

## **EXPLANATORY MEMORANDUM FOR CASE BUDGETING IN FEDERAL CAPITAL HABEAS CORPUS PANEL ATTORNEY REPRESENTATIONS ARISING OUT OF A STATE COURT DEATH SENTENCE**

The Judicial Conference of the United States encourages courts to use case budgeting in Criminal Justice Act (CJA) private “panel” attorney representations in federal capital habeas corpus proceedings arising out of state court death penalty sentences. (JCUS-MAR 97, p. 23; see [§ 640](#) of the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), Vol. 7A, *Guide to Judiciary Policy*.) It is hoped that the development of a case budget on behalf of a capital habeas petitioner will help ensure that CJA panel attorneys receive the resources necessary to represent the petitioner effectively and facilitate payment of vouchers. At the same time, counsel is required to incorporate cost considerations into litigation planning, and to provide sufficient information to enable the court to assess and monitor the expenditure of public funds.

Federal law entitles a prisoner under a sentence of death imposed by a state court to the appointment of counsel in post-conviction proceedings. 18 U.S.C. § 3599(a). Because of the complexity of these cases and the higher hourly rate paid to counsel, the total cost of providing representation to death-sentenced prisoners seeking counsel has increased dramatically since the Anti-Drug Abuse Act of 1988 (see 21 U.S.C. § 848(q), recodified as 18 U.S.C. § 3599) created a statutory right to counsel in capital habeas corpus proceedings. The subsequent enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA, Pub. L. 104-132, 110 Stat. 1214) has raised many still unresolved questions about the substance and procedure of federal capital habeas cases, which counsel must address during the habeas corpus proceeding.

### **What Should the Case Budget Include?**

CJA Guidelines [§ 640.30](#) provides that the case budget should be made up of all “[m]atters that may affect the compensation and reimbursement of counsel and payments for investigative, expert, and other services,” including, but not limited to:

- the hourly rate of attorney compensation; and
- the best preliminary estimate that can be made of the total cost of services (appointed counsel and investigative, expert, and other services) for the entire case, although the court may determine that defense counsel should budget for shorter intervals of time. (See p. 4, below, regarding budgeting in stages.)

### **National Habeas Assistance and Training Counsel**

Counsel with questions involving capital habeas corpus case budgeting, or substantive questions regarding capital habeas corpus petitions, are encouraged to contact the National Habeas Assistance and Training Counsel, and visit their website at [www.capdefnet.org](http://www.capdefnet.org). The National Habeas Assistance and Training Counsel can assist lawyers in developing realistic and appropriate case budgets.

## How Does the Case Budgeting Process Work?

Although there are some variations in the practice, the case budgeting process generally includes the following procedures:

- **Initial order appointing counsel.** The court will appoint counsel who will be available to commit the time necessary to provide representation in a capital habeas corpus proceeding within the time limitations under the AEDPA (including equitable tolling) or an impending execution.
- **Determine the hourly rate.** Often the court will determine the hourly rate of compensation at the time of appointment, subject to the statutory maximum. The court may also set a reasonable hourly rate for second or associate counsel. CJA Guidelines [§ 620.10.10](#) provides that “appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.”
- **Authorize counsel to review the record and conduct an initial factual and legal investigation of potential claims.** A realistic budget cannot be developed until counsel have reviewed the record and made a preliminary assessment of potential federal claims, including claims that may not have been identified or thoroughly investigated or developed in earlier proceedings. Although questions of exhaustion or procedural default may ultimately preclude relief, counsel’s ethical obligation is to identify all potential federal claims. As Justice O’Connor wrote in her concurring opinion in *McFarland v. Scott*, 512 U.S. 849, 860 (1994): “our carefully crafted doctrines of waiver and abuse of the writ make it especially important that the first petition set forth all of the state prisoner’s colorable grounds for relief.” In some instances, the assembly and review of the record alone will be a substantial undertaking. Also, case budgets should include entries for time and expenses of investigators, experts, other service providers, and counsel may need to consult with those individuals to provide the court with accurate estimates, as well as to obtain enough information to evaluate the need for and extent of such resources.
- **Authorization for Services Prior to Submission of the Case Budget.** The CJA Guidelines recognize that there may be instances “that investigative, expert, or other services may be required before counsel has an opportunity to prepare a case budget or the court to approve it...” In such circumstances, “courts should act upon requests for services where prompt authorization is necessary for adequate representation. Courts, in examining the case budget, may reconsider amounts authorized for services prior to the budget’s approval; however, courts shall not rescind prior authorization where work has already been performed.” CJA Guidelines [§ 640.40](#).

- **Presumptive Rates.** Some jurisdictions, like the Second, Sixth, and Ninth Circuits, have presumptive rates or ranges for counsel, investigators, mitigation specialists, experts, and the like. When writing a budget and hiring service providers, counsel needs to be aware if the court uses established presumptive rates to avoid costly reductions later. If presumptive rates have been established, counsel may ask the court to exceed the rates if the request can be justified.
- **Submission of a proposed case budget to the court *ex parte*.** Because case budgets lay out counsel’s entire litigation plan, including matters of strategy and witness development, they must be treated as confidential and should not be disclosed to the prosecutor. All documents relating to case budgeting should be filed *ex parte* and under seal, without service on the opposing party. CJA Guidelines [§ 640.20\(b\) and \(d\)](#).

While the budget remains confidential, by law the court must determine on an *ex parte* basis whether a sufficient showing of a need for confidentiality has been made before authorizing the use of investigative, expert, or other services. (18 U.S.C. § 3599(f).) The need for confidentiality is generally established in the budgeting process because such applications disclose matters protected by the attorney-client or work-product privileges, and also may prematurely reveal defense strategies. See, e.g., Federal Rules of Civil Procedure 26(b)(3); *United States v. Sanders*, 459 F.2d 1001, 1002 (9<sup>th</sup> Cir. 1972) (funding statutes are designed to put indigent defendants in same position as those who can afford counsel).

- **Review of the proposed budget.** The court may review the budget submission in writing, or it may schedule an *ex parte* case-budgeting conference with counsel. CJA Guidelines [§ 640.20\(c\)](#). The court may also seek the assistance of a lawyer with capital habeas experience, such as one of the National Habeas Assistance and Training Counsel, a federal defender, or a CJA administrator to review the budget and make recommendations about whether it should be approved or modified. In addition to reviewing the entire case budget, the court must ultimately determine whether to approve each item submitted for payment.
- **Review of investigative, expert, and other services by the chief judge of the court of appeals.** Under 18 U.S.C. § 3599(f), fees and expenses for investigative, expert, and other services are limited to \$7,500 unless the presiding judicial officer certifies that additional amounts are necessary to provide fair compensation for services of an unusual character or duration. The chief judge of the court of appeals, or the chief judge’s designee, must approve any payment in excess of the \$7,500 threshold. Although approval of the portion of a case budget reflecting requests for investigative, expert, and other services in excess of \$7,500 by the court of appeals is not required by statute, advance submission of this portion of a case budget may facilitate the implementation of a coordinated litigation plan including both counsel and other services.

- **Sealed pretrial order.** After reviewing the proposed budget, the court may enter a sealed order including: (1) the hourly rate of compensation for counsel; (2) the amounts approved for the case budget; (3) agreement that counsel will advise the court in advance, or as soon as practicable given case deadlines, of significant changes to the estimates contained in the order; (4) a schedule for further *ex parte* review of the budget as the case progresses; (5) procedures for the submission and review of interim vouchers; and (6) authorization for payment of expert, investigative, and other services called for in the budget. The order may also include standards for the documentation of requests for compensation, guidelines for expenses such as travel or computer-assisted legal research, and guidelines for staffing decisions such as the use of paralegals or law students and the number of attorneys who will be compensated for particular tasks. CJA Guidelines [§ 640.20\(d\)](#).
  
- **Budgeting in stages.** To make the case budgeting process more manageable and accurate, it would be advisable, with the judge’s approval, to submit case budgets in stages.<sup>1</sup> CJA Guidelines [§ 640.30\(b\)](#) (“In capital habeas corpus cases ... in its discretion, the court may determine that defense counsel should prepare budges for shorter intervals of time”). Submitting a small, concise budget reflecting the work and cost counsel is readily able to support and justify may prove easier. In its report, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, the Defender Services Committee’s Subcommittee on Federal Death Penalty Cases recognized that “it is impractical to require counsel to budget for an entire case from start to finish.” *Id.* p. 55. The Subcommittee also recognized that “[c]ase budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.” *Id.*, p. 53. Although the report dealt with federal death penalty prosecutions, the same rationales are equally applicable to capital habeas cases. Whether the case is budgeted in stages or in its entirety, the court may schedule periodic conferences to review the case budget.
  
- **Modification of the case budget.** The initial case budget may be modified as warranted as progress on the case is made and new information emerges affecting the resources required to provide representation. CJA Guidelines [§ 640.10](#) and [§ 640.20\(f\)](#). Courts may be reluctant to pay counsel for costs that exceed the authorized budget. However, in view of the period of time covered by the budget, it is likely that unanticipated events will require adjustments to the authorized expenditures. Accordingly, counsel should be

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<sup>1</sup> The Judicial Council of the Ninth Circuit created a case management plan that divides a capital habeas corpus case into four phases (district courts have the flexibility to permit capital habeas budgeting in whatever stages of the proceeding or time blocks determined to be appropriate), using a separate budget submitted by counsel prior to the start of each phase. The four phases include: Phase I - appointment, record review, and preliminary investigation; Phase II - petition preparation; Phase III - exhaustion, motion for evidentiary hearing, and briefing of claims; and Phase IV - discovery, evidentiary hearing, and final briefing.

prepared to file an amended or modified budget with the court, together with appropriate justification for any change. Additionally, before counsel authorizes or performs work not contemplated in the approved budget, counsel may wish, if time and court-ordered deadlines permit, to request permission from the court before such work is performed. Counsel also should be provided an opportunity, if necessary, to explain the reasons counsel believes the funds the court approved are inadequate to provide the competent representation contemplated by case law defining effective and ineffective representation, the CJA Guidelines, and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines) (2003).

- **Payments are subject to the CJA Guidelines.** Time and expenses approved by the court in a case budget will still be subject to district and, if applicable, circuit court approval, consistent with relevant CJA Guidelines. The court must always review compensation and expense vouchers for reasonableness. The development of a litigation plan is compensable legal work; however, the “bookkeeping” aspect of case budgeting is considered office overhead, just like the preparation of vouchers. Submission of a case budget should reduce the amount of time later expended in justifying each claim for compensation. Additionally, although the court must still approve each voucher for payment, approval of an overall case budget should reduce disputes over claims for compensation and should provide counsel with advance assurance of reasonable compensation for the representation.

### **What Kinds of Work Should be Included in a Case Budget?**

- **Obtaining Stays of Execution**

If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora. ABA Guidelines, Duties of Post-Conviction Counsel 10.15.1.

- **Evaluating Potential Claims & Raising Federal Claims**

**Counsel’s ethical obligation, upon appointment to represent a death-sentenced state prisoner, is to evaluate all potential federal claims.** Before counsel makes a determination of what claims may (or will) be raised in a habeas petition, an extensive preliminary investigation, including the use of investigative, expert, and other services, may be required. Work in connection with claims arising solely under state law, no matter how meritorious or important to the client, may not be compensable under 18 U.S.C. § 3599. In addition, under current Judiciary policy, before appointed federal counsel may be compensated with federal funds for work done to exhaust a claim(s) in state court, counsel must obtain advance authorization from the presiding federal judge.

**Potential federal claims are not limited to issues raised on direct appeal in state court, or in the state habeas petition.** Counsel obligated to provide effective representation cannot assume that a constitutional claim not previously litigated will be

precluded on procedural grounds, especially without investigating the “cause” for the default and the “prejudice” it produced to the client, or the possibility of disregarding the procedural default to prevent manifest injustice. See *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) (“Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.”)

## ■ **Conducting a Proper Investigation**

Habeas counsel “must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition.” *McCleskey v. Zant*, 499 U.S. 467, 498 (1991). See also *McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O’Connor, J., concurring in judgment in part) (“our carefully crafted doctrines of waiver and abuse of the writ make it especially important the first petition adequately set forth all of a state prisoner’s colorable grounds for relief”); ABA Guideline 10.15.1, Commentary (2003) (“Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. ... [C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7”).

ABA Guideline 10.7 outlines the standard for investigation in capital cases:

- A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
  - 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
  - 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
- B.
  - 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
  - 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

## ■ Clemency

Each attorney appointed to represent an individual for capital habeas corpus proceedings under 28 U.S.C. § 2254, unless replaced by similarly qualified counsel, “shall also represent the defendant ... for executive or other clemency as may be available to the defendant.” See 18 U.S.C. § 3599(e); CJA Guidelines [§ 680.10.10](#); *Harbison v. Bell*, 556 U.S. 180 (2009). Consistent with CJA Guidelines [§ 640](#), courts are encouraged to require counsel appointed in 28 U.S.C. § 2254 proceedings to submit a proposed initial clemency budget. The district court, in consultation with counsel, should determine when the clemency budget should be submitted – early in the habeas corpus proceedings, or at the beginning of the clemency work. In order to allow sufficient time for clemency preparation, budgeting should occur well in advance of final resolution of the case in the courts. CJA Guidelines [§ 680.30](#). All attorney compensation (CJA Form 30) and investigative, expert, or other service (CJA Form 31) vouchers pertaining to clemency representation should be submitted to the district court, regardless of whether the habeas corpus case is on appeal at the time. CJA Guidelines [§ 680.20.20](#).

### **Conclusion**

The complexity of federal capital habeas corpus cases continues to grow, as does the scrutiny of its rising costs. Counsel should view case budgeting as a positive step towards educating judges about the factors and necessities behind the time and costs involved in filing a habeas corpus petition, as well as a possible means to receiving faster approval and compensation. Once a budget has been approved, attorney vouchers may be approved faster, leading to quicker payment.

The biggest advantage of case budgeting for the individual lawyer is that once the budget is approved, the lawyer can proceed to investigate and evaluate potential federal claims with reasonable assurance that the necessary compensation and expert, investigative, or other services within the litigation plan will be approved for payment. This allows counsel to focus energy on the representation, rather than a constant struggle for resources. Advance planning can also make it easier to control costs without compromising the representation. For example, it may be possible to reduce travel expenses by combining investigative trips. Conscientious efforts to save money throughout the budget may help to avoid the unexpected disapproval of a badly-needed expert or investigative service in a case which is viewed as unreasonably costly.