

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**

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FOR THE GUIDE TO JUDICIARY POLICIES AND PROCEDURES

TO: JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT EXECUTIVES
FEDERAL PUBLIC/COMMUNITY DEFENDERS
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS OF APPEALS
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FROM: Leonidas Ralph Mecham



SUBJECT: Revisions to Appointment of Counsel in Criminal Cases, Volume 7, *Guide to Judiciary Policies and Procedures*

This transmittal provides changes to the Appointment of Counsel in Criminal Cases, Volume 7, *Guide to Judiciary Policies and Procedures (Guide)*. Those changes are detailed below. Questions may be directed to the Office of Defender Services, Duty Attorney, on 202-502-3030.

FILING INSTRUCTIONS (Keep this transmittal sheet in the front of the appropriate volume for reference):

<u>Remove Previous</u>	<u>Insert Attached</u>	<u>Dated</u>
Table of Contents, Pages iii,iv	Table of Contents, Pages iii,iv	08/15/2005
Chapter II Pages i,ii, 3-6, 9-14, 17-25	Chapter II Pages i, ii, 3-6, 9-14, 17-24	08/15/2005
Chapter III Pages 13, 14	Chapter III Pages 13, 14	08/15/2005
Chapter VI Pages 5-12	Chapter VI Pages 5-12	08/15/2005

<u>Remove Previous</u>	<u>Insert Attached</u>	<u>Dated</u>
Appendix C Pages C-1, C-2	Appendix C Pages C-1, C-2	08/15/2005
Index (all)	Index (all)	08/15/2005

Change Code:
 E = editorial
 P = new policy/procedure
 R = revised policy/procedure

Section-by-Section Comparison Chart

Type of Change	Old Information	New Information	Reason for Change
R	<p>Paragraph 2.01E(4) of Volume 7 of the <i>Guide</i> provides that civil actions to protect federal jurors’ employment are not covered by or compensable under the Criminal Justice Act. Such actions are under the authority of 28 U.S.C. § 1875. That federal juror protection statute, however, does not provide a payment source for counsel appointed by the court. Although not referenced in the <i>Guide</i>, Congress has annually included statutory language in the appropriation for the federal judiciary’s Defender Services account to authorize “the compensation of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by 28 U.S.C. 1875(d).”</p>	<p>Paragraph 2.01E(4) of Volume 7 of the <i>Guide</i> is amended to clarify that the Defender Services appropriation is the payment source for compensating attorneys appointed in civil actions to protect a federal juror’s employment. The revised guideline further provides for appointment and compensation standards and procedures, including that private attorneys (rather than federal defenders) should receive such appointments and that the court shall utilize the CJA Form 20 for the appointment and compensation of counsel.</p> <p>Paragraph 2.22B(2)(viii) of Volume 7 of the <i>Guide</i> provides for the CJA panel attorney felony case compensation maximum amount to apply, and current subparts (viii) and (ix) are renumbered as (ix) and (x).</p>	<p>Since neither the juror statute nor paragraph 2.01E(4) of Volume 7 of the <i>Guide</i> referenced the appropriation statute, there has been confusion regarding the proper payment source for representation of federal jurors to protect their employment.</p>

Type of Change	Old Information	New Information	Reason for Change
R	<p>Under paragraph 2.31 of Volume 7 of the <i>Guide</i>, appointed counsel have been allowed to claim as a reimbursable out-of-pocket expense (pursuant to paragraph 2.27) the cost of using computer-assisted legal research equipment, but only if they submitted “a brief statement setting forth the issue or issues that were the subject matter of the research” and if the amount claimed did not exceed the total amount of attorney compensation that reasonably would have been approved if counsel had performed the research manually. Similar restrictions applied to paragraph 3.15, under which counsel could be authorized by the court to obtain commercial computer-assisted legal research services as provided under subsection (e) of the CJA.</p>	<p>A new subparagraph B is added to paragraph 2.27, allowing appointed counsel to claim reimbursement as an out-of-pocket expense for computer-assisted legal research (CALR) costs, provided they are reasonable and accompanied by appropriate documentation; claims in excess of \$500 are to be accompanied by a brief statement of justification. Paragraph 3.15 is amended to delete the requirement that the attorney estimate the number of hours required to do the research manually and to base the authorization for commercially-performed CALR on the reasonableness of the estimated charges. Paragraph 2.31 is eliminated, which included the former CALR provision. Current paragraph 2.32 (Record Keeping) is renumbered as 2.31.</p>	<p>The Judicial Conference approved the revisions to paragraphs 2.27, 2.31, and 3.15 of Volume 7 of the <i>Guide</i> (JCUS-MAR 05, p.4) to simplify and expedite procedures to reimburse CJA panel attorneys for expenses incurred in conducting CALR.</p>
R	<p>Paragraph 6.02B(2) in Volume 7 of the <i>Guide</i> addresses the number and compensation of counsel in cases in which a defendant is indicted for a capital offense and it is subsequently determined that the death penalty will not be sought.</p>	<p>Revised paragraph 6.02B(2) emphasizes that, for cases in which a defendant is indicted for a death-eligible offense and the Attorney General subsequently decides not to seek the death penalty, courts should be discouraged from continuing more than one counsel and/or the higher capital compensation rate, absent extenuating circumstances. The revised paragraph includes factors to be considered by the court in determining whether extenuating circumstances exist.</p>	<p>The Judicial Conference approved the Defender Services Committee’s recommendation (JCUS-MAR 05, p.4) as a cost-containment strategy.</p>

2.05 Partial Eligibility	8
2.06 Family Resources	9
Part B. <u>Appointment of Counsel</u>	
2.10 Appointment of Counsel to Represent More Than One Individual in a Particular Case	9
2.11 Compensation of Co-Counsel	9
2.12 Continuity of Representation	9
2.13 Other Appointments	10
2.14 Appointment of Counsel in Habeas Corpus and Proceedings under Section 2255, Title 28, United States Code	10
2.15 Forms for the Appointment of Counsel	11
2.16 Waiver of Counsel	11
2.17 Standby Counsel	11
2.18 Termination of Appointment	11
2.19 Federal Defender Organizations	12
Part C. <u>Compensation and Expenses of Appointed Counsel</u>	
2.20 Forms to be used	12
2.21 Time Limits	12
2.22 Limitations	12
2.23 Prior Authorization by Court to Counsel to Incur Expenses	20
2.24 Proration of Claims	20
2.25 Substitution of Counsel	20

2.26 Travel Time	20
2.27 Reimbursable Out-of-Pocket Expenses	21
2.28 Non-reimbursable Items	23
2.29 Writ of Certiorari	24
2.30 Interim Payments to Counsel	24
2.31 Record Keeping	24

Chapter III. AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE,
EXPERT OR OTHER SERVICES

Part A. General

3.01 Availability	1
3.02 Limitations	2
3.03 <i>Ex Parte</i> Applications	3
3.04 Claims for Services Other than Counsel	3
3.05 Forms for the Authorization and Payment for Services Other than Counsel	3
3.06 Interim Payments	4
3.07 Review of Vouchers	4

Part B. Policies Regarding Investigative, Expert and Other Services

3.10 Investigators	5
3.11 Psychiatrists, Psychologists	5
Summary Chart - Responsibility for Payment of Psychiatric and Related Expert Services.	8

CHAPTER II

APPOINTMENT AND PAYMENT OF COUNSEL

<u>CONTENTS</u>	<u>PAGE</u>
<u>Part A. Eligibility for Representation Under the Act</u>	
2.01 District Plans	1
2.02 Criminal Justice Act Forms	7
2.03 Fact-finding	7
2.04 Standards for Eligibility	8
2.05 Partial Eligibility	8
2.06 Family Resources	9
<u>Part B. Appointment of Counsel</u>	
2.10 Appointment of Counsel to Represent More Than One Individual in a Particular Case	9
2.11 Compensation of Co-Counsel	9
2.12 Continuity of Representation	9
2.13 Other Appointments	10
2.14 Appointment of Counsel in Habeas Corpus and Proceedings under Section 2255, Title 28, United States Code	10
2.15 Forms for the Appointment of Counsel	11
2.16 Waiver of Counsel	11
2.17 Standby Counsel	11
2.18 Termination of Appointment	11

CONTENTS

PAGE

2.19 Federal Defender Organizations 12

Part C. Compensation and Expenses of Appointed Counsel

2.20 Forms to be Used 12

2.21 Time Limits 12

2.22 Limitations 12

2.23 Prior Authorization by Court to Counsel
to Incur Expenses 20

2.24 Proration of Claims 20

2.25 Substitution of Counsel 20

2.26 Travel Time 20

2.27 Reimbursable Out-of-Pocket Expenses 21

2.28 Non-reimbursable Items 23

2.29 Writ of Certiorari 24

2.30 Interim Payments to Counsel 24

2.31 Record Keeping 24

- B. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:
- (1) attorneys furnished by a bar association or a legal aid agency; or
 - (2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (g) of the Act.
- C. Each plan should contain a provision to the effect:
- "If at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with his or her representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall advise the court."
- D. Composition and Management of the Panel of Private Attorneys (CJA Panel). The CJA Panel must be designated or approved by the court. The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation. Members should serve at the pleasure of the court.

Subsection (b) of the Act provides, in part, that:

Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

However, when the district judge presiding over the case, or the chief judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant. Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances. Further, the attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify him or her for admission to the district's CJA panel in the ordinary course of panel selection.

Administration and management of the CJA Panel should be centralized in one organizational element (such as the Clerk's Office or, where appropriate, the Federal Defender Organization) to ensure that counsel is appointed as expeditiously as possible, appointments are equitably distributed, and information on availability of counsel is maintained.

Appointments should be made in a manner which results in both a balanced distribution of appointments and compensation among members of the CJA Panel, and quality representation for each CJA defendant. These objectives can be accomplished by making appointments on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations.

A copy of a "Model Plan for the Composition, Administration, and Management of the Panel of Private Attorneys under the Criminal Justice Act" is included as an appendix to the "Model Criminal Justice Act Plan" in Appendix G, at page G-12.

- E. Cases or proceedings which are not covered by or compensable under the Act include the following:
- (1) Petty offenses (Class B or C misdemeanors or infractions), except where confinement is authorized by statute and the judge or United States magistrate judge determines that appointment of counsel is required in the interest of justice;
 - (2) Corporate defendant cases;
 - (3) Prisoners bringing civil rights actions under 42 U.S.C. § 1983. Care should be taken to ensure that a prisoner is not denied the appointment of counsel due to the mislabeling of his action as "civil rights" when the proceedings could also be considered as seeking relief under 28 U.S.C. § 2254;
 - (4) Civil actions to protect federal jurors' employment. However, Congress has annually included statutory language in the appropriation for the federal judiciary's Defender Services account to authorize "the compensation of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by 28 U.S.C. 1875(d)." The court shall appoint counsel under the standard set forth in 28 U.S.C. § 1875(d)(1), which does not require a finding of financial eligibility. The court shall appoint a private attorney, who may be a member of the CJA panel and should have employment law experience; a federal defender should not be appointed. The court shall utilize the CJA Form 20 for the appointment and pay counsel "to the extent provided by [the Criminal Justice Act]", 28 U.S.C. § 1875(d)(1), and the CJA Guidelines. The court may, as authorized by 28 U.S.C.

§ 1875(d)(2), order a defendant employer to pay the fees and expenses of counsel appointed under 28 U.S.C. § 1875(d)(1); in such event, the court should follow the reimbursement procedures set forth under section 2.22E of the CJA Guidelines;

- (5) Administrative deportation proceedings before the Immigration and Naturalization Service.

F. Other cases or proceedings which may be covered or compensable under the Act include, but are not limited to the following (see also paragraph 2.22 B(2)):

- (1) Counsel may be appointed under the Act for a person charged with civil or criminal contempt who faces loss of liberty.
- (2) Upon application of a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, counsel may be appointed where there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty.
- (3) Counsel may be appointed for financially eligible persons proposed by the U.S. Attorney for processing under a "pretrial diversion" program.
- (4) Counsel may be appointed for persons held for international extradition under chapter 209, title 18, United States Code.
- (5) Representation may be furnished for financially eligible persons in "ancillary matters appropriate to the proceedings" pursuant to subsection (c) of the Act.

In determining whether a matter is ancillary to the proceedings, the court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge.

In determining whether representation in an ancillary matter is appropriate to the proceedings, the court should consider whether such representation is reasonably necessary to accomplish, *inter alia*, one of the following objectives:

- (i) to protect a Constitutional right;
- (ii) to contribute in some significant way to the defense of the principal criminal charge;

- (iii) to aid in preparation for the trial or disposition of the principal criminal charge;
- (iv) to enforce the terms of a plea agreement in the principal criminal charge;
- (v) to preserve the claim of the CJA client to an interest in real or personal property subject to a civil forfeiture proceeding pursuant to 21 U.S.C. §881, 19 U.S.C. §1602 or similar statutes, which property, if recovered by the CJA client, may be considered for reimbursement under subsection (f) of the Act and paragraph 2.04 of these Guidelines; or
- (vi) to effectuate the return of real or personal property belonging to the CJA client which may be subject to a motion for return of property pursuant to Fed. R. Crim. P. 41(e), which property, if recovered by the CJA client, may be considered for reimbursement under subsection (f) of the Act and paragraph 2.04 of these Guidelines.

The scope of representation in the ancillary matter should extend only to the part of the ancillary matter that relates to the principal criminal charge and to the correlative objective sought to be achieved in providing the representation (e.g., a CJA defendant in a criminal stock fraud case should be represented by CJA counsel at the defendant's deposition in a parallel civil fraud action for the limited purpose of advising him concerning his Fifth Amendment rights.)

Representation in an ancillary matter shall be compensable as part of the representation in the principal matter for which counsel has been appointed and shall not be considered a separate appointment for which a separate compensation maximum would be applicable under paragraph 2.22 B of these Guidelines. A private panel attorney appointed under the Act may obtain, through an *ex parte* application to the court, a preliminary determination that the representation to be provided in an ancillary matter is appropriate to the principal criminal proceeding and compensable under subsection (c) of the Act and this guideline. However, failure to obtain such a preliminary determination shall not bar the court from approving compensation for representation in an ancillary matter provided that the services and compensation related thereto are justified in a memorandum submitted by the attorney to the court at the conclusion of the principal criminal matter and the presiding judicial officer finds that such representation was appropriate.

2.06 Family Resources. The initial determination of eligibility should be made without regard to the financial ability of the person's family unless his family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if he is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.

Part B. Appointment of Counsel

2.10 Appointment of Counsel to Represent More Than One Individual in a Particular Case. Unless good cause is shown or in the absence of a waiver on the record by the defendants, in a criminal prosecution involving more than one defendant, or where separate charges arising out of the same or similar transactions are concurrently pending against two or more defendants, separate counsel should normally be appointed for each defendant. If an attorney is appointed to represent more than one person, a separate order of appointment shall be entered with respect to each person. An attorney who represents joint defendants may be compensated for his services up to the statutory maximum for each person represented, unless the case involves extended or complex representation (see paragraph 2.24 of these Guidelines).

2.11 Compensation of Co-counsel.

A. Without appointment. Unless appointed in accordance with paragraphs 2.11 B or 6.01 A, co-counsel or associate attorneys may not be compensated under the Act. However, an appointed counsel may claim compensation for services furnished by a partner or associate or, with prior authorization by the court, counsel who is not a partner or associate, within the maximum compensation allowed by the Act, separately identifying the provider of each service.

B. With appointment. In an extremely difficult case where the court finds it in the interest of justice to appoint an additional attorney, each attorney is eligible to receive the maximum compensation allowable under the Act. The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice shall appear on the Order of Appointment. (See paragraph 6.01 A for appointment of more than one attorney in capital cases.)

2.12 Continuity of Representation. If the attorney appointed by the United States magistrate judge is to continue to represent the defendant in the district court, no

additional appointment by the district court should be made, except on appeal from a judgment rendered by the United States magistrate judge in a misdemeanor case.

An order extending Appointment on Appeal (CJA 20) should be executed for each appellant for whom counsel was appointed by a United States district judge or magistrate judge for representation at the trial level. In a federal capital prosecution, or a proceeding pursuant to 28 U.S.C. § 2254 or 2255 challenging a death sentence, the appointment should be made on a CJA 30.

Absent special circumstances, whenever a case is transferred to another district, such as under Rules 20, 21, and 40, Federal Rules of Criminal Procedure, appointment of counsel should be made in the transferee district.

2.13 Other Appointments. A new appointment on CJA Form 20 should be made for each person represented in the following proceedings:

- A. New trial after motion, mistrial, reversal, or remand on appeal;
- B. Probation revocation proceedings;
- C. Appeal, including interlocutory appeals;
- D. Bail appeals to a Court of Appeals;
- E. Extraordinary writs;
- F. Mental condition hearings pursuant to section 4243 (Hospitalization of a Person Found Not Guilty only by Reason of Insanity), 4245 (Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect), and 4246 (Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect) of title 18, United States Code. (See also paragraph 2.22 B(2)(vi)(f) and Appendix H infra.)

2.14 Appointment of Counsel in Habeas Corpus and Proceedings under Section 2255, Title 28, United States Code. While the Rules for sections 2254 and 2255 of title 28, United States Code, mention the appointment of counsel only with regard to discovery and evidentiary hearings, the Criminal Justice Act, subsection (a)(2)(B), permits discretionary appointment at any stage of the proceedings, in the interest of justice. (See paragraph 2.01 A(2)(ii)). In addition, 21 U.S.C. §848(q)(4) requires the appointment of one or more attorneys in death penalty federal habeas corpus cases. (See paragraph 6.01 A.)

- 2.15 Forms for the Appointment of Counsel. Forms for the Appointment of Counsel, together with instructions for the execution and distribution thereof, are included in Appendix A.
- 2.16 Waiver of Counsel. A waiver of assigned counsel by a defendant should be in writing. If the defendant refuses to sign the waiver, the judge or United States magistrate judge should certify thereto. No standard form has been prescribed for this purpose. If an appointment of counsel has been made previously, the CJA appointment form and the waiver should be forwarded to the Administrative Office.
- 2.17 Standby Counsel. Criminal defendants have both a constitutional and statutory right to self-representation in federal court. [See Faretta v. California, 422 U.S. 806 (1975); 28 U.S.C. §1654]. In some cases, however, the judge or United States magistrate judge may find it necessary to appoint "standby" counsel to be available to assist a *pro se* defendant in his or her defense and also to protect the integrity and ensure the continuity of the judicial proceedings. [See McKaskle v. Wiggins, 465 U.S. 168 (1984); Faretta, supra]. The CJA, however, provides that "[u]nless the (financially eligible) person waives representation by counsel... [the court] shall appoint counsel to represent him." While the court has inherent authority to appoint standby counsel, such appointments may not be made and counsel may not be compensated under the CJA unless the defendant qualifies for appointed counsel and representation is actually rendered by counsel. Accordingly, if a financially eligible *pro se* defendant agrees to be represented, at least in part, by standby counsel, compensation may be provided under the CJA. Similarly, if at any time during the course of the proceedings the services of standby counsel are accepted by a financially eligible *pro se* defendant, a *nunc pro tunc* CJA appointment order should be effected and counsel may be compensated under the CJA.

On the other hand, in circumstances in which appointment is made under the court's inherent authority, and counsel serves exclusively on behalf of the court to protect the integrity and continuity of the proceedings, and does not represent the defendant, any compensation to be paid counsel shall be in the capacity of an "expert or consultant" pursuant to 5 U.S.C. §3109. Accordingly, an appointment pursuant to this section may be made regardless of whether the defendant is financially able to obtain adequate representation. In such cases, compensation will be determined by the judicial officer in accordance with CJA hourly rates and case compensation maximums. The Office of Defender Services of the Administrative Office should be consulted regarding appointment and payment procedures. If, during the course of the proceedings, a *pro se* defendant who is financially able to retain counsel elects to do so, the court's appointment of an attorney pursuant to §3109 shall be terminated.

- 2.18 Termination of Appointment. In any case in which appointment of counsel has been made and the court subsequently finds that the person is financially able to obtain counsel, such appointment should be terminated. (Use CJA Form 7, Appendix A.)

- 2.19 Federal Defender Organizations. When cases are assigned to a Federal Public or Community Defender Organization, the appointment should be made in the name of the Organization (i.e., the Federal Public Defender or Community Defender), rather than in the name of an individual staff attorney within the Organization. (see paragraph 4.04 of these Guidelines).

Part C. Compensation and Expenses of Appointed Counsel

- 2.20 Forms to be Used. Forms for the compensation and reimbursement of expenses to appointed counsel, together with instructions for the execution and distribution thereof, are included in Appendix A. A copy of all supporting documents which itemize or expand the amounts shown on the face of CJA Form 20 must be attached to at least copies numbered 1 and 2.

2.21 Time Limits.

- A. Vouchers shall be submitted no later than 45 days after the final disposition of the case, unless good cause is shown. The clerks of the concerned courts should ensure that attorneys are complying with the prescribed limits. Every effort should be made to have counsel submit the claim as soon as possible upon completion of services rendered.
- B. Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

2.22 Limitations.

A. Hourly Rates.

- (1) In General. Except in federal capital prosecutions and in death penalty federal habeas corpus proceedings, compensation paid to appointed counsel may not exceed \$60 per hour for time expended in court or before a United States magistrate judge and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that higher maximum rates not to exceed \$75 per hour are justified for particular places of holding court. (See paragraph 6.02 A regarding compensation of counsel in federal capital cases and death penalty federal habeas corpus proceedings and paragraphs 2.22 A(2) and (3) regarding adjustment of hourly rates.)
- (2) Establishment of Alternative Hourly Rates for Particular Districts or Circuits.
- (a) Judicial Conference Authority. Subsection (d)(1) of the Act, as amended by the CJA Revision of 1986, authorizes the

Judicial Conference to establish higher maximum hourly rates not to exceed \$75, for particular districts or circuits.

The "alternative" rate provision is intended to be utilized by the Judicial Conference if it determines that circumstances existing in particular districts or circuits warrant an exception from the general hourly maximums of \$60 per hour for in-court time and \$40 per hour for out-of-court time.

To ensure the reasonable exercise of the Judicial Conference's alternative rate setting authority, Congress directed that the Conference develop guidelines for determining the rates.

(b) General Considerations.

- (i) In setting the higher maximum rates, the Judicial Conference may retain or eliminate the in-court/out-of-court hourly rate differential.
- (ii) With respect to representation before the court of appeal, the attorney compensation should be determined based on the higher rate of the maximum hourly rates for the district in which a lawyer maintains his or her principal office or for the district out of which the case arose.

(c) Factors to be Considered in Setting Alternative Rates. In determining whether higher rates are justified, and if so, what such rates shall be, the Judicial Conference may consider the following:

- (i) The minimum range of the prevailing hourly rates for qualified attorneys in the particular district or circuit. In determining the minimum range, the following may be taken into consideration: Any surveys that have been conducted by state and local bar associations, management consulting firms, federal, state and local government agencies, or other organizations regarding hourly rates for in-court and out-of-court time and per diem charges for representation in trial charged by qualified criminal defense lawyers in the relevant area.
- (ii) Overhead costs incurred by criminal practitioners in the area for which an increase is sought including data regarding the average costs for secretarial and clerical personnel, and average lease costs.

- (iii) The ability of the court to recruit and retain qualified private attorneys to serve on the court's CJA panel when compensation is limited to the general hourly maximums, including whether and to what degree the locality has experienced a drop in panel membership and the incidence of refusal by panel members to accept appointments.
 - (iv) The recommendations of the judicial councils of the circuits.
- (d) Procedures. The Judicial Conference has established the following procedures to be followed in connection with requests for alternative rates:
- (i) The Office of Defender Services of the Administrative Office shall conduct studies of the reasonableness of CJA hourly rates in judicial districts and report its findings to the Judicial Conference Committee on Defender Services. The studies should consider the factors enumerated in paragraph 2.22A(2)(c), as well as any other relevant information. The Office of Defender Services shall conduct periodic reevaluations of the CJA rates in districts in which the maximum alternative rates have not been established.
 - (ii) Chief judges of districts or judicial councils of circuits may submit requests and justifications for approval or modification of alternative hourly rates to the Office of Defender Services.
 - (iii) The Committee on Defender Services will review the studies of the Office of Defender Services and requests from districts and circuit councils, and make recommendations to the Judicial Conference regarding the establishment of alternative rates in particular districts or circuits.
 - (iv) The Judicial Conference will consider the requests and recommendations, and make the final determinations on rate adjustments and amounts.
- (3) Annual Increase in Hourly Rate Maximums. Subsection (d)(1) of the Act, as amended by the CJA Revision of 1986, also authorizes the Judicial Conference to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees, beginning three years after the Act's March 14, 1987 effective date. Hourly rate maximums, including established alternative rates, will

- (vii) Non-capital Post-Conviction Proceedings under sections 2241,2254 or 2255 of title 18, United States Code.

\$7,000 for trial court level.

\$5,000 for appeal.

- (viii) Proceedings to Protect Federal Jurors Employment under section 1875 of title 28, United States Code.

\$7,000 for trial court level.

\$5,000 for appeal.

- (ix) Other Representations required or authorized by the CJA.

\$1,500 for trial court level.

\$1,500 for each level of appeal.

[This category includes but is not limited to the following representations:

- (a) Probation Violation;
- (b) Supervised Release Hearing [for persons charged with a violation of supervised release or facing modification, reduction or enlargement of a condition or extension or revocation of a term of supervised release];
- (c) Parole Proceedings under chapter 311 of title 18, U.S.C.;
- (d) Material Witness in Custody;
- (e) Mental Condition Hearings Pursuant to chapter 313 of title 18, U.S.C. [with the exception of hearings pursuant to sections 4241 and 4244 of title 18, U.S.C., which are considered part of the case in chief with no separate compensation maximums applying. (A chart detailing the treatment for the purpose of compensation of representation at each hearing pursuant to chapter 313 is included as Appendix H.)];
- (f) Civil or Criminal Contempt [Where the person faces loss of liberty];
- (g) Witness [before a grand jury, a court, the Congress, or a federal agency or commission which has the power to

compel testimony, where there is a reason to believe either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty];

- (h) International Extradition [under chapter 209 of title 18, U.S.C.].
- (x) Ancillary Matters. Representation in ancillary matters shall be compensable as part of the representation in the principal matter for which counsel has been appointed, and shall not be considered a separate appointment for which a separate compensation maximum would apply.
- (3) Waiving Case Compensation Maximums. Payments in excess of CJA compensation maximums may be made to provide fair compensation in cases involving extended or complex representation when so certified by the court or United States magistrate judge and approved by the chief judge of the circuit (or by an active circuit judge to whom excess compensation approval authority has been delegated).

In determining if an excess payment is warranted, the court or United States magistrate judge and the chief judge of the circuit (or an active circuit judge to whom excess compensation approval authority has been delegated) should make a threshold determination as to whether the case is either extended or complex. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex." If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is "extended."

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard: responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed; knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and injury thereto; any extraordinary pressure of time or other factors under which services were rendered; and any other circumstances relevant and material to a determination of a fair and reasonable fee.

- (4) Case Budgeting. Courts are encouraged to use case budgeting techniques in representations that appear likely to become or have become extraordinary in terms of potential cost (ordinarily, a representation in which attorney hours are expected to exceed 300 hours or total expenditures are expected to exceed \$30,000 for appointed counsel and services other than counsel on behalf of

an individual CJA defendant). If a court determines that case budgeting is appropriate (either on its own or upon request of counsel), counsel should submit a proposed initial litigation budget for court approval, subject to modification in light of facts and developments that emerge as the case proceeds. Case budgets should be submitted *ex parte* and filed and maintained under seal. See generally the case budgeting principles pertaining to capital cases in paragraph 6.02F of these Guidelines.

C. Supporting Memorandum.

- (1) Claim for Less than the Case Compensation Maximum. In any case in which the total compensation claimed is less than the statutory case compensation maximum, counsel may be required to submit a memorandum supporting and justifying the compensation claimed, whenever called for by local rule, standing order, or by the presiding judicial officer.
- (2) Claim for More than the Case Compensation Maximum. In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel shall submit with the voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. Upon preliminary approval of such claim by the presiding judicial officer, the court should furnish to the chief judge of the circuit a memorandum containing its recommendation and a detailed statement of reasons.

D. Reduction of CJA Compensation Vouchers by the Reviewing Judicial Officer. The Criminal Justice Act provides that the reviewing judicial officer shall fix the compensation and reimbursement to be paid to appointed counsel. In cases where the amount approved is less than was requested by appointed counsel, the judicial officer may wish to notify appointed counsel that his or her claim for compensation and/or reimbursement has been reduced, and to provide an explanation of the reasons for the reduction.

E. Payments by a Defendant Under Subsection (f) of the Act. No appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate judge on CJA Form 7. If such payment is authorized, it shall be deducted from the fee to be approved by the court under subsection (d) of the Act. In this regard, the combined payment to any one attorney for compensation from both the person represented and the government shall be subject to applicable dollar limitations, unless excess compensation is approved under subsection (d)(3) of the Act. Whenever the court finds that funds are available for payment from or on behalf of a person represented and directs that such funds be paid to the court for deposit in the Treasury, payment should be made by a check or money order

drawn to the order of the clerk of court, who will deposit all monies received to the credit of the Treasury and credit such sums to the CJA appropriation. Subsection (f) of the Act does not authorize a judicial officer to require reimbursement as a condition of probation, and the Judicial Conference believes that reimbursement of the cost of representation under the Act should not be made a condition of probation under any other authority.

F. Services Before United States Magistrate Judges. United States magistrate judges may only approve vouchers for services rendered in connection with a case disposed of entirely before the United States magistrate judge.

2.23 Prior Authorization by Court to Counsel to Incur Expenses. Court plans may require advance authorization for such items as counsel's expenses over stipulated amounts or counsel's travel in excess of stipulated distances. Such advance authorization need not be submitted to the Administrative Office.

2.24 Proration of Claims. When a defendant is charged in one indictment with severable counts, one voucher should be submitted and one maximum applied under subsection (d)(2) of the Act, whether or not the counts are severed for trial. When a defendant is charged in two or more indictments (other than a superseding indictment or information), a separate voucher should be submitted, and a separate maximum applied under subsection (d)(2) of the Act, for each indictment, whether or not the indictments are consolidated for trial.

Where single counsel is appointed to represent multiple defendants, separate vouchers should be submitted, and a separate maximum applied under subsection (d)(2) of the Act, for each defendant represented.

Whenever appointed counsel submit separate vouchers, as provided by this paragraph, time spent in common on more than one indictment or case must be prorated among the indictments or cases on which the time was spent; and each indictment or case must be cross-referenced on the vouchers. Time spent exclusively on any one indictment or case may properly be charged on the voucher for that indictment or case.

2.25 Substitution of Counsel. If an attorney is substituted for an attorney previously appointed for a defendant in the same case, the total compensation which may be paid both attorneys shall not exceed the statutory maximum for one defendant, unless the case involves extended or complex representation. In such cases, vouchers for attorney's services shall not be approved by a judicial officer until the conclusion of the trial so that the judicial officer may make such apportionment between the attorneys as may be just.

2.26 Travel Time. Compensation shall be approved for time spent in necessary and reasonable travel. Ordinarily, allowable time for travel includes only those hours

actually spent **in or awaiting transit**. Accordingly, if a trip necessarily and reasonably requires overnight lodging, compensable travel time to the destination from the claimant's office would terminate upon arrival and check-in at the hotel or other place of accommodation plus travel time returning directly to the claimant's office from said destination. Compensation for travel time shall be at a rate not to exceed the rate provided in subsection (d) of the Act for "time reasonably expended out of court."

If such travel is made for purposes in addition to representing the person whom the attorney has been appointed to represent under the Act, the court shall determine whether, in fairness to the appointed attorney, the travel time should be apportioned, and the appointed attorney compensated for that portion of the travel time reasonably attributable to the performance of the attorney's duties under the Act. In determining whether such travel time should be so apportioned, the court may consider the time reasonably expended in the performance of the attorney's duties under the Act, in relation to the time expended furthering other purposes of the trip, the significance to the representation of the duties performed, and the likelihood that the attorney would have made the trip to perform the duties under the Act in the absence of the other purposes for making the trip.

2.27 Reimbursable Out-of-Pocket Expenses. Out-of-pocket expenses reasonably incurred may be claimed on the voucher, and must be itemized and reasonably documented. Expenses for investigations or other services under subsection (e) of the Act shall not be considered out-of-pocket expenses.

A. Reimbursement for Transcripts.

- (1) Generally, court reporters or reporting services which furnish court authorized transcripts in CJA cases claim and receive compensation for their services on the CJA Form 24, "Authorization and Voucher for Payment of Transcript," (See paragraph 3.12 of these Guidelines). While this is the preferred method for payment of transcripts, if assigned counsel has elected to pay for the court authorized transcripts "out-of-pocket," the cost may be claimed as a reimbursable expense, as provided for in subsection (d)(1) of the Criminal Justice Act. However, unlike most reimbursable expenses, which should be claimed on the CJA Form 20, "Appointment of and Authority to Pay Court Appointed Counsel," reimbursement to the attorney who has paid for the transcript as an "out-of-pocket" expense should be claimed on a CJA Form 24. (See Appendix A).
- (2) The cost of transcribing depositions in criminal cases is the responsibility of the Department of Justice pursuant to Rule 17b of Fed. R. Crim. P. (but when witness is an expert, then the Administrative Office will pay out of CJA funds)(53 Comp. Gen. 638 (1974)).

- B. Computer-Assisted Legal Research. The cost of use, by appointed counsel, of computer-assisted legal research services, may be allowed as a reimbursable out-of-pocket expense, provided that the amount claimed is reasonable. Whenever appointed counsel incurs charges for computer-assisted legal research, counsel should attach to the compensation voucher a copy of the bill and receipt for the use of the legal research services or an explanation of the precise basis of the charge (e.g., indicating the extent to which it was derived by proration of monthly charges, or by charges identifiable to the specific research). If the amount claimed is in excess of \$500 or if it includes costs for downloading or printing, counsel should include a brief statement of justification.
- C. Travel Expenses. Travel by privately owned automobile should be claimed at the rate currently prescribed for federal judiciary employees who use a private automobile for conduct of official business, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

Per diem in lieu of subsistence is not allowable, since the Act provides for reimbursement of expenses actually incurred. Therefore, counsel's expenses for meals and lodging incurred in the representation of the defendant would constitute reimbursable "out-of-pocket" expenses. In determining whether actual expenses incurred are "reasonable," counsel should be guided by the prevailing limitations placed upon travel and subsistence expenses of federal judiciary employees in accordance with existing government travel regulations.

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, attorneys must contact the clerk of the court and obtain prior approval from the presiding judicial officer.

- D. Interim Reimbursement for Expenses. Where it is considered necessary and appropriate in a specific case, the presiding judge or United States magistrate judge may, in consultation with the Administrative Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case. Interim reimbursement should be authorized when counsel's reasonably-incurred, out-of-pocket expenses for duplication of discoverable materials made available by the prosecution exceed \$500.
- E. Reimbursement for Expenses Incurred Defending Malpractice Allegations. The CJA was amended by the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, to authorize courts to reimburse panel attorneys for expenses reasonably incurred in defending actions alleging malpractice in furnishing representational services under the CJA. The amendment covers expenses incurred on or after its effective date (November 13, 2000). No reimbursement shall be made if a judgment of malpractice is rendered against the attorney; in

view of this prohibition, no reimbursement should be provided until the malpractice claim is resolved.

The total reimbursement shall not exceed the deductible amount of counsel's professional liability insurance policy or \$5,000, whichever is less. Expenses qualifying for reimbursement may include, but are not limited to, the costs of transcripts, witness fees and costs, and attorney fees. In determining reasonable attorney fees for this purpose, CJA rates are inapplicable. Reimbursement shall not include compensation for representing oneself in defending the action alleging malpractice, or, if represented by counsel, for time spent assisting that counsel in defending the action.

Reimbursement should be claimed under the expense categories on a CJA Form 20 (or, where the appointment was in a capital matter, CJA Form 30), and supporting documentation should be attached.

F. Other. This would include items such as telephone toll calls, telegrams, copying (except printing -- see paragraph 2.28 D below) and photographs.

2.28 Non-reimbursable Items. Appointed counsel may not claim reimbursement for the following:

- A. General Office Overhead. General office overhead includes general office expenses which would normally be reflected in the fee charged to the client. The statutory fee is intended to include compensation for these general office expenses. Therefore, except in extraordinary circumstances (see paragraph 3.16), personnel, rent, telephone service, and secretarial expenses associated with CJA representation, whether work is performed by counsel or other personnel, are not reimbursable.
- B. Items and Services of Personal Nature. The cost of items of a personal nature purchased for or on behalf of the person represented, such as purchasing new clothing or having clothing cleaned, getting a haircut, furnishing cigarettes, candy or meals, etc. Also, the cost of services of a personal nature and expenses incidental thereto which cannot be considered legal representation, such as assisting the defendant in the disposition of his or her personal property, arranging for the placement of minor children of the defendant, assisting the defendant in executing the conditions of probation, providing legal assistance in matters unrelated to the litigation of the case, although incidental to the defendant's arrest, etc.
- C. Filing Fees. Attorneys should not be required to pay a filing fee in a Criminal Justice Act case inasmuch as such payment and reimbursement thereof is tantamount to the Government billing itself to accomplish a transfer of appropriated funds into the General Fund of the Treasury.

- D. Printing of Briefs. The expense of printing briefs, regardless of the printing method utilized, is not reimbursable; however, the cost of mimeographing, "xeroxing," or similar copying service is reimbursable.
- E. Service of Process. Witness fees, travel costs, and expenses for service of subpoenas on fact witnesses, are not payable out of the CJA appropriation but are governed by Rule 17, Fed. R. Crim. P. and 28 U.S.C. §1825.
- F. Taxes. Taxes paid on attorney compensation received pursuant to CJA, whether based on income, sales or gross receipts, are not reimbursable expenses.

2.29 Writ of Certiorari. Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered as applicable to the case before the United States Court of Appeals, and should be included on the voucher for services performed in that court.

2.30 Interim Payments to Counsel.

- A. Non-Death Penalty Cases. Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to counsel. Appendix E (pages E-1 through E-6) contains instructions on the procedures for effecting interim payments to counsel, as well as a sample memorandum order on this subject which provides for two alternative payment methods. The payment options provided in the order are designed to strike a balance between the interest in relieving court-appointed attorneys of financial hardships in extended and complex cases, and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation. Other interim payment arrangements which effectuate this balance may be devised in consultation with the Office of Defender Services of the Administrative Office of the United States Courts.
- B. Death Penalty Cases. Presiding judicial officers are urged to permit interim payments in death penalty cases. Since the Anti-Drug Abuse Act of 1988 effectively repealed the CJA hourly rates and case maximums with respect to death penalty cases, a separate set of procedures and a separate memorandum order should be used in those cases. These procedures and a sample memorandum order are set forth in Appendix E, at page E-7.

2.31 Record Keeping. Appointed counsel must maintain contemporaneous time and attendance records for all work performed, including work performed by associates, partners, and support staff, as well as expense records. Such records, which may be subject to audit, must be retained for three years after approval of the final voucher for an appointment.

3.14 Guardian Ad Litem.

- A. In Proceedings Involving Juveniles. A guardian ad litem appointed under 18 U.S.C. § 5034 is not eligible for compensation under the Criminal Justice Act or any other authority. Any person who is appointed as both counsel and guardian ad litem in one case under § 5034 should prorate time spent fulfilling the duties of these two offices. Only time spent as counsel on a case is compensable and should be reflected on the CJA claim.
- B. In Prisoner Transfer Proceedings. A guardian ad litem appointed in proceedings to verify consent of a minor or incompetent prisoner to transfer from the United States to a foreign country is eligible for compensation under the Criminal Justice Act pursuant to 18 U.S.C. § 4109(b). (See paragraph 2.22 B(2)(iv) regarding compensation limits and Regulations for the Appointment of Counsel Pursuant to a Prisoner Transfer Treaty, which appears at Section B of this Volume.)

3.15 Commercial Computer-Assisted Legal Research Services. The court may authorize counsel to obtain computer-assisted legal research services, where the research is performed by employees of a commercial legal research firm or organization rather than by appointed counsel, provided that the total amount charged for computer-assisted legal research services is reasonable. Requests by counsel for authority to obtain such computer-assisted legal research services should include the following:

- A. a brief explanation of the need for the research services; and
- B. an estimate of the charges.

Claims for compensation for such services should be submitted on CJA Form 21, “Authorization and Voucher for Expert and Other Services”, or, in a death penalty proceeding, CJA Form 31, “Death Penalty Proceeding: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services”. (See paragraph 2.27B concerning reimbursement for the cost of direct use, by appointed counsel, of computer-assisted legal research services.)

- 3.16 Other Services and Computer Hardware and Software. In addition to investigators, psychiatrists, psychologists, and reporters, services other than counsel may include but not necessarily be limited to, interpreters, computer systems and automation litigation support personnel and experts; paralegals and legal assistants, including law students; neurologists; and laboratory experts in the areas of ballistics, fingerprinting, and handwriting.

The Administrative Office is authorized to pay out of Criminal Justice Act funds expenses of eligible defendants for stenographic and notarial expenses required to perpetuate and authenticate testimony of expert witnesses for such defendants.

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. (See Decision of the Comptroller General, B-139703, dated February 28, 1974, 53 Comp. Gen. 638.)

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. (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. 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. 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.

6.02 Compensation of Appointed Counsel in Capital Cases.

A. Inapplicability of CJA Hourly Rates and Compensation Maximums.

(1) Hourly Rates.

(a) In General. Pursuant to 21 U.S.C. § 848(q)(10)(A), **with respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal was perfected, on or after April 24, 1996**, the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (unless raised by the Judicial Conference in accordance with section 848(q)(10)(A)).

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the Antiterrorism Act, an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums.

(b) Annual Increase in Hourly Rate Maximum. Subsection 848 (q)(10)(A) of the Anti-Drug Abuse Act of 1988 (Title 21, United States Code), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, authorizes the Judicial Conference to increase annually the hourly rate maximum by an amount not to exceed the federal pay comparability raises given to federal employees, beginning three years after the Act's April 24, 1996 effective date. The hourly rate maximum will be adjusted automatically each year in accordance with any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rate will apply with respect to services performed on or after the effective date.

(2) Inapplicability of Compensation Maximums. There 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.

B. Attorney Compensation Recommendation.

- (1) In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (see paragraph 6.01 C), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided.

In consideration of the potential for wide disparity in compensation paid to attorneys in federal death penalty cases and in federal capital habeas corpus proceedings, and for overburdening the Defender Services appropriation, it is recommended that presiding judicial officers limit the hourly rate for attorney compensation to between \$75 and \$125 per hour for in-court and out-of-court time. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** the rate of compensation shall not exceed \$125 per hour for in-court and out-of-court time (unless revised by the Judicial Conference in accordance with 21 U.S.C. § 848(q)(10)(A)).

- (2) If, following the appointment of counsel in a case in which a defendant was charged with an offense that may be punishable by death, it is determined that the death penalty will not be sought, the court should consider the questions of the number of counsel and the rate of compensation needed for the duration of the proceeding.

The court should, absent extenuating circumstances, make an appropriate reduction in the number of counsel. In deciding whether there are extenuating circumstances, the court should consider the following factors:

- (a) the need to avoid disruption of the proceedings;
- (b) whether the decision not to seek the death penalty occurred late in the litigation;
- (c) whether the case is unusually complex; and
- (d) any other factors that would interfere with the need to ensure effective representation of the defendant.

In addition, the court should, absent extenuating circumstances, reduce (only prospectively) the compensation rate. In determining whether there are extenuating circumstances, the court should consider the following factors:

- (a) the extent to which this representation precludes counsel from taking other work;
 - (b) the commitment of time and resources counsel has made and will continue to make in the case; and
 - (c) the need to compensate appointed counsel fairly.
- C. Interim Payments to Counsel. It is urged that the court permit interim payment of compensation in capital cases. (See generally paragraph 2.30 B concerning interim payments to counsel in death penalty cases.)
- D. Forms. Claims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted on CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel."
- E. Review of Vouchers. Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.
- F. Case Budgeting in Federal Capital Habeas Corpus Proceedings and Federal Death Penalty Cases. Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds. Case budgets should be submitted *ex parte* and filed and maintained under seal.
- (1) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.
 - (2) Consideration should be given to employing an *ex parte* pretrial conference in order to facilitate reaching agreement on a litigation budget at the earliest opportunity.
 - (3) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and

payments for investigative, expert and other services, including but not limited to the following matters:

(a) The hourly rate at which counsel will be compensated (see paragraphs 6.02 A and B);

(b) In capital habeas corpus cases: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) for the entire case (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(c) In federal death penalty cases:

i. Prior to prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice determines whether to authorize the death penalty;

ii. After prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

iii. Death penalty not sought: as soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed in accordance with subparagraph 6.02 B(2);

(d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;

(e) Agreement on a date on which a subsequent *ex parte* case budget pretrial conference will be held;

(f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (see paragraphs 6.02 C and E);

(g) The form in which claims for compensation and reimbursement should be submitted (see paragraph 6.02 D) and the matters that those submissions should address; and

(h) The authorization and payment for investigative, expert, and other services (see paragraph 6.03).

(4) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

G. Case Management in Federal Capital Habeas Corpus Proceedings. Judges are encouraged to employ the case-management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases.

6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases.

A. In General. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court should authorize the defendant's attorneys to obtain such services. No *ex parte* request for investigative, expert, or other services in such cases may be considered unless, a proper showing is made by counsel concerning the need for confidentiality.

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(9) prior to that provision's amendment by the AEDPA, upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the presiding judicial officer shall authorize the defendant's counsel to obtain such services on behalf of the defendant.

For all capital cases, upon a finding that timely procurement of necessary investigative, expert or other services could not await prior authorization, the presiding judicial officer may authorize such services *nunc pro tunc* consistent with paragraph 3.02 B.

Except as otherwise specified in paragraph 6.03, the provisions set forth in Chapter III are applicable to the authorization and payment for investigative, expert, and other services in capital cases.

- B. AEDPA Limitation: Inapplicability to Pre-AEDPA Cases. For all capital cases, the compensation maximum set forth in paragraph 3.02 A of these guidelines is inapplicable.

With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, pursuant to 21 U.S.C. § 848(q)(10)(B), the fees and expenses for investigative, expert, and other services are limited to \$7,500 in any case unless payment in excess of that amount is certified by the court, or United States magistrate judge if the services were rendered in connection with a case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). The \$7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually.

Once payments for investigative, expert, and other services total \$7,500, then additional payments must be approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). Accordingly, the court shall monitor all payments for investigative, expert, and other services.

If it can be anticipated that the payments for investigative, expert, and other services will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). See sample form, Appendix C. Rather than submitting multiple requests, where possible, courts should submit the expert, investigative and other services portion of the approved case budget (see paragraph 6.02 F) to the chief judge of the circuit (or his or her designee) for advance approval.

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the AEDPA, the presiding judicial officer shall set compensation for investigative, expert, and other services in an amount reasonably necessary to obtain such services, without regard to CJA or AEDPA maximum limitations.

- C. Consulting Services in Federal Capital Habeas Corpus Cases and in Federal Death Penalty Cases. Where necessary for adequate representation, subsection (e) of the CJA and 21 U.S.C. § 848(q)(9) authorize the reasonable employment and compensation of expert attorney consultants to provide “light consultation” services to appointed and *pro bono* lawyers in federal capital habeas corpus cases and in federal death penalty cases in such areas as records completion, determination of need to exhaust state remedies, identification of issues, review of draft pleadings and briefs, authorization process to seek the death penalty, etc. “Light consultation” services are those that a lawyer in private practice would typically seek from another lawyer who specializes in a particular field of law, as opposed to “heavy consultation” services, which include, but are not limited to, reviewing records, researching case-specific legal issues, drafting pleadings, investigating claims, and providing detailed case-specific advice to counsel, if such tasks take a substantial amount of time.

An expert attorney consultant shall not be paid an hourly rate exceeding that which an appointed counsel could be authorized to be paid.

Courts may wish to require that an appointed counsel who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the Administrative Office’s Office of Defender Services if there is no federal defender in the district or if the federal defender has a conflict of interest, regarding who could serve as an expert attorney consultant.

- D. Interim Payments to Persons Providing Investigative, Expert and Other Services. It is urged that the court or United States magistrate judge permit interim payment of compensation in capital cases.

With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, 21 U.S.C. § 848(q)(10)(B), as amended, provides a \$7,500 payment maximum for the total cost of fees and expenses for investigative, expert, and other services. A special set of procedures for effecting interim payments, including a special memorandum order, must be used in these cases. These procedures and a sample memorandum order are set forth in Appendix F, beginning on page F-11. (See also the case budgeting techniques recommended in paragraph 6.02 F.) Other interim payment arrangements which effectuate a balance between the interest in relieving service providers of financial hardships and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess payment may be devised in consultation with the Office of Defender Services of the Administrative Office of the United States Courts.

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, there are no expert services maximums. A separate set of procedures for effecting interim payments, including a separate memorandum order, must be used in those cases. These procedures and sample memorandum order are set forth in Appendix F, beginning on page F-7.

- E. Forms. Claims for compensation and reimbursement of expenses for investigative, expert or other services in death penalty proceedings should be submitted on CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services."
- F. Review of Vouchers. Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.

APPENDIX C

MEMORANDUM

TO: Chief Judge (or Delegate) _____
United States Court of Appeals For the _____ Circuit

DATE: _____

FROM: _____

SUBJECT: Advance Authorization for Investigative, Expert or Other Services

It is requested that advance authorization be granted to obtain services in an amount in excess of the maximum allowed under the provisions of subsection (e)(3) of the Criminal Justice Act, 18 U.S.C. § 3006A, [**or, for capital cases commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, under 21 U.S.C. § 848(q)(10)(B),**] as follows:

Case Name & Designation _____

Name of Expert or Investigator or Service Provider _____

Address _____

Type of Service _____

Reasons for Application _____

Estimated Compensation (Non-Capital Case) \$ _____

Estimated Compensation and Expenses (Capital Case) \$ _____

Estimated Compensation and Expenses of All Investigative, Expert, and Other Services (Capital Case) \$ _____

I certify that the estimated compensation in excess of the maximum set forth in 18 U.S.C. § 3006A(e)(3) [or, if applicable, the estimated compensation and expenses in excess of the maximum set forth in 21 U.S.C. § 848(q)(10)(B),] appears necessary to provide fair compensation for services of an unusual character or duration and therefore recommend approval of this advance authorization in the amount of \$_____.

United States District Judge
or United States Magistrate Judge

Date

Advance authorization is hereby approved in the amount of
\$_____.

Chief Judge, United States Court of Appeals
(or Delegate)

Date

INDEX

Chapter/Page

Accelerated Transcript III-10

Alternative hourly rates for counsel:

- Annual increase of II-14,15
- Authority for I-3; II-12,13
- Factors to be considered II-13,14
- General considerations II-13
- Procedures for requesting II-14

Amicus Curiae participation of federal public
and community defenders in federal court IV-7

Ancillary matters:

- Compensation limit II-18
- Definition of II-5,6
- Ex parte* application II-6
- Preliminary determination II-6
- Scope of representation I-3; II-6

Appeals:

- Bail appeals II-10
- Compensation limit II-16-18
- Filing fees I-7; II-23
- Interlocutory appeals II-10
- New appointment II-10
- Writ of certiorari II-24

Appointment/Evaluation of federal
public defender and staff I-9,10; IV-2-4

Appointments (see also Cases covered/not
covered by the Act):

- Appointment of co-counsel II-9
 - Death penalty cases I-11,12; VI-1,2; App. I
- Appointment of counsel to represent more than
one individual in a particular case II-9
- Civil actions to protect jurors' employment II-4,5,17
- Continuity of representation II-9,10
- Federal death penalty cases and
federal capital habeas corpus proceedings I-11-14; VI-1-4; App. I
- Federal defender organizations I-2; II-3

Appointments (continued):

Forms for	II-7,10,11; App. A
New appointment, types of proceedings	II-10
Out-of-district attorney	II-3
<i>Pro hac vice</i> admission to panel	II-3
Standby counsel	II-11
Substitution of counsel	I-3; II-20
Termination of	II-11
Transfer of case to another district	II-10
Under 18 U.S.C. § 983 (b)(1) in certain judicial civil forfeiture proceedings	I-14; II-7
Waiver of counsel	I-2; II-11
Arrested person	I-1; II-1
Assets, duty to disclose client's	II-3
Associates of appointed counsel	II-9
Bail appeals	II-10
Bar associations, attorneys furnished by	I-2; II-3
Briefs, printing of	II-24
Capital cases	I-11-14; VI-1-12; App. I
Case budgeting in federal capital habeas corpus proceedings and federal death penalty cases	II-19; VI-7-9; App. I
Case budgeting in high-cost non-capital representations.	II-18,19
Cases covered by the Act (see also Compensation limits):	
Ancillary matters	I-3; II-5,6
Appeals	II-10
Arrest	I-1; II-1
Bail appeals	II-10
Judicial civil forfeiture proceedings under 18 U.S.C. § 981 (b)(1) (certain proceedings)	I-14; II-7
Civil forfeiture proceedings (ancillary matters) pursuant to 21 U.S.C. § 881, 19 U.S.C. § 1602, or similar statutes	II-6
Civil or criminal contempt with loss of liberty	I-1; II-5
Deferred prosecution (pretrial diversion)	II-5

Cases covered by the Act (continued):

Extraordinary writs	II-10
Felony	I-1; II-1
Grand jury witness	II-5
Habeas corpus	I-2; II-2,10; VI-1,2,5-11
International extradition	II-5
Juvenile delinquency	I-1; II-1
Material witness in custody	I-1; II-2
Mental condition proceeding	I-1; II-2,10
Misdemeanor	I-2; II-1,2
Narcotic Addict Rehabilitation Act	I-1; II-2
Parole proceedings	I-1; II-1
Petty offense with confinement authorized	I-2; II-2
Pretrial diversion	II-5
Prisoner transfer proceedings under chapter 306 of title 18	I-1; II-2,16; Section B
Probation violation	I-1; II-1
Proceedings under 18 U.S.C. §4106A (see also: Parole proceedings)	I-4; II-16
Sixth Amendment requirement	I-1; II-2
Standby counsel	II-11
Supervised Release	I-1; II-1
Witnesses before a grand jury, court, Congress, or federal agency or commission	II-5

Cases not covered by the Act:

Civil actions to protect jurors' employment	II-4,5,17
Civil rights cases by prisoners	II-4
Corporate defendant cases	II-4
Deportations, administrative proceedings before INS.	II-5
Guardian ad litem	III-13
Petty offense with no confinement authorized	II-4

Certiorari, writ of

.....	II-24
-------	-------

Civil forfeiture proceedings (ancillary matters)

pursuant to 21 U.S.C. § 881, 19 U.S.C. § 1602, or similar statutes	II-6
---	------

Civil rights cases by prisoners

.....	II-4
-------	------

Claims (see Compensation claims)

Claims (see Suits alleging malpractice or negligence
in furnishing representational services)

Community defender organizations I-10; II-12; IV-5

Compensation claims for counsel (see also
Investigative, expert and other services):

Approval by United States magistrate judges	II-20
Associates of appointed counsel	II-9
Case budgeting and management in federal capital habeas corpus proceedings and federal death penalty cases	VI-7-9; App. I
Case budgeting in high-cost non-capital representations	II-18,19
Excess claims	I-4; II-18,19
Expenses (see Expenses)	
Forms for payment	II-7,11; App. A
Hourly rates	I-3,4; II-12,13
Alternative hourly rates	I-3; II-12-14
Authority for annual increases	I-3; II-14,15
Death penalty cases	I-12; VI-5-7; App. I
Interim payment	II-24; App. E; App. F
Death penalty cases	II-24; VI-7; App. E; App. F
Judicial civil forfeiture proceedings under 18 U.S.C. § 983 (b)(1)	I-14; II-7
Limits on amount (see Compensation limits)	
Memorandum in support of claim	II-19
Multiple indictments	II-20
Out-of-pocket expenses (see Expenses)	
Proration of claims	II-20
Reduction of claims	II-19
Standby counsel	II-11
Substitution of counsel	II-20
Time limits for submission of claims	II-12
Travel time and expenses	II-22

Compensation limits for counsel:

Ancillary matters	II-18
Appeals	I-4; II-16,17
Civil or criminal contempt with loss of liberty	II-17
Death penalty cases	II-15,19,23,24; VI-5-7; App. I
Deferred prosecution (pretrial diversion)	II-16

Compensation limits for counsel (continued):	
Felony	II-16
Grand jury witness	II-17,18
Habeas corpus	II-17
International extradition	II-18
Judicial civil forfeiture proceedings	
under 18 U.S.C. § 983 (b)(1)	I-14; II-16
Material witness in custody	II-17
Mental condition proceedings	II-17; App. H
Misdemeanor	II-16
Other representations	II-17,18
Parole violation or revocation	II-17
Petty offense	II-16
Pretrial diversion	II-16
Prisoner transfer proceedings under	
18 U.S.C. §4106A, 4107 and 4108	II-16
Probation violation	II-17
Proceedings under 18 U.S.C. §4106A	I-4; II-16
Standby counsel	II-11
Witnesses before a grand jury, court, Congress,	
or federal agency or commission	II-17,18
Compensation of federal public defender and staff	IV-2
Compensation of paralegals and legal assistants,	
including law students.	III-15
Computer-assisted legal research:	
Use by appointed counsel	II-22
Performed by commercial legal research firm	III-13
Computer hardware and/or software:	
Application to court to acquire with CJA funds	III-14
Consultation with Office of Defender Services	III-14
Model order authorizing acquisition of	App. C
Computer systems and automation litigation support	
personnel and experts:	
Application to court to acquire with CJA funds	III-14
Consultation with Office of Defender Services	III-14
Consulting services in federal capital	
habeas corpus proceedings and federal capital prosecutions.	VI-11

Contempt, civil or criminal	II-5,17
Continuity of representation	II-9,10
Corporate defendant cases	II-4
Court of appeals:	
Compensation limit	I-4; II-16-18
Filing fee	I-6; II-23
New appointment	II-10
Writ of certiorari	II-24
Court reporters and reporting services	III-10,11
Criminal Justice Act panel (see also District plans):	
Administration, composition and management	I-2; II-3,4
Distribution of appointments	II-4
Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys Under the CJA	App. G
Out-of-district attorney, admission of	II-3
<i>Pro hac vice</i> admission to	II-3
<i>Criminal Monetary Penalties: A Guide to the Probation Officer's Role,</i> Monograph 114, Chap. VI	II-1
Death penalty federal habeas corpus and federal capital cases	I-11-14; VI-1-12; App. I
Defender organizations:	
Assignment of cases to	I-2; II-3; IV-6
Assistance to <i>pro se</i> litigants	III-2
Expert and other services	IV-5,6
Statutory authority for	I-9; IV-1
Types of	
Community defender organizations	I-10; IV-5
Federal public defender organizations	I-9,10; IV-1-4
Deferred prosecution (pretrial diversion)	II-5,16
Delegation of excess compensation	
approval authority	I-4; II-18; III-2
Death penalty cases	I-13; VI-10

Depositions:	
Expert witnesses	III-12
Fact witnesses	III-12
Disclosure of client's financial status	II-3
Disclosure of payment information	I-5,6,14; V-1-4, App. A
District plans:	
Advance authorization by court to incur expenses	II-20
Duty to disclose client's assets	II-3
Model CJA Plan	II-1,4; App. G
Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys Under the CJA	II-4; App. G
Modification of	I-2
Option for attorneys furnished by bar association or legal aid agency	I-2; II-3
Option for attorneys furnished by defender organization	I-2; II-3
Provision for private attorneys	I-2; II-3
Requirement for	I-1; II-1
Standard forms	II-7
Doubts about eligibility	II-8
Dual purpose examinations	III-6,7
Eligibility:	
Defendant's financial status as contained on CJA Form 23	II-7; App. A
Determination by federal judge or magistrate judge	II-7
Doubts about	II-8
Erroneous determination	II-8
Fact-finding by other officers of the court	II-7,8
Family's financial status	II-9
Partial	II-8; III-1
Reimbursement from defendant	I-3,8; II-8,19,20
Standard for	II-8
U.S. Attorney and law enforcement officers	II-7,8
<i>Ex parte</i> applications in ancillary matters	II-6

<i>Ex parte</i> applications for services other than counsel	I-7; III-3
Death penalty cases	I-13; VI-9
<i>Ex parte</i> submissions for case budgets in:	
Federal capital habeas corpus proceedings and federal death penalty cases.	VI-7,8
High-cost non-capital representations	II-18,19
Excess compensation claims	I-4,8; II-19; III-2; App. A; App. E; App. F
Death penalty cases	I-13; VI-10; App. A; App. E; App. F
Expenses:	
Advance authorization to incur	II-20
Computer-assisted legal research services	II-22; III-13
Defending actions alleging CJA panel attorney malpractice	I-3,4
Depositions	III-12
Experts (see Investigative, expert and other services)	
Fact witnesses	III-12
Forms for reimbursement	II-12; III-3; App. A
Interim reimbursement	II-22; III-4; App. E; App. F
Non-reimbursable items	
Filing fees	II-23
General office overhead	II-23; III-14
Items of a personal nature	II-23
Printing of briefs	II-24
Service of process	II-24
Reimbursable out-of-pocket	II-21-23
Transcript costs	II-21; III-10,11
Travel expenses	II-22
Expert and other services (see Investigative, expert and other services)	
Expert witnesses:	
Depositions	III-12
Expenses of	III-2,12,14
Extradition	II-5,18
Extraordinary writs	II-10

Fact witnesses:	
Depositions	III-12
Fees and expenses of	III-12
Fact-finding for eligibility	II-7,8
Family's financial status	II-9
Federal death penalty cases and federal capital habeas corpus proceedings	I-11-14; VI-1-12; App. I
Federal death penalty resource counsel	App. I
Federal defender organizations (see Defender organizations)	
Felony charge	I-1; II-1,16
Filing fees	II-23
Financial eligibility (see Eligibility)	
Financial status:	
Defendant's	II-7,8
Family's	II-9
Forms:	
Appointment of and Authority to Pay Court Appointed Counsel (CJA 20)	II-4,12; App. A
Authorization and Voucher for Expert and Other Services (CJA 21)	III-3; App. A
CJA Forms list	App. A
Compensation and reimbursement of expenses of	
Counsel (CJA 20)	II-4,12,21; App. A
Expert and other services (CJA 21)	III-3; App. A
Death Penalty Proceedings:	
Appointment of and Authority to Pay Court Appointed Counsel (CJA 30)	App. A
<i>Ex Parte</i> Request for Authorization and Voucher for Expert and Other Services (CJA 31)	App. A
Excess compensation claim, supplemental information statement:	
district court (CJA 26)	App. A
appeals court (CJA 27)	App. A
Financial Affidavit (CJA 23)	App. A

Forms (continued):	
Public disclosure of attorney fee information, notice to court-appointed counsel of (CJA 19)	V-1-4; App. A
Standard forms	II-7; App. A
Termination of appointment (CJA 7)	II-11; App. A
Transcripts (CJA 24)	II-21; App. A
Freedom of Information Act (not applicable to CJA information)	V-1
Grand jury witness representation	II-5,17,18
Grant and Conditions	
Community defender organization	App. D
Gross Receipts Taxes (see Taxes)	
Guardian ad litem	III-13
Habeas corpus cases	
Death penalty cases	I-11-14; VI-1-12; App. I
Generally	I-2; II-2,10
Hourly rates	I-3; II-12-15
Alternative hourly rates	I-3; II-12-15
Annual increases	I-3; II-14,15
Capital Cases	I-13; VI-5-7; App. I
Information (procedures for release of)	V-1-4
Interim Payments:	
Generally	
To counsel	II-24; App. E
To experts	III-4; App. F
Capital Cases	
To counsel	II-24; VI-7; App. E
To experts	III-4; VI-11,12; App. F
Interlocutory appeals	II-10
International extradition	II-5,18
Investigative, expert and other services:	
Advance authorization to incur	I-7; III-2,3
Availability to persons with retained counsel	III-1

Investigative, expert and other services (continued):

Availability to <i>pro se</i> litigants	III-1,2
Case budgeting and management in federal capital habeas corpus proceedings and federal death penalty cases	VI-7-9; App. I
Claims for payment	III-3
Commercial computer-assisted legal research services	III-13
Computer hardware and/or software	
Application to court to acquire with CJA funds	III-14
Consultation with Office of Defender Services	III-14
Model order authorizing acquisition of	App. C
Computer systems and automation litigation support personnel and experts	
Application to court to acquire with CJA funds	III-14
Consultation with Office of Defender Services	III-14
Consulting services in death penalty cases	VI-11
<i>Ex parte</i> application	I-7; III-3
Death penalty cases	I-13; VI-9
Excess compensation claims	I-8; III-2
Death penalty cases	I-13,14; VI-10
Expenses	III-2,12,14,15
Extraordinary office overhead	III-14
Forms for payment	III-3; App. A
Interim payments	III-4; App. F
Death penalty cases	III-4; VI-11,12; App. F
Investigators	III-5
Law students	III-14
Legal assistants	III-14,15
Limits on amount	I-8,13,14; III-2,3; VI-10
<i>Nunc pro tunc</i> authorization	I-8; III-3
Death penalty cases	VI-9
Paralegals	III-14,15
Psychiatrists, psychologists	III-5-9
Transcripts	II-21; III-10,11
Investigators:	
Expenses of	III-14,15
Policies regarding	III-5
Jurors, civil actions to protect employment	
employment	II-4,5,17
Juvenile delinquency cases	I-1; II-1
Law students	III-14,15

Legal aid agency, attorneys furnished by	I-2; II-3
Legal assistants.	III-14,15
Limits on compensation (see Compensation limits)	
Magistrate judges (see United States magistrate judges)	
Malpractice or negligence claims:	
Federal defender employees furnishing representational services	I-10,11
CJA panel attorneys furnishing representational services	I-3,4
Material witness representation	I-1; II-2,17,18
Memorandum in support of claim	II-19
Mental condition proceedings:	
Appointment of counsel	I-1; II-2,10
Compensation limit for	
Counsel	II-17; App. H
Experts	III-2,3
Dual purpose examinations	III-6,7
Procedures for payment of experts	III-5,6
Psychiatrists, psychologists	III-5-9
Source of payment for experts	III-5-9
Types of examinations	III-5-9
Misdemeanor charge	I-1,2; II-1,2,16
Model CJA plan	II-1,4; App. G
Model order authorizing acquisition of computer hardware and/or software	App. C
Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys Under the CJA	II-4; App. G
Multiple indictments	II-20
Narcotic Addict Rehabilitation Act (NARA)	II-2
New trial	II-10

Non-reimbursable expenses (see Expenses)	
Non-secretarial, professional support personnel	III-15
Notarial services	III-12,14
<i>Nunc pro tunc</i> authorization of investigative, expert and other services	III-2,3
Death penalty cases	VI-9
Office overhead	II-23; III-14
Out-of-district attorneys, admission to panel	II-3
Out-of-pocket expenses (see Expenses)	
Panel (see Criminal Justice Act panel)	
Paralegals.	III-14,15
Parole proceedings	I-4; II-1,16,17
Partial eligibility	II-8; III-1
Payments by defendant (see Reimbursement from defendant)	
Personal nature items supplied to client	II-23
Petty offense cases	I-2; II-2,16
Plans (see District plans)	
Pretrial diversion	II-5,16
Printing of briefs	II-24
Prisoner civil rights cases	II-4
Prisoner transfer proceedings under 18 U.S.C. §§4107, 4108 and 4109	I-1,4; II-2,16; Section B
Privacy Act (not applicable to CJA information)	V-1
Private attorneys	I-2; II-3,4,22

Probation:	
Compensation limit	II-17
<i>Criminal Monetary Penalties: A Guide to the Probation Officer's Role,</i> Monograph 114, Chap. VI	II-1
Reimbursement as a condition of	II-19,20
Violation or revocation	I-1; II-1,10
Process, service of	II-24
<i>Pro hac vice</i> admission to panel	II-3
Proration of claims	II-20
<i>Pro se</i> litigants, services for	III-1,2
Psychiatrists and psychologists:	
Compensation limit	III-6
Dual purpose examinations	III-6,7
Procedures for payment	III-6
Source of payment	III-5-9
Types of examinations	III-5-9
Reduction of claims	II-19
Reimbursable expenses (see Expenses)	
Reimbursement from defendant:	
Condition of probation	II-20
During the proceedings (interim)	II-8
Duty to disclose client's assets	II-3
Family contribution	II-9
Final determination	II-8
Generally	I-8
Procedures	II-19,20
Reporters and reporting services	II-21; III-10,11
Representation under the Act (see Cases covered/not covered by the Act)	
Retained counsel, services for persons with	III-1
Rules 20, 21 and 40 (appointment of counsel when case is transferred)	II-10
Sales Taxes (see Taxes)	

Service of process	II-24
Services other than counsel (see Investigative, expert and other services)	
Sixth Amendment, appointments under	I-1; II-2
Standard forms	II-7; App. A
Standby counsel	II-11
Statutory requirement, appointment of counsel under	I-1; II-1,2
Stenographic services	III-14
Substitution of counsel	II-20
Suits alleging malpractice or negligence in furnishing representational services:	
Federal defender employees	I-10,11
CJA panel attorneys	I-3,4; II-22,23
Supervised release	I-1; II-1,17
Taxes	I-24; III-15
Termination of appointment	I-3; II-11
Time limit for submission of claims	II-12
Transcript costs:	
Accelerated	III-10,11
Apportionment of	III-10,11
Commercial duplication	III-11
Form to use	II-21
Limits on amount	III-10
Payment of	II-21; III-10
Standards for other than federal court proceedings	III-11
Transfer of case to another district	II-10
Travel expenses of counsel	II-22
Travel time of counsel	II-22

United States magistrate judges:
Approval of compensation claims I-7,8,13,14; II-19
Reimbursement of expenses in defending actions
alleging CJA panel attorney malpractice I-4

Vouchers (see Compensation claims)

Waiver of counsel II-11

Witnesses:
Before a grand jury, court, Congress, or
federal agency or commission II-5,17,18
Fees and expenses II-21; III-12
Material witness in custody I-1; II-2,17,18
Travel funds III-12

Writ of certiorari II-24
Writs, extraordinary II-10