Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing #5–San Francisco, California
March 2-3, 2016

Transcript: Panel 5—Views from Judges

Judge Fischer: All right. If it's 10:30 a.m., we must be in San Francisco for the hearings of the ad hoc Committee to review the Criminal Justice Act. Welcome to all of you including our spectators, some of whom are future panel members and thank you for being with us. As you know, I'm Dale Fischer from the Central District of California. Here with this Committee I'll be chairing today, and we have been starting off with a few minutes of initial statements from our panel members. We have read the submissions that you've provided, thank you very much.

You're not compelled to do anything really, but certainly not to make an opening statement unless you'd like to. So if each of you would like to give about a five minute opening statement, please feel free to do that. If not, we'll move on to questioning. Judge Seabright, would you like to . . .

Chief Judge Seabright: I'm happy to rely on the written testimony and have the interaction between the panel and the judges from my perspective.

Judge Fischer: Thank you, and Judge Seabright from the District of Hawaii, the Chief District Judge, is our panel member, as well as Judge Yvonne Gonzalez Rogers from here in the Northern District. Judge David Carter from my district, the Central District of California, and Judge Richard Boulware from the District of Nevada. Judge Gonzalez Rogers, would you like to make a statement?

Judge Gonzalez Rogers: Just very briefly, Judge, thank you. I do want to welcome the entire Committee to the Northern District of California. We hope that you're enjoying your time here and will continue to enjoy your time. As you may have noticed, I've been sitting in the audience and trying to listen, and I will, as my colleague Judge Seabright, submit on my written statements, but I do have three reflections after having listened to some of the testimony you heard yesterday.

One, I do want to stress that our judges value our structure, a copy of which you have with your materials, but to put a finer point on it, yesterday there was some discussion about sequestration. When all of us in all of our various districts were looking to cut back, the CJA supervising attorney position, which is funded by our clerk's office, we as judges were adamant was not going to be cut because it is such as a critical part of our process.

The key ingredient in our view for why that process works is that the person who sits in that seat is a respected former member of the defense bar, and that, I think, is important. Second, in terms of your ultimate

recommendations, if your focus is on cost savings, I do think that in the life of a case, there are short-term issues and long-term issues. With respect to the short-term issues, as you heard from Sean Broderick yesterday, we have to get a grip. We have to get some way to manage the escalating costs with e-discovery.

In terms of long-term issues, I've not heard any testimony about § 2255 appeals, but there are long-term costs associated with appeals if an attorney is not doing their job. I have been told anecdotally that in the Northern District of California, our numbers, our appeals are lower than others. I don't know if that's true, but if it is true, I would not be surprised because I do think that we have a system that allows defense lawyers and CJA panel lawyers to do their job, and defendants then are more satisfied that justice, in fact, was done, not that we don't ever get them, but it may be worth looking at in terms of statistics.

The final point is that, especially in terms of the last panel, in terms of your ability to make recommendations with respect to independence and the independence from the courts. As you know, we have a hybrid model, and our structure has been in place for twenty years. We have judges, and we have panel attorneys, and we work together in the context of that structure and it works, and it may be a mechanism that will work in other districts. So it's something for you to consider. Thank you.

Judge Cardone: Thanks so much. Judge Carter, would you like to make an opening statement?

Judge Carter: Well, first of all, thank you, and if you would have joined us last evening, the four of us got together over coffee and tea, the evening rolled along, and I wish you could have recorded the conversation because it was a fabulous interchange of information, and we're here formally, but I think we had a wonderful time just talking about the very problems that are being presented to you. I already made some questions for you that might guide any answer that I give, and I'm going to separate myself from the years of death penalty litigation and presiding over death penalty cases on the state and federal level, where my present position is chair of the Capital Case Committee of the Ninth Circuit. Those are two different rules, and if we get into a discussion, I'd like to focus on complex litigation, and I hope I came prepared today to give you some absolute, concrete ideas for your discussion and thought.

So briefly I would ask this question of myself, certainly not the Committee, but what is a complex case? Is it an individual defendant charged with death? Is it potentially if Congress changes a position in Guantanamo is eventually downloaded from sixty-seven prisoners, and if Guantanamo's too costly and eventually these come to the federal court? Is that a complex

case? Or is a complex case a RICO case not driven by the death penalty with 100 defendants literally that come to our court?

The same question I would be asking just for me is where are my cost drivers? Where are they geographically located? Are they in Portland, Oregon where I grew up or is it in the Northern District of California or New York? What is really absorbing the cost in the country? I think that the third general question I'd ask besides the complexity is, can we and the judiciary through your intervention resolve this problem before Congress intervenes? And I came, I hope, today with twenty-five hours of proposals for you to consider, but I hope I came with concreteness today in a discussion that I really believe might be thoughtful in discussing these issues and immediate cost savings that we in the judiciary could implement before we ever go to Congress.

And the last thing, I just want to give you a brief example of just a funny story involving the Aryan Brotherhood, the largest death-qualified group in our country's system, twenty-one death-qualified, forty-two defendants. A CJA counsel came into court and said "Judge, on a non-statutory mitigating factor, we want to use the mitigation specialist that my colleague, Dick Matsch just used in the Oklahoma Bombing city cases on the defense side," and they said, "Judge, this is $425 to talk about mitigation and why life without possibility of release is a better solution than death for presentation to the jury," and naively, I looked at that and wondered if I was staff and I saw that and I had a guideline of $350 an hour, I might have rejected that, and back it would come for review maybe to the court and maybe non-involvement, which I keep hearing.

I naively asked the U.S. attorney, "Well, you have a death penalty specialist who's going to testify that death is a better resolution. What are you charging?" And when the figure from the United States Attorney's Office was $625 per hour, I can't say to you how quickly I signed that order. The idea of non-judicial involvement, I think, is something that we need to be very careful about because we and the individual trial courts, not even our chief judge, are the ultimate determiner of fairness, transparency, and all the other beliefs that we have as trial judges, and that can't [be] driven by staff. So I welcome any questions.

Judge Cardone: Thank you very much. Judge Boulware?

Judge Boulware: Thank you, Judge Carter for your comments, and thank you, Judge Fischer and members of the Committee. I think that for me one of the first things I would say is that the work of this Committee is important, and I hope that you come up with something concrete, and I say that with all due respect, but having been involved in many different types of committees and hearings and evaluations that this is significant work, and I think that you all have an

important mission.

In particular, someone who in my career, have been devoted my entire career to indigent defense prior to taking the bench and that leads me to, I think, my second point which is this, I don't want this Committee or any of us to lose focus with respect to the principle of vigorous indigent defense. Amidst all of this conversation about cost and the escalation of cost, there are individual defendants whose lives depend upon the individual representation each and every member of the CJA panel, and at sometimes, I get concerned that we don't have anyone who represents them at these types of meetings.

We have panel attorneys. We have judges. We have defenders. We don't have defendants, and it's the defendants who ultimately, we all must serve in the context of the mission of the CJA panel and the Criminal Justice Act, and so for me, I just want to remind all of us because it's something that I, as a judge have to remind myself being removed, that this is about individual people's lives and indigent defense that whatever the Committee recommends should integrate that overall and overriding principle in the context of recommendations. Thank you, Chairman.

Judge Cardone: Thank you. Mr. Frensley, would you like to begin?

Chip Frensley: Judge Gonzalez Rogers, if I could start with you, we have reviewed your comprehensive testimony from your court as well as the written submissions provided by panel attorneys in this district and also heard from the supervisory attorney here, and by all accounts, it seems to be very well received. It seems to be something that could potentially serve as a model for an alternative to what the current system is, and so, I would ask you the question, beginning with the obvious assumption that you support the system through your written submission and your statements this morning, if you were going to offer it as an alternative and you had judges from other districts or anywhere else coming to you to say, "Why should we do this," what would be your answer, based on the experience that you have in terms of what you would say to convince everyone else to adopt the model that you have?

Judge Gonzalez Rogers: Well, I think that one of the things that you have heard as you've gone across the country from judges is that we are at times very uncomfortable in having to get into the minutia of . . .

Judge Gerard: Pull your Mike phone just a little closer?

Judge Gonzalez Rogers: Of strategy. Is that better, Judge? Thank you, Judge Gerrard.

And this allows that separation. The other thing is frankly none of us want to do vouchers, and I can't imagine . . . many of the judges, I listened to some of

the other testimony that you had archived on the website, and I've heard many complaints that judges have that they have to do the vouchers, but I also think, and this can't be quantified, that what our system allows is a healthy respect for all of the institutional players, and I think that because we have this structure in place, we have a level of . . . well, respect is really the best word for it, for what our panel attorneys do and what our federal defender does and everybody's respective role.

And I was been trying to see if there was some other kind of way to classify that, and I think that from what I'm hearing in these other districts, there is a level of distrust between the judges and the defenders, and I don't think that's healthy for a justice system. So if we're ever going to get back to a road of respecting the institutions, then having a structure that is more collaborative, I think, is a good model.

Chip Frensley: Do you think that the model that you all have in this district is exportable?

Judge Gonzalez Rogers: Is portable?

Chip Frensley: Yes, can it be replicated in other places? Do you see any impediments to that system applying anywhere?

Judge Gonzalez Rogers: No, I don't, actually. It will be tougher . . . one of the things that we have that some other districts may not have, and you obviously know other districts better than I because I've not traveled the country with you, but we do have a very large pool of excellent defense lawyers who want to be on our panel and for whom panel work is not the entirety of their practice.

So when I sit down every year with our committee that chooses the panel, and that committee includes defense lawyers, the federal defender, and judges, and we sit down and figure out who is going to be on the panel. We have sixty applicants for twenty positions or twenty-five positions. That allows us to choose the best and the brightest and people with whom we have total confidence. So if you have a district where there are a dearth of qualified attorneys, it may be less portable, but that would be the only thing that I think would be a problem.

Chip Frensley: You talked about the importance of the individual and the supervisory attorney position having criminal defense experience, and I guess that's both in terms of their understanding of what's reasonable and appropriate but also in terms of the legitimacy of the position and the buy-in, if you will, of the panel attorneys who have to deal with that individual, and obviously, your position is a court position, and presumably the person chosen for that position is chosen by the court . . .

Judge Gonzalez Rogers: Well, it's chosen by the court and we also, again, have our CJA panel representative on that committee and the Federal Defender. So the recommendation is made to the full bench, but the work of the committee is a collaborative work group.

Chip Frensley: So the appointing authority, if you will, for the supervisory position is this committee that you talked about?

Judge Gonzalez Rogers: It is the committee that vets all of the candidates and then makes a recommendation to the full court.

Chip Frensley: Okay. For the panel as a whole, is there anybody who is strongly in favor of the district judges retaining the authority to review vouchers and approve experts that want to make the case for that?

Judge Carter: I am.

Chip Frensley: Yes, sir.

Judge Carter: I get concerned when I get a request that is what I call a "waterfall" request. It's a request for a couple hundred thousand dollars in supportive fees for expert fees, let's say. And I would like to take what I call the "trickle-down" approach. I'm eventually going to approve a good portion of what the defense asks me, if not, all, but I'd like to see some justification along the way for what's being asked.

I am very concerned about massive requests at the beginning, big-bill items without having some way to go, and so all counsel has to do is show me the effort and where they're going in an in-camera setting, especially on a death case, and they're going to have my acquiescence right away, but as far as the first $250,000, likely approved, I'd like to know a little bit more about your case. So I'm very much concerned with cost containment, and I'm very much concerned that whatever decision I make is also going to affect cost, and I think it has to come from a court first because we're in charge of due process and a fair trial.

Chip Frensley: And do you think that there's any other entity or individual or capacity that could make that same kind of review or do you think there's something about the judge's position that's necessary for the . . .

Judge Carter: Yeah. I think you're extremely helpful in terms of uniformity. If I'm dealing with a sixty-five-defense counsel usually because a public defender's been disqualified because they have a conflict, which I'd love to talk to you about how we get them involved, or I'm feeling an inequality of arms, an unfairness to the defense because, quite frankly, one of tragedies or travesties is the government doesn't have to disclose their costs. They remain silent, non-

transparent, yet my defense counsel have to disclose their cost which then causes this unfair push-back.

So I think you're extraordinarily helpful, in terms of copying costs, uniformity, coming to me and saying, "Look, we've got an out-of-district attorney that we had to bring in from," I won't name the area, "We ran out of attorneys in the Central District. We had to go to literally two different districts to get attorneys." Their costs and their thought processes was significantly different from ours, and so it helped reign that in, but as far as the ultimate decision, I'm ultimately the determiner of fairness and that has a lot to do with what requests I grant and how I grant them.

Chip Frensley: Yes, sir.

Chief Judge Seabright: I can follow up because I think I have a little bit of a different view than Judge Carter. I think ultimately the decision probably has to rest with the presiding judge at the end of the day, but I do believe in the first instance, the request should go elsewhere. In our district, we sent it to the magistrate judges to look at these requests and rule in the first instance, but just like so many different matters that go to a magistrate judge, those are appeal-able and can be appealed to the presiding judge.

And ultimately, I think the decision has to rest with the presiding judge who would know the case better and presumably have a better handle on some of the fairness issues that Judge Carter is talking about, but it makes most of us . . . it certainly makes me very uncomfortable doing that. In the first instance, it really makes me uncomfortable. I mean, recently I had to request for someone to hire a polygrapher. Well, I used to be AUSA. I sort of understand what's behind all of that, and it's not necessarily a good thing, what's behind that. I sort of understand that.

Judge Carter: Well, could I intercede also? Also, I'll give you a critical decision we have to make in a death case and that is whether we're going to appoint second counsel at the beginning or whether we're going to take this on what I call "the cheap," one counsel and delay it to see whether main justice will eventually death qualify your client. If I take the position that I'm waiting and with the slowness of the local protocol on some occasion and the laxity . . . I hope I'm not using that word probably, but apparently I am . . . on sometimes on main justices part, unless we as trial judges are pushing and threatening with definite dates, that could take a long time in main justice.

Now, I understand by appointing second counsel, I am potentially subject to the criticism of wasting funds, but if they death qualify that client, now I've got to bring a second attorney in and the case may be a year or two old and that attorney has to catch up. In the meantime, I try to preside over twelve defendants at the same time. Now I've got severance problems that are

occurring, and it causes even further delay.

So right at the beginning, we have to make that critical choice, and if we're wrong, then at least maybe we wasted a year's worth of second counsel, but then we could invite second counsel by segmenting out the discovery and their role to depart the case. Sometimes, quite frankly, we don't because I agree with one of my colleagues. Even on a non-qualified death case, if it's a murder case with vicar allegations but not death, I'm usually going to retain that second counsel because I think so . . . frankly . . . due process oriented and I think defense needs it. So those are very critical decisions to make right at the beginning.

Chip Frensley: Just a follow-up, you said ultimately you said you think the presiding judge has to make that final decision and I understand statutorily that the presiding judge has to make that decision, but do you think that the presiding judge should make that decision?

Chief Judge Seabright: Well, I think there's some practicalities here. I did try a death penalty case about a year and a half ago, and there were a lot of issues. I had the magistrate judge deal with most of the motions for various fees and experts and so forth, but there are some realities and that is, if we started saying no to this extra expert and there was this gamesmanship between DOJ and the defense where DOJ would bring in another expert, and then the defense would run another to match that, and then another one and another one and it just kept building up.

I don't know how many experts we had testify at trial, I mean, probably thirty by the time it was done or at least between Atkins hearings and trials, it was at least thirty, but if at some point time, the answer is "no," where does that appeal go to if the person is sentenced to death . . . and do you think a district judge is really going to take a risk at having a death penalty overturned because you say "no" to one $40,000 expert?

So there are some realities on, I think, how we as judges look at this, and maybe we look at what circuit we're in, in making those determinations differently than some other judges may, but these are hard choices especially in death penalty cases. So I think it probably does need to reside, ultimately, the decision with the district judge. I think we should try to wall-off the presiding judge as much as possible.

Judge Boulware: Well, I think we need to make the distinction between death cases and non-death cases. As a federal defender for over eleven years, I have to say I think judges are actually not in a good position to evaluate anything effectively with respect to defense strategy, and I know that now sitting on the bench. There are defense strategies that I developed as a defender which I could not effectively explain to the judge.

So we have a couple of issues, first, most federal judges have never defended a criminal case. They actually don't understand what it means to defend a criminal case. They don't understand what it means to develop a relationship with a client and pursue avenues of investigation that relate not just to your case but to establishing trust with your client so that you can further develop other information. That is information that you would never share with a judge nor should you share it with a judge, but it is crucial to defending a case.

There are all sorts of different aspects to defense of a case that judges just don't see and can't see and shouldn't see because of the nature of the defense function, and so while I appreciate that the judge ultimately has to decide issues of process and fairness from the judge's perspective, that is distinct from whether or not the judge understands that the defense lawyer is adequately defending the case.

Those are distinct perspectives. They're distinct roles, and what's happened is we're conflating those roles, right? The judge absolutely has a duty and obligation to oversee the process, to make sure that it is fair, but that is completely distinct from understanding the defense attorney's role and defending someone and pursuing a case, and I have to say I have not been on the bench that long but two years, but I've been on long enough to know that even as a judge, there are things that I don't see, that I can't see in the context of defense of a case and that I'm not likely ever to be able to see.

And so I have to say that I don't think that judges should be involved in it not because they can't be fair but because, first of all, many of them don't have that experience. They don't. There are very few of us who have been defenders or criminal defense lawyers, and there is something different about judging a case verses prosecuting a case verses doing other things, and we need to be able to understand and respect the difference, right, and figure a way forward that allows the judge to manage the fairness of the process but nonetheless recognize that they, may not fully understand completely how that defense theory and strategy develops.

Chip Frensley: But Judge Boulware, if not the judge, then who?

Judge Boulware: I think there are different models for this. I think basically you have two choices. With what I see, either the federal defender does it with CJA panel representatives or someone who the judges designate who is independent, who has criminal defense experience that oversees a committee. I think those are basically the only choices that you really have, and if those two individuals or committees make a recommendation to the circuit and not to the presiding district necessarily to avoid issues of tension with respect to lawyers not wanting to ask a particular judge for resources and that those are

the mechanisms for doing that, and the other thing that I think is important, the one thing that I would encourage this Committee to do if it does nothing else is to develop a measurement tool for figuring out whether, in fact, CJA lawyers are adequately defending their cases.

We can come up with a national system. We have Dr. Rucker here who is an expert, right, in social scientific measurement data. That is something that, in fact, we can standardize. Our entire evaluation of the CJA panel system is based on anecdotal information. We don't have systemic studies across districts about whether or not we're, in fact, getting what we pay for in the context of the funds that we authorize. So you know, it's a little bit further out than what you'd asked, but I think that that's an important part of what I hope this Committee will do.

Judge Gerard: Very well. Welcome to everybody. This is going to be a lively discussion and I welcome your invitation, Judge Carter, to engage in it, and really one of the things that we're talking about, and it starts with the first issue you raised, Judge Carter, and that is what is an extended and complex case and maybe the guidelines that we'll impose, but really, what we're talking about here is the difference between case management, you know, who appoints counsel, when counsel is appointed et cetera, verses maybe a different layer of reviewing compensation, and I hope we can talk about those issues.

And maybe, Judge Carter, you're of the view that it's all one; that the review of the compensation goes along with case management. Maybe you are, maybe you aren't, but I do want to hear your views on that, but first of all, I do want to hear your views on what you consider to be, what's defined as an extended and complex case. I mean, we've heard testimony throughout the country, almost every case . . . well, not every case, but many, many, many cases exceed the statutory cap of $10,000 and what is extended and complex and does it really mean anything anymore? And so, that's my first question to you.

Judge Carter: Okay, I think it's both. That's why I used that lead-in. I think by definition, a complex case is any death-qualified case because death is different. You don't ever turn that around. That is the finality that we in trial courts face and it's a very difficult thing to preside over. The second is, a complex case to me is not only the number of defendants coming into my court, but it's their geographical disparity. If I have thirty black prisoners murdered across the United States by the Aryan brotherhood and seven murders take place in Atlanta, five in Louisburg, four in Marion, four more in Leavenworth, a couple up in super max, and then San Louis Obispo, the first problem for me is, is this going to get scattered across the country into six different districts with United States attorneys bringing piecemeal litigation or is one district going to be willing to absorb what's going to turn out to be this sticker-shock case, and also, quite frankly, be scrutinized concerning an amount of costs

that accrue to that district.

From my perception, it's always better to bring those cases into one court someplace in the country. I don't know whether you want to call it a volunteer court. I don't know what to call it, but having six different trials exposes the government to a multiplicity of transportation, exposing informants and it also disadvantage the defense because we in trial courts get used to trying bottom-up, and if there's one thing I would say to this panel is that I would really recommend that there's some type of really good input from you to trial judges.

These cases should always be top-down because if you've got potentially three or four separate layers of twenty-one death qualified defendants, the government is really after Bingham and Mills. They're really the leader of the Aryan brotherhood and you could preside over the first trial, if you will, of four or five defendants for six months but the government's not giving up. They want that top echelon of RICO.

And we've been trained to take what I call the "sitting easy ducks" first, the non-death qualified, the lower ring. We trial judges need to be trained to do the tough thing and that's start at the top because if the government's not successful and they weren't in the Aryan brotherhood. It was nine to three for death, everything else collapsed. Everything else, plea bargains. We save our four trials of an estimated six months each involving a multiplicity of murders because each one of those murders on a conspiracy to commit RICO came into your case. It just wasn't individual murders. So let me stop there. Does that answer your question?

Judge Gerard: Not exactly, but I'll try again. I mean there's no question those are extended and complex cases. I guess the question, and I'll ask the entire panel, in the nature of the statutory scheme now, what does extended and complex mean, anytime there is a case, a simple conspiracy case that is tried appear many of them aren't tried, the bills are going to exceed $14,000, $20,000, $30,000? Is that an extended and complex case and obviously, if so, should we be looking at a different definition, I guess is my question, not just a cap, but a different definition.

Judge Gonzalez Rogers: Well, I don't have a definition for you, but I do think that document intensive, multiple defendant, high guideline cases are the ones that generate the most fees because if someone is looking at 200, to 300 months and with some work, they can bring that down, that means something, but we're finding the amount of review that we have to deal with in these high document cases, that in and of itself drives you over the statutory max. So that's why I initially prefaced by initial comments with we really need to address that particular issue.

Chief Judge Seabright: And I think we need to do better with case management in criminal cases. We do it all the time in civil cases. We all know how to do it. We've all gotten used to it, comfortable with it. With the new proportionality rules, hopefully we will do it more in sitting down early and talking about the e-discovery and the scope of what discovery we're going to permit. It makes more since to me that after a case is filed, that decision is almost made the by the court. In the Speedy Trial Act setting, you know, sometimes the parties will ask that the case be designated complex as for the purposes of holding time. I don't know that we couldn't do a similar sort of thing, change the system a little bit, and do a similar sort of thing.

I don't think it should be dollar capped necessarily. That doesn't make sense to me. In the old days when I'd get those forms and you'd have to circle "complex" or "extended," I mean, I'd always shake my head and say, "I don't know," and I'd circle one. I mean, honestly, it was one or the other, I knew, but I didn't even know the difference between the two really. In most cases you don't know the difference. Certainly there are some cases that are almost always in my district going to fit that bill. We have a lot of environmental cases, including criminal cases that's going to fit that bill. We have a lot of human trafficking cases. Those tend to go on for a very long time and are naturally complex, but maybe it should be designated early within the context of that particular litigation, if that could be done.

And I think on a similar vent although a little bit different, I think, when I talk about what we do in the civil cases, we as judges need to be better with the discovery issues between the U.S. Attorney's Office and particularly CJA panel in facilitating that discovery, and I think having early conferences, make them as informal as you can within a criminal process, which some judges won't be comfortable with, but actually sitting down and talking about what there is and how that process is going to take place because I've heard from defense attorneys. I heard one just earlier that, you know, when they talk about the U.S. Attorney's Office about how we can handle this or and keep costs down, the U.S. Attorney's response is, "I don't really care about your costs. That's not my problem." Well, let them come in and tell magistrate judge that or district judge that and see what respondent they get. They'll start caring pretty quickly if they come into court and say, "I don't care about defense costs."

Judge Carter: So my definition back to you is very simple then, and so in my definition subject to your discussion, death . . . death . . . second numerosity, whether they're death-qualified, death-eligible or even not death-eligible or death-qualified. If I'm hit with 100 defendants in my case, and the third definition I tried to say is geographical diversity because of my discovery problems and trying to decide if I want to bring that into the Central District or if I'm to let that mushroom across the country, quite frankly, with increased costs. Those

are my three beginning definitions.

Judge Gerard: Let me just add, I'm sorry. So then if a case wouldn't meet those three definitions, they would not be extended or complex? In other words, the cap should not be exceeded?

Judge Carter: I'm sorry, I didn't hear you and I apologize.

Judge Gerard: In other words if it did not meet your definition, or the definition of extended and complex, would the cap not be exceeded then at that point in time? What about the wire fraud case that's . . .

Judge Carter: Oh, I could think of a slightly hearsay rule. I could think of a couple of other exceptions. I'm just opening, summaries, three quick areas for you where you take that discussion. There are many other complex definitions.

Judge Gerard: Very fair.

Judge Boulware: Well, I was going to say, the last two years I was a federal defender, I specialized in large complex cases, and I had, I guess the honor and privilege of . . . in some respects . . . of managing one of the largest management technology budgets this circuit has ever seen upwards in the millions of dollars, and what I can tell you in the context of complexity, it will almost always be from my perspective . . . some of the things my colleagues have mentioned, one is the voluminous nature of both in paper discovery and the electronically sorted information, the ESI.

The second would be the extent to which . . . and this, I think, will be an important factor, the data is tied to the sentence, and so what happens in these large white collar cases is, as Judge Rogers said, what can happen is your client, in the case of the defender or in the case of a judge, they may still plea, but you can bring down potentially or the range can be brought down by effective review of large amounts of data.

And so oftentimes, we think about it in the context of initially pleading or not pleading, but there's an initial side of this which is that most of the cases, in fact, do plead and so there can still be complexities that relates to sentencing mitigation, and having defended these cases for years, involved in these cases for years, and having now overseen them, the issue is, the extent and organization of the data, and I'm sure one of the things you all have heard that relates to how the U.S. Attorney's Office in criminal cases actually organizes and provides the data. So in my case, the cost, literally, millions of dollars, part of that was related to the fact that what occurred was the U.S. Attorney's Office during their investigation had seized on office and then literally dumped file cabinets full of documents onto the floor into a storage unit, and the cost was related to reorganizing the documents.

So what I do in my criminal cases, I have a discovery conference in every single one of my criminal cases, and I ask the U.S. Attorneys, what is the status of the data? How can we coordinate that? Because literally if you don't have a coordination, this circuit and . . . my district is paying hundreds of thousands of dollars simply to recreate files that could have been maintained at the time by investigators or federal law enforcement.

Judge Gonzalez Rogers: And I assume you've heard this as well, but the platforms are different, and that was a big shock to me. When hundreds of thousands of pages are delivered to the defense attorneys in TIFFs, where every single page has to be clicked to open it, how can we be surprised that the costs don't skyrocket? It's just not . . . and it's just a waste of time. It is absolutely not sustainable.

Judge Gerard: Very well. I'll come back in a moment because I want to give other panel . . . can I ask one structural question though to Judge Gonzalez Rogers, and it goes along with Chip's question, the portability of your system in the Northern District, and I think if everything we've heard of Ms. Weiss [Diana Weiss] was portable, your system would be portable anywhere. It's sounds like she's a wonderful supervising attorney, and that is my question. In the Southern District of New York or the Central District of California and some of the larger areas, is a system like yours . . . is it practical? Is it portable in a larger context?

Judge Gonzalez Rogers: It's hard for me to believe that a committee of people committed to indigent . . . to defense of judges and defense lawyers couldn't find someone who valued that role as well and was prepared as we have had . . . she's not been our only supervising attorney . . . is prepared to leave the grind of practice and serve in a role that is in-between, still doing incredibly important work, but that role has to be valued by both sides, and there has to be buy-in by both sides. So I think it's portable because I do have faith that we have judges and defense lawyers out there who all have a core value and that they can find someone.

Judge Gerard: Where did your model come from? Did it come from state court . . .

Judge Gonzalez Rogers: You know, it's been in place for over twenty years and I can get you that information. I'm looking at Judge Hamilton who's here. She's shaking her head that she doesn't know either.

Judge Hamilton: We have that information.

Judge Gerard: Okay. That's all.

Judge Cardone: Judge Goldberg?

Judge Goldberg: Such a wealth of experience and knowledge in this panel, and mostly all the

panels that we've heard, so thank you for your time. I've got three days of questions for all of you, but probably exercising horrible judgment, I'm going to start my question with the ex-marine who has two purple hearts.

Judge Carter: That's a terrible judgment.

Judge Goldberg: Judge Carter, I wanted to ask you about your CJA 26 form for supplemental information statement where the compensation claim is in excess of statutory claim maximum. We heard some testimony yesterday from CJA lawyers from your district who said that they had done a pretty good canvas of the morale and the specific effect that this is having on morale, and I want to emphasize, before I raise my questions, the issues I want to hear from you about, I'm not in any way criticizing how you're managing your district. I'm sure if you came to my district, Eastern District of Pennsylvania, you could ask me a lot of questions about why do you do this, why do you do this, why do you do this. I'm raising these questions because I want to gain from your experience . . .

Judge Carter: I'm going to ask to defer on that, and the reason I'm going to ask is sitting right next to you is the expert, Judge Fischer.

Judge Goldberg: Well, I can't . . .

Judge Fischer: But he'd know nothing about it. He knows nothing about it.

Judge Carter: I'm in the Ninth Circuit chair of the habeas. I'd be glad to answer that. I'm a little hesitant especially without our chief judge here. I'm here to speak to you as an individual about mega cases and would love you and hopefully a lot of cost savings. So no disrespect, I just ask to beg off, if you don't mind.

Judge Goldberg: No disrespect taken. Maybe I could ask some general questions, just to get your input. See if you're comfortable with these, and I'm certainly not going to request my colleague.

Judge Carter: But leading into that, could I make one suggestion totally unrelated?

Judge Goldberg: Sure.

Judge Carter: Okay. Since we create patent pilot programs and now specialization in some of the larger districts, and we've created bankruptcy and basically this whole bankruptcy system, why in the judiciary haven't we thought of a cadre of willing judges, if you will, who would preside over these complex cases? And let me give you some reasons historically why that hasn't happened and perhaps the blame lies with us. First we've had those old barriers that don't exist in the state court system by the way of districts and the case only belongs to you or to me. It's almost a sign of weakness to reach out to a

colleague.

We don't reach out outside of your circuit, but if you really wanted cost containment which all of us do, one of the thoughts may be that there are a cadre of young judges here, who might literally enjoy these cases and would have a really good idea about cost containment because of repetition but also that fair balance if you will, and I don't know why we haven't at least discussed that. I don't know why Yvonne can't come to the Central District if we're impacted if she wanted to, I don't think she'd want to but . . .

Judge Gonzalez Rogers: To take one of my cases that was inactive….

Judge Carter: And the second thing is I'm not denigrating Portland, but when I hear Portland Oregon discussed, which is my hometown, it has absolutely no relevance, in terms of what drives their costs to the Central District of San Francisco, and why do you have this high input? Because we're paying well in the Central District and the Northern District, and we're paying well for psychologists, psychiatrists, mitigation specialists, but if you took me over to Arizona, the judges there when we went to $173 and then $170 some, Dr. Rucker, we had push back from Arizona that they were never going above $155 an hour for CJA counsel, and if you take us up to Portland, Oregon, you'll see we've got a really difficult time at $200 an hour, with San Francisco with their cost of living, quite frankly, can't exist and we apologize for not raising this sooner for you.

Judge Goldberg: Let me see if I can pose a general question that you're comfortable with. So going back to the testimony that we heard yesterday and knowing that in this very expensive district, cost of living district, it's still $129 an hour, have you heard or do you have any views on the morale of your CJA lawyers who have the fill out this nine page form with fifty different areas of information? What's the sense you get? Is there a problem?

Judge Carter: Well, I didn't take a Gallup poll. I'm not being facetious, but you hear things, and I think that the Northern District and the Central District are primary cost drivers. I think that some of other practices historically needed re-examination. I think a very strong colleague took that over and set parameters that made sense and it made sense from the circuit judge reviewing, and now I think there's starting to be an adaptation to those new, if you will, rules the CJA counsel receiver there, but anybody making a change is going to be subject or any group subject to . . . if we did it this way, this is a shock. Quite frankly, we weren't in compliance with a lot of the national standards.

Judge Goldberg: Have you seen a drop off? We heard a little bit of this yesterday. In your opinion, your Honor, have you seen a drop off in the really, really top criminal defense attorneys not wanting to be a part of your CJA program

because of these procedures?

Judge Carter: Well, what I heard was rumors of grumbling on occasion, but those seem to be dissipating, but what I've seen is an increased level of competence.

Judge Goldberg: I'm sorry, a what?

Judge Carter: An increased level of competence . . .

Judge Goldberg: Increased?

Judge Carter: Quite frankly this provided the opportunity to possibly give that gentle nudge to some people who had been practicing who, quite frankly, hadn't kept up with the times and maybe would like to have moved on, and they might have been nudged.

Judge Goldberg: For some reason I'm having a little trouble hearing.

Judge Carter: I'm sorry. You talked about morale. In summary, I believe today the morale is good. If you would have asked me a year and a half ago, I would say that moral was bad because changes were being made and they were painful changes. It provided an opportunity though. I think the level of competency now is extraordinarily high in the Central District, and I wouldn't have said that a year and a half ago. There were some people who just perhaps were on the CJA panel for many years who might want to move on . . .

Judge Goldberg: Okay. I had a lot of other questions about it, but I'll ask other questions.

Judge Carter: I don't want to dominate but if we were to get into costs . . . [CROSSTALK].

Judge Cardone: Can I ask a follow-up question? Judge Carter, let me ask a question because this Committee, we've been all over the country and there are a lot of hard questions, and I hear you saying that the expert that . . . you didn't answer Judge Goldberg's question because the expert here is on our Committee, but I guess my question to you is, one of the things we're trying to figure out is the structure of all of this, and we all as judges have responsibility to look at what's happening and see the cases that are tried in front of us, and if there's a problem to deal with it, and we as a Committee are hearing that there's a problem in your district.

I mean let's . . . Judge Fischer is on our Committee and we are a very cohesive Committee and work together very well, but the problem is that if there is a problem in your district and people perceive Judge Fischer as the problem, then if you are her fellow judge and you're not willing to take a contrary stand to Judge Fischer, where does that put the CJA panel attorneys in your district?

Judge Carter: Okay, by the way the way, thank you for the questions, so bluntness between us. We needed, if you will, more uniformity, and that was going to require a strong hand whether it was Judge Fischer or me, and I was supposed to succeed her as a chair. I absolutely have refused to do that for one reason. I don't want CJA counsel or anybody to out-weight the standards that have been set and agreed to by our entire court and the changes that Judge Fischer has made by CJA counsel out waiting her turn. So from my perception in talking to CJA counsel who, quite frankly, came rushing into the door perceiving I was a next chair. One, I'm not undermining her and number two, she's there forever as she's going to live to be 105. [CROSS-TALK].

Now, that gave uniformity, okay? If you want bluntness, I don't think it was what Judge Fischer did. I think it was the shock, maybe what you call the bedside manner. I don't know how it was dealt with, et cetera, but it had to be done. And if it wasn't done by Judge Fischer, it would have been done by me.

Judge Goldberg: Why did it have to be done?

Judge Carter: Because I think that what was occurring were what I call the "old-timers." A way of business that had grown up in a sense that the individual judges were approving, as Chip said, you know these orders, and they couldn't keep up, so they're signing off. And then we got staff involved, and the benefit of staff was with 100 defendants, you got some kind of uniformity and "Judge Carter, we've got a problem with this attorney from San Diego who's charging too much." Then we'd step in but I had that ancillary service.

So it's kind of a mixture, okay. Are things peaceful now? No. They're not completely peaceful. There are some other people who need to either remain on the CJA panel or get out of the CJA panel because this district totally supports Judge Fischer, and as you make tough decisions and sometimes a litigant isn't happy, that's our decision and it's a collective decision of our court.

Judge Goldberg: Judge we totally support Judge Fischer too, but shouldn't the focus be on the indigent defendant and the best representation for that person?

Judge Carter: That question assumes the fact that there isn't the best representation. Remember, I can always . . .

Judge Goldberg: People are leaving the panel.

Judge Carter: Remember, I can always override. These are guidelines that are set, but when . . . Chip, when I see that U.S. Attorney getting $600, you got to be kidding me, on non-statutory mitigating factor on the death? I'll tell you

what, the defense is going to get whatever they want, and I think that you're discussing right now a problem that was relevant a year ago. Is it as relevant now? Maybe in some people's minds, but we've had a really difficult time as we've gotten our house in order, and I'll tell you where it started. It started with Judge Kozinski.

It started with this rule of 1000 hours, and anybody who goes over 1000 hours needs to be examined. In this business involving death qualification and death and complex cases, I can't make a living as a defense counsel. I can't go to the state courts. I'm in Judge Carter's court or one of my colleague's court, and I've got a five month trial coming up. I have to make my living on these cases so I could run up 2000, 3000 hours.

Now, what happened was there was some ludicrous CJA counsel who wrote 7000 hours. You can't stay awake 7000 hours nor can I combining both our times, and, quite frankly, I think there was some fraud. When the central district pushed back and said, "This is not appropriate. You get this money back to us," and in fact, some were threatened with crimes that were taken to the United States Attorney's Office. I think CJA counsel got concerned.

It became a cost. I don't blame them for that and they all felt threatened. I have no doubt that they did, but this was targeted at three or four individuals who had abused the system, and we were going refer that to the United States Attorney's Office and we did. Now, that caused a ripple effect, and who's sitting there? It could have been me. It could have been Dale, it could have been Judge Philips, anybody, and that pushed back.

Judge Goldberg: I appreciate your candor. I'm going to change the subject to, maybe, something a little bit lighter really quick. I wanted to ask Judge Boulware a question and then I'll be finished with my questions.

We took a little informal poll yesterday when we were having lunch with the Committee. I was curious about the statement, the premise that not a lot of district court judges have criminal defense background. So on our Committee here, most of us have had some level of criminal defense background, some more than others, but most of the us here have and the only other reference point I have is the Third Circuit in the Eastern District of Pennsylvania by way of example, your Honor, the last two Third Circuit appointments where one Judge Restrepo, who was a career defender, CJA lawyer, federal defender, state defender, private defender . . . I'm sorry private defense attorney, and then Judge Krause, who was on our CJA panel for a while, so is that really true, throughout the country? Do most judges not have criminal defense experience?

Judge Boulware: So here is what I will say, I mean, I don't have the exact numbers. What I'll say, and this is what part of what I went through in my nomination process.

They said that we've had very few, and maybe I should be more clear, career defenders or people who have spent most of their life either doing criminal defense work as a career defender or on CJA panels or as criminal defense attorneys, and when I went through my process recently, they gave me some numbers I think in terms of recent appointments that there maybe were 6 or 7 out of 200 some odd appointments, and so part of this is information that I was received through that process. So I don't have exact numbers, but in my . . .

Judge Goldberg: Those are compelling numbers, though.

Judge Boulware: Right. So and that's where I got the information from, but again, it focused on, also, career criminal defense attorneys and not people who may have, in the course of their career, at one time or another volunteered on a pro bono case or did something else, and who had been involved importantly in indigent defense.

Indigent defense is different, because I worked at a firm briefly, than retained white collar defense. That is a very different type of practice. It involves different challenges. It relates to clients and defense work, and so my comments were directed at information I previously received about people who had been involved for most of the their career in indigent defense, and if there are other numbers, I'm happy to stand corrected, but I'm not sure that they are, and again that was part of the information I received when I was going through my nomination process.

Chief Judge Seabright: Judge Goldberg, make some of you were chosen because of the your background.

Judge Boulware: Right.

Chief Judge Seabright: I mean, that's what I'm thinking as to the statistical anomaly that may exist in your group.

Judge Goldberg: Absolutely, that's what we talked about . . .

Judge Walton: Judge Boulware, as a former defense counsel and recent defense counsel, I obviously have a lot of respect for your opinions about how this process should work, and we hear from judges, one perspective about how the process should work, and we hear generally from defense counsel, panel lawyers, a different perspective, and that becomes a difficult task in reconciling what position we should take, but we've heard judges say it's fine and that judges have to be involved in the approval, for example, of third-party defense services.

And we hear from defense counsel that, that's just not the way it should

work, that it undermines the independence of the system when the defense counsel has to go to a judge and seek authorization to have third-party services provided. You've sort of indicated that there should be some . . . or at least judges should not be involved to the extent that we're involved now. What's your perspective to what this system should look like in order to afford indigent defenders the quality of representation they're entitled to?

Judge Boulware: Thank you, Judge Walton for your question. I think that we're missing a key piece here that's been part of this discussion, which is that oftentimes judges are using vouchers as a way to figure out how well someone is doing at representing someone. Part of the problem is that we don't have the in-between piece that would give both panel attorneys and judges confidence that, in fact, attorneys are performing adequately, and that's why I went back to my earlier recommendation about the need for there to be a performance measure.

We're using vouchers as proxies for determining whether or not attorneys are actually doing their work, and they're not good proxies at all for making that determination. So what I would say is for there to be a system, you would first need to make sure you have some independent mechanism for evaluating the performance of the overall panel and individual attorneys . . . one.

Second, you do you need to have the judges involved in making sure that the process itself overall is fair and that from my perspective is making sure vouchers are being processed adequately, making sure that you're getting enough lawyers who are well qualified to be on the panel and then selecting someone who can work as either a supervisory attorney or someone else who the judges trust and the panel attorneys trust to review vouchers and review performance, and then this individual or it can be a committee, can make recommendations with respect to performance or other issues to both the panel and the judges, but this should be from my perspective, a separate, independent body.

It could be a supervising attorney or it can be a committee, but this Committee can then be involved in reviewing defense strategies or not and reviewing vouchers or not, but I think that you can't have a system . . . first, because here's the other issue, which is that panel attorneys can also be reluctant to call out their colleagues who are not performing, and so you don't want to have a system where you have a committee that's completely comprised of other CJA lawyers, one, you could have potential liability issues, but in addition to that, there's going to be a reluctance to be the whistle blower on a colleague with whom you may share cases outside of the panel.

So the important part of this system is that you have to have input from both the judges and from the panel, but neither can control the panel. They have

to be subject to the system. They have to have input. Their input has to be taken into consideration, but neither one, I think, can have a predominant role, and it must be accompanied by a performance measurement tool such that we're not looking at vouchers or other courtroom performance as a way to try to judge the overall performance of a CJA lawyer.

Judge Goldberg: Who has the final say, though, and that's just . . .

Judge Boulware: Well, I think statutorily, we know who has the final say.

Judge Goldberg: But we're here to recommend statutory changes, so what do you recommend?

Judge Boulware: My recommendation would be that the committee would have the final say and that absent a judge identifying some sort of observable, ethical breach by an attorney, and you'd have to have some sort of carve out for that, where you see someone who's clearly deficient subject to . . . there might be a § 2255 or something else, that at that point, the judge would have the authority to step in and say, "This lawyer needs to be removed." Absent that type of a observable egregious conduct, that the ultimate authority would reside either with this Committee or again, it could be the Federal Public Defender. You could re-work that. I know some of the defenders may not want to hear me saying that, but I think that's another alternative, but either way, it should reside with this independent authority.

Judge Gonzalez Rogers: Could I just tag onto that, is Judge Walton?

Judge Walton: Yes.

Judge Gonzalez Rogers: One of the reasons why I think our selection committee works so well is because while we don't have a performance measurement, that's effectively where it happens. It is when you can have frank discussions between the judges and the panel attorneys about who should be on the panel. There is a collaborative discussion and pushback from both sides. So when we have the old-timers who perhaps it's their time to go, who aren't as vigorous as they used to be, sometimes that committee does, in fact, make the decision, or they get counseled out because the attorneys on the committee will go and have tough discussions.

When someone's not pulling their weight, and we know this because we have many multiple defendant cases, so the lawyers know who is pulling their weight and who is not, and we can choose who are going to be on these panels, they don't make the cut. Highly confidential discussions, but there is buy-in from the entire group, and then when people outside the group complain about it, we have representatives in the defense bar who can say, "You know, I can't tell you anything, but I can tell you it was fair."

Judge Walton: Judge Seabright, what's your response to what we've heard about maybe a different structure than what you have in Hawaii, and I say that in a context of not just what we heard here today but what we've heard in other places by panel lawyers who feel that their willingness to request third-party defense service have been chill based upon prior experience that they've had making those requests.

Chief Judge Seabright: Let me start by commenting briefly on follow ups to what Judge Boulware and Judge Rogers said. I agree in general. I don't think most judges . . . I've never had, this isn't conversation we typically have, but use voucher as a proxy as to quality, but I don't certainly do that, and I don't know if others really do, do it, and I think a measuring tool would be useful if it is possible, but I'm not convinced it is possible.

I don't think anyone knows better than the judges in the court as a whole as to the quality of representation coming out of the CJA panel, and I'm sure we all see these aging lawyers who don't provide the sort of representation we think they should, and it's very, very difficult, obviously, to have that discussion with them because it's personal. You get to know these people, especially a small district like Hawaii. You really do get to know them, but I do certainly like the Northern District model.

I think having representatives from the committee around the table when these hard decisions are made would create a lot more trust overall between the panel and the court in the decision making. If they knew they had some level of representation, they had a voice at that table, I think it would be helpful. You know, I was here just for a little bit of the prior panel when Lynn Panagakos talked about an instance in which she was refused services. I don't know what case that was, and I don't know if you folks have the statistics of district-by-district in the requests for service and if they are-

Judge Walton: We do.

Chief Judge Seabright: Granted or turned down and the degree of . . . some of you are saying "yes," some "no."

Judge Fischer: Well, we do. We do have the numbers, but we don't know how many were granted or turned down. We have no record of that.

Reuben Cahn: We know the percentage of cases in which experts are used in a given district.

Chief Judge Seabright: Okay.

Prof. Gould: Microphone [CROSS-TALK].

Reuben Cahn: We know the percentage of cases in a given district in which expert services were used but not what requests were made and turned down verses what requests were simply never made.

Chief Judge Seabright: In our district, I don't think it's that common that requests are turned down. Ms. Penagakos talked about a case. I don't know what case that was. I think I have an idea what case it was, but, I mean, what she was looking for, it was not my case, but I don't know what those statistics look like, and, you know, the culture could be, the CJA panel also in addition to what do might be a judicial culture in some districts, that is that they tend not to just go to the court to ask for these services, but I can tell you that I've only a handful of times when it's come to me turned down services in my district, and it's always where I thought they were duplicative and that's why I've turned them down in the past. I would love to see that list and see where district of Hawaii is on that list.

Judge Walton: I really struggle with the issue of to what extent judges should be involved because I appreciate the perspective that we do have a role to play. On the other hand, I'm sympathetic to the perspective of lawyers who feel that they should not have to answer to us when it comes to what they do as far as representing their clients because I've heard lawyers say that think that we're, as judges, somehow going to punish them for the things that they request, and maybe it's because I'm getting older and my memory's fading, but I don't know what I've authorized six months ago, and therefore it didn't really factor in, in my assessment of a lawyer's performance.

But I do appreciate that, you know, we've heard for example, maybe in smaller districts that lawyers do feel that we develop black robe disease, "robe-itis," and that we use our position as judges to punish lawyers who don't do things the way we want them to be done, and that you know, becomes a difficult challenge for us because how do we make recommendations that have a universal impact throughout the country, when maybe that's only a problem in some districts?

Chief Judge Seabright: I also think though, you know, the people you have seen at this table yesterday and today are all respected attorneys who are doing a good job. Not all the CJA panel attorneys fit that bill, and we do, in my view have a responsibility to watch the purse in this regard. In my testimony, I believe we should try to divorce that from the presiding judge as much as possible. As much as possible, we should do that.

Judge Boulware: Let me give you an example, and of course, I have a slightly different perspective about why I think that judicial involvement can be difficult.

First, one of the things as a judge that you never see, and I don't see this as a judge now, is client management issues as it relates to investigation. There's no way to capture that. There's no way to see that. You will never see it. You won't see why—for example— is someone having to in a document case that's 200 documents, spending 30 hours to go to the client review there.

The client may have mental challenge issues. You may not want to judge to know that. The client may have education issues. You may not want the judge to know that. So what do I say to a judge, where the judge says to me—and I've observed this working with CJA lawyers—it's 100 pages, why are you charging for 50 hours of time going to review 50 or 100 pages with your client? What is an attorney to say?

And I'm not saying, again, that there isn't a role for judges, but I do want to encourage you to think about the fact that there are just lots of portions of this process, and most of it related to client management investigation that judges just can never see, and to be honest with you, client management is the most important part as your role as an indigent defense attorney.

You're having to talk with people about making the most important choice often in their life. Do you plead guilty or do you go to trial and face ten to fifteen years? You need to be able to spend the time with someone to be able to do that, and so I think that, that's part of the reason why I think we're having this conversation, but part of the reason why I really want this Committee to think about the hidden parts of defense work that are nonetheless central to important indigent defense, and I think that we have to figure out a way that we can do that.

And also to speak to Judge Seabright's point, I wasn't saying that all judges use vouchers as a proxy for performance, but what I am saying is that when a judge sees vouchers for items that they don't readily understand, it's difficult for me to imagine that, that judge wouldn't somehow take that into consideration in evaluating the attorney's performance, and it's difficult for most attorneys not to think that either.

And so whether or not the judge actually . . . Judge Walton remembers that or not, the attorney who's requesting that will remember that they requested it, and they'll remember even the slightest comment that a judge maybe may have may have made about whether or not they thought that was a viable avenue of investigation, and that's an important part of this process, and you all are faced, obviously, with a very difficult job.

I don't necessarily envy you in terms of balancing all of this, but nonetheless, this is a tension, that I think we have to work out and we can work out, but I also think it's important to recognize this is going to be an ongoing challenge. We're not going to have a perfect answer. We're going to have to keep doing

this because it's important work that we have to keep evaluating.

Judge Walton: Well, Judge Boulware, you seem so say you think that judges should not be involved in approving these third-party service requests, before you do think there should be somebody or some entity that does. How do you respond to those panel lawyers who say, "Well, federal defenders don't have to ask anybody. Private lawyers who are retained don't have to ask anybody, so why should panel lawyers be treated any differently?"

Judge Boulware: Well, I think because if we did not have the Criminal Justice Act, we would be in a different circumstance, and we have a statutory scheme that requires a certain amount of supervision, and you can agree or disagree with that statutory scheme, but once it's in place to provide indigent defense, there has to be some mechanism for being able to monitor that.

With that being said, Judge Walton, one of reasons why I focused on this issue on a performance measurement tool, is that, that would allow for, I think, greater latitude in the approval of certain requests, and having a more sort of summary form of looking at how expenses are taken into consideration, but I think that unfortunately, the supervision arises out of this statutory scheme. It arises out of the fact that these are public funds, and in almost all instances, public funds, generally should at least I think require some level of auditing or management.

Judge Walton: But I assume what's being asked implicitly, at least, is that we recommend that, that statutory requirement be eliminated.

Judge Boulware: You mean by me?

Judge Walton: Supervision, that they shouldn't have to be making the requests to anybody in reference to the third-party service providers they retained.

Judge Boulware: Well, no I'm not recommending that because one of the things and I said this in my written testimony that I am very concerned about is the variability and the quality of representation and the supervision gives a mechanism by which you can, in fact, look at quality of representation, so I think that there certainly can be avenues by which you have greater latitude in requesting funds, but I do think that there needs to be a mechanism for overseeing that process in part because I've seen abuses and that there has to be a way to be able to capture them to make sure that they're dealt with. I mean, I've seen fairly significant abuses that led to potentially hundreds of thousands of dollars of unnecessary funds being authorized, and so I wouldn't say that there should be no requirement for supervision or oversight.

I would say that, that requirement should be wed with some performance measurement tool that helps the judges to have confidence that . . . and the

circuit have confidence or the country should have confidence that they're getting what they paid for.

Judge Walton: Thank you.

Judge Cardone: I have a question. We've been talking about a lot of about CJA lawyers, but we're looking at the entire structure, and so one of my questions for all of you and any of you can jump in, I just want to know how you feel FPDs, CDOs are working in your districts and whether there are any issues that you would point out to us of concern.

Judge Carter: I think some of the most talented of counsel are the federal public defenders, and they're unfortunately not used enough, and that's because the judges like me aren't willing to take the chance in minimal conflict situations. One of the most difficult things that I see is when I have literally thirty CJA counsel and I've got the federal public defender and that public defender has a conflict right at the beginning of one of these mega cases because they represented witness number thirty-two, if the government will even disclose that to us early on, in a bank robbery, or they were a prior informant.

And now I have to take that rich resources of a public defender because of a conflict and disqualify that office and they declare a conflict oftentimes, and Sean Kennedy and I have had numerous conversations with one of the these public defenders about trying to figure out a way. "Sean, how could we get you involved?" "Dave, I want to be involved." I don't know if I should take the chance, quite frankly, on one of these minimal conflicts some day and endanger an entire case with my circuit who reverses me, but we're losing this incredible, if you will, resource that we can combine with the CJA counsel and they're off the case almost at very beginning. So that's my initial comment I've got.

Judge Gonzalez Rogers: Well, I'm not surprisingly a huge fan of our Federal Defender and our Federal Defender's Office. They work incredibly hard with limited resources. I would just say that resources are always an issue and they do have budgets. They have had to lay people off, and all of the work that they do in supporting our CJA program, which is considerable, they receive absolutely no funding for it, and that should be rectified.

So if you are going to give them additional duties, know that they need funding for that.

Chief Judge Seabright: I have great respect for our public defender and the people that work in his office. I share with Judge Carter a frustration at times when I see the PD's office coming in representing defendant number four, number five, in a case. It makes no sense to do that. It really takes coordination between the U.S. Attorney's Office and PDs and the court to make that work correctly.

In my death penalty case, it was a husband and wife who tortured and killed a five-year-old daughter after about five months of torture. The woman came into court first, and the PD's was put on her case, but it was pretty clear for anyone including investigators, and it should have been the AUSA at the time, that it was likely death penalty to be sought against husband but not the wife, and that is exactly what happened, and so the PD's was not on the case at all, and I'm sure that cost us . . . Dr. Rucker who maybe has the numbers . . . a considerable amount of money in not having . . . and they would have loved to have been on that case and they couldn't.

That's a large example, but I see many small examples of that, and I think that takes working with U.S. Attorney's offices too to get a culture where they understand that the PDs represent . . . and Judge Carter talked about it at our dinner last night, you know, one of the comments we made and agreed upon was that seasoned AUSAs would prefer to have the public defenders on the case because they want the good attorney, and so some of the seasoned one will actually work with the magistrate judge or the clerk's office and sort of explain that someone else will be coming in tomorrow. "Maybe you should hold back the PD for that."

I don't think younger ones tend understand that as much. A small point I want to raise and that is recruitment of new CJA counsel. The one frustration I've had in the past with our PD, and I've had this conversation many times is, to have him help us recruit new people to get on the CJA panel, and the PD is in a unique position to know when attorneys leave, for instance, the state public defender's office the and go into private practice, who's good and who isn't and who could be mentored for a while and work into federal court.

At least in Hawaii there is this perception that federal court is scary for lawyers who grew up in state court. It's like this big federal court and the big, thick Sentencing Guidelines, and I don't understand them. So they're happy to go into state court. They're reluctant to put a foot in federal court, and I think the PDs could play a more active role in finding those people, recruiting them and then maybe we could find a way, maybe more funds are needed, to mentor and get them into federal court, but they have an ability unique to lawyers in our community to fair out those quality lawyers who are coming out of local PD offices.

Judge Carter: Let throw out a really controversial concept to you as a Committee for your private discussion and that is, what about the Federal Public Defender's Office? I unfortunately was a presiding judge in the state courts in my area of the world when Orange County declared the largest municipal bankruptcy in the country's history, and you could imagine what you call your CJA costs, believe me, they're small compared to a system that's taking in 12,000 defendants a year.

We immediately decided to go to a three-tier system, not a two-tier system, just to survive. We had no money. Reverse derivatives flattened that county, in fact, they're still paying off mortgages on all the buildings. A second public defender's office was created and tremendous animosity from the defense bar. A third public defender's office was actually created, not just a second tier. We had a number of what you would call CJA counsel remaining, but it really got winnowed, and as a presiding judge, I had to profusely apologize literally to tens of tens of attorneys.

I can tell you that there was an experience and that was that we had tremendous cost containment. We had tremendous uniformity of representation, and frankly, I have to say, overall . . . and this is anecdotal on my part as a presiding judge . . . the quality went up.

Let me repeat that to you. The cost went down and the quality went up. Now, I'm not proposing that and I hope I get out of this court alive from my CJA counsel in back of me, so I'm not proposing that, but I want to toss that out to you as a Committee because hopefully we get our house in order but Congress does. It's controversial, but I hope you discuss a second tier of public defender representation across the country and maybe even . . . well, I'll leave that at that.

Judge Boulware: Well, I would say, at least in my district . . . again, I've worked in two different districts, as a Federal Public Defender in the Southern District of New York and in the District of Nevada in Los Vegas that the Federal Public Defender's Office is doing a great job, but I think that's one alternative that we've talked about that may not require the same level of statutory revision, which is to house this supervision process within the Federal Public Defender's Office.

You'd have to, as Judge Gonzalez Rogers said, allocate resources for that, but it does allow for a shift in the context of who would be responsible and the perception of who's approving or not approving things, but I also think within the Federal Public Defender's offices, there is a comfort on the part of attorneys that they can and should pursue all avenues that are reasonable to represent their clients, and that one of the things that I've noticed in working with CJA lawyers before and after is the hesitation, is the "should I?" Whereas, when I was an assistant federal public defender, I never had that hesitation.

I never had it when . . . I don't know if Fran is still here . . . but Franny Forsman was FPD, or when Leonard Joy was the FPD in New York, or Rene Valladares was the FPD in Las Vegas. But, as a general matter in my experience in going to federal defender conferences, you don't have that hesitation as it relates to requests for investigative service or other expert

service.

So I think that this Committee should take a strong look at, at least as an interim measure if there's going to be no statutory revision by housing the supervision component in Federal Defender's offices and again some of my former colleagues might be upset I would be saying this, but I think they're in a very good position to do this, in part because I can tell you, when I was an assistant federal public defender, I had a good idea of which of the panel lawyers were defending their client and which were not.

Now I could hear they're a little bit trepidacious now because I'm head of the CJA panel in southern Nevada, and so it seems that everybody's upped their game because they know that I know. I say that in all jest. We have some fine lawyers, but the fact of the matter is that, the panel lawyers know that the federal defenders know and in fact, they oftentimes will call federal defenders for advice on how to manage their cases.

And so that is hopefully a symbiotic relationship that this Committee can take advantage of in the context of addressing these issues, because the federal defenders also know when you're just barking up a tree that's going to bear absolutely no fruit in any reasonable way and not even in the context of client management, right.

And so that is something that I would strongly urge this Committee to think about as a recommendation in the context of the current statutory scheme because many of the judges, in fact, do have confidence in their federal public defenders, and if the federal public defenders says, this person should or shouldn't be on the panel or these are reasonable expenses, often, not always, the local bench will take into consideration that recommendation.

Judge Fischer: Thank you.

Reuben Cahn: Thank you. A few questions, and Judge Carter, I want to start with you because you brought up a subject that I'm dealing with in my own district right now. Yesterday, a panel lawyer from my district testified that quite often the Federal Defender's Office is conflicted out of the case because the U.S. Attorney offers what she considered at least a rather distant and tenuous conflict, and that reason would be accepted by the magistrate as a reason not the appoint the federal defender, and I'm wondering if you have any thoughts about a different way of handling these conflict determinations to prevent that from happening unnecessarily.

Judge Carter: That's a terrific question and it's a costly question and it has a lot to do with our case management. Let me start with all of you knowing the obvious and that is, even in a death case by statute the government doesn't have to disclose the witness until three days prior to trial, the witness list. Now, I

want you to think how absurd that is in a death case and usually in our respective districts we draw the line and say sixty days before or ninety days before and most of the time we get compliance, but by statute they don't have to.

What I think that you're talking about is this problem of not knowing early on, and we have to be the ones, I think, that push for these answers. I'm not concerned about the defense to begin with, believe it or not. In fact, I'm so sympathetic because the boxes arrive un-bates, dumped on the floor, no, and we're bearing down on the defense for cost? We can't get witness lists to know what trials we're going to try in twelve . . . which eight next, which five next, which are death-qualified, not death-qualified. It's taking this whole protocol of local and then national and they're dragging their feet off at times.

I'm most critical of government. I hope that that's on record. I'm extraordinarily critical because they drive the ship. They file this, and they're duty-bound to give me answers right to begin with the help of my case management. So when you get that kind of problem, I think that it's incumbent upon us to ask. They don't have to give, but I think most of the when you ask a U.S. attorney, they're compliant. We're not asking the questions, and we're not asking them early enough.

Judge Boulware: I can say one of the things that happened in the District of Nevada in Las Vegas that dealt with some of these issues is that the federal defender made a decision not to represent people on target letters and not to represent people when they are identified as a witness without the U.S. Attorney disclosing the level of the target.

I mean for those of you who are former AUSAs, and this is unusual to have so many judges who are not former AUSAs in front of me, but Judge Seabright will tell you, seasoned AUSAs will want that, and they'll disclose that because they recognize how much more fluid the process will be when you have that type of input, but that is one system that was put in place, I know, in the District of Nevada and in the Southern District of New York where there was a decision made not to represent people on target letters or other types of referred representation unless the U.S. Attorney had made some representation that this person was a significant part of that scheme.

The other thing that I will tell you, which I'm sure you all know, is that having the Federal Defenders Office in white collar cases or in these mega cases can significantly reduce costs because the costs that can be carried, all though they don't like to mention it, by the Federal Defender's offices in the management of expenses, and I did that in one of the cases that I managed, but there is a significant cost saving that can occur in that larger context as it relates to the federal defender's involvement.

Reuben Cahn: Can I follow up because one of the things you just suggested might a workable solution to some of the problems we face as having the federal defender manage some of this, and we've heard expressions of concern from a couple of different areas about that, and for instance, yesterday, my chief judge expressed a concern that defenders would judge harshly those lawyers who tend to plead and cooperate their clients early.

We've had some other panel lawyers suggest that they were concerned about conflicts of interest in multi-defendant cases and defenders managing vouchers and managing expert requests, and I wonder if you've given any thought to that and whether they're needs to be any mechanisms to ensure fairness if a federal defender were managing the panel.

Judge Boulware: I think there has . . . in any system, there has to be a mechanism by which the judges and the circuit can get information about how the system is operated. There has to be a mechanism by which panel attorneys can express these views if they have them. Now, it has not been my experience in the over eleven years that I was a federal defender to see the types of things that you've described occur that in the different districts in which I've practiced, and so, I don't know how prevalent those types of concerns are.

But when you weigh those concerns against the overall issue of vigorous, indigent defense, I don't know if they actually can overcome that significant balance. I think that there has to be a mechanism for that information or those complaints to come forward, and that can be in the context of the evaluation of the federal defender because the federal defenders are, in fact, evaluated if you make it part of their job function, and so there can be a mechanism for that information to be provided.

I do think that there's going to be some pressure but not necessarily bad pressure on panel attorneys to actually perform at the level at which the Federal Defenders offices are generally recognized to perform, and I think that, that could be a good thing. I think that there can be, I think, a healthy pressure in the context of performance.

I think that the issue of having . . . I worked on many codefendant cases and multi-defendant cases, the issue of conflict can be dealt with. We have many different mechanisms for dealing with conflicts and multi-defendant cases, and there are many experienced attorneys, both in CJA panel and at the Federal Defender's Office, and judges who understand what are different approaches to managing that, but given the fact, those cases often don't predominate necessarily in the context of the complexity, again, I'm not sure that, that consideration outweighs, I think, the larger consideration of creating the support for CJA panel attorneys in the context of their overall defense function.

Chief Judge Seabright: It seems to me . . . and I'm not sure I'm understanding your question directly, but if in part the question deals with the conflict the PDs may have in approving certain services for panel attorneys, if that is one option on the table, it seems to me that is very problematic that in a multi-conspiracy case, a Title III case, you know, the indictment comes down with however many defendants, one through forty, whatever it is, the PDs, hopefully, will take number.

But if they're looking to have some say in what investigative services would be available for defendants two through forty, if that's what is being suggested, absent some statutory mandate on my part, I would never do that. I would never agree to that if that's in part to what the process might look like.

Judge Boulware: And I would agree with that. I'm not suggesting that either. I don't know that, that was what was being suggested because it seems to me regardless of the system, you're going to have to have some at some point some independent person who when their conflict cases arise can function as the supervisory attorney functions as Judge Gonzalez Rogers describes.

Even if you were to place this overall function in the Federal Defender's Office, there's going to have to be at least the creation of some special committee that when there are conflicts if this Committee or this individual can address that because I completely agree with Chief Judge Seabright that you can't have on a particular case the PD's office overseeing a particular codefendant's expenses, but I think that there are mechanisms to address that and to deal with that in the context of some of the systems we're talking about.

Reuben Cahn: Judge Seabright, I think one of the things we've heard testimony about are circumstances where the public defender's office employs an individual or a group of individuals who are walled off from the rest of the office and tasked with these jobs, but how would you feel about that option?

Chief Judge Seabright: Part of the problem is that may be doable in Central District California, Southern District New York. In the district of Hawaii, it would be impossible, it seems to me for a PD's office that size to actually do that. I suppose if everyone had the capacity to do that in any particular case, one different person might be walled off from everyone else, it's possible. I still think it raises a lot of questions and I would be very concerned with that process.

Reuben Cahn: Let me ask you one last, very quick, question which is just, you talked about the capital case that you handled and how you would have preferred, for cost reasons, to have the Federal Defender appointed to the most likely death

eligible defendant, and I know because I know about the case that you had to go out of state for counsel, and I'm wondering if anyone from the Administrative Office or anyone else ever suggested that there was a possibility of appointing an out-of-district Federal Defender for representation.

Chief Judge Seabright: Well, let me say first, I came into this case late. It was another judge's case who moved out of district, and I took it over maybe a year and a half before trial . . .

Reuben Cahn: Judge left Hawaii?

Chief Judge Seabright: Yes, yes.

Reuben Cahn: Did they have a sanity examination?

Judge Cardone: That Judge came to the Western District of Texas . . .

Reuben Cahn: Exactly yes, definitely needed sanity examination.

Chief Judge Seabright: Not everyone here is going to be complaining about that, yes, and he agreed to take a full case load in the Western District of Texas as a senior judge. So you could really question why he did what he did, and that never was suggested.

Initially, when Judge Ezra had the case, we had mainland counsel from here in San Francisco and local, Honolulu counsel. He became so stressed over the case. He asked to be removed, was told that's probably not likely, and he quit the practice of law. That was his answer to being told it's unlikely to be taken off the case.

At that point in time, the Atkins issues were heating up and there was a request to bring on the second counsel from mainland as opposed to someone from Hawaii, but it was never suggested to bring someone in from a PD's office.

Reuben Cahn: Thank you.

Dr. Rucker: Okay, I'd like to ask just two quick questions if I may. The first one I'd like to address to Judge Boulware. If your opening statement, you said something that I've been thinking about a little bit, and that is we need to hear from the defendants as well, and I don't see an easy way to do that, but it seems to me you've given this some thought. Do you have any idea? I know it calls for conjecture about what we might hear if we were able to ask the clients, you know, what they think of this system.

Judge Boulware: I think one of the things that they would talk about, which is some ways hard to capture is the amount of client contact. One of the issues that comes up frequently with these cases is the issue of client contact and client understanding of an overall case and how it should work, and so again I think there is a way, through surveys and other interviews to actually receive input in terms of the different social scientific methodologies that could be used.

But I think one of the things that you would hear from defendants is we need to make sure that the CJA panel attorneys are spending actual time with them because that's not something the judges necessarily look at or evaluate, but the fact of the matter, as I've said earlier is, it's integral to that relationship, particularly in the context of making a decision about a resolution.

The other thing that you would probably hear from them is that they can't . . . In these white collar cases, if they're in custody, there is no good way for them to review evidence. Part of the expense of white collar cases for clients in custody is getting the documents and the database into the prison and then allowing the respective client or defendant to review the information.

As we're focused on these larger cases . . . now, many of these defendants are actually not in custody, but for those defendants who are in custody, the cost of getting this amount of massive data into a prison and also allowing for someone to review the data if in prison can be very significant in terms of what type of technology used to allow for that to actually happen.

I've worked with various different types of technologies in the context of organizing large cases and what types of computers you would need to be able to use and how they can be used in the prison. You have to get each laptop in most facilities specifically approved, reviewed. They have to review the hard drive. If it's not the Federal Defenders Office, because all the time, the federal defenders will have a designated laptop or two, but for a CJA counsel, they have to go through a fairly complicated process to get information in.

So I think in going back, the issue of what I think defendants might say, it's also about can we get access to the data in a way that's meaningful rather than simply having our attorney summarize this information to us and then asking us to make an important life decision.

So I think those are two aspects of things that you would hear in the context of this, and also you would probably hear them talk about the extent to which they thought their attorney simply didn't like them, that they didn't connect with their attorney, that they were a fine attorney but on some level they didn't trust that this particular attorney had their best interest at heart.

And I think that that's also something that's difficult to capture but nonetheless would hopefully be captured in the context of lawyer's ability to work with their clients, particularly difficult clients.

Dr. Rucker: I do have a second question that I wanted to give the other judges a chance to answer that if any of them would to.

Judge Gonzalez Rogers: I would just note, just for informational purposes that right now in the Northern District through the efforts of our U.S. Marshal and Steve Kalar, we now are only cusp of having tablets approved to be left in North County Jail, which is our primary facility, so that huge amounts of data can be accessible to the defendants without their lawyers there. That took a lot of work to get to this point, so anyway that's just a data point for you, Judge.

Dr. Rucker: Okay, thank you. The second question I have really is for all four of you. One of the themes that we're supposed to be talking about here in the hearings this week is budgeting. The judicial conference has a policy on what they call the mega cases ask their definition right now is anything over 300 attorney hours or $39,000.

Judge Carter: Was that one million or one thousand dollars?

Dr. Rucker: So my question to you is, you know, are you budgeting cases and is that a reasonable threshold to really say a budgeting case? Can we really save money at that level or should it be a much higher level at that, and I start with Judge Seabright.

Chief Judge Seabright: No and no. We aren't budgeting, not in a meaningful way and that's not a reasonable level. I mean, if you're going to call it a mega case, let's be real and make it a mega case.

Dr. Rucker: Would you suggest a threshold?

Chief Judge Seabright: At least over $100,000, $150,000. In today's world, I think that's much more realistic.

Dr. Rucker: Thank you, Judge.

Judge Gonzalez Rogers: I would agree with the threshold. We're beginning to do, I think, a better job at case budgeting and with eVoucher, people have to do it, so we're getting there, but it's a work in progress.

Judge Carter: I agree with my colleagues.

Judge Boulware: I think that the threshold that you mentioned earlier obviously is too low, but I also think that, quite honestly, $100,000 is also low.

I mean, the reality of it is when you're dealing with mega cases in the context of these types of cases, you're looking at much more than that in the context of organizing data given what happens in these cases, but again, I think with case budgeting, you know, we haven't really started doing that in my district, and different judges do different things, but I can tell you the cases that I manage, case management is an essential part of the process.

And here's why I would say it's essential. In order to do the budget, you actually have to know what you're looking for and know what your defense theory is, and in fact, it's crucial to your function if you're a defense attorney to do that up front, to be able to take advantage of possible opportunities for your client to plea.

Oftentimes, what we don't focus on as judges and even defense attorneys don't focus on is the need to have information to inform the decision about pleas or cooperation in the context of large document cases and that information is crucial in the context of understanding a particular defendant or client's exposure and what can and can't be proven and what can you expect to find based on upon what your client has told you or what the defendant has said to a judge exists.

Judge Carter: And that's why that definition from you as a Committee becomes important to us. If this is a death case and you told me it was $39,000, I'm concerned. If you tell me that it's a multi-defendant case with twenty-five or thirty or forty defendants which we unfortunately commonly get in the Central District, I'm concerned. It's ludicrous standard.

If you tell me that it's a geographically dispersed case across the country with five defendants and four more over in the southern . . . I'm concerned. So the standard to begin with, what I'm concerned about, though, is picking an arbitrary number of $100,000 because there are exceptions to that, and you support it, what your psychologist is charging in Portland, Oregon compared to the Central District of New York, I'm concerned.

So I don't have a number, but I tend to agree with you that $100,000 is just minimally and almost laughable on these cases, quite frankly, but it's not $39,000, set up that budget you talked about.

Dr. Rucker: Thanks very much.

Katherian Roe: Thank you. Judge Seabright, I wanted to ask you a few questions about your CJA voucher process. I believe you indicated in your written statement that the magistrate judge and the federal public defender review the voucher before you see it?

Chief Judge Seabright: Yes.

Katherian Roe: Each voucher, there's a three-part review?

Chief Judge Seabright: Well, it used to be before eVouchers, and we were late getting on board on that, they would actually get together. At lunch or something and get together and have a pile of vouchers and go through them. Now they don't do that any longer, but they both review and sign off on it.

The eVoucher probably only reflects the magistrate judge signing off on it and not the public defender, but the public defender I know has signed off on it because the magistrate judge will not, absent that agreement. So both do review it and then they do have a back and forth whether it be by email or phone, and by the time I get it I know it's been approved by both the federal public defender and the magistrate judge.

Katherian Roe: And has that been a federal public defender and a magistrate judge that you trust their judgment?

Chief Judge Seabright: You know, they don't cut vouchers very often. You talk about culture, in our district, it's very seldom we cut vouchers. We have had occasion, whether it's time listed for events that never took place and those sort of things, where obviously we cut, but generally speaking, within the culture of our district, I do trust that review process.

Katherian Roe: And the reason I ask that is because I also saw in your statement that you said that you often suspect that the voucher is excessive.

Chief Judge Seabright: It's not uncommon for me to feel that way.

Katherian Roe: And why do you feel that way?

Chief Judge Seabright: Because I know the case. I know what the lawyer did and I know the lawyer.

Katherian Roe: When you say you, "know what the lawyer did," you know what the lawyer did in the courtroom and in writing?

Chief Judge Seabright: Well, look, there are times we know what the lawyers do because we know the lawyer, and we know the client, going back to what Judge Boulware says is complaining, "He never comes out and sees me." So there certainly are times I think the voucher is excessive, but I don't cut when I have that feeling. It's a gut feeling. It's not objective criteria I can lay out, but I feel comfortable going back and saying, "I think the voucher should be cut."

Katherian Roe: All right. So basically, just a . . . is it fair to say a gut feeling?

Chief Judge Seabright: I think that's fair. I think that's more than any objective criteria I can apply.

Katherian Roe: You also mentioned earlier that the folks that we've been hearing from are CJA lawyers that are respected and that all folks aren't like that, and the question I would have is if you believe that some of the folks on your panel are not respected lawyers, why is there no effort to remove them from the panel?

Chief Judge Seabright: Well, that's a good question. We had this discussion last night as well that I think there's a standard across the country, and I think our district is as guilty as others that the unspoken standard for whether an attorney's acceptable to be on the panel is whether or not they would generate a § 2255, a viable § 2255.

So I think judges need a lot of introspection, and we need to spend more time in reviewing the attorneys that are on the panel in making these determinations. When I said earlier . . . I wasn't suggesting that they're engaged in fraud by any stretch or that they were necessarily ineffective. I'm just saying that what you're getting here before you is probably the cream of the crop. And we have an obligation, it seems to me, to "watch the fisc."

And there are attorneys who I think have . . . I've seen in the past, request services that from my perspective . . . and I fully appreciate what Judge Boulware is saying about we're working with blinders on, sometimes very large blinders, but who make requests for services that I don't believe meet the standard within the Ninth Circuit to justify that expense.

Katherian Roe: What do you mean by that?

Chief Judge Seabright: For some of the attorneys, the view is, "It's not my money. What do I care? It's not my money." I've heard them say that before.

Katherian Roe: And how do you come to that conclusion? Is it something they said, something they did, the written document they had to support the request for the expert?

Chief Judge Seabright: What they say, yes.

Katherian Roe: So you've had attorneys actually say, "I'm requesting an expert but I don't care how much it costs."?

Chief Judge Seabright: When questioned on it and I give them the standard, their response has been, I have heard in the past, "It's not my money. My client wants it," and they

try to push it off on the client.

Katherian Roe: Okay. Judge Gonzalez Rogers, you said something earlier about the respect amongst the players in your district and that in your opinion, that's why your system works so well. One of the questions I wanted to ask you is that we've heard testimony about another district in your circuit in which lawyers were ordered to give back money, funds they had already been paid for their services, and it's in the same circuit as your circuit, so I'm wondering if that has happened at all in the Northern District of California.

Judge Gonzalez Rogers: I'm aware of nothing like that ever happening.

Katherian Roe: Thank you. I have no further questions.

Prof. Gould: I have potentially one, maybe two questions. Judge Carter, when you were talking about the lawyers in your panel that were over-billing, billing more than twenty-four hours a day and the like, how many lawyers are we talking about?

Judge Carter: Very small number. I don't want the exception to become the rule or leave you with that impression, but on those occasions, I will speculate that one lawyer literally committed suicide upon discovery . . .

Prof. Gould: I'm sorry?

Judge Carter: Committed suicide. Walked in front of a . . .

Prof. Gould: Oh, okay.

Judge Carter: Committed suicide when it was discovered, and another lawyer was referred to U.S. Attorney's Office, and my point was, that's the outside extreme. I never mean to imply that 99.9% didn't fairly play by the rules, but when that came out, what occurred in relation to your question, Judge, was that the CJA counsel believed, in my opinion, that they were really being confronted, and they took this up as a cause, and quite frankly, if would have seen the facts, this should have never gone public.

It went public in the Daily Journal, and what that caused was the Central District to coalesce around the decisions we've made because we wanted to clean up our own house. We didn't want anybody else to do it. We took a good faith effort and it was firm, decisive. Everybody knew the rules. That's what caused, I think, the conflict you referred to with Judge Fischer. So it's a way of looping back to, don't ever let the exception of the few become your perception and that's what was happening. It's a good option right now.

Prof. Gould: And I appreciate that. I guess the question I would ask you, and I'm sure you've thought about this, is in the focus on cost containment, in the focus on the referring these attorneys to the U.S. Attorney and the like, are you setting up a feeling, a culture, that has your panel lawyers believing that the court is more concerned with reducing costs than improving quality, and is that then end up hurting the culture of indigent defense practice in the Central District?

Judge Carter: That is really speculation on my part, so I'll speculate with you, okay?

Prof. Gould: Thank you.

Judge Carter: I think the old-timers would have a feeling that the rules changed, they changed abruptly, and they would look back and say "ouch." I think the newer panel of attorneys coming on understood those rules to begin with, applied for CJA panel, and so what we've had this year of transition or two years now really because Judge Tallman's committee was working with my committee and the habeas with the CJA counsel at same time. So I'd say that the new lawyers are more comfortable than an older lawyer would be.

The problem was it blew up in the press, and it blew up in the criticism of the court and the action that they've taken, and thank goodness, as judges, we don't push back, but believe me, there was a real coalescing in our court. So when you talk to Judge Fischer, Judge Phillips, who is our incoming Chief Judge, Judge King, me, you'll find our bench was unified. And behind the scenes, quite frankly, a little disgruntled that this had gone public over what were three obvious, and I mean absolutely obvious, issues that actually require approval from the U.S. Attorney's Office.

Prof. Gould: Let me speculate just a little bit more, maybe get some introspection which is, I appreciate your saying that this went public because the attorneys . . .

Judge Carter: Just a little louder.

Prof. Gould: I'm sorry. I appreciate that you're saying that this went public because of the role of the attorneys. In retrospect, is there anything you think you or the bench in the Central District could have done to reduce the controversy that has gone along with this and thus bring down the level of conflict?

Judge Carter: Yeah. I think the controversy old. I haven't heard the other testimony. Maybe it's still as pronounced. I don't know. I don't know how this is delivered by the committee or any individual judge, you know, this change. Perhaps informal communication, you know, letting it go along it's way, and I'll give you an example.

I know that the Northern District and habeas work is suffering. You can't get experts in habeas work at the rate that we have at the present time. In

Portland, we're trying to raise it to a minimum of $250 but we're back channeling them. Diana, are you still here? Yeah. She knows that we've already voted and will propose to our counsel, we wanted to do this in February to raise these rates not driven solely by San Francisco, but they know in good faith that we're really trying, and we're going to do that in June. Right, Dr. Bob? June? So there's been a really good communication, and that word has leaked out to the habeas lawyers, at least, that our committee is going to be the driver on these increased rates.

Now, that's going to leak over to CJA for one reason. If my committee can push that on habeas, you can't have this inequality of support services at $400 . . . I won't tell you rates yet, but we're working on it. It's going to leak right over to CJA. They're going to get a lot of support, I think at that same council meeting. That's the kind of back channeling communication that's really helpful to, quite frankly, keep your CJA lawyers hopeful that something's being done.

I think that this got delivered with such impact from the circuit to the Central District that we were going to act now in our own house and they were going to act if we act, and that's what caused what you're hearing, I think, is the criticism that came specifically towards Judge Fischer apparently.

Prof. Gould: Okay. One last question for Judge Boulware, you have been very compelling in explaining what judges can't do and what ought to be pushed to a panel of judges and lawyers together, and I think we've all noted that you're an unusual judge in the sense that not only have you been a career public defender, but you're only on the bench a couple of years.

So I would imagine like anyone who practiced law, there were days when you were a defender you thought, "When I get to the bench someday, I'm going to do it differently than I've seen it." What have you done or what do you think you can do on the bench to improve the quality of representation vis-à-vis, the CJA?

Judge Boulware: Well, one of the things that I do is, to the extent, I hope this helps, I have a pre-disclosure conference where I require the defendant to be brought to court, and I say directly to the defendant, "I want you to be actively involved in your case. If you feel like you're not getting something in your case that you need, you should request that through your attorney. If that does not work, you have leave from me to write directly to me to explain what it is that you're not receiving in the context of your defense."

And what I say to them is, "Look, I don't want to receive that letter three days before trial. We're here now because I want you to know that it's important to me that you get information about your case, and I generally . . . We work out in the context of that a Rule 16 disclosure deadline for the

government that could be consistent with the Speedy Trial Clause.

So I'll ask the government attorneys, "Can you describe the nature of the evidence in this case?" And this conference lasts about thirty minutes, and I'll say, "Do you think you could get the information to the defendant by in this period of time?" And they say "yes" or we have some back and forth.

And then I turn to the defendant and I say, "You understand that the purpose of this is to make sure you get the information that's important to your case? And I say that because later on I don't want you to say to me that you didn't get the information because you have an opportunity to be able to do that."

Now, I don't know, Professor, whether or not that makes a difference. I know from my previous experience that one of those things my clients used to say to me is, that made a difference to them is, "The judge heard me. I didn't necessarily expect that I was going to win, but the judge heard me." And I do this in my civil cases and my pro se cases for example.

Even in my civil cases, all pro se litigants have at least one opportunity to appear directly in front of me to argue their case, and so part of what I just hoped was to carry that over in the context of the case, and I also give, in criminal cases, defendants an opportunity, in the context of sentencing or other hearing matters opportunities to bring personal representatives to court to speak directly to me about who they are and what they've done in the course of their life.

Now, I don't know, again, whether that's made a difference. I don't, obviously, directly talk with defendants who've appeared in front of me, and I've had, at this point, maybe sixty, seventy cases, but I would like to believe, Professor, that, that matters because in my experience, I know that my former clients having felt like they were heard, and the judge speaking directly to that particular person was something that they almost all remembered.

Prof. Gould: Thank you very much. Judge Fischer, no further questions.

Judge Walton: How many communications have you had received in response to that?

Judge Boulware: You mean written since I've been on the bench?

Judge Walton: Yes.

Judge Boulware: What I hear is directly . . . indirectly through the Federal Defender's Office. And I hear it on my civil cases, there are a lot of requests to have their cases transferred to me because they have an opportunity to appear in front of me, but through CJA lawyers and federal defenders I've heard at least anecdotally, and again I don't know what that means for someone like Dr.

Rucker, but I've heard at least anecdotally that it matters and that they appreciate that in the context of the organization of the case, particularly on CJA cases why I also will say, we're not going to have five stipulations to continue this case because we want to have the case tried, so at least that's what I hear, Judge Walton.

Judge Fischer: Thank you all very much for being with us. My schedule says "working lunch break." Thank you very much. [Judge] Cardone will be working through lunch and we'll see you all at 1:45 p.m., thank you.

Judge Cardone: I do want to say and Judge Fischer, I think, just forgot to mention that if you have anything you'd like to submit as extra information because you've heard us ask you a bunch of questions about different things, and sometimes whatever you submit, you don't really know what our questions are going to be, and so if there is stuff that you'd like to add to your submission, we are happy to get your information. You can either contact your staff directly or submit it through cjastudy.fda.org, thank you.

Judge Boulware: Thank you all.