

## Criminal Justice Act Budgeting and Vouchers

### Fifth Circuit Recommended Practices

The recommendations set out below are intended to promote circuit policy in two respects. One is to encourage as much uniformity as possible among the various districts and divisions in how CJA vouchers are handled and in what is expected of CJA counsel. The other is to allow vouchers to be processed as expeditiously as possible. The latter goal should compensate somewhat for the low (and recently reduced) hourly rates paid to panel attorneys, and prevent the amplification that delay can cause in the sting that results from an unexpected cut in the amount claimed in a voucher. In addition, the expeditious processing of vouchers provides rapid feedback to the lawyers, and allows them more quickly to adjust their work patterns and billing practices toward more efficient provision of representation that is paid for by the government under the Criminal Justice Act.

Although it is sometimes necessary to cut a voucher and pay less than the requested amount, it is not the purpose of the suggestions below, nor of the general requirement that a voucher be reviewed by the presiding judicial officer, to save large amounts of money through the cumulative effect of these reductions. As noted below, the Guide to Judicial Policy specifically warns against responding to “adverse financial circumstances” in this way. Instead, the review process, and the imposition of reductions when appropriate, should be regarded as a mechanism for encouraging attorneys to handle their representations efficiently, and record and report their time accurately.

Indeed, the Guide contains this language: “If the court determines that a claim should be reduced, appointed counsel should be provided prior notice of the proposed reduction with a brief statement of the reason(s) for it, and an opportunity to address the matter.” Such a notice is one mechanism for the court and counsel to explore issues about how time and resources should be spent in a CJA case, but it is not the only one. The Guide also explains that this requirement should not be viewed “as discouraging the court from communicating informally with counsel about questions or concerns in person, telephonically, or electronically, as deemed appropriate or necessary.”

Because the client is not the party paying the fee, CJA counsel are often faced with difficult questions of judgment about the line between work that is reasonable and necessary to the defense, and work that has too little chance of providing a benefit to fall into that category. Especially in cases that are likely to be expensive, judges who encourage the opening of a dialogue with counsel early in the case, and who remain accessible as the case progresses, can provide substantial assistance in this respect.

## Appointment of Counsel

- In deciding which attorney to appoint, the district court should keep in mind the following:
  - The amount of travel that will be required, taking into account where the defendant is housed, where the courthouse is, where the attorney is, and how much the attorney will need to travel to the prison and the court.
    - If travel will be substantial, consider appointing a lawyer who will require less travel.
    - Consider reducing hourly rate for travel time during which work is not performed.
  - If the client does not speak English, whether a lawyer can be appointed who speaks the same language as the client.
- The Guide permits appointed counsel to bill for time spent by partners and associates, though the voucher worksheets must clearly identify which attorney did the work. In order to prevent the proliferation of timekeepers, district judges should, at the beginning of the case, discuss with appointed counsel which attorneys at his firm will assist with the case, and what rates they will be paid.<sup>1</sup>
  - Unless they obtain prior approval from the court, appointed counsel are *not* permitted to bill for assistance provided by attorneys who are not partners or associates. If prior approval is given, the rate paid for the lawyer providing assistance should be no more than is paid to him by appointed counsel.<sup>2</sup>
- In appropriate situations, paralegals or legal assistants can effect significant savings if they do work that would otherwise have to be done by an attorney at a higher rate. Paralegal time should be billed on a Form CJA-21 like any other service provider, even if the paralegal is an employee of appointed counsel or his firm. The hourly rate for a paralegal depends on the background of the paralegal and the nature of the services

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<sup>1</sup> The rates provided for by the Guide are maximum rates; it is acceptable to reduce hourly rates for junior lawyers.

<sup>2</sup> At the court of appeals, we discovered that some attorneys were attempting to subcontract work out to others (even non-lawyers), bill the time as their own, and pocket the difference in hourly rates. We now require each voucher to include a certification that all timekeepers have been accurately identified.

provided.<sup>3</sup> It should not be set so low as to discourage the use of paralegals, nor so high as to remove the possibility of savings. The rate for paralegals who are firm employees may take into account the firm's overheads; the rate for an independent contractor paralegal should be what the paralegal actually receives.

- District courts should ensure that out-of-circuit lawyers who are appointed in capital cases are aware of the presumptive circuit limits for attorneys' fees in these cases. In federal capital prosecutions, the presumptive limit on fees for all attorneys combined is \$100,000; in capital habeas cases it is \$35,000. Out-of-circuit attorneys may not be aware that vouchers exceeding those limits will be subject to circuit review.

#### Case Budgeting and Pre-authorizations for Service Providers

- The Fifth Circuit strongly recommends case budgeting for all capital cases and for defendants in non-capital cases whose cost of defense is likely to exceed \$30,000.
  - Circuit approval of budgets is required unless all of the budget items are within the presumptive limits set by statute, Volume 7A of the Guide to Judiciary Policy, and the Fifth Circuit Policy on attorneys' fees in capital cases. However, this will rarely occur, and most budgets will have to be sent to the circuit for approval.
- Pre-authorizations in excess of \$2400 for individual service providers in non-capital cases, and in excess of \$7500 for all service combined providers in capital cases, must be approved by the circuit.<sup>4</sup> Failure to send these pre-authorizations to the circuit is the single most common mistake we see in CJA processing.
- Budgets should start at the beginning of the representation, rather than the date of submission. Time already spent and costs already incurred should be included and identified.
- Budgets should identify all necessary service providers, at least by type of service required. The hourly rates of service providers who bill by the hour should be included in addition to the total amount budgeted. In many situations, the individual service provider will have to be identified in order to be sure that the projected hourly rate is accurate.

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<sup>3</sup> Neither paralegals nor attorneys may be compensated for work that is essentially secretarial in nature.

<sup>4</sup> Service providers' out-of-pocket expenses are excluded from the \$2400 limit but are included in the \$7500 limit.

- In a multi-defendant case in which more than one defendant submits a budget, the district court should structure budget approvals so that the budgets for the various defendants are as uniform as possible.
  - The expected length of trial should be the same in each budget.
  - Each budget should contain the same provisions for interim payments, etc., unless there is good reason for different provisions.
  - District courts should consider whether differences in amounts requested for attorneys' fees reflect real differences between different defendants or whether they are accidental.
- In a federal capital prosecution, separate budgets should be approved for the preauthorization phase and for the trial phase.<sup>5</sup>
  - Adequate time and service provider resources should be allowed for the defense to prepare fully to attempt to persuade the government not to authorize the death penalty. The case will be much less expensive if the death penalty is not sought.
  - However, if it appears likely that the death penalty will not be authorized, because the government is going forward with obtaining an authorization decision from the DOJ without requesting materials from defense counsel or inviting defense counsel to make a presentation at the DOJ, it may be possible to delay providing substantial preparation funds for the lawyers until it is apparent that preparation for such a presentation is actually required. Such a delay will be possible only if there would be sufficient time for adequate preparation should the original expectation prove incorrect.
  - The budget for the trial phase should begin at the date of the government's decision whether or not to pursue the death penalty. The trial budget does not need to be submitted before this authorization decision is made.
- In budgeting a capital habeas case, the district court should insist that lawyers explain with particularity how, despite the restrictions of AEDPA, they will make use of any new investigation or work by experts beyond the state habeas record.

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<sup>5</sup> Even if the case is not authorized to proceed as a capital matter, it is likely to be expensive to try. However, a trial budget may not be needed if, as a result of the government's decision not to seek the death penalty, a guilty plea seems imminent and the case is unlikely to be tried.

### Cost Containment in Case Management

- Encourage the prosecution to produce discovery expeditiously and in an orderly and accessible fashion, and to timely identify material intended to be used at trial.
  - Significant unnecessary costs are incurred when defense counsel is forced to organize discovery or to review discovery of little potential assistance to the defendant that the prosecution does not intend to use at trial. This is a very common theme among defense counsel explaining why vouchers exceeded the presumptive limits.
  - Broad production of discovery early in the case could also significantly reduce costs if it results in an earlier guilty plea.
- If interim payments are authorized, ensure that, after making an interim payment, the amount remaining in the budget is sufficient for the work left to be done in the case.
- While saving money is never a reason for denying a defendant due process or preventing the government from having a fair opportunity to make its case, pretrial rulings, as on discovery, the admissibility of evidence or severance for trial, can have significant effects on the cost to the CJA system, and courts should be conscious of these costs.

### Voucher Review and Submission of Excess Vouchers to the Circuit

- In a high-cost case, requiring frequent submission of vouchers allows a court to keep apprised of the rate at which time and money are being expended. However, vouchers generate considerable paperwork, especially when they are excess vouchers that have to be sent to the circuit. Courts might consider whether submitting periodic reports of time billed and expenses incurred, rather than vouchers to be processed for payment, would serve the purpose adequately.
- Lawyers should be required to explain unusual amounts of time disproportionate to the tasks being done.
- Courts should disallow billing of more than one or two minutes for reviewing routine docket notices. It is the practice of many lawyers to bill six (or even twelve) minutes for each scheduling notice or other non-substantive docket notice without regard to how much time was actually required to read the notice. There are multi-defendant cases in which a lawyer must closely monitor the docket activity of co-defendants, but the amount of time spent on this must not be overbilled.

- One reason for encouraging the prompt submission of vouchers is that district judges may find it helpful to review at the same time all or most of the attorney and service provider vouchers that will be submitted for a particular defendant. This provides a more complete picture of the cost of a representation than would be allowed by piecemeal submissions. Similarly, in a multi-defendant case, being able to review all of the defendants' vouchers together has considerable advantages. In addition, when all of the excess vouchers in a case are sent to the circuit at the same time, processing is made quicker and more efficient, and consideration of the vouchers is made easier.
- In a case in which one CJA lawyer replaces another, the Guide requires that the first lawyer's voucher be held until the end of the case so that the lawyers' vouchers can be considered together. Because a single presumptive limit applies in such situations, the limit is likely to be exceeded by the total amount requested. If so, each lawyer's voucher should be treated as an excess voucher, even though the individual voucher is itself within the limit. As with the situation above, submitting the vouchers to the circuit together means that the circuit is able to accomplish its tasks more efficiently and more easily.
- The Guide requires certain certification language for excess vouchers. Recommendations for payment of excess vouchers MUST include the following language of certification:
  - For CJA 20s (non-capital attorney vouchers): the case was *extended* and/or *complex*, and the amount requested is *necessary to provide fair compensation*.
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  - For CJA 21s and 31s (service provider vouchers): the services provided were of an *unusual character* and/or *duration*, and the amount requested is *necessary to provide fair compensation*.
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  - For CJA 30s (capital attorney vouchers): no special language is necessary in connection with a recommendation made to the chief circuit judge.
- Although the JCUS recently reduced the hourly rate for both capital and non-capital cases, the Guide provides that “[v]ouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.”<sup>6</sup> It is certainly appropriate, however, to deduct time spent inefficiently, time spent on non-compensable activities or time spent that is unreasonably out of proportion to the benefit that the client might receive.

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<sup>6</sup> Guide to Judiciary Policy, Vol. 7, Part A, § 230.33.

## Additional Suggestions

- When sending budgets, pre-authorizations, and excess vouchers to the circuit, district courts should provide any additional information that would be helpful to the circuit in evaluating the request.
- District judges should provide an independent assessment of budget items, pre-authorizations and excess vouchers rather than attempting to anticipate what the circuit might be willing to approve.
- While magistrate judges do not have authority to make final decisions as to budgeting, pre-authorizations, or voucher approvals (except as to cases fully disposed of before them), they may be very helpful in connection with the consideration of all of these, and in making recommendations to the district judge.
- The circuit is available to discuss budgeting and other CJA-related issues. We suggest contacting Joe St. Amant and Mary Gaber as a first resort at 504-310-7799. Judge Catharina Haynes is also available to discuss budgeting. Any or all of us can also be available to attend district meetings by phone if that would be helpful to address questions from judges.