

CJA Software, Expert and Computer Resources

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Available from Case Soft. CaseMap is currently version 5 with version 6 coming out any day. They also have a Bates Stamping utility that is new and will put Bates Stamps on PDF documents IF you have the full version of Acrobat. There is not a special CJA price for these packages. Go to the web site, 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. Note, at the support section of this site are a number of White Papers that provide very good ideas on using Acrobat and on case organization.

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¹ Standard disclaimer: the comments in this article are solely the opinions of the author and do not reflect any policy of Defender Services or the Judiciary nor does this paper intend to advocate for the use of any specific commercial product.

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PDF Converter

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 the full version of Acrobat). www.nuance.com/pdfconverter Version 3 runs \$50.

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Obtaining Resources as a CJA Attorney

Hardware

1. Easiest way, go buy what you want.
2. Middle ground, borrow what you need from your FPD or friends.
3. Most difficult, getting CJA funds for hardware purchases.

Software

1. Easiest way, go buy what you want.
2. Middle ground, borrow what you need from your FPD or friends.
3. Most difficult, getting CJA funds for software purchases.

Experts

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

Point 1. CJA funds cannot be used to buy you gear.

If the Court approves money for hardware or software, once the case is over you must return it. Where does it go ? To either your local FDO, or to Defender Services “central”.

Getting Approval.

As with all things judicial, there is a “process”. The “Holy Grail” search begins with The Criminal Justice Act, 18 U.S.C. §3006A, followed by 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, and on-line at www.fd.org. Since we are digging into this we might as well try and do it correctly. So bear with me. Section (e) of 3006A addresses “services other than counsel”. The judicial conference augments the Act in chapter III of the Guidelines.² Turning to Chapter III, we locate the following pertinent sections.

3.01 Availability.

Investigative, expert or other services necessary to 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.

3.02 Limitations.

A. With Prior Authorization. With prior authorization, compensation for

²The Guidelines table of contents are included below.

investigative, expert and other services is limited to **\$1,600** per individual plus expenses reasonably incurred³ ... 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.

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 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.**

- 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.

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 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.

3.04 Claims for Services.

³ **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). Government travel rates at substantial reductions from ordinary commercial rates may be available from common carriers for travel authorized by the court in connection with representation under the CJA. To obtain such rates, investigators and other service providers must contact the clerk of court and obtain prior approval from the presiding judicial officer.

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 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. **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.** (emphasis added)(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 the Office of Defender Services, or by the Office of Defender Services itself, and shall remain the property of the United States. (Emphasis added). 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 the Office of Defender Services.** (Emphasis added). 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.

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.

Summary:

- Funds are available for technology assistance in the form of people, software and hardware.
- Caps are \$500 with no advanced approval, \$1,600 per item with pre-approval, and more with approval for “services of an unusual character or duration”.
- Requests are ex parte and under seal, the prosecution plays no role in this.⁴
- Any hardware or software is owned by and returned after the case to the local Federal Defender or Defender Services.

Example:

The best way to work through this maze is through an example. You are appointed as one of six CJA attorneys each representing defendants in a multi-count fraud case based on an alleged “pyramid” investment scheme. There are 16 boxes of paper records, numerous recordings and an untold number of potential victims. You are not initially sure what your defense will be there was no fraud, might be I had no intent, might be I was not part of this. The attorneys for most of the defendants have talked and several defendants seem situated at about the same place as 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. From this you hope to be able to understand just how your client fits in and move toward a viable theory of defense.

Needed:

- Someone who understands security sales and regulations as the government claims this is part of an unlicensed sale of securities.
- Someone who knows how to organize and index up to 16 boxes of discovery as you do not see that as “ordinary office resources”.
- Some type of tool(s) to utilize the discovery once it is organized.

Based on some seminars you have attended and articles 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 how

⁴See *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.

you want it. Double wow. You call a couple companies for references and prices. They all say they can take out the confusion and hold down the tech-babble. Now what ?

What to Do First:

Before you start looking at “litigation support services” you want to:

- A. **Speak with your FD and their CSA** (computer systems analyst) 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.
- B. **Call Jeff Flax**, National Litigation Support Manager for Defender Services. Jeff is our full time person who focuses on litigation support. He has been involved in hundreds of cases and used or reviewed countless products. Telephone 303-464-7377, e-mail: Jeff_Flax@ao.uscourts.gov Mail: P.O. Box 220, Broomfield, CO 80038-0220.
- C. **Speak with other lawyers** you know preferably in your District but also on a national level to learn about approaches they have used.

Point 2: There is no one “silver bullet” 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.

What to do Second:

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

- A. Begin establishing the potential case facts.
- B. Speak with the client about their view of what occurred.
- C. If possible try to get the AUSA and /or case agent to explain the case to you from their perspective. I 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).
- D. Begin to decide what you are looking for and a way to find it.

Examples.

A. 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 Jeff and 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 will give you a printout. Maybe they will give you the actual spreadsheet. Ask.

B. Tapes

You need to listen to the tapes. What you are most interested in is if your client’s voice is on any tape, or if his name is mentioned. Ask Jeff. There may be software that does this. 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 software.

C. Documents

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

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 you plan require work of others ?
5. Distill it down and we are ready to get the money we need to implement the plan (assuming some funds are needed).

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.⁵ 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 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 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 suggest asking the Magistrate's clerk which is preferred.

Case Law - Courts Seem to Love Some Law

The opinion in *U.S. vs. McVeigh*, 954 F. Supp. 1441 (D.Colo. 1997)(Judge Matsch) 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:

⁵ The First Circuit vacated a sentence and remanded the case when the District Court violated the ex parte provisions of the Act. *U.S. v. Abreu*, 202 F.3d 386 (1st Cir. Jan. 31, 2000).

“[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. 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. 08/30/1995) provides some useful insight into how an appellate court, looking backwards addresses expert and funding issues. Kennedy received appointed counsel in 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 WMC records. The boxes were placed in a repository in two rooms of a government building in Denver, Colorado, and 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 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. Overall, not bad. Here is precedent from the notoriously "thrifty" 10th circuit supporting funds for a second attorney, three experts and a paralegal. The defense was provided with \$5000 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 *U.S. v. Albert*, 195 F. Supp. 2d 267, 283 (D. MA, 2002) the Court explains 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.

Here is a sample.

Request for Funds for Expert and other Services

Overview: X one of six codefendants 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 para-legal, and

E., funds for the purchase of a portable, external hard drive.

Facts: Blah, Blah, Blah.

Authority: 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 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.⁶

⁶ 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

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.

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). *U.S. v. Bissell*, 954 F.Supp. 903, 922 (D.N.J. 1997). Here, the court has found X indigent and appointed counsel.

Services Needed:

The defense requires the following services, each of which will be described in so 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 para-legal, and
- E., funds for the purchase of a portable, external hard drive.

Now you need to create a paragraph or two for each expert explaining:

1. Who the witness is.
2. Why under the case facts the witness is needed. Be specific, not conclusory.
3. The qualifications of the witness and the fees charged. I attach an 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.
4. Just what the witness will be doing for you.

Equipment or Software

When seeking equipment or software explain:

1. Exactly what you propose to purchase including product literature.

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.

2. Why you need to purchase this product and why it is outside the scope of what your office has and is also “hardware or software not typically available in a law office”.
3. The price. If the price varies show the court that you price shopped. In your consultation with Jeff Flax he will find out if there is a lower government price available. It is always helpful to show how the item is being obtained at a reduced price for government work.
4. Your compliance with Guideline 3.16 and how you have submitted your proposal to Jeff Flax, National Litigation Support Manager for Defender Services. If possible has Jeff prepare a memo or letter of support for your request which you can include in what you give the court.
5. Your plan for turning the product over to either the local Defender or Jeff Flax at the end of your usage.

Point 3: Try before you buy.

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

Conclusion:

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

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 DSAG representative for the First and Second circuits and is a Past-President of the Maine Association of Criminal Defense. David is finish 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 regular author and speaker at CLE not just in Maine but across the county.