

**UNITED STATES COURTS
FIFTH JUDICIAL CIRCUIT**
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M E M O R A N D U M

TO: CJA Panel Members **DATE:** July 20, 2016

FROM: Margaret Alverson
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RE: Case Budgeting Overview:
Capital Prosecutions
Capital Habeas Corpus (28 U.S.C. § 2254 and 28 U.S.C. § 2255)
Capital Stay and Clemency Proceedings
Non-Capital Mega Cases

This memorandum provides an overview of case budgeting practices. Additional information, including worksheets specific to the types of cases typically subject to budgeting, is available from the Circuit CJA Case Budgeting Attorney, Margaret Alverson, 504-310-7799; margaret_alverson@ca5.uscourts.gov.

I. INTRODUCTION

Case budgeting is a tool which should be employed in cases where it is anticipated that the representation by counsel appointed under the Criminal Justice Act (CJA) will become extraordinary in terms of cost. Analyzing, organizing, and planning the factual and legal defense of the case will promote efficient and high quality representation while enabling counsel to prepare a well-reasoned budget.

The *Guide to Judiciary Policy*, Vol. 7, Part A, Guidelines for Administering the CJA and Related Statutes, (“CJA Guidelines”) encourages and provides guidance for case budgeting in non-capital and capital cases. For non-capital cases, the CJA Guidelines provide, “[c]ourts are encouraged to use case-budgeting techniques in representations that appear likely to become or have become extraordinary in terms of potential cost,” i.e., where the representation is expected to exceed 300 attorney hours or total expenditures for counsel and service providers are anticipated to exceed 300 times the prevailing CJA panel attorney non-capital hourly rate.¹ CJA Guidelines § 230.26. High

¹ There is no need to budget cases expected to require less than 300 attorney hours unless counsel and the district court deem it necessary or advisable for some reason, for instance, to allow for the submission and payment of interim vouchers by the district court without the need for circuit approval.

cost indicators include (a) multi-count indictments, e.g., RICO, CCE, major frauds, (b) multiple defendants, (c) electronic surveillance, (d) voluminous documentary or electronically stored discovery, (e) extensive scientific or forensic evidence, and (f) projected length of the trial.

The CJA Guidelines encourage budgeting in all capital representations. See, § 640 *et seq.* Counsel appointed to represent a capital defendant are obligated to continue the representation unless replaced by successor counsel. This includes continuity of representation through all stages of the judicial proceedings including conviction and sentence, motion for new trial, appeal, petitions for writ of certiorari, and all phases of post-conviction representation including applications for stay of execution, competency and clemency proceedings. 18 U.S.C. § 3599(e). Budgeting is also encouraged and appropriate at the clemency stage of capital proceedings. CJA Guidelines § 680.30.

In the Fifth Circuit, the *Judicial Council of the Fifth Circuit, Special Procedures for Reviewing Attorney Compensation Request in Death Penalty Cases* (as amended: Feb. 1, 2005) establishes the policy for excess compensation requests in capital cases. These *Procedures* supersede the CJA Guidelines in this Circuit and contain presumptive limits for attorney compensation in capital cases, including capital habeas representations pursuant to 28 U.S.C. § 2254 or § 2255.² Case budgeting is an effective mechanism for complying with these procedures. A well-supported budget proposal can provide the court with justification for anticipated excess compensation and allow counsel to obtain advance court authorization for the expenditures.

II. THE CASE BUDGETING ATTORNEY

The role of the Case Budgeting Attorney includes working with CJA counsel to develop a case budget and providing assistance to the presiding judge and to the chief circuit judge (or designee) reviewing a proposed budget. It is recommended that counsel contact the Case Budgeting Attorney in all capital representations and for non-capital mega-cases that may be eligible for budgeting. The district court may also order that a case be budgeted and may include a provision in the order for counsel to confer with the Case Budgeting Attorney.³

² The CJA Guidelines, on the other hand, state that “[t]here is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.” CJA Guidelines § 630.10.20.

³ In those districts in which budgeting is currently done with the CJA Administrator, that practice will continue. The Case Budgeting Attorney may be consulted when developing the budget at the district court level and will review all budget proposals and the district court’s recommended order at the circuit level.

III. CASE BUDGETING

A. Overview

Case budgeting is a process by which an appointed panel attorney develops a road map for funding the defense based on a strategic analysis of the work required over the course of the representation and the amount of time required to perform the work. It is also a process by which counsel ascertains the need for and requests funding for service providers, including investigators, mitigation specialists, paralegals, and case-specific experts. It is intended to enhance the quality of representation and optimize the use of resources by enabling counsel to manage the litigation in an effective, yet cost-conscious manner, through case planning. A carefully devised budget request provides the presiding court with sufficient information to assess the reasonableness of and necessary justification for expenditures. With a budget order then in place, counsel can proceed with the assurance that funding within the budget will be forthcoming.

Budgeting also facilitates voucher review. Once a circuit-approved case budget is in place, counsel may, at the district court's discretion, submit interim vouchers to the district court for payment without the need for circuit review, until the final voucher, thereby reducing delays and additional paperwork.⁴ Interim vouchers submitted at regular intervals help the court and counsel monitor compliance with the budget and are therefore an important check on expenditures and the potential need to seek additional funding.

Cases subject to budgeting involve protracted and complex litigation, so typically it will make sense to budget in phases of litigation. This is particularly applicable when the work accomplished in one phase affects that to be performed in subsequent phases. Budgeting for the pre-authorization phase of capital prosecutions is an example. Even in those cases which are budgeted in toto through trial and post-trial litigation, thinking about the case in phases is an effective method of planning the representation and preparing the budget.⁵ Each proposed budget and order should clearly delineate the stage of litigation it covers, reference previously authorized funds, and any funds which have been paid. Counsel and the courts are encouraged to confer with the Case Budgeting Attorney on suggested phases for specific types of budgeted cases.

⁴ Interim fee payments, excluding reimbursement for expenses, to counsel are subject to a twenty percent retainage which may be submitted for payment in the final voucher which is subject to circuit review. Alternatively, if an interim voucher order provides for cumulative interim vouchers to be submitted for circuit review, the twenty percent retainage may be submitted at those designated intervals. Expenses are reimbursed in full. For information on reimbursable expenses, refer to the CJA Guidelines §§ 230.63, 230.66, and 320.80.

⁵ A budget for representation through trial enables the court to evaluate the likely cost of the entire case and reduces the time and paperwork involved in the budget approval process. However, proceeding in stages will usually be the more practical approach.

Budgets are meant to be flexible, not rigid financial parameters restricting the defense of the case. If counsel determines that the budgeted amount will be insufficient, counsel should submit an amended budget request as soon as practicable.

B. The Budgeting Process⁶

Once it is determined that a case is appropriate for budgeting, counsel should prepare a proposed budget along with supporting motion or memorandum to be submitted *ex parte* and under seal.⁷ Alternatively, the district court may order that the case be budgeted. The circuit Case Budgeting Attorney is available to consult with counsel and the court on the preparation and review of the budget.

There are several ways to generate a budget. Upon identifying the legal and factual issues in a case, counsel can assess the work that needs to be performed and the time needed to do it. The government's projection of the length of a trial enables counsel to budget for trial preparation and trial time. Counsel should also factor in post-verdict motions and sentencing proceedings.

The district court may hold an *ex parte* conference or hearing on the budget at which counsel may endeavor to further develop support for the requested funding.

The district court must then forward its order approving or modifying the budget proposal to the chief judge of the circuit, or designee, for review and issuance of an order setting forth the budget. If the budget is not approved counsel can move for reconsideration, and if the refusal to approve the budget in any way restricts counsel's work in connection with the representation, counsel are cautioned to preserve an appropriate record for possible appellate or post-conviction review.

The chief judge of the circuit, or designee, will then issue a budgeting order to be filed under seal which will govern the case or the phase of the case in question.

i. In summary:

- a) The district court may order that a case be budgeted.
- b) Alternatively, counsel may request to budget a case to get funding preapproval and to be able to get interim vouchers paid at the district court's discretion without the need for circuit review.

⁶ See, CJA Guidelines § 230.26.20, *et seq.*, § 640 *et seq.*

⁷ Note that in capital prosecutions and capital habeas matters, 18 U.S.C. § 3599 requires that counsel make a proper showing concerning the need for confidentiality in order to submit an *ex parte* request for service provider funding. 18 U.S.C. § 3599(f); CJA Guidelines § 660.10.10.

- c) Counsel should prepare an initial budget subject to its being amended or supplemented. Budgeting should typically proceed in phases of the litigation, but in some cases, may cover the entire case through trial and post-verdict litigation.
- d) The budget proposal should be submitted *ex parte* under seal with a supporting memorandum explaining the need for the proposed work and the time needed to perform it. (Note need for showing in capital cases).
- e) The case budget should include authorization for service providers including paralegals, investigators, and experts.
- f) The district court will review the proposed budget. The district court's order approving (or revising) the budget is then forwarded to the chief judge of the circuit, or designee, for review.
- g) The circuit chief judge or designee will issue the budget order which will be filed under seal.
- h) In circumstances in which a budget request is reduced or denied altogether by the district court, counsel may move the district court for reconsideration.
- i) Counsel should take care to document on the record the denial or reduction of a budget request for potential appellate and post-conviction review.

C. Important considerations – Attorney Services

While every case and hence every budget proposal will be different, there are some generally applicable considerations which provide a framework for developing the budget.⁸ These include the following.

i. Identify Cost Drivers.

The court and counsel should identify a case's cost drivers. Examples include voluminous discovery - particularly electronically stored information (ESI) - multiple defendants, or long-running conspiracy and RICO prosecutions; in capital cases, statutory and non-statutory aggravating factors which must be investigated and defended in addition to the crime(s) charged, the need for an unusual amount of contact with the client/family, extensive record collection and review, and in all cases, the need for travel to see witnesses and incarcerated clients. Cost-savings ideas should be discussed. The Case Budgeting Attorney can be included in these discussions.

⁸ CJA Guidelines §§ 230.26 and 640.

ii. Budgeting in Stages and/or Time Periods

Typically, it will most efficacious to break the budgeting process into stages, and if appropriate, time periods within stages (e.g., at six month intervals). For example, in cases with voluminous discovery, the first stage could encompass obtaining, organizing, and conducting initial review of the discovery. In a federal capital prosecution, the first stage would ordinarily extend to the DOJ authorization decision.⁹

iii. Provide for Submission of Interim Vouchers

It is within the district court's discretion to set a schedule for attorneys and service providers to submit vouchers at regular intervals which is an effective means by which the court and counsel can monitor expenditures against the approved budget.¹⁰

iv. Allow for Supplemental or Amended Budgets

If it appears that an approved budget will be exceeded, counsel should file a proposed amendment to the budget.¹¹ Counsel should be mindful not only of attorney time but also the work and billing by service providers. *It is incumbent on counsel to communicate with the service providers regularly to gauge compliance with the budget.* Attorneys should use a written retainer letter for services which should spell out the terms of the engagement, including the authorized funding. If the budgeted amount is going to be exceeded, counsel should notify the court and seek approval for additional funds. If counsel is working with the Case Budgeting Attorney, or CJA administrator, that person should also be consulted and kept informed.

v. Use of Lower-Cost Service Providers and Associates in lieu of Appointed Counsel

a. Use of Service Providers

Counsel are encouraged to use well-qualified paralegals, law clerks, investigators, and other service providers who bill at a lower hourly rate than appointed counsel in lieu of having appointed counsel perform certain tasks where doing so would save money and time. Tasks may include records collection, organizing discovery, locating witnesses, logistical arrangements for interviews, etc. Counsel should assess whether delegating tasks, with the implicit need to give sufficient instruction and supervision, is more cost efficient than having the experienced lawyer perform the task, whether because of the skills required, or because it only imposes an extra layer of review of the work product. It will depend on the nature of the task and the experience of the lower cost personnel. Requests for such resources should specify the tasks, projected number of hours, hourly rate, and

⁹ CJA Guidelines §§ 640.30(b) and (c).

¹⁰ CJA Guidelines §§ 230.73.10 640.30(g).

¹¹ CJA Guidelines §§ 230.26.20(a), 640.10, 640.20(f), and 640.30(d).

total anticipated expenditure.

b. Use of Associates

Appointed counsel are encouraged to use well-qualified associates who bill at a lower rate when to do so is cost-efficient and does not diminish the quality of the representation.¹²

vi. Share Responsibilities among Defense Teams in Multi-Defendant Cases

If it can be accomplished without creating a conflict of interest, counsel should develop a plan to share responsibilities in order to reduce the unnecessary duplication of effort among the defense teams in multi-defendant cases. For example, it may be cost-effective to have one attorney conduct certain tasks provided that conflicts or an attorney's responsibilities to the client do not preclude it (e.g., liaison with service providers performing work for more than one co-defendant; principal role in researching and writing certain motions joined by more than one defendant). Individual counsel still need to review the work performed by a co-defendant's attorney to ensure effective representation of his or her own client.

vii. Divide Responsibilities among Defense Team Members

In cases in which more than one attorney has been appointed, counsel should develop a plan to divide responsibilities among core defense team members so that each member is performing his or her duties effectively and efficiently. Counsel should develop an efficient schedule for team members to alternate client interviews (travel may be a factor) and a platform for communicating the substance of all meetings, including client meetings, investigative developments, and legal research to the rest of the defense team. Similarly, it may not be necessary for both attorneys to attend routine status conferences, particularly if travel is a factor, but an effective manner of communication about the proceedings should be in place.

viii. Coordinate and Run Meetings Efficiently in Respect of Participants' Time.

Meetings amongst defense team members are important as are meetings among defense counsel in multi-defendant cases. This is particularly true when counsel have devised a plan to divide responsibilities. However, these meetings involve the billable time of multiple attorneys and service providers. Counsel are advised to conduct them in an organized and time-efficient manner with consideration given to the time involved for the several attendees. An attorney or defense team member should be tasked with circulating regular meeting agendas and with keeping updated minutes reflecting assignments and timely completion thereof. Consideration should be given to

¹² Compare CJA Guidelines § 620.10.10(c) which provides criteria in capital cases including the requirement of prior approval for associate attorneys, and CJA Guidelines § 230.53.10(b) pertaining to non-capital cases which does not require prior approval for use of associates. Counsel should also check with the local rules and practices of the district court as prior approval for the use of associates in both non-capital and capital cases may be required.

permitting people to attend remotely by telephone or video conference when travel time and costs are a factor.

ix. Cost Saving Measures Should be Reflected in the Budget Proposal.

Counsel should point out cost saving measures in the proposal. This informs the court of counsel's fiscal responsibility and makes the court aware of cost containment efforts by the defense.

D. Important considerations – Investigative, Expert, and Other Service Providers

i. Service Provider Fees – The Need for Prior Authorization

a. Capital Prosecutions and Capital Habeas Corpus Proceedings

Importantly, for capital prosecutions and capital habeas matters, compensation and expenses for service providers including investigators, mitigation specialists, and experts, are limited to \$7,500 *combined* unless excess payments are certified by the trial court and approved by the chief judge of the circuit or designee.¹³ 18 U.S.C. § 3599(g)(2); CJA Guidelines § 660.20.20. However, if the total cost of all service providers combined does not exceed \$800 plus reasonable expenses, prior authorization is not necessary. 18 U.S.C. § 3006A(e)(2), CJA Guidelines § 660.10.40. Obtaining prior authorization may nevertheless be advisable, as the use of and amount paid to the service providers is still subject to review by the district court.

When evaluating a capital case, counsel should be mindful of the need to request advance authorization for funding for service providers at an early stage, as the combined \$7,500 figure can be exceeded very quickly, and obtaining approval at both the district and circuit levels cannot be done instantly. If time is of the essence, e.g., in preparation for a DOJ authorization presentation, counsel may need to seek pre-approval for funding for service providers before preparing the case budget.

b. Non-Capital Cases

In non-capital cases, payment of service providers is provided for in 18 U.S.C. § 3006A(e) and in the CJA Guidelines at Chapter 3. Please be aware of the amounts which trigger the need for authorization:

- If the amount of compensation for *an individual service provider* will exceed \$2,500 (excluding expenses), the district court must certify the amount as “necessary to provide fair compensation for services of an unusual character or duration,” 18 U.S.C. § 3006A(e)(3),

¹³ This limitation does not apply to pre-AEDPA cases, i.e., those commenced before April 24, 1996.

and prior authorization must be obtained from the chief judge of the circuit or designee. A separate authorization needs to be obtained for each such service.

- If the expected amount of compensation is less than \$2,500, prior authorization must be obtained from the district court; circuit authorization is not necessary.
- However, if the total cost of *all service providers combined* does not exceed \$800 plus reasonable expenses, prior authorization is not necessary. 18 U.S.C. § 3006A(e)(2), CJA Guidelines § 310.20.30. Obtaining prior authorization may nevertheless be advisable, as the use of and amount paid to the service providers is still subject to review by the district court.

ii. Negotiate with Experts on Fees.

Counsel should seek funding for specialized experts who are competent, well-respected in their fields, and, particularly in the case of testifying experts, vetted for instances of past misconduct or findings of incredibility when testifying in other cases. Nevertheless, counsel are encouraged to negotiate with service providers, particularly high-cost specialized experts, for a lower CJA rate for their services. Many experts are willing to charge a lower hourly rate or adjust their fee schedule for work performed for indigent defendants. Counsel should inform the expert that his or her billing will be through the CJA system and payment will come through that system so that there is a clear understanding of the financial aspect of the retainer.

iii. Geographic Proximity Preferred

Because travel costs and time can significantly increase the cost of the service, counsel should make every effort to engage qualified local service providers. A locally situated expert may charge more than someone located in another area of the country. However, travel costs have the potential to negate any apparent savings on the fee and must be taken into consideration. Counsel should interview and get fee quotes from several qualified experts in the field. If applicable, counsel should explain to the court why a geographically remote service provider should be authorized.

iv. Obtain Fee Schedules, Sign an Engagement Agreement, and Monitor the Work for Compliance with the Budget

Counsel should obtain a fee schedule from the service provider which quotes fees for the work to be performed (e.g. document review, interviews with client, testing of client, analysis or testing of physical evidence, preparation for and testimony at hearings or trial).

Counsel is responsible for communicating the terms of an approved budget to retained service providers. Counsel should use a written engagement letter signed by both parties which should include a reference to the fee schedule and the authorized funding. Counsel is responsible for monitoring the work performed by the service provider to ensure that it remains within budget. Thus provision should be made for the service provider to keep counsel informed of his or her billing

status. If it appears that additional funding will be needed, counsel should seek to amend or supplement the budget before spending exceeds the budgeted amount.

The signed engagement letter should be kept in the client's file. Counsel should be aware that the engagement letter is potentially discoverable, particularly in the case of testifying experts. The Case Budgeting Attorney can provide copies of sample engagement letters.

v . Phase Work for Responsible Spending

It may be appropriate in certain cases to budget for a limited number of hours of work by a service provider to determine whether there is a need for more extensive work, hence funding, on a particular issue or set of issues. For example, anecdotal information about a childhood head injury may implicate the need for a neuropsychological evaluation which then may or may not indicate the need for more extensive brain testing to support a mental health or intellectual impairment claim.

vi. Share Service Providers if No Conflict of Interest

In a multi-defendant CJA case, counsel should advise the court of any service provider work that can be shared without creating a conflict of interest or compromising quality (e.g., translation of documents; background investigations; discovery management). Counsel should also indicate the time needed for all counsel to confer with such providers.

vii. Attendance at Court Proceedings

Generally, support staff, including investigators, paralegals, and law clerks who are not in an active participating role, such as investigation of recently disclosed § 3500 material, securing the attendance of witness, or assisting with management of voluminous discovery and trial exhibits, will not be compensated for attendance at court proceedings. Counsel are strongly advised to seek preapproval explaining the need for the presence of additional personnel especially at trial.

USEFUL LINKS

Defender Services information on case-budgeting policies and principles: CJA Guidelines §§ 230.26 and 640: <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines>

Worksheets and explanatory memoranda: www.fd.org; <https://www.fd.org/navigation/select-topics-in-criminal-defense/cja-panel-information>

National Litigation Support (particularly useful for managing voluminous discovery electronic data): <https://www.fd.org/navigation/litigation-support/subsections/what-is-litigation-support>

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