

## **Case-Budgeting Techniques and Other Cost-Containment Policies** (October 11, 2016)

The case-budgeting techniques and other cost-containment policies in this document may be adapted to local practice, and many have application for both budgeted and non-budgeted representations. For case-budgeting policies and principles, see sections [230.26](#) and [640](#) of the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), Volume 7, Part A, *Guide to Judiciary Policy*.<sup>1</sup> Worksheets and explanatory memoranda for budgeting eligible representations are available on [www.fd.org](http://www.fd.org), the website of the Administrative Office of the United States Courts (AO), Defender Services Office (DSO) Training Division.

For assistance with and questions regarding case budgeting and any of the cost-containment suggestions in this document, it is suggested that judges, other court personnel, and defense counsel in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits first contact their circuit CJA case-budgeting attorney (CBA).<sup>2</sup> Additional resources include select court or federal defender personnel; the Death Penalty Resource Counsel Projects ([www.capdefnet.org](http://www.capdefnet.org)), which are expert services available through DSO; and the DSO Legal and Policy Division Duty Attorney, 202-502-3030.

This document is intended to assist both the court and Criminal Justice Act (CJA) panel attorneys in ensuring that representation is provided in a cost-effective manner while maintaining the quality of representation, and can serve as a cost-containment checklist. The techniques and policies set forth below have been collected in large part from the experiences of the CBAs, as well as from other judiciary personnel and court materials. The document indicates those practices for which there is a Judicial Conference policy. Reference should also be made to the CJA Guidelines for Judicial Conference policies. Three major national initiatives are set forth (discovery, remote detention, and formation of criminal justice committees). This document will be revised as experience with case budgeting grows.

### **I. Preliminary Points in Cost Containment: Cost Effectiveness and Quality**

It is important to emphasize that case budgeting should facilitate the cost-effective provision of representation that promotes and is consistent with the best practices of the legal profession. In approving the CBA position, the Judicial Conference noted the Federal Judicial

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<sup>1</sup> Judicial Conference policy encourages budgeting in panel attorney mega cases, which include: (a) federal capital prosecutions and capital habeas corpus cases, and (b) non-capital representations with the potential for extraordinary cost (attorney work expected to exceed 300 hours or total expenditures expected to exceed 300 times the prevailing CJA panel attorney non-capital hourly rate, rounded up to the nearest thousand, for appointed counsel and services other than counsel for an individual CJA defendant).

<sup>2</sup> At its March 2011 session, the Judicial Conference approved the use of the three pilot CBA positions, authorized continued funding for them, and endorsed incremental expansion in the number of positions subject to the approval of its Committee on Defender Services and the availability of funds (JCUS-MAR 11, p. 13). The CBAs assist judges and attorneys in the case-budgeting process and develop circuit cost-containment policies.

Center’s finding that the CBAs “contained costs and did not diminish (and even improved) the quality of representation” (JCUS-MAR 11, p. 13).

Moreover, CJA Guidelines [§ 230.33](#) provides that “[v]ouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.” CJA Guidelines [§ 230.36](#) provides that judges should give counsel prior notification of a potential reduction to a voucher claim (notice need not be given for a reduction on mathematical or technical grounds), a brief statement of reasons, and an opportunity to address the matter. The guideline explicitly endorses informality and flexibility in both communication of the notice and in the resolution of any objection by counsel.

## II. Appointment of Counsel

From a cost-containment perspective, the first and most cost-effective action that courts can take is to appoint appropriately qualified and experienced counsel. In federal capital prosecutions and capital habeas corpus representations, Defender Services program resources have been created to help the court accomplish that objective (see sections V and VI below). Non-capital representations with the potential for extraordinary cost qualify for the exception from a court’s general practice of contacting the next panel attorney on the appointment list. See CJA Guidelines, [Appx 2A](#) (Model Plan for Implementation and Administration of the Criminal Justice Act), section X.B.2 (“Appointment of cases to CJA panel members will ordinarily be made on a rotational basis. In a complex or otherwise difficult case, the [federal public defender/community defender/court] may appoint counsel outside of the normal rotation to ensure the defendant has sufficiently experienced counsel.”).

## III. Case Budgeting Generally (see CJA Guidelines §§ [230.26](#) and [640](#))

- A. **Identify Cost Drivers.** Counsel are encouraged to adopt cost savings strategies in all instances where appropriate, and to explain those efforts in the budget submission. The court and counsel should identify a case’s cost drivers and discuss cost-savings ideas. These discussions and/or written submissions will help the court assess the reasonableness of the budget and voucher submissions, monitor fairness in its authorization of attorney and service provider time and expenditures, and effectively oversee the expenditure of CJA funds. In recognition of the fact that the defense has no control over many cost drivers, courts are encouraged to use their authority and discretion to obtain the prosecution’s cooperation in such areas as discovery.
- B. **Budgeting in Stages and/or Time Periods.** To make the budget submission and review process more manageable and effective, budgeting may be accomplished in stages and, if appropriate, time periods within stages. For example, the first stage of a federal capital prosecution extends to the DOJ authorization decision. The attorney could submit a budget for the entire stage, or submit a budget to cover a given period of time within the stage. See CJA Guidelines [§ 640.30\(b\) and \(c\)](#).

- C. **Schedule Interim Vouchers.** To help the court and counsel monitor expenditures against the approved budget, the court should set a schedule for attorneys and service providers to submit vouchers at regular intervals (e.g., at the end of each month when more than 10 hours of services have been provided) and the last day of a budgeted stage. See CJA Guidelines [§ 640.30\(g\)](#).
- D. **Require Budget Amendments.** If it appears that an approved budget will be exceeded, counsel should file a proposed amendment to the budget, where possible. See CJA Guidelines §§ [640.10](#), [640.20\(f\)](#), and [640.30\(d\)](#).

#### IV. Attorney Work

- A. **Use Lower Costing Service Providers in lieu of Appointed Counsel.** Counsel should consider the use of lower costing (vis-a-vis attorney hourly rates), well-qualified paralegals, investigators, and other service providers in lieu of having appointed counsel perform certain tasks where doing so would save money and time. Requests for such resources should specify the tasks, projected number of hours, hourly rate, and total anticipated expenditure. See section VII below.
- B. **Use Lower Costing Associates in lieu of Appointed Counsel.** Counsel should also consider the use of lower costing, well-qualified associates. In capital cases, CJA Guidelines [§ 620.10.10\(c\)](#) provides that appointed counsel must obtain prior approval to use attorneys who work in association with them and that the hourly rate must be lower than that of appointed counsel and must reduce the cost of the representation or be necessary to meet time limits. Although CJA Guidelines [§ 230.53.10\(b\)](#) does not include these limitations for associates in non-capital cases, the court may find it useful to require appointed counsel to request prior approval for the use of associates after a certain number of hours (e.g., 10 hours is the threshold in the Second Circuit).
- C. **Develop Maximum Rates for Associates.** The court may find it useful to set maximum rates or ranges of rates for associates, subject to exception based on justification submitted by appointed counsel.
- D. **Share Responsibilities Among Defense Teams.** Counsel should seek to share responsibilities among the defense teams, thereby reducing duplication of effort, when consistent with an attorney's obligations to the defendant. For example, in multi-defendant cases, it may be cost-effective to have one attorney conduct certain tasks where conflicts or an attorney's responsibilities to the client do not preclude such (e.g., liaison to service providers performing work for more than one co-defendant; principal role in researching and writing certain motions). Individual counsel still need to review the work performed by a co-defendant's attorney to ensure effective representation.
- E. **Divide Responsibilities Among Defense Team Members.** Counsel should develop a plan to divide responsibilities among defense team members to help

ensure that each member is performing duties effectively and efficiently, thereby avoiding unnecessary duplication of effort. If more than one attorney has been appointed for an individual defendant, counsel should consider, for example, whether each attorney needs to attend specific court proceedings or conduct witness interviews.

- F. **Plan Meeting Time Efficiently.** In-person meetings are needed to effectively divide responsibilities among team members and to coordinate efforts. Such meetings will be compensable if the frequency and time billed are reasonable given the needs of a case. Counsel should carefully assess the need for a meeting in advance and consider whether its purpose could be served by a conference call.
- G. **Utilize Cost-Efficient Means to Set Schedules.** Especially in large, multi-defendant cases, the court should consider alternative means (e.g., teleconference or email) to having all counsel in court to set a schedule.
- H. **Anticipate Waiting Time.** Courts are encouraged to consider scheduling adjustments that would reduce federal defender and panel attorney in-court waiting time. In addition, panel attorneys should try to anticipate waiting time in court and at detention facilities, and avoid billing for waiting time by working on other matters.
- I. **Limit Billing for Administrative Work Related to ECFs.** Because it ordinarily is a clerical function, counsel should not charge for downloading, opening, renaming, saving, printing, and/or forwarding an electronic court filing (ECF) notice. Counsel may bill for reading substantive documents attached to the ECF, but should aggregate time spent during the day and ensure that double billing of time does not occur.

V. Appointment of Counsel and Attorney Work Specifically in Federal Capital Prosecutions

- A. **Utilize Resources to Appoint Counsel and Develop/Evaluate Budgets.** 18 U.S.C. § 3005 provides that the court “shall consider” the recommendation of the federal defender (or the AO if there is no federal defender) regarding the appointment of counsel for a defendant indicted for a capital crime. Federal defenders often will consult with Federal Death Penalty Resource Counsel (FDPRC) (see [www.capdefnet.org](http://www.capdefnet.org)) before making a recommendation. See CJA Guidelines [Appx 2A](#), [§ 620](#), and [Appx 6A](#) for information regarding the appointment of counsel in capital cases, including the appointment of the federal defender.

Counsel should consult with FDPRC to help develop a capital defense budget and, as a general resource, to provide advice in capital litigation. FDPRC and other Defender Services Death Penalty Resource Counsel projects, including Federal Capital Appellate Resource Counsel, are also available to consult with the court (see CJA Guidelines [Appx 2A](#) and [www.capdefnet.org](http://www.capdefnet.org)).

- B. **Act on the DOJ Authorization Decision.** Upon learning of the DOJ authorization decision, counsel should notify the judge or court staff person who is coordinating case budgeting in the representation. (The DOJ death penalty authorization protocol provides that the United States Attorney or Assistant Attorney General shall promptly advise the court and defense counsel once a decision has been made.) If the death penalty is not authorized by the Attorney General, the court should consider whether, in its discretion, to reduce the number of appointed attorneys and/or the hourly rate (see CJA Guidelines [§ 630.30](#)).
- C. **Set a Schedule for the Authorization Decision.** Over the past several years, the judiciary has urged DOJ to streamline its “fast-track” protocol for cases where the U.S. Attorney does not recommend the death penalty and it is highly unlikely that DOJ will ultimately seek the death penalty. The goal is to reduce the length of time between the indictment of a defendant on capital-eligible charges and a decision by the Attorney General that the defendant will *not* be prosecuted capitally. (There is also a pre-indictment fast-track provision in the protocol.) Unless and until DOJ notifies counsel and the court that it does not intend to seek the death penalty for a death-eligible defendant, defense counsel must assume that the death penalty will be pursued; the judiciary is obligated to bear the substantial cost of two defense counsel who are compensated at a higher capital rate; and counsel are required to perform investigation and otherwise prepare for a capital sentencing proceeding. CJA Guidelines [§ 670](#), jointly developed by the judiciary and DOJ staff, encourages courts to consult with the parties in order to set reasonable deadlines for stages of the death penalty authorization process (subject to extension for good cause). An early decision by the Attorney General *not* to seek the death penalty could achieve significant cost savings for the defender services program, as well as eliminate unnecessary diversion of limited resources.
- D. **Avoid Unnecessary Legal Research and Writing.** Given the Supreme Court decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), a detailed memorandum explaining the legal basis for a mitigation expert in a capital case should not ordinarily be required. The memorandum should explain the work to be performed.

VI. Appointment of Counsel and Attorney Work Specifically in Capital Habeas Corpus Cases

- A. **Utilize Resource Counsel.** The National and Regional Habeas Assistance and Training Projects for capital § 2254 cases and the Federal Capital Habeas Project for capital § 2255 cases are available to work with courts to identify appropriate counsel (see [Appx 2A](#) and [www.capdefnet.org](http://www.capdefnet.org)). The Projects also are available to assist courts and panel attorneys with case budgeting and to consult with appointed counsel regarding their representations.
- B. **Consider Appointing Federal Defender First.** Consistent with a court’s CJA plan, courts in districts served by a federal defender organization with staff

dedicated to capital habeas representation should first consider appointing the federal defender rather than a panel attorney. In special circumstances, these capital habeas units have provided representation in districts without one.

## VII. Investigative, Expert, and Other Services

- A. **Use Lower Costing Service Providers in lieu of Appointed Counsel.** Counsel should consider using lower costing, well-qualified investigators, experts, and other service providers in lieu of appointed counsel to perform certain tasks where doing so would save money and time. Requests for such resources should specify the tasks, projected number of hours, the hourly rate, and the total anticipated expenditure.
- B. **Establish Presumptive Ranges.** A court may find it useful to establish presumptive ranges for investigators and often-used experts and other service providers. These ranges could be exceeded based on justification submitted by appointed counsel (e.g., unavailability of a qualified service provider). By [memorandum](#) dated February 26, 2014, the Committee on Defender Services adopted experience-based ranges in mega cases for five types of service providers (law students, paralegals, investigators, mitigation specialists, and jury consultants).
- C. **Limit Copying Costs.** The court should consider setting maximum rates for copying services, including in-house copying, subject to exception. Section 530.20.20 of Vol. 6 (Court Reporting), Ch. 5, *Guide to Judiciary Policy*, provides that “[c]ourts may want to obtain price quotations from copy services (at least three where feasible) to determine the commercially competitive rate for each court location. The AO estimates that ten cents per page would be a maximum copy rate, with such rate often lower and rarely higher. Commercial rates should be monitored by the court on a periodic basis to ensure accuracy and compliance with the guideline.”
- The court should ensure that the CJA is not incurring higher than competitive copying costs due to the U.S. Attorney’s use of a particular medium or deposit of documents with a particular vendor.
- D. **Negotiate with High-Cost Experts.** Counsel are encouraged to negotiate with service providers, particularly high-cost specialized experts, for a lower CJA rate for their services.
- E. **Consider Local Service Providers First.** To minimize travel costs, counsel should select local service providers whenever appropriate. Nevertheless, courts should give counsel the opportunity to explain why a remote service provider, especially for specialized services, should be authorized. By [memorandum](#) dated February 26, 2014, the Committee on Defender Services recommended travel policies in mega cases.

- F. **Phase Work to Avoid Unnecessary Billing.** In certain cases, the court may consider authorizing a limited number of hours to enable the service provider to perform a sufficient amount of work that will enable counsel to decide whether to seek additional spending authorization.
- G. **Share Service Providers.** In a multi-defendant CJA case, counsel should advise the court what service provider work can be shared without creating a conflict of interest or compromising quality (e.g., translation of documents; background investigations; discovery management).
- H. **Communicate Expectations Clearly.** As soon as a case budget has been approved, counsel is responsible for communicating with the service providers to ensure compliance with specific terms of the court order and to ensure that charges do not exceed the amount authorized. Where feasible, counsel should provide an engagement letter to the service providers specifying the terms and limits of the work. The letter should caution that fees and costs may not exceed the contracted amount absent court approval. By [memorandum](#) dated February 26, 2014, the Committee on Defender Services recommended that engagement letters for service providers be used in mega cases, and provided sample language and a recommended time worksheet.
- I. **Limit Attendance at Court Proceedings.** Generally, support staff, including investigators, paralegals, and law clerks who are not in an active participating role, will not be compensated for attendance in court. Counsel should seek advance approval for service providers to be compensated at court proceedings. Courts should consider authorizing one or more service providers to assist appointed counsel at a court proceeding, especially in capital cases and cases involving voluminous discovery, trial exhibits, or witnesses.
- J. **Seek Federal Defender Advice.** Courts and panel attorneys may consult with the applicable federal defender regarding the appropriate rates of compensation for certain “high-cost” expert services.

VIII. Three National Initiatives: Discovery, Remote Detention, and Criminal Justice Committees

A. **Discovery**

- 1. In a voluminous documents case, preferably at the outset, counsel should contact the DSO National Litigation Support Team (510-637-3500), based in the Federal Public Defender Organization for the Northern District of California. See CJA Guidelines [§ 320.70.40](#). The National Litigation Support Team will assist counsel in developing a cost-efficient proposal for the organization of discovery, including the production of discovery in electronic form, and the presentation of evidence in the courtroom. The court and counsel should be familiar with the February 2012 joint [DOJ-](#)

[Administrative Office recommendations](#) on the production of electronic discovery.

The National Litigation Support Team might recommend the use of one of three Coordinating Discovery Attorneys (CDAs), under contract with the AO, who have technological knowledge and experience, resources, and staff to effectively manage complex electronic discovery in multiple-defendant or other highly complex cases. A CDA may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and federal defender staff. The CDA can serve as a primary point of contact for the U.S. Attorney's Office to discuss electronic production issues for all defendants, resulting in lower overall case costs for the parties.

2. In a multi-defendant case, the court may designate one of the appointed attorneys to act as the "discovery liaison attorney" to coordinate the collection and management of discovery with the government, including coordination with the CDA, if applicable, other appointed counsel, and the National Litigation Support Team. Each defense team in a multi-defendant case has an independent obligation to the client to review the appropriate discovery.
3. Counsel should explore means to limit copying costs both in terms of the rate and alternative means to review documents (e.g., electronic discovery).

## **B. Remote Detention**

An Ad Hoc Working Group on Remote Detention was formed to help the judiciary lessen the impact of remote detention on the judicial process and attendant costs. Several Judicial Conference committees were represented on the working group, as well as a federal public defender, the chief panel attorney district representative, chief pretrial services/probation officers, and representatives from the United States Marshal Service (USMS), Bureau of Prisons, and the Office of the Federal Detention Trustee (OFDT) (merged with the USMS in 2012). The Working Group recommended that each judicial district form a District Detention Committee (DDC), or use another appropriate forum, with relevant stakeholders to assess, prepare for, and respond to current and future remote detention issues. The objective should be to ensure adequate attorney access to detainees to preserve the integrity of the judicial process and ensure the constitutional rights of the defendants, while minimizing undue strain on appointed counsel and the Defender Services budget.

Local efforts to reduce the costs associated with remote detention of pre-trial defendants have been highly successful. Some suggestions for local actions include: (1) Encouraging the district's U.S. Marshal to (a) house pretrial detainees in facilities that are local rather than distant from the courthouse, and (b) provide transportation for detainees from the facility to the courthouse for defense team-client consultations upon the request of counsel - perhaps by

- making available unneeded seats on the bus when prisoners are being transported to court;
- (2) Embracing methods of alternative detention, such as electronic monitoring devices; and
  - (3) Reducing the number of defendants subjected to pre-trial detention.

A website (<https://ows.usdoj.gov/DDCWS/>) was launched by OFDT in 2009, in consultation with the Working Group, to provide information to assist local detention committees. The password to access the district-specific information is #1Worksite (case sensitive). Please contact Pamela Hamrin, Chief, DSO Legal and Policy Division, at 202-502-3030 if you need assistance.

### **C. Court Committees Dedicated to Cost Containment in the Criminal Justice System**

Courts should consider the establishment of a “Criminal Justice Committee” or “Stakeholders Committee” in which the principals in the criminal justice system (including the chief judge, magistrate judge, clerk of court, federal defender, panel attorney district representative, probation/pretrial services officer(s), U.S. Attorney, U.S. Marshal, and warden) can meet, as needed, to discuss ways to reduce CJA and other criminal justice costs (e.g., access by panel attorneys to the courthouse, waiting time associated with visiting clients at detention facilities, remote detention solutions, discovery policies, etc.). JCUS-MAR 94, pp. 17-18.

In addition, courts have established the following committees:

1. CJA Committee - to consider all issues and policies relating to CJA representation (e.g., approval of expert and investigative services, travel issues, voucher issues, parity of access to courtroom technology, methods and timing of appointments, the ratio of case appointments between the defender and the panel, etc.). This committee should serve a broader objective than the panel selection committee. Members of this type of committee have included the federal defender, the panel attorney district representative, the chief judge, other district or magistrate judges, members of the panel, and the CJA panel administrator.
2. District Detention Committee - to address remote detention issues, see section VIII.B above.
3. Voucher Review Committee - to assist individual judges in the reasonableness review of CJA vouchers. Upon the request of a judicial officer, experienced federal criminal practitioners review the referred voucher and provide the court with a recommendation as to whether to approve or adjust it. Members of this type of committee have included the federal defender, the panel attorney district representative, experienced members of the panel, and local federal criminal practitioners.