

EXPLANATORY MEMORANDUM FOR CASE BUDGETING IN FEDERAL DEATH PENALTY PANEL ATTORNEY REPRESENTATIONS

The Judicial Conference of the United States encourages courts to use case budgeting in federal death penalty cases. (JCUS-SEP 98, pp. 72-73; see [§ 640](#) of the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), Vol. 7A, *Guide to Judiciary Policy*.)¹ It is hoped that the development of a case budget on behalf of a capital defendant will help ensure that CJA panel attorneys receive the resources necessary to represent the accused effectively and will facilitate payment of vouchers. At the same time, the attorney is required to both incorporate cost considerations into litigation planning and to provide sufficient information to enable the court to assess and monitor the expenditure of public funds.

Two-Stage Case Budgeting

In federal death penalty cases, the capital case-budgeting process contemplates sequential two-stage budgeting. The “pre-authorization” stage commences with the return of an indictment charging a potentially capital offense and continues until such time as the Attorney General has officially decided whether to pursue the death penalty against a particular defendant. (See United States Attorney’s Manual § 9-10.000.) The “post-authorization” stage starts with the Attorney General’s decision whether to authorize seeking the death penalty and continues until the conclusion of the case. (See CJA Guidelines [§§ 640.30\(c\)\(1\) and \(2\)](#) and [Appendix 6A](#) of the CJA Guidelines, Recommendations 9.b and 9.d.) If the Attorney General determines not to

¹ CJA Guidelines [§ 640](#) also applies to case budgeting of capital post-conviction proceedings. Similar case-budgeting provisions have been included in CJA Guidelines [§ 230.26](#), which pertains to non-capital representations that appear likely to become or have become “extraordinary” in terms of potential cost. Whereas the provisions of [§ 230.26](#) are applicable only to those non-capital representations that are expected to exceed certain cost thresholds (*i.e.*, attorney hours exceeding 300 hours or total expenditures exceeding \$30,000), case budgeting pursuant to section [§ 640](#) is encouraged in *all* federal death penalty cases.

authorize the death penalty, the court reviews the number of appointed counsel and the hourly rate (CJA Guidelines [§§ 640.30\(c\)\(3\)](#) and [630.30](#), and [Appendix 6A](#), Recommendation 9.i); any changes would be incorporated into the second stage of the budget. Counsel should explain his or her assumptions with respect to the length of time being included in each stage of the budget; it is possible for there to be more than one budget submission within each stage based on stated lengths of time. (See also *Reevaluating Case Budgets*, p. 7, below.)

Importance of Sentencing Mitigation Investigation at the Outset of the Case

Because of the importance of the authorization process, counsel must conduct a sentencing mitigation investigation at the outset of the case. As stated in the commentary accompanying the recommendations adopted by the Judicial Conference (from the Committee on Defender Services report entitled *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (May 1998), updated by the Committee's report entitled [Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases](#) (September 2010), p. 93, “[s]ince an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the district’s United States Attorney and with the Justice Department is critical both to a defendant’s interests and to sound fiscal management of public funds.” Accordingly, the pre-authorization budget should include costs for investigators, mitigation specialists, and such other expert services as counsel deems necessary to investigate pertinent mitigation issues, including mental health.

Starting the Budgeting Process

Counsel should commence the budgeting process as soon as practicable (*i.e.*, once defense counsel becomes sufficiently familiar with the case to identify factual and legal issues).² CJA Guidelines [§ 670\(a\)](#) provides that “[w]ithin a reasonable period of time after appointment of counsel under [18 U.S.C. § 3005](#), and only after consultation with counsel for the government and for the defendant (including, as appropriate, in an *ex parte* application or proceeding), the court should establish a schedule for resolution of whether the government will seek the death penalty.” Courts are further encouraged to inquire of the prosecution regarding the nature of its evidence (*i.e.*, the existence of electronic surveillance, the nature and significance of forensic evidence, etc.) and the estimated length of trial. The sooner defense counsel and the court obtain case-specific information, the more effective the planning process and the court review of case budgets will be. Even if such details are unavailable, counsel and courts are encouraged to budget early and on the basis of specifically stated assumptions (e.g., that there is a certain number of pages of discovery or hours of wiretap recordings, that there is no DNA evidence, that the substantive allegations and/or aggravating factors set forth in the indictment will or will not be broadened, etc.).

Under CJA Guidelines [§ 320.70.40](#), appointed counsel must consult the National Litigation Support Team in the Administrative Office of the United States Courts (AO), Office of Defender Services (510-637-3500) before procuring computer hardware or software with a cost

² See CJA Guidelines [§ 640.40\(a\)](#), providing that courts should act on requests for investigative, expert, and other services made before there is an opportunity for counsel to prepare a case budget or for the court to approve it, where prompt authorization is necessary for adequate representation. In addition, CJA Guidelines [§ 640.40\(b\)](#) states that courts, in examining the case budget, may reconsider amounts authorized for services prior to the budget’s approval; however, courts may not rescind prior authorization where work has already been performed. The case-budgeting process also contemplates that counsel will be paid for reasonable and necessary work performed prior to approval of the case budget.

exceeding the limitations in CJA Guidelines [§ 310.20.30](#) or utilizing computer systems, litigation support products, services, personnel, or experts with an expected combined cost exceeding \$10,000.

Case-Budgeting Worksheets

To assist the court and counsel, the AO developed [case-budgeting worksheets](#) that set forth important categories of information, with sufficient detail to enable the preparation of a realistic case budget. Counsel may submit a detailed, supporting memorandum with the worksheets. There are both *detailed* and *summary* worksheets for each of the four types of services: attorney, investigator, expert, and “other.” It is anticipated that the summary worksheets for each service provider would be submitted by appointed counsel. (The work of providers of the same type of service, including defense counsel, may be combined on one form, with counsel explaining the division of labor between them.³) The court has the option of requesting that counsel prepare one or more of the detailed worksheets, depending on whether the summary worksheet(s) and any supporting memoranda supply the court with sufficient information to evaluate the budget. In addition, the detailed worksheets may serve as a useful tool for counsel in developing the summary documents.

For administrative convenience, a single set of case-budgeting worksheets covering the entire case, rather than separate pre- and post-authorization sets, was developed. The single set enables counsel to include information applicable to one stage that may affect the budgeting

³ A defense team choosing to utilize the services of both an investigator for purposes of the guilt-innocence phase and a mitigation specialist to conduct a factual investigation of the defendant’s social history (*see Wiggins v. Smith*, 539 U.S. 510 (2003)) for the penalty phase could prepare separate worksheets for each. Courts utilizing case budgeting have treated mitigation specialists as either an investigative or expert service, depending on a variety of factors (such as the qualifications of the specialist and the nature of the work).

request for another stage and allows for the practice of some courts to budget for the entire case from the outset (counsel should still submit the budget in stages). If the Attorney General decides not to authorize the death penalty, counsel should nevertheless continue to use these worksheets.

Please note that the Ninth Circuit, as part of the circuit CJA case-budgeting attorney pilot project (2007 - 2011), developed Microsoft Excel worksheets to assist in the case-budgeting process. One major feature of these documents is that the attorney budgeting categories correspond to the in-court and out-of-court categories on the CJA Form 30 Death Penalty Proceedings: Appointment of and Authority to Pay Court-Appointed Counsel). The Ninth Circuit worksheets (also available in a condensed format) can be obtained by contacting the ODS Legal and Policy Duty Attorney, at 202-502-3030, or via email at ods_lpb@ao.uscourts.gov; judges and panel attorneys in circuits with a circuit CJA case-budgeting attorney should contact that individual.

Assistance Available to Counsel in Formulating Budgets

In putting together a budget, counsel are strongly encouraged to seek assistance from Federal Death Penalty Resource Counsel⁴ and the ODS Legal and Policy Branch Duty Attorney. (CJA Guidelines, [Appendix 6A](#), Recommendation 9.d.)

⁴ Contact information for Federal Death Penalty Resource Counsel is available on www.capdefnet.org. The Administrative Office and federal defender organizations have utilized the services of Federal Death Penalty Resource Counsel to fulfill their statutorily mandated role in helping courts identify counsel for appointment in death-eligible cases, pursuant to 18 U.S.C. § 3005 and CJA Guidelines [§ 620.30](#), and [Appendix 6A](#), Recommendation 2.

Submission of Budget *Ex Parte*

Case budgets and supporting materials should be submitted *ex parte* and filed and maintained under seal, given the amount of attorney work-product and litigation strategy they reveal. (CJA Guidelines [§ 640.20\(b\)](#) and [Appendix 6A](#), Recommendation 9.e.) 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 (9th Cir. 1972) (funding statutes are designed to put indigent defendants in same position as those who can afford counsel).

Role of the Court

With respect to the court's role in the development, review, and approval of capital case budgets, a court should consider utilizing, at the earliest opportunity, *ex parte* pretrial conferences with defense counsel (CJA Guidelines [§ 640.20\(c\)](#)). In reviewing a budget, judges may contact the ODS Legal and Policy Branch Duty Attorney to obtain information about available personnel resources who can provide objective case-budgeting advice to the court.

By virtue of the dollar amounts typically involved for investigative, expert, and other service providers in capital cases, budgets submitted by CJA panel attorneys will almost certainly implicate the case compensation maximum for those services (\$7,500 in fees and expenses for all investigative, expert, and other services combined, 18 U.S.C. § 3599(g)(2)). Thus, it is

recommended that the presiding judicial officer send that part of the case budget to the chief judge of the court of appeals (or his or her delegate) for concurrence. (See CJA Guidelines [§ 660.20.20](#).)

Once a budget has been approved, it should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting compensation and reimbursement for attorneys and other service providers. (CJA Guideline [§ 640.20\(d\)](#).) The order should include, among other things: (1) an agreement that counsel will advise the court of significant changes to the estimates set forth in the order; (2) a date on which a subsequent *ex parte* case budget pretrial conference will be held; (3) the procedure and schedules for the submission, review, and payment of interim vouchers (given the typical lengthy duration of a capital case, CJA Guidelines [§§ 630.40](#) and [660.40](#) urge that interim payments to both defense counsel and service providers be permitted); and (4) the authorization and payment terms for investigative, expert, and other services. (CJA Guidelines [§§ 640.30\(d\) - \(h\)](#).)

Reevaluating Case Budgets

The litigation budget is not intended to be viewed as etched in stone. Even where a case budget has been carefully prepared, subsequent events can have a major impact on it. Counsel and the court should reevaluate case budgets when justified by changed or unexpected circumstances, particularly those resulting in deviation from the stated assumptions upon which the original budget and order were premised (e.g., if the budget presupposed 5,000 pages of discovery but the government produces 10,000 pages). The budget order should be modified by the court where good cause is shown. (CJA Guidelines [§ 640.20\(f\)](#), and [Appendix 6A](#), Recommendation 9.f.)

Conclusion

Although the process is inherently inexact, careful planning in the development and use of a budget should result in the availability of the resources necessary for the defense of a capital case. The use of the case-budgeting worksheets should provide the necessary information, in sufficient detail, to facilitate this planning process. The request for resources, and the accompanying justification, should allow the court to understand clearly how the resources are to be used, and thus to oversee the expenditure of public funds while, at the same time, permitting prompt and full payment of CJA counsel and providers of services other than counsel.