rid of this judicial intervention with the merits of the case, with whether you get third party providers. That's more important to me than the rate. I asked my office manager, we're only three lawyers, I asked my office manager: "What's our overhead per hour attorney work?" Afterwards, I almost regretted that I asked because it was so depressing when I got the answer.

It was almost \$100 an hour. So at a \$129, that's probably as much my fault as anybody else's because I'm there so much I like to have a nice office. In any event, at \$129 that's, that doesn't cut it and it's interesting that what she said, she said if that question comes up you make sure you tell them that I said it should be at least a \$150. That was the number that she used too. But from my personal perspective it's more important to me that you get the judges out of the middle of these cases than the rate. I'll do it for a \$129 if it comes down to that. Thank you.

Lynn Panagakos: Your Honors, for the District of Hawaii, \$129 is also too low. I just didn't mention it in my written comments because I know it's a steady drumbeat that you're, what's one more voice to that. One of the best attorneys on the panel in our district has just taken a job with . . . he's been a . . . he started out as a state PD, he's a great defense attorney and has recently taken a job with a civil law firm because he just can't do it. It saddens me because we were sort of talking a lot about moving in together and just sharing space and resources and, that's one person that our panel lost because of the rate being too low. There are other, some of the best attorneys in our district aren't on the panel, and I think that's probably why.

Judge Goldberg: Thank you.

Chip Frensley: While we're on the topic of rate, I would just like for you to each sort of speak to the issue. We've talked about the rate causing folks to leave the panel, what about recruitment and how is that affecting the ability to recruit qualified attorneys especially given the escalating costs of legal education and cost of everything else that just keep going up. Are you seeing an impact in terms of the ability to recruit lawyers based on the rate?

Daniel Albregts: In the District of Nevada, the key is quality. Quality attorneys. We have people that applied to the panel that are pretty good clip the last time, this was the first time I'm on the panel selection committee, I complained about

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that. I said if I do the district rep work for free, you should at least let me be on the selection committee so I have some input and they agreed. We had a fair amount of applicants, but the vast majority of those—when our questionnaire among other things we asked how many cases do you think you'd want to take a month—we had people saying twenty, I'll take twenty, thirty cases, and so we have a fair amount of those. But in terms of the people like Lynn is referring to, the people that we, in our minds eye we know if I was in trouble I would hire this person or my . . .

When you combine the hourly rate with what they perceive is the administrative hassles for lack of a better word, and then the court oversight. I mean a lot of these are pretty independent fierce people that don't want to have to say to a judge, "Can I get an investigator? Can I get an expert?" I think the combination of those two has kept the people that we would like to apply from applying and, the people that don't belong we weed out pretty quick. So while we have plenty of people that are applying to be on the panel, the quality of them, the quality of lawyers, I just see, I can think of a handful of people around that I'd like to go to and say, "You need to be on this panel." They would say, "It's just not the worth the hassle Dan. I'm not going to do it." I do see the effect of that side of it.

Franny Forsman: The fact of the matter is, is that there are very few entre's into federal criminal practice because of the number of cases that are appointed. That percentage is very, very high. For young lawyers, I used to think you couldn't get on the panel unless you had three or four years of federal criminal practice; and that isn't three or four years in the U.S. Attorney's Office. I don't believe that . . . the U.S. Attorney's Office gives you experience substantively but the work, as one former AUSA in our district goes, "I had no idea how different this work is." So I'm talking about three or four years of federal criminal defense practice and there's not a lot of places to get that unless you are in a public defender office and you leave it.

I continue to believe that we need to recruit young lawyers but we need to have a structure that will, and we have a start of one in the District of Nevada that we've be doing a number of years. You may have heard about it before, the mentorship program that we have. It's a year-long, it's lots of intensive, we used to do these Saturdays where we would have most of the Saturdays spent on different subjects with different presenters along with a mock trial at the end of it. They have to work side-by-side with a panel member or an AFPD learning it because I think that's where we're going to recruit the quality. I think that just simply because somebody has been practicing in federal court for fifteen years, there are still quality issues there. So the recruitment aspect of it, we have to look at how do we grow the lawyers, like young lawyers are grown in FPD offices?

Chip Frensley: Either Hawaii or New York any impact on recruiting based upon the hourly

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rate?

Lynn Panagakos: Just that those lawyers that we would like on the panel don't apply.

Chip Frenshley: I want to shift to another issue and that is there's a theme I think or one theme among people who would encourage this Committee to think small and it's the theme is because every district is different, because everywhere is so different there shouldn't be a national solution, there shouldn't an answer that touches everyone. Does anybody on the panel have any thoughts about that or any position either that would support that theme or would argue against that? I guess I'm thinking specifically in terms of the things that you all have talked about as being important with respect to judicial involvement and those types of things.

Daniel Albrechts: I think judicial involvement is one that would resonate throughout all the districts. I mean I don't . . . I don't think the differences in the nuances of the districts would say that in one district no judicial involvement would be good and the other district we need judicial involvement. I think the independence issue, I could be wrong but I think the independence issue is across every district. The rate is too.

Franny Forsman: I would just look at the folks that are recommending that you think small and try to come up with an evaluation of, certainly that stands in the way of progress but it also . . . I wonder about the quality of representation in those districts where you're just saying, "just leave me alone." I think study and reform are good for systems. I think when you've got the ABA as their number one of Ten Principles saying, and that's not except for in this district or not in that district, they're saying, judicial independence is the key to all of it. Defenders are the same way. Defenders said for a long time, leave me alone. I'm doing fine. I'm different. So I think I would . . . something's got to happen. I think there's some shameful aspect of what's happening here right now.

Rod Personius: Chip, my only comment which is beating the same drum is I don't have a problem with judicial involvement. I think the problem is if under the current structure, if the judge, chief judge in that district decides to assume all that power that the judge can have, that judge can run the show. That's not good. I think across the board, there should be a system setup, whether it is or is not with judicial involvement—again, I think you want to have the input of the judges—but it should be a system where the chief judge for the district does not have ultimate say on any decision, just input but not the ultimate say.

Chip Frenshley: With respect to some of the suggestions or recommendations about transferring the authority vis-à-vis experts or voucher review to someone other than the judge, again, a theme of those who would encourage not doing

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that is, the idea that that's just creating a new bureaucracy and that's somehow a bad thing. Does anybody have any thoughts about that particular theme or positions pro or con with respect to that?

Franny Forsman: Have you gotten feedback on Oregon? Because they have managed that panel for as long as, before I was a federal defender and so I would only ask if you look at that. Is that the result that occurred in Oregon? And, if it's not, then you know that that's a red herring.

Daniel Albregts: I mean it's either this bureaucracy or this bureau. Is it going to be the judiciary who is the "bureaucracy" (in quotes) that's going to be looking at these things or is it going to be some independent body outside of the judiciary? Again, I echo, I'm not saying the judges shouldn't have input in this and certainly as it relates to selection and retention I think judges are very important because they see who's practicing in front of them. So I just, it's either going to be one or the other and like Franny has emphasized the ABA and everybody else thinks that there should be that independence and that's what we think as panel members as well.

Prof. Gould: Thank you, Judge Fischer. Now I'm going to butcher your name so I apologize for that. Ms. Panagakos, am I close?

Lynn Panagakos: That's great. Yes.

Prof. Gould: I don't think my coffee quite kicked in when you were testifying, so I heard you say that you have not in the past use service providers as much as you think you might. What I didn't hear was what the reason was for that?

Lynn Panagakos: In my first large case where I ask for paralegal services and Rule 17 subpoenas. I was granted some hours for the paralegal. When I went in for additional requests, one was granted reluctantly. Then the visiting district judge took over the management of the case and the rate was cut in half and the subpoenas were denied. I felt some tension with the magistrate and my relationship after that. I also learned that other attorney's weren't asking for those sorts of resources. So as a cultural thing, I thought, "well, I better not." In subsequent cases when the need was quite apparent, when it became an expert as opposed to a paralegal or an investigator because those are services, well I can just do it myself, but when it came to experts I would ask and be granted.

Thereafter, I went and had some cases in the District of Nevada where I saw that the attorneys were encouraged to apply for resources and were supported in those applications that I then back in Hawaii did on another complex case ask for a paralegal and get it. I'm very . . . it's the nature of what we have to do, we're the only ones that have to go in and apply to get these resources

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and then we have to estimate hours. So it's structurally it's different than the government. I mean it is a bureaucracy, and there has to be some bureaucracy, and it's about money and we have to do that procedure but it has made me very reluctant now. But hearing from this Committee that there is under-utilization of service providers and getting the statistics on my district I feel much more confident that I can go back and make requests.

Prof. Gould: Okay. It sounds like it was kind of a cultural, legal cultural issue. The Committee has also heard, actually over the last couple of days, some other explanations including the attorneys—these are panel attorneys—like to do the investigations themselves; or the record that the government provides is so voluminous don't need to go do anymore investigation besides my client is going to plea. Now two of you have been in the public defender office before, how does that compare with your experience and your practice in your office in terms of whether you would use investigators even on a case that's going to plea?

Franny Forsman: Let me give you an example is that I were to design an evaluation system for panel attorneys I would look to see how often they requested the resources and then take into account if they've been denied that kind of thing. I have to tell you in my office, certainly there are some cases that are just the paper will do it, it's there, you're offered something decent—that's less often—but, and you won't use an investigator. The vast majority of the cases if you are not using the services of an investigator, in my opinion, you're malpracticing.

Daniel Albregts: If you're asking the difference from when I was a deputy public defender and then when I went on private practice, it's night and day. It doesn't . . . in the Federal Defender's Office it was like a kid in the candy store. I had an investigator, I had the paralegal, I had the resources. Like Franny says, there might be the occasional bank robbery case where my clients caught with the ink all over this hands from the dye pack that they put in, and he's on camera and it's a clear picture. I make an assessment on my CJA panel cases. I almost always get investigators or support staff but I make more of an assessment about it and have to justify it in my mind because I know I have to justify it for the court whereas when I was in the Federal Defender's Office, you almost had to justify why you're not using the investigator in a specific case. To me, it was just polar opposites.

Prof. Gould: I guess this raises a question I'm wondering whether you're all willing to go to this conclusion: you've heard the idea put forth today that there are two kinds of justice systems, one for those with resources, one for those who don't; one of you has made the argument that there's a tremendous disparity in resources between the government and the defense, do we have two defense systems in terms of level of quality? One between the public defenders and the other between the panel attorneys?

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Rod Personius: I think you do. Your question and in particular Dan's response to that underscores the fact that there are really three-tiers: there's your privately retained clients, there's your clients that have the good fortune to get the Federal Defender, then, there's the rest of them that get the assigned lawyers. Because if you get the Federal Defender, you get all those services, you're encouraged to use them and you don't have to think twice about whether or not you're going to go to a judge and have to disclose your case or somehow upset the judge by going in and making the request. I think that's absolutely true.

Daniel Albregts: It manifests itself in even a basic case where if I am appointed, I'm in there in the courtroom. I may have a paralegal that's appointed. When I watch the public defender's office try a case, there's always two lawyers, there's almost always a paralegal in the courtroom, as well as an investigator, and if they need other staff they're there as well. It's unfortunate, I do everything I can on my appointed cases to try to keep it from happening but it's almost inevitable that there's a disparity.

Prof. Gould: You mentioned the number of people that the defender has in . . . Personius, right? Did I get that . . .

Rod Personius: Very good. Thank you.

Prof. Gould: Good. I'm batting two for two today. You had also mentioned earlier when you look across at the government's table that they have two, three people, when it is just you as one . . . I am wondering since all of you really are, have been at this a while, have you seen the nature of cases change over time? Such that you're actually dealing with more complex cases now either on the issues or the discovery, such that a system that expects you to have only one person at your table isn't taking account of what the realities are of your practices now?

Rod Personius: Yeah. I do. I think that's absolutely true. If nothing else the proliferation of emails, text and that, those types of communications has complicated cases. I think the types of cases that I recall prosecuting back in the 80s when I was an assistant U.S. attorney as compared to the cases that are being prosecuted now there's some change. We used to actually get bank robbery cases, we get smuggling across the border. I don't know what's happening to those cases, they don't exist anymore. Those were two or three day trial cases. Any case now, I mentioned this in my submission, any case that goes to trial in federal court now, seems to go, at least a week and if not longer and it's not uncommon to have a case go a month or two months.

Prof. Gould: The rest of you agree with this concept?

Franny Forsman: It's not . . . the white collar cases and emails and all the paper trail that are, is

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new because of the change in technology is one thing but also even the drug cases, they're not, and they can get a lot of time on those guys with one or two counts; but you end up with indictments that are multicount, multi-defender. We had a case that went to trial in Reno and the trial lasted a year and a half and that was a bit ago but I think that most of the practitioners would say "yes." Even a drug conspiracy is now years of conspiracy. Many defendants.

Daniel Albrechts: There just seems to be so much more information. When I started, it always seemed that I would have a trial notebook. The whole world of that case would be in a trial notebook in a couple of places. With the proliferation of the information that's what seems to be, especially in the mega cases, it's just so overwhelming. Like I said in other cases, I'd be able to go through and look at evidence differently than a prosecutor and maybe come up with some defenses or some weaknesses. When you feel like you can't get your arms around everything, you wonder whether you're missing those nuggets. The little things that might portray your client in a different light even if it's for sentencing. That's the difference.

Prof. Gould: One last question. Mr. Personius mentioned black robe disease which I've never heard before, so I thank you for that term. I can tell you, none of the judges in this Committee suffer from it. [CROSSTALK]. I want to ask you, but actually a flipside to that. You are all either panel representatives or a veteran well respected members of your panels and so when you come here you have the protection if you will of your reputations to say what you want and you've been very candid in what you said about the system.

Thinking about the more junior members of your panel who don't have as many years of experience, may not have the protection of being the panel representative, do you think they would be as willing to say the same things you have and if they wouldn't, what if anything is this Committee missing that they would have said to the Committee? You're smiling Mr. Personius, so what's the answer?

Rod Personius: That's a very, very good point. I tried before I put together my written submission to get exactly that, and as I indicated I got almost a 50% response. There were, if you will, outlier complaints that I got back, there were complaints about the delays in vouchers being approved.

In my experience, the way it is now compared to what it was ten years ago or fifteen years ago, it's vastly better than it used to be. I didn't bring that up because I don't really see that as a problem but that was mentioned as a concern. Something else that was mentioned was there should be a better system in place for getting interim payments. In other words, there's a system in place now but it's a little bit complex and I don't use it. As I understand it, you have to not only go to the district judge, but I think interim payments

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have to be approved by the chief judge of the circuit. It's a bit of a complicated process. But that was mentioned if there were some system in place where on some periodic basis even if it was annually that you could submit vouchers. But all of this to me creates administrative steps and if I've got to do that, I'd just as soon do it once as opposed to doing it on multiple occasions.

Prof. Gould: The rest of you, the more junior members of your panel?

Daniel Albregts: Again, we're beating this horse, but the newer ones get back to—and in Clark County maybe it's a little different than around the country—but it's this idea, "I have to ask the judge that I'm trying the case in front of for this?", and "I have to ask for this expert and that expert. I don't want them to know that I think that this might be an issue in this case because what if the expert, I asked for it and then I don't use the expert, what does the judge think the expert found and is that going to affect the judge?" I think the newer ones would say the same thing. We don't have to do this in any other case, why do we have to do it here?

Prof. Gould: Okay. Thank you very much. Judge Fischer, I'm done.

Judge Fischer: Thank you all very much for being with us and giving us your comments. If you think of anything else after the hearings that you would have liked to have said or others having seen your testimony, wish you had said, please remember that you can continue to submit comments to our website and in addition comments can be submitted confidentially if you think that's the only way to get us the information. So please keep that in mind and again, thank you all for being with us and we'll take a fifteen break.

Franny Forsman: Thank you for inviting us.

Daniel Albregts: Thank you.