

# **CJA Panel Attorney Resources: A Guide to Litigation Support Software & How to Obtain Resources in the CJA System**

**David Beneman  
Maine Federal Defender**

**Sean Broderick  
National Litigation Support Administrator**  
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More than any ruling from the U.S. Supreme Court, the advent of the computer has turned the legal system up-side down. The very organizational structure of legal offices has changed dramatically due to the introduction of computer systems. Gone are the days of the typist pool, replaced with information technology (IT) and litigation support departments. Now solo practitioners and small firms can do legal research and prepare complex pleadings and exhibits that were the province of big city law firms just a decade ago.

Though the majority of panel attorneys appointed to Criminal Justice Act (CJA) cases (who are most often solo practitioners) have been using computers for years, the computer revolution continues to impact them with the need for newer machines, operating systems and software programs. More and more cases that CJA practitioners receive require litigation support software. U.S. Attorney's offices are starting to provide discovery in electronic format, either in TIFF or PDF format, no matter what the type of case. From reviewing the discovery in the case to presenting evidence in the courtroom, if you are working on a federal criminal case, you can't avoid the need for technology.

Unfortunately, the potential of computer systems is limited by computer literacy, budget and human resource constraints and the inability to identify the right program(s) for one's pressing needs. Often, attorneys know that technology can help them in cases, but they don't know exactly how. As a result, they have numerous questions about software, hardware, vendors and experts, about what they should buy, and how they can obtain assistance from the court for their more complex cases.

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<sup>1</sup> David Beneman originally wrote most of this article in 2005 and 2006; in 2008, Sean Broderick updated and added to the article. Standard disclaimer: the comments in this article are solely the opinions of the authors and do not reflect, except where stated, any official policy of the Office of Defender Services or the Judiciary.

There are two parts to this article. The first briefly describes some of the litigation support<sup>2</sup> software programs that are popular among Federal Defender Offices (FDOs) and CJA panel attorneys. Because each attorney's needs are different we are not advocating for particular software or hardware. Rather, our aim is to describe some options, and how you can find out more about the products. We are not describing the higher end database programs or web-based programs. This article highlights programs that you may utilize on small to medium size cases, as opposed to high-end software appropriate for extremely large cases. We also note discounts available to CJA practitioners.

The second part of the article describes the CJA guidelines governing CJA funding for software, hardware and expert services. We will walk you through a case example to illustrate how the funding process works.

## I. Litigation Support Software

### A. *Courtroom Presentation Software Programs*

#### 1. Trial Director

Trial Director allows users to present documents, video, animations, charts, and graphics to locate, retrieve and markup any exhibit on the fly in the courtroom (as opposed to PowerPoint where you generally have to go in a pre-defined linear order). The program allows one to isolate visual evidence in a number of ways including using a call-out or zoom of a portion of a document, or mark-up or highlighting portions of a document. This makes it a useful tool for cross-examination or other aspects of trial that require a great deal of flexibility.

Trial Director is a product of inData Corporation. Version 5.1 is available to CJA practitioners at the discounted price of \$297 (half of the retail price). You must also purchase the annual maintenance package, for a total cost of \$416. To purchase Trial Director, contact inData sales directly (**800-828-8292**). Inform them that you are a CJA attorney and that you would like to purchase the Trial Director software at the special CJA rate. A copy of the most recent letter from inData documenting this offer is attached at the end of this article.

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<sup>2</sup> What do we mean by litigation support? It is the use of computer systems to organize, review, analyze and present case materials. In federal criminal defense cases, there are three primary ways that litigation support is utilized by FDO and CJA panel attorneys: (1) conducting electronic courtroom presentations; (2) document management and case analysis of paper documents and their electronic equivalents; (3) evidence organization and case analysis of electronically stored information (ESI), specifically working with native files (electronic documents that are in their original file format, e.g., if the file was created in Microsoft Word, it is a Word document).

Contact information:

1325 North Fiesta Blvd, Suite #4,  
Gilbert, AZ 85233

Phone: 480-497-8595, 877-463-2829, or 800-828-8292

Fax: 480-497-1833;

Technical Support: 480-497-0066 (Mon - Fri, 9:00 am - 8:00 pm)

[www.indatacorp.com](http://www.indatacorp.com)

**2. Sanction**

A direct competitor with Trial Director, Sanction is another option when considering courtroom presentation software. Published by Verdict Systems, in Tempe, Arizona, the current version is 2.9. For more information, and a free 30 day download, go to [www.sanction.com](http://www.sanction.com). Take notice that the United States Attorneys' Offices makes extensive use of Sanction for courtroom presentations.

**3. PowerPoint**

This is the most common "slideware" presentation software. It is available as a stand alone product, or as part of several Microsoft Office Packages. The most recent version of the program is PowerPoint 2007. Go to <http://office.microsoft.com/en-us/powerpoint/default.aspx> for further information.

PowerPoint Resources: There are many books on PowerPoint. The *PowerPoint 2002 for Litigators* book is published by NITA, and it is available for \$75 from their website, [www.nita.org](http://www.nita.org). Also available at the same site is the companion volume, *PowerPoint 2003: 50 Great Tips for Faster, Easier Slides*, for \$30. For those seeking more, consider, *Effective Use of Courtroom Technology: A Lawyer's Guide to Pretrial and Trial*, also \$75 (available at Amazon). Though these books reference the earlier versions of PowerPoint, their tips are useful for basic courtroom presentations.

With the release of PowerPoint 2007, beginning users should consider *PowerPoint 2007 for Starters: The Missing Manual* by E. Vander Veer (Paperback - Jan 25, 2007). For more advanced users, *PowerPoint 2007: The Missing Manual* also by E. Vander Veer (Paperback - Dec 22, 2006) and *Advanced PowerPoint 2007* by Wayne Kao and Jeff Huang (Paperback - 2008) are also excellent resources. These books focus more on the technical aspects of PowerPoint than on methods of effective presentations. For the later, consider *PresentationZen* by Garr Reynolds (Paperback - 2008).

#### 4. Corel Presentations

Another slideware software program and a worthy competitor to PowerPoint is Corel Presentations. Since many use WordPerfect in the legal world (though those numbers are shrinking), you may already own it as part of the full WordPerfect Office package. The most recent version, X4 (14), is only available as part of the Corel WordPerfect Office productivity suite. Go to [www.corel.com/](http://www.corel.com/) for further information.

#### 5. Open Office.org

This is a free cross-platform office application suite. It was developed by Sun Microsystems (<http://www.openoffice.org/>). This option includes all of the types of programs found in an office suite, yet at no direct cost to you. Their slideware software program is "Impress," and it is a free alternative to PowerPoint. It does not have ready-made presentation designs as PowerPoint does, but you can obtain third-party templates.

### B. Case Organization Software Programs

#### 1. Adobe Acrobat

Are you still using only the free Adobe Reader for your PDF<sup>3</sup> files? Much can be done with Adobe Acrobat, available from many software suppliers, and from Adobe directly, at [www.adobe.com/products](http://www.adobe.com/products). The three different versions of Acrobat have many additional features besides the viewing, printing and searching that are available with Adobe Reader.

There are now three versions of Adobe Acrobat: Adobe 9 Standard, Adobe 9 Pro, and Adobe 9 Pro Extended. Standard sells for \$300, Pro for \$450 and Pro Extend for \$700. Among other features, Adobe Acrobat Pro 9 gives you the ability to electronic bates-stamp documents (such as discovery provided from the government); OCR<sup>4</sup> non-searchable PDF documents;

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<sup>3</sup> PDF (Portable Document Format): An imaging file format technology developed by Adobe Systems. PDF captures formatting information from a variety of applications in such a way that the files can be viewed and printed as they were intended in their original application by practically any computer, on multiple platforms, regardless of the specific application in which the original was created. PDF files may be text-searchable or image-only.

<sup>4</sup> OCR stands for Optical Character Recognition. OCR is the technological process that translates and converts printed matter on an image into a format that a computer can manipulate (ASCII codes, for example) reading that matter text searchable. OCR software evaluates scanned data for shapes it recognizes as letters or numerals. All OCR systems include an optical scanner for reading text, and software for analyzing images. Advanced OCR systems can read text in a large variety of fonts, but still have difficulty with handwritten text. OCR technology relies upon the quality of the imaged material, the conversion accuracy of the

convert TIFF<sup>5</sup> files into searchable PDF files; redact sensitive information; and compare differences between two PDF documents. It also enables users of the Reader version to share their comments on documents with others. Many of these processes can be done as a "batch process"; in other words, multiple files at a time. Another useful feature is the ability to create an index of the text in PDFs. Indexing PDFs dramatically enhances the speed of searches for words and phrases. Adobe 9 Pro is probably the best combination of features and price for CJA panel attorneys.

A 30-day free download of Adobe Acrobat is available at the Adobe website. For a detailed matrix about the various Adobe Acrobat products and their corresponding abilities, see <http://www.adobe.com/uk/products/acrobat/matrix.html>.

## 2. PDF Converter

This is a handy utility that converts PDF documents into both Word and WordPerfect, as well as allowing almost any program to "print to" PDF (for those who do not have Acrobat). It can create audio files from PDFs allowing you to "listen" to discovery, case law, etc. (What fun for a family car trip!) Visit the website, [www.nuance.com/pdfconverter](http://www.nuance.com/pdfconverter), for Version 5 which currently sells for \$100.

## 3. CaseMap and TimeMap

CaseMap is a relational database that focuses on the management and analysis of the case facts and legal issues. Built on a Microsoft Access database, it has customized tables or spreadsheets for facts, objects (documents, witnesses, organizations, etc.) and issues that link between each other. As you enter information into the database about your facts, you see patterns develop - leads for further investigation and potential theories for your case. Since it is a database, multiple people can add information to the case, and it is built to be user friendly. One can create time line graphic charts or presentations with TimeMap, a stand alone product which works seamlessly with CaseMap.

Owned by Lexis-Nexis, CaseMap is currently offering version 8.0 and TimeMap version 4. CJA attorneys are able to obtain the discounted government rate for these software programs.

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software, and the quality control process of the provider. The process is generally acknowledged to be between 80 and 99 percent accurate.

<sup>5</sup> TIFF (Tagged Image File Format): A widely used and supported graphic file formats for storing bit-mapped images, with many different compression formats and resolutions. File name has .TIF extension. More popular than the PDF file format, it is the standard in document imaging and document management systems, where documents are imaged or scanned and saved into this format. TIFFs are popular because its file structure allows many different types of software programs to easily open it.

Go to their website, [www.casesoft.com](http://www.casesoft.com) which offers a fully functional 30 day free download to try the software. You must then call in, pay and receive the activation code. Please note that the White Paper and Webinar sections of this website (<http://www.casesoft.com/training/articles.asp>, and <http://www.casesoft.com/webinar/webinars.asp> respectively) include many excellent resources on the effective use of CaseMap related software, as well as general case organization strategies (including helpful tips on the effective use of Adobe Acrobat). If you wish to purchase CaseMap, contact Paul Brady of LexisNexis CaseMap directly at 904-373-2174 and inform him that you are a CJA attorney. As of May 2008, a one year subscription for a CaseMap license is \$539; a year subscription for TimeMap is \$224; and a CaseMap / TimeMap combination set is \$708.

### C. *Full-Text Search Programs*

Full-text search refers to a technique for searching a computer-stored document or database. In a full-text search, the search engine examines all of the words in every stored document as it tries to match search words supplied by the user. Two popular programs that can do full-text searching are ISYS and dtSearch. They can search many different file types (unlike Adobe which only can search PDF files). Both programs require you to build a word index that stores the location of words in the documents.<sup>6</sup> As you will see from the following descriptions, they have similar capabilities.

#### 1. **ISYS**

ISYS has a desktop search tool (ISYS: desktop 9) designed to enable searches across individual PCs, shared folders or even large corporate networks. The main benefit of ISYS is being able to find information fast. You may not be able to remember where you saved a certain document, or which document contains the information you need. You may not even know that information exists within your materials. With ISYS, after you index your data, you can search using terms and phrases in the same way you would search the Web.

ISYS provides a preview pane that highlights the hits for quick review of a result; and on-the-fly categorization to navigate, drill down and refine a results list. It can help you find associations and connections between your search terms and the entities ISYS automatically extracts and displays. The program also allows highlighted search terms (in-document hit-highlighting) and navigation from hit-to-hit.

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<sup>6</sup> Since full-text software programs create large word indices of all of the electronic case materials, these indices will take up additional space on the computer hard drive or server. The size of this index depends on the number of files that are being indexed. This can be an important issue to remember, especially if you do not have a large hard drive or lots of space on your server.

After you type in the relevant search terms, ISYS will find every instance of those terms and make them available to you to view -- even if you don't have the original application that created them. You can search MS Office formats, email, attachments, PDF, HTML, ZIP files, databases and native format spreadsheets, and more.

Further information about this program is available at <http://www.isys-search.com/>. An evaluation copy of the software is available for 14 days.

## 2. **dtSearch**

dtSearch Desktop also allows you to instantly search terabytes (i.e., vast amounts of electronic data) of text across a desktop, network, Internet or Intranet site. It has over two dozen indexed, unindexed, fielded and full-text search options and highlights hits in HTML, XML and PDF, while displaying embedded links, formatting and images. It will convert other file types — word processor, database, spreadsheet, email and full-text of email attachments, ZIP, Unicode, etc. — to HTML for display with highlighted hits.

Once dtSearch has built an index, it can automatically update it using the Windows Task Scheduler to reflect additions, deletions and modifications to your document collection. Updating an index is even faster, since dtSearch will check each file, and only re-index files that have been added or changed.

The dtSearch indexer automatically recognizes and supports all popular file formats, and never alters original files. A single index can hold over a terabyte of text, and dtSearch can create — and search with a single search request — an unlimited number of indices. If the files have not yet been added to the index, dtSearch can search indexed and non-indexed files doing a “combination” search.

Further information about this program is available at <http://www.dtsearch.com/>. An evaluation copy of the software is available for 30 days.

## D. *Image Viewer Programs*

An image viewer or image browser is a computer program that can display stored graphical images. It can handle various graphics file formats, even if you don't have the software program that originally created the image. Such software usually renders the image according to properties of the display such as color depth, display resolution, and color profile. Typical features of image viewers are basic viewing (i.e., zooming and rotating), fullscreen display, slideshow, thumbnail display, printing and screen capture. Though some of the newer operating systems have many of these capabilities built-in, it can be useful to have an image viewer program for opening up image files.

**1. Irfanview**

This is a free viewer that will let you open, view, edit and convert almost any image file or graphic. <http://www.irfanview.com/>

**2. XnView**

This is another image viewer that is cross-platform (meaning it can be used on different types of operating systems) and is used for viewing, converting, editing and organizing graphical and video files. <http://www.xnview.com/>

## II. Obtaining Resources as a CJA Panel Attorney - Overview

### A. Hardware

1. Easiest way: purchase what you want.
2. Middle ground: borrow what you need from your FDO or friends.
3. Most difficult: getting CJA funds for hardware purchases.

### B. Software

1. Easiest way: purchase what you want.
2. Middle ground: borrow what you need from your FDO or friends.
3. Most difficult: getting CJA funds for software purchases.

### C. Experts and Vendors

1. No easy way.
2. No middle ground.
3. Need to apply to the Court for funds. Expert and vendor funds should be easier to get than money for hardware or software.

### **CJA funds cannot be used to buy your permanent gear.**

If the Court approves money for hardware, or software, once the case is over you *must return* it. Where does it go? It will go either to the Office of Defender Services National Litigation Support Administrator (NLSA), or to your local FDO. Check first with the NLSA (currently Sean Broderick) before sending the equipment anywhere.

### D. Getting Approval<sup>7</sup>

As with all things judicial, there is a “process.” The “Holy Grail” search begins with The Criminal Justice Act, 18 U.S.C. §3006A and the CJA Guidelines promulgated by the United States Judicial Conference: *Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures* (CJA Guidelines). These are available from your Court Clerk, through your Defender, or on-line at [http://www.fd.org/odstb\\_CJAGuide2.htm](http://www.fd.org/odstb_CJAGuide2.htm). Since we are digging into this issue, we might as well try to do it correctly. Section (e) of 3006A addresses “services other than counsel.” The Judicial

<sup>7</sup>

Sean Broderick’s contact information is located at the end of this article.

Conference augments the Act in chapter III of the Guidelines. Below are the guideline sections relevant to obtaining CJA resources:

### **3.01 Availability**

Investigative, expert or other services necessary for adequate representation, as authorized by subsection (e) of the Act, *shall* be available to persons who are eligible under the Act, including persons who have retained counsel, but who are found by the court to be financially unable to obtain the necessary services [emphasis added]....

### **3.02 Limitations**

**A. With Prior Authorization.** With prior authorization, compensation for investigative, expert and other services is limited to **\$1,600** per individual plus expenses reasonably incurred<sup>8</sup>... A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case.... If it can be anticipated that the compensation will exceed the statutory maximum (\$1,600), advance approval should be obtained from the court and the chief judge of the circuit... (See sample form, Appendix C) [emphasis added].

Payment in excess of the \$1,600 limit for services authorized prior to the performance thereof may be made when certified by the United States judge, or United States magistrate judge, **and approved by the chief judge of the circuit** (or an active or senior circuit judge to whom excess compensation approval authority has been delegated) as **being necessary to provide fair compensation for services of an unusual character or duration** [emphasis added].

**B. Without Prior Authorization.** Subsection (e)(2)(A) of the Act authorizes the obtaining of investigative, expert and other services, without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed **\$500**, plus expenses reasonably incurred [emphasis added].

### **3.03 Ex Parte Applications**

Ex parte applications for services *shall* be heard *in camera*, and *shall not* be revealed without the consent of the defendant. The application *shall* be placed under seal until the

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**3.17 Reimbursement of Expenses:** In determining the reasonableness of expenses of persons furnishing investigative, expert or other services, claimants and the court should be guided by the provisions of these Guidelines regarding reimbursement of expenses of counsel (see paragraphs 2.27 and 2.28)....

final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense. Appointed counsel *shall not* be required to submit evidence of a prior attempt to enter into a stipulation with the United States Attorney as a prerequisite to obtaining services under subsection (e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the ex parte application [emphasis added].

### **3.04 Claims for Services**

All claims for services other than counsel, under subsection (e) of the Act, should include the following: a statement as to the type of, dates of, and time expended for, the services provided; an explanation of the fee arrangement (i.e., hourly rate, per diem rate, etc.); an itemized statement of all expenses for which reimbursement is claimed; and supporting documentation, where practicable, for all expenses of lodgings and subsistence, and for any expenses in excess of \$50.

### **3.16 Other Services and Computer Hardware and Software**

Services ... may include, but are not necessarily limited to, ... computer systems and automation litigation support personnel and experts; paralegals and legal assistants, including law students; neurologists; and laboratory experts ...

Criminal Justice Act attorneys are expected to use their own office resources, including secretarial help, for work on CJA cases. (See paragraph 2.28 A.). However, unusual or extraordinary expenses of these types may be considered "other services necessary for an adequate defense" and may be paid from CJA funds under subsection (e) of the Act. In determining whether the expense is unusual or extraordinary, consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses.

Providing an adequate defense case may require CJA panel attorneys to utilize computer hardware or software not typically available in a law office. In such cases, following the standards in the preceding paragraph, counsel may apply to the court for authorization of CJA funds for the acquisition of such property. **Before seeking court approval for any computer hardware or software with a cost exceeding \$500, or for the utilization of computer systems, automation litigation support personnel or experts with an expected combined cost exceeding \$10,000, appointed counsel must consult the Office of Defender Services (ODS) for guidance and inform the court in writing of the Office of Defender Service's advice and recommendation regarding counsel's proposed expenditure (emphasis added).** (NOTE: A model order "Authorizing the

Acquisition of Computer [Hardware and/or Software] under the Criminal Justice Act" is included in Appendix C). The acquisition of the computer hardware and/or software, with CJA funds, shall be made by a federal defender organization designated by ODS, or by ODS itself,<sup>9</sup> and shall remain the property of the United States. While computer hardware or software is being used by counsel, information contained on the hardware or software may be confidential work product and may also be protected by attorney-client privilege. **Upon the completion of the case, the computer hardware and software must be returned in good condition, after all case-related materials have been removed, to a federal defender organization designated by ODS.**<sup>10</sup> Unless otherwise required by the court or law, counsel should retain copies, electronic or otherwise, of the case-related materials for the client's file [emphasis added].

For services of paralegals and legal assistants, and other non-secretarial professional support personnel employed by appointed counsel, the court shall determine a reasonable hourly compensation rate that shall not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services. Authorizing compensation at such rates should result in greater efficiency and lower costs for the CJA program than would occur if counsel performed and charged for these services.

*E. Summary:*

1. Funds are available for technology assistance in the form of human resources, software and hardware.
2. Caps are: \$500, with no advanced approval; \$1,600 per item with pre-approval, and more with approval by the circuit court for "services of an unusual character or duration."

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<sup>9</sup> Though the Guidelines state that the purchases "shall be made by a federal defender organization designated by ODS, or by ODS itself," in many instances CJA counsel have either had the vendor bill the court directly through a CJA 21 or 31 form (assuming the vendor is willing to do this), or have purchased the item themselves and have obtained reimbursement for the expense by filling out a CJA 21 or 31 Form. The advantage of the former method is that it avoids the need to pay sales tax. **Please note: you should get prior approval from the court before purchasing any item in order to ensure reimbursement. Any hardware/software that you purchase is still considered to be government property.**

<sup>10</sup> The CJA panel attorney should contact the National Litigation Support Administrator to determine whether to return it to ODS or to a local defender.

3. Requests are *ex parte* and under seal; the prosecution plays no role in this process.<sup>11</sup>
4. Guidance from ODS must be obtained for the purchase of any computer hardware or software over \$500 and for any computer systems, automated litigation support personnel, experts or vendors over \$10,000. Provide your request (your motion) to the NLSA to get his recommendation **before** submitting your request to the court.
5. Any hardware or software is owned by the federal government, and will be returned to ODS or the local FDO at the end of the case.

*F. Getting the Money*

You will use an *ex parte* sealed request to your court. In most, if not all courts, sealed filings are NOT sent using ECF.<sup>12</sup> ECF will automatically generate a filing notice to all other counsel in the case (including the government and often probation/pre-trial), so DO NOT send via ECF. I (David) hand deliver and put a “stick it” note on top saying “Under Seal, Ex- Parte, not for ECF.” Local practice varies some, but generally the request is either a letter or a motion, and it usually goes to the Magistrate, although some Judges handle such requests themselves. Depending on practice in your District, you may be filing one request which includes each of the experts and services needed as one document, or you might file separate requests for each service. I (David) suggest asking the Magistrate’s clerk which is preferred.

*G. Case Law - Courts Seem to Love Some Law*

The opinion in *United States v. McVeigh*, 954 F. Supp. 1441 (D. Colo. 1997) is very helpful in obtaining needed funds. The District Court approved a broad motion filed by court-appointed defense counsel requesting the appointment of additional counsel, investigators, consultants and forensic specialists “together with attendant costs and expenses.” The scope of the ruling and phraseology used in the opinion are worth quoting here:

“[T]he court has made no effort to evaluate the credibility or determine the significance of these submissions, and has consistently relied on the experience and integrity of defense counsel, accepting their representations that such resources are reasonably necessary in preparing for the trial defense of Mr.

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<sup>11</sup> See *United States v. Bodkins*, 2005 U.S. Dist. LEXIS 8745 (W.D VA, 5/11/05) ruling that approved case and expert budgets to remain sealed pre-trial.

<sup>12</sup> The First Circuit vacated a sentence and remanded the case when the District Court violated the *ex parte* provisions of the Act. *United States v. Abreu*, 202 F.3d 386 (1st Cir. 2000).

McVeigh. There is no requirement that defense counsel show that admissible evidence will result from these investigatory efforts." (Page 1445).

For an exhaustive review of experts and indigent defense, see Giannelli, Paul, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, September, 2004, particularly pages 1332-1339 on CJA and footnotes 170-210. Another good starting point is *Construction and application of provision in subsection (e) of Criminal Justice Act of 1964 (18 USC § 3006A(e)) concerning right of indigent defendant to aid in obtaining services of investigator or expert.* 6 ALR Fed 1007.

The case of *United States v. Kennedy*, 64 F.3d 1465 (10th Cir. 1995) provides some useful insight into how an appellate court, looking backwards, addresses expert and funding issues. Kennedy received appointed counsel one year before his August 1993 trial. During pretrial discovery, the government provided the defense access to 800 bankers' boxes of documents it had amassed during its investigation, 539 of which contained records for a corporation that Kennedy helped create, Western Monetary Consultants, Inc. (WMC). The boxes were placed in a repository in two rooms of a government building in Denver, Colorado, and they were available for viewing as of August 14, 1992.

During this pretrial period, Kennedy's counsel made numerous requests for additional support services to supplement the services of his one paralegal assistant. The court granted Kennedy funds for an investigator, and funds to retain Philip Bolles ("Bolles"), who had served as WMC's chief financial officer from 1989 to 1992, and who was an expert on the inner workings of WMC. The court additionally authorized funds for Kennedy to hire Ray Thomas ("Thomas") as an expert witness on the metal industry, and to hire Richard McCormack ("McCormack") as an expert witness on Ponzi schemes. On December 15, 1992, the court also appointed a co-counsel to work on Kennedy's case. The court denied Kennedy's request for additional paralegals to help review and index the 800 boxes of documents. Also denied was Kennedy's request to hire the accounting firm Arthur Anderson to audit WMC's financial records and to review the conclusions and analysis of one of the government's key expert witnesses. (The 10<sup>th</sup> Circuit eventually upheld the district court's rulings denying the defendant's requests for additional paralegals, airfare to fly to Colorado to prepare for trial, or services of an accounting firm, stating that the court did not abuse its discretion under the Criminal Justice Act.) Overall, not bad. Here is precedent from the notoriously "thrifty" 10<sup>th</sup> Circuit supporting funds for a second attorney, three experts and a paralegal. The defense was provided with \$5,000 to retain Thomas, a qualified expert in the metals industry and \$200 per hour up to \$7,500 to retain McCormack, a qualified expert on Ponzi schemes.

**Standard used:** "In order to obtain services under this provision, the defendant must do more than allege that the services would be helpful. *United States v. Ready*, 574 F.2d 1009, 1015 (10th Cir. 1978). The defendant bears the burden of showing that the requested services are "necessary" to present an adequate defense. *United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986), cert. denied, 480 U.S. 908 (1987). The denial of such a request is reviewed only for

an abuse of discretion. *United States v. Nichols*, 21 F.3d 1016, 1017 (10th Cir.), cert. denied, 115 S. Ct. 523 (1994). *Kennedy* at 1470.

More recently in *United States v. Albert*, 195 F. Supp. 2d 267, 283 (D. Ma 2002) the Court explained its reasoning in allowing an initial \$5,000 for a computer expert:

The defendant seeks \$15,000 for the employment of a Computer Forensics Expert in order to “undertake a complete defensive assessment and analysis of the alleged contents of any and all computer disks, computer hard drives, and computer files seized by the government.” Defendant is indigent and asserts that such analysis is necessary in order to prepare an adequate defense.

The defendant bears the burden of demonstrating the necessity of expert services for an adequate defense. *United States v. Algarin de Jesus*, 211 F.3d 153, 155 (1st Cir. 2000). Here, the defendant has met this burden. He is indigent and unable to afford the services of an expert as evidenced by the court’s appointment of counsel. His defense of the case, depends largely on the analysis of the evidence contained on the defendant’s computer and computer equipment.

The defendant has submitted the rates of 14 computer forensics experts whose rates range from \$35 to \$160 per hour. Funds in excess of \$1,000 are warranted in this case, but no sufficient showing has been made to justify the full amount requested. This Court will therefore authorize expert funds in the amount of \$5,000 without prejudice to a supplemental application if and when good cause is shown. All fees shall be paid upon completion of the expert’s services, and in no event will retainer fees be authorized.

#### *H. You Get The Funding From The Court*

If you get funds for hardware and/or software, you will need to provide a copy of the following documents to the NLSA. The documents are necessary so that the proper tracking of all equipment purchased with CJA funds can be done:

1. **The original request for the equipment.** This will be the final version of the motion that you submitted to the court.
2. **The approval of the request.** This will be a copy of the court’s order.
3. **The purchasing documents.** This will usually consist of the following:
  - a. A completed CJA 21 (or 31) form.
  - b. The purchase order from the vendor.

4. **Any receiving documents**, such as a copy of the packing slip or the company's invoice.

The documents are necessary because without them, it is not possible to track the items of federal property purchased with CJA funds. If you have any questions about this process, please contact the NLSA.

*I. After the Case is Done*

Remember that because the equipment was purchased with CJA funds, it is U.S. government property. It is not your property. Thirty (30) days after the completion of the case, you will need to return the equipment to the NLSA. You will need to remove your case data from any computer media, and return all of the hardware, manuals, computer disks, etc. that came with the item(s) that were purchased in your case. The NLSA may direct you to return it to a local defender, but contact the NLSA before giving the items to anyone.

### III. Working Through A Fictitious Case

The best way to work through this maze is with an example:

You are appointed as one of six CJA panel attorneys, each representing defendants in a multi-count fraud case based on an alleged “pyramid” investment scheme involving an unlicensed sale of securities. There are sixteen boxes of paper records, numerous recordings and untold numbers of potential victims. Initially, you are not sure what your defense will be (e.g., “I had no intent;” vs. “I was not part of this ‘scheme.’”) The attorneys for most of the defendants have spoken to another and several defendants appear to be similarly situated to your client. What you would like is to get some of the paper organized, create an outline and/or timeline, then compare some of the key documents to the outline. Through this process you hope to be able to understand just how your client fits in the alleged scheme and move toward a viable theory of defense.

A. *Needed:*

1. Someone who understands securities sales and regulations;
2. Someone who knows how to organize and index up to sixteen boxes of discovery, as you do not see that as “ordinary office resources;”
3. Tool(s) for utilizing the discovery once it is organized.

Based on some seminars you have attended and articles you have read, you figure this is a case that cries out for technology. Your first thought is to have all of the boxes of discovery “scanned,” so you can load them in the computer. Looking deeper, you see that basic image scanning just gives you a computer full of pictures and does not really change the situation. You do a web search and find there are companies who will scan, OCR and “code” the documents for you. Wow, this is really something. Then you find there are companies that will design a system for you that organizes the discovery the way you want it. Double wow. You call a couple of companies for references and prices. They all say they can take out the confusion and hold down the tech-babble. Now what?

B. *What to Do First*

**Before you start looking at “litigation support services” talk to others about what you are trying to do.**

1. **Speak with your local FDO.** In particular, try talking to the more “techie” assistant federal public defenders (AFPDs), the CSA (computer systems analyst), or paralegal in the office to see if they have already been through this process. If so, they may be able to steer you to a local or proven approach.
2. **Speak with other lawyers** you know, preferably in your District, but also on a national level to learn about approaches they have used.
3. **Call the National Litigation Support Administrator**, Sean Broderick. He provides guidance and recommendations to federal courts, federal defender organization staff and court appointed attorneys on complex cases, including evidence organization, document management, case analysis and trial presentation.<sup>13</sup> See Guideline 3.16 for the circumstances under which you must consult the NLSA.
4. **Contact the technology people** in the clerk’s office. They can be a very good resource, especially when you are getting ready for courtroom presentation issues. They will inform you whether the courtrooms are wired, and what one needs to do in order to give an electronic presentation.

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<sup>13</sup> Please remember that there is only one person currently working on national litigation support issues for both the CJA panel and FDOs. With more than 13,000 CJA attorneys in the country and thousands of FDO employees, there may be some delay in response, though Sean will do his best to get back to you quickly.

### **Try before you buy.**

If you think there is software that will make a big difference in your case, find some way to test the software, before actually purchasing it. There are SO MANY stories of software purchases which never left the shrink wrap, or were used for a week then abandoned. Many vendors will provide demo versions that are good for a limited time, or which have some, but not all of the programs features. For example, CaseMap lets you download a fully functional version for 30 days. More expensive products often have a representative who will bring a working copy to your office, or allow you to come to an office to use their demo version. Remember, your FDO may have a version of the software that you can at least see how it works in action. Some software you may have on your home computer, and you may not even know it. Your kids may have PowerPoint from school, or it may be on the Public Library computer. Try it and see if you feel comfortable using it.

### **There is no one “silver bullet” or “right” answer.**

There is no “one size fits most.” Your initial approach is to try and figure out what you are trying to figure out. Then, you look for the tool(s) which will help you achieve that goal. There are lots of software programs, and most likely the solution that will work for you will be a combination of programs as opposed to one system.

#### *C. What to Do Next:*

Now that you have spoken to your FDO, or some other attorneys, you have a better idea of what is available, and what you are trying to accomplish.

1. Begin establishing the potential case facts.
2. Speak with the client about her/his view of what occurred.
3. If possible, try to get the AUSA and /or case agent to explain the case to you from their perspective.
  - a. NOTE: We realize this is not always done, but there are many prosecutors who will be happy to educate you as to why your client should plea (and cooperate).
4. Begin to decide what you are looking for, and a way to find it.

*D. Examples of Discovery to Organize, Review and Analyze:*

**1. Checks**

You decide you would benefit from seeing the 5,200 checks involved sorted a number of different ways. You are looking for patterns. How can you sort by date, payer, recipient, amount, bank? Go back to Sean, and maybe he can suggest a software that sorts by categories. Maybe Excel will do it. Maybe the government has already entered the checks into Excel, and they will give you a printout. Maybe they will give you the actual spreadsheet. Ask.

**2. Tapes**

You need to listen to the tapes. Your immediate reaction is to first determine if client's voice is on any tape, or if his name is mentioned. Ask the AUSA and case agent. "Is my client's voice on any tape?" "Is his name ever mentioned ?" The government may have made transcripts which they will have to give you at some point. Ask for them in a searchable form and use the search or index feature of the software.

**3. Documents**

There are all sorts of different documents, and you need to create some semblance of order to group them. This might benefit from a database. There may be specific software for what you are trying to do.

*E. Action Plan*

You have done all of the above. Now it is time for action. What next?

1. Do you already have the hardware or software you need based on your discussions?
2. If not, what do you need and how much does it cost?
3. Is what you need something you will keep using in the future, or more of a one time special use?
4. Do you have the time and ability to actually do the work, or will your plan require the work of others?
5. Distill it down and you are ready to get the money you need to implement the plan (assuming some funds are needed).

F. *Structure of Motion for Request for Expert and Other Services*

**Request for Funds for Expert and other Services**

1. **Overview:** [X one of six co-defendants facing a 43 count indictment alleging mail, wire and securities fraud, conspiracy, and money laundering related to a claimed pyramid scheme alleged to involve 6.3 million dollars. The discovery to date consists of 16 boxes of assorted documents as well as 4 CDs of tape recordings. I am seeking approval of funds to retain:
  - a. An accountant with expertise in forensic fraud investigations,
  - b. A licensed securities dealer who has served as an expert witness in numerous securities related cases, both civil and criminal,
  - c. A litigation support service which will provide document handling services,
  - d. Funds for a litigation support paralegal, and
  - e. Funds for the purchase of a portable, external hard drive.]
2. **Facts:** [Factual description of case and why you need CJA funding based on these case facts]
3. **Authority**<sup>14</sup>: [The Criminal Justice Act (CJA), 18 U.S.C. § 3006A authorizes payment as needed to “include counsel and investigative, expert, and other services necessary for adequate representation”. Subsection (e) of the act specifically addresses:
  - (e) Services other than counsel. --
    - (1) Upon request. -- Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

The United States Judicial Conference has promulgated; *Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to*

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<sup>14</sup> We have placed the complete section of the relevant guidelines in this section, though little case law. We have included this information so you can include the relevant portions of the guidelines, but to the extent possible, you may want to avoid quoting the entire guideline in your motion. In addition, you may want to add more relevant case law, especially case law from your circuit.

*Judiciary Policies and Procedures* (CJA Guidelines) to assist courts in CJA matters. The Guidelines reiterate the availability of experts and other services and the ex-party request process. See subsections 3.01 and 3.03. On the specific issue of other services and computer hardware and software, the Guidelines have been updated to provide:

**3.16 Other Services and Computer Hardware and Software.** Services ... may include but not necessarily be limited to, ... computer systems and automation litigation support personnel and experts; paralegals and legal assistants, including law students; neurologists; and laboratory experts ...

Criminal Justice Act attorneys are expected to use their own office resources, including secretarial help, for work on CJA cases. (See paragraph 2.28 A.) However, unusual or extraordinary expenses of these types may be considered "other services necessary for an adequate defense" and may be paid from CJA funds under subsection (e) of the Act. In determining whether the expense is unusual or extraordinary, consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses.

Providing an adequate defense case may require CJA panel attorneys to utilize computer hardware or software not typically available in a law office. In such cases, following the standards in the preceding paragraph, counsel may apply to the court for authorization of CJA funds for the acquisition of such property.<sup>15</sup>

For services of paralegals and legal assistants, and other non-secretarial professional support personnel employed by appointed counsel, the court shall determine a reasonable hourly compensation rate that shall not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services. Authorizing compensation at such rates should result in greater efficiency

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<sup>15</sup> Potential footnote to add: "Before seeking court approval for any computer hardware or software with a cost exceeding \$500, or for the utilization of computer systems or automation litigation support personnel or experts with an expected combined cost exceeding \$10,000, appointed counsel must consult the Office of Defender Services for guidance and inform the court in writing of the Office of Defender Service's advice and recommendation regarding counsel's proposed expenditure. Counsel has done so and will elaborate later in this memo."

and lower costs for the CJA program than would occur if counsel performed and charged for these services.

Services are “necessary for an adequate defense” when “a reasonable attorney would engage such services for a client having the independent financial means to pay for them.” (internal citations omitted). *United States v. Bissell*, 954 F.Supp. 903, 922 (D.N.J. 1997). Here, the court has found X indigent and appointed counsel.]

4. **Services Needed:** [The defense requires the following services, each of which will be described in detail and particularity.
  - a. An accountant with expertise in forensic fraud investigations.
  - b. A licensed securities dealer who has served as an expert witness in numerous securities related cases, both civil and criminal.
  - c. A litigation support service which will provide document handling services.
  - d. Funds for a litigation support paralegal.<sup>16</sup>
  - e. Funds for the purchase of a portable, external hard drive.]
5. **Detail Request per Expert/Vendor:** Now you need to create a paragraph or two for each expert/vendor explaining:
  - a. Who is the expert/vendor.
  - b. Why under **your case facts** the expert/vendor is needed. Be specific, not conclusory.
  - c. The qualifications of the expert/vendor and the fees charged.
    - (1) [NOTE I (David) attach a resume or short form CV. I try not to include a full CV as later pre-trial checking may result in an “updated” CV being produced; and,
  - d. Describe the mechanics of what exactly the expert/vendor will be doing for you.
  - e. Your compliance with Guideline 3.16 and how you have submitted your proposal to the NLSA prior to filing the request with the court.
6. **Detail Request per Hardware or Software:** When seeking equipment or software explain:
  - a. Exactly what you propose to purchase including the relevant product literature.

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<sup>16</sup> Courts are always interested in counsel retaining people who can competently do the work at a hourly rate less than counsel’s. Because the use of a paralegal can be cost-effective, courts find their use appealing.

- b. Why you need to purchase this product.<sup>17</sup>
  - (1) Why it is outside the scope of what your office has.
  - (2) Why this is "hardware or software not typically available in a law office."
- c. The price. If the price varies or if it is a request for a lot of money, show the court that you price shopped and obtained multiple bids.
- d. Your compliance with Guideline 3.16 and how you have submitted your motion to the National Litigation Support Administrator.
  - (1) If it is helpful in your case, Sean can prepare a memo or letter of support for your request which you can include in what you ultimately submit to the court.
- e. Your commitment and agreement to turn the product over to either ODS or the local FDO at the end of your case.

#### IV. Conclusion

The statute and Guidelines support putting CJA counsel on more equal footing than ever before. Technology, when used properly, can make a big difference in raising the quality of criminal defense litigation. At the same time, technology can be like a pleasure boat, a floating hole into which endless amounts of money can be tossed. Remember the admonition of your trial advocacy instructor, KISS: Keep It Simple Stupid.

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**David Beneman** is the Federal Public Defender for Maine. A graduate of Bates College and the University of Maine School of Law, he was a partner at Levenson, Vickerson & Beneman for 20 years. In 1994, he spent the month of August with Gerry Spence at the first Trial Lawyers College in Wyoming. He previously served as CJA Resource Counsel for the District of Maine, as Defender Services Advisory Group (DSAG) representative for the First and Second circuits and is a Past-President of the Maine Association of Criminal Defense Lawyers. David finished his term as chair of the Maine Rule of Evidence Committee, and serves on the Maine Federal District Court Local Rules Committee, and the First Circuit CJA Continuing Education Committee. An early advocate for technology in the law office, he has evolved from WordPerfect for DOS on a 286, 386, 486 to his current dual screen Dell 8300 running Windows XP pro, WordPerfect X-3, Word, CaseMap, TimeMap, PowerPoint and Trial Director. David is a regular author and speaker at CLE not just in Maine, but across the country.

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<sup>17</sup> NOTE: This is very important. One of the most common failings in requests are that they talk about how useful the software program is in general, but do not explain why this software is needed in **this** particular case. If you can show how the equipment or service, though initially costly, will save time and money in the long run, that can be especially persuasive.

**Sean Broderick** is the National Litigation Support Administrator for the Office of Defender Services, Administrative Office of the United States Courts. He provides guidance and recommendations to federal courts, federal defender organization staff and court appointed attorneys on complex federal criminal cases, including evidence organization, document management, case analysis and trial presentation. Prior to this position, Sean worked as an investigator, paralegal and mitigation specialist on numerous complex cases for more than 15 years. He was appointed to CJA cases throughout the country and worked in the Northern District of California Federal Public Defender Office. In these different capacities, Sean dealt with a wide range of criminal and civil cases, including multi-defendant, white collar fraud, federal trial, and capital trial and habeas corpus cases. He has lectured on various criminal defense and litigation support issues internationally and throughout the United States.

**Sean Broderick Contact Information**

National Litigation Support Administrator  
Office of Defender Services, Administrative Office of the United States Courts  
555 12th Street, Suite 650  
Oakland, CA 94607-3627  
510-637-1950 Direct  
510-637-3500 General  
510-637-3507 Fax  
[sean\\_broderick@fd.org](mailto:sean_broderick@fd.org)