

CHAPTER III
**AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE,
EXPERT AND OTHER SERVICES**

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

Part A. General.

3.01 Availability.

- A. Investigative, expert or other services necessary to adequate representation, as authorized by subsection (e) of the Act, shall be available to persons who are eligible under the Act, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services. In this connection, a person with retained counsel is financially unable to obtain the necessary services if his resources are in excess of the amount needed to provide him and his dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to his retained counsel, but are insufficient to pay for the necessary services. In responding to requests for subsection (e) services by a defendant represented by retained counsel, the court should inquire into the fee arrangement between the retained attorney and the defendant. If the court finds the fee arrangement unreasonable in relation to fees customarily paid to qualified practitioners in the community for services in criminal matters of similar duration and complexity, or that it was made with a gross disregard of the defendant's trial expenses, the court may order the attorney to pay out of such fees all or such part of the costs and expenses as the court may direct. The procedure outlined in paragraph 2.05 shall apply to such persons who are financially able to pay some, but unable to pay all, the costs of necessary services.
- B. Persons who are eligible for representation under the Criminal Justice Act, but who have elected to proceed *pro se*, may, upon request, be authorized to obtain investigative, expert, and other services in accordance with subsection (e) of the Criminal Justice Act.

The court should authorize subsection (e) services for *pro se* litigants and review and approve resulting claims in the same manner as is its practice with respect to requests made by Criminal Justice Act panel attorneys. However, in matters in which appointment of counsel is discretionary pursuant to subsection (a)(2) of the Act, the court should make a threshold determination that the case is one in which the interests of justice would have justified the furnishing of representation, prior to approving the requested services for *pro se* litigants.

Although a federal defender organization may be requested to provide administrative assistance to *pro se* litigants who wish to arrange for subsection (e) services, the investigative, paralegal or other services or resources of the organization should ordinarily be employed only when the organization is appointed as counsel of record, responsible for the conduct of the litigation.

3.02 Limitations.

- A. With Prior Authorization. With prior authorization, compensation for investigative, expert and other services is limited to \$1,600 per organization or individual, exclusive of reimbursement for expenses reasonably occurred, per individual authorization to perform said service, except with regard to capital cases. (See paragraph 6.03 for guidelines applicable to capital cases.) A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case. While the contractor may be compensated separately for each defendant served, care should be taken to ensure that duplicate charges are not being made for the same services. If, pursuant to subsection (e) of the Act, such services are rendered by members of an organization such as a corporation, unincorporated association, or partnership (other than those created pursuant to subsection (g) of the Act), in their capacities as members of that organization, compensation shall be deemed to have been earned by the organization and shall be paid to it only once, per defendant served, in an amount not to exceed the statutory maximum of \$1,600, exclusive of reimbursement for expenses reasonably incurred. Payment in excess of the \$1,600 limit for services authorized prior to the performance thereof may be made when certified by the United States judge or United States magistrate judge and approved by the chief judge of the circuit (or an active circuit judge to whom excess compensation approval authority has been delegated) as being necessary to provide fair compensation for services of an unusual character or duration. If it can be anticipated that the compensation will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or the active circuit judge to whom excess compensation approval authority has been delegated). See sample form, Appendix C.
- B. Without Prior Authorization. Subsection (e)(2)(A) of the Act authorizes the obtaining of investigative, expert and other services, without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed \$500 plus expenses reasonably incurred (but see paragraph 6.03 A regarding obtaining investigative, expert, and other services in capital cases). This \$500 limit may be waived however (see

subsection (e)(2)(B) of the Act), if the presiding judge or United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge) in the interest of justice, finds that timely procurement of necessary services could not await prior authorization.

- 3.03 Ex Parte Applications. *Ex parte* applications for services other than counsel under subsection (e) shall be heard *in camera*, and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense. Appointed counsel shall not be required to submit evidence of a prior attempt to enter into a stipulation with the United States Attorney as a prerequisite to obtaining services under subsection (e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the *ex parte* application.
- 3.04 Claims for Services Other than Counsel. All claims for services other than counsel, under subsection (e) of the Act, should include the following: a statement as to the type of, dates of, and time expended for, the services provided; an explanation of the fee arrangement (i.e., hourly rate, per diem rate, etc.); an itemized statement of all expenses for which reimbursement is claimed; and supporting documentation, where practicable, for all expenses of lodgings and subsistence, and for any expenses in excess of \$50.
- 3.05 Forms for the Authorization and Payment for Services Other than Counsel. Forms for the authorization and payment for services other than counsel, together with instructions for the execution and distribution thereof, are included in Appendix A.

3.06 Interim Payments.

- 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 an individual whose services are obtained pursuant to subsection (e) of the Act. Appendix F (pages F-1 through F-6) contains instructions on the procedures for effecting interim payments to persons other than 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 providers of subsection (e) services 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 payment in death penalty cases. Because the CJA compensation maximum of \$1,600 for investigative, expert, and other services does not apply in capital cases, different procedures and memorandum orders must be used in those cases. (See paragraph 6.03 D.) These procedures and sample memorandum orders are also set forth in Appendix F, beginning on pages F-7 and F-11.

3.07 Review of Vouchers. Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert or other services within 30 days of submission.

Part B. Policies Regarding Investigative, Expert and Other Services

3.10 Investigators. When necessary to an adequate representation as described above, the court may authorize, pursuant to subsection (e) of the Act, the services of an investigator.

3.11 Psychiatrists, Psychologists.

A. Type of Examinations. Chapter 313 of title 18, as amended by the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984), provides for court-directed psychiatric or psychological examination of individuals in connection with the various proceedings to determine mental condition which are authorized under that chapter. The functions of these separate proceedings are to determine: (1) the mental competency of a defendant to stand trial (18 U.S.C. §4241); (2) insanity at the time of the offense (§4242); (3) the mental condition of an acquitted person hospitalized following a finding of not guilty only by reason of insanity (§4243); (4) the present mental condition of a convicted defendant (§4244); (5) the present mental condition of an imprisoned person who objects to transfer to a treatment facility (§4245); and (6) the present mental condition of a hospitalized person due for release (§4246).

In addition, mental condition examinations may be conducted for purposes other than those specified in chapter 313, e.g., to aid the defendant in preparing his defense.

B. Source of Payment. CJA funds are used to pay for psychiatric and related services obtained in accordance with subsection (e) of the CJA upon a determination that the services are "necessary for an adequate defense." These are "defense" services, where the defendant selects the expert and controls the disclosure of the expert's report. It is important to note that psychiatrists and related experts may be used in many circumstances in which payment is made from a source other than the CJA appropriation. In these situations the court or the government selects the expert and persons other than the defendant also have access to the expert's report. The Department of Justice (DOJ) generally pays for these "non-defense" services. The chart on pages 8 and 9 of this chapter summarizes payment responsibility for the various circumstances in which psychiatric and related services are utilized.

- C. Limitation of Amount. The limitations of \$1,600 and \$500 contained in paragraph 3.02 of this chapter apply to compensation claims submitted by "defense" psychiatrists and related experts, to be paid out of the CJA appropriation. [See subparagraph (E) below, regarding "dual purpose" examinations.]
- D. Procedures for Payment.
- (1) CJA Appropriation. A CJA Form 21 (Authorization and Voucher for Expert and Other Services) should be submitted to the AO for all payments for "defense" services. In a death penalty case, CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services" should be used. The CJA Form 21 or Form 31 should clearly describe the purpose of the expert's service. If separate vouchers are submitted for examination and testimony, they should be cross-referenced by voucher number.
 - (2) Department of Justice. Compensation claims for psychiatric and related services to be paid for by the DOJ should be referred to the U.S. Attorney or Assistant U.S. Attorney.
- E. Dual Purpose Examinations. On occasion, a psychiatrist or related expert will be asked to examine an individual for both a "defense" purpose and a "non-defense" purpose. In these cases the defense has waived the confidentiality of the "defense" portion of the examination. In such dual purpose examinations, for the convenience of the expert providing the service, the entire compensation claim may be submitted on a CJA Form 21, or, in a death penalty proceeding, CJA Form 31. The AO will pay the expert the total amount approved and obtain reimbursement to the CJA appropriation from the DOJ for one-half of the cost. As a result of the AO's need to seek reimbursement from the DOJ, the CJA Form 21s and Form 31s for dual purpose examinations must be accompanied by separate court orders which indicate:
- (1) who requested the examination;
 - (2) the specific purpose(s) of the examination;
 - (3) to whom the examination is directed; and
 - (4) to whom copies of the report are to be given.

The limitation in subparagraph (C) above applies to 50% of the claim for a dual purpose examination in which a portion of the examination is for "defense" purposes.

SOURCE OF PAYMENT

Type of Service	CJA	DOJ
5 a. Examination costs		Yes
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
<hr/>		
6. To determine mental condition of imprisoned person, under §4245		
a. Examination costs		Yes, including costs of additional examiner selected by imprisoned person in accordance with §4247(b)
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by imprisoned person in accordance with § 4247(b)
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7. To determine mental condition of hospitalized person due for release, under § 4246		
a. Examination costs		Yes, including costs of additional examiner selected by hospitalized person in accordance with § 4247(b)
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by hospitalized person in accordance with § 4247(b)
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8. Examination of a person in custody as a material witness		Yes, under all circumstances
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9. Examination and testimony costs for expert witnesses not appointed under §§ 4241, 4242, 4243, 4244, 4245, 4246	If requested by the defense	If requested by the government, or if appointed as an independent expert on court's own motion under Fed. R. Evid. 706

3.12 Transcripts.

A. Authorization and Payment.

- (1) For panel attorneys, the preferred method for payment of transcripts is for the court reporter or reporting service to claim compensation directly for transcripts authorized by the court on a CJA Form 24, "Authorization and Voucher for Payment of Transcript." However, if assigned counsel elects to pay for the court authorized transcript, the attorney may seek reimbursement as an "out-of-pocket expense," and should use the CJA Form 24 for this purpose. (See paragraph 2.27 of these Guidelines.) Regardless of which method is used, the limitations of \$1,600 and \$500 mentioned in paragraph 3.02 of this chapter and \$7,500 mentioned in paragraph 6.03 B are inapplicable with regard to the cost of transcripts. (For procedures regarding federal defender organization transcript payments, see paragraph 4.03 A of these Guidelines.)
- (2) In order to obtain necessary parts of transcripts, or, if required, the entire transcript, in a direct appeal in a case in which counsel is assigned pursuant to the Criminal Justice Act, neither the Act nor Section 753 (f) of title 28, United States Code, as amended by Public Law 91-545, requires the signing of a pauper's oath or certification by the Court that the appeal is not frivolous.

B. Apportionment of Costs. Routine apportionment of accelerated transcript costs among parties in CJA cases is prohibited. The following resolution was adopted by the Judicial Conference in March of 1980, and modified in September of 1986:

That the furnishing of accelerated transcript services in criminal proceedings should be discouraged; however, recognizing that there are some circumstances in which such transcript services are necessary and required by either the prosecution or the defense, or both, accelerated transcript services may be provided.

That in those cases where accelerated transcript services are provided, the party from whom the request or order emanates shall pay for the original, and if the requesting or ordering party is other than defense counsel appointed under the Criminal Justice Act, the CJA counsel shall be entitled to a copy at the copy rate.

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 does not exceed the total amount of attorney compensation that would reasonably be approved if the appointed counsel had performed the research manually. 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 number of hours of attorney time that would be required to do the research manually.

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 2.31 concerning reimbursement for the cost of direct use, by appointed counsel, of computer-assisted legal research equipment.)

- 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.

For services of paralegals and legal assistants, and other non-secretarial professional support personnel employed by appointed counsel, the court shall determine a reasonable hourly compensation rate that shall not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services. Authorizing compensation at such rates should result in greater efficiency and lower costs for the CJA program than would occur if counsel performed and charged for these services.

- 3.17 Reimbursement of Expenses. In determining the reasonableness of expenses of persons furnishing investigative, expert or other services, claimants and the court should be guided by the provisions of these Guidelines regarding reimbursement of expenses of counsel (see paragraphs 2.27 and 2.28). Gross receipts or other taxes levied on fees for expert services rendered pursuant to the CJA are not reimbursable expenses.

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

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- (4) Appointment of a Committee to Assess the Qualifications of Candidates for the Position of Federal Public Defender and of the Federal Public Defender for Reappointment. In view of the intent of Congress to insulate the Federal Public Defender from the involvement of the district court before which the Defender principally practices, the recruitment and screening of candidates for the office of Federal Public Defender and the evaluation of Federal Public Defender performance prior to reappointment should be a function of the court of appeals rather than the district court. In carrying out this responsibility, the chief judge of the circuit should appoint a committee to assess the performance and potential for future performance of the Federal Public Defender candidates or incumbent Federal Public Defender. The committee should consist of persons knowledgeable in federal criminal defense issues, but should not include probation, pretrial services, enforcement or prosecutorial personnel.
- (5) Appointment of the Federal Public Defender. In recruiting and selecting candidates for the office of Federal Public Defender, the committee should seek attorneys with the following qualifications: (1) a member in good standing in the bar of the state in which he or she is admitted to practice; (2) a minimum of five years criminal practice experience, preferably with significant federal criminal trial experience, which demonstrates an ability to provide zealous representation of consistently high quality to criminal defendants; (3) the ability to effectively administer the office; (4) a reputation for integrity; and (5) a commitment to the representation of those unable to afford counsel. The committee should solicit the views of those in a position to evaluate the performance of the candidates, including, but not limited to judges and United States magistrate judges of courts in which the candidate has practiced.

A national vacancy notification effort consistent with equal employment opportunity standards should be undertaken in connection with the recruitment of candidates for vacant Federal Public Defender positions. The Office of Defender Services of the Administrative Office of the United States Courts should be contacted for advice and financial support in this regard. The committee should screen applications and submit the names of 3 to 5 candidates ranked in order of preference to the district court for comment and recommendation. Pursuant to the provision of the Criminal Justice Act requiring the court of appeals to consider the recommendation of the district court or courts to be served, the recommendations of the

district court shall be included in the committee's report to the court of appeals, along with the committee's response to the district court's comments and recommendations, where appropriate.

When a candidate is selected, the Office of Defender Services of the Administrative Office of the United States Courts should be notified promptly of the nominee so that it may initiate any background investigation requested by the court of appeals.

- (6) Reappointment of the Federal Public Defender. The committee should assess the quality of representation, level of commitment and service to clients, and administrative efficiency of the Federal Defender Office prior to deciding whether the reappointment of an incumbent Federal Public Defender is warranted. In this process, it should solicit the views of those in a position to evaluate the performance of the Federal Public Defender as well as the quality of the services provided by the Federal Public Defender Organization, including, but not limited to, judges and United States magistrate judges of courts served by the organization.

The Defender should be given an opportunity to respond to adverse comments, including adverse comments which would not influence the decision to reappoint, so that the Defender may benefit from constructive criticism. The committee shall not disclose the identity of any person who requests confidentiality, but shall provide the Defender with a general description of the source and nature of the comments.

The committee's report and assessment, including any recommendations from the district court to be served, should be considered by the court of appeals in determining whether to appoint or reappoint a particular individual as the Federal Public Defender.

- B. Community Defender Organizations. The Community Defender Organization shall be an organization, one of the stated purposes of which is to implement the aims and purposes of the Criminal Justice Act. Its bylaws must demonstrate that it is an organization with a professional and fiscal responsibility capable of providing adequate representation pursuant to the Act. The bylaws shall be an inherent part of the plan for the district authorizing a Community Defender Organization. It may operate either on the fee system or by way of grants to be approved by the Judicial Conference.

If a Community Defender Organization which has been approved under the plan for the district court, applies for any grant, it shall do so on a form prepared by the Director of the Administrative Office for the use of the Judicial Conference in considering applications for such grants. The receipt and use of grant funds shall be subject to the conditions set forth in Appendix D. Community Defender Organizations shall agree to and accept these conditions of grant prior to payments being made thereunder.

4.03 Transcripts, Investigative, Expert and Other Services.

A. Procedures for Payment of Transcripts.

- (1) General Authorization. All defender organizations have general authorization to procure transcripts, provided that total expenditures for transcripts (and other services) shall not exceed the budget or grant authorization for the other services budget category.

The limitations set forth in paragraph 3.02 above are inapplicable with regard to the cost of transcripts and do not apply to Federal Public or Community Defender Organizations.

The general authorization provided above includes supplemental funds approved for the other services object classification or funds transferred to that object classification from other classifications.

- (2) Funding Considerations. Once the Federal Public or Community Defender has obligated all funds in the other services object classification, it will be necessary to transfer funds from other object classifications or to seek supplemental funds to cover additional expenditures.

B. Procedures for Payment of Investigative, Expert and Other Services.

- (1) General Authorization. All defender organizations have general authorization to procure investigative, expert and other services as contemplated under subsection (e) of the Criminal Justice Act, as amended, provided that total expenditures for investigative, expert and other services shall not exceed the budget or grant authorization for these specific categories (object classifications).

The limitations set forth in paragraph 3.02 above, do not apply to Federal Public or Community Defender Organizations.

The general authorization provided above includes supplemental funds approved for the expert services object classification or funds transferred to that object classification from other classifications.

- (2) Funding Considerations. Once the Federal Public or Community Defender has obligated all funds in the expert services object classification, it will be necessary to transfer funds from other object classifications or to seek supplemental funds to cover additional expenditures.

4.04 Assignment of Cases. To ensure the effective supervision and management of the organization, Federal Public Defenders and Community Defenders should be responsible for the assignment of cases within their own offices. Accordingly, appointments by the judge or United States magistrate judge 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.

4.05 Apportionment of Cases Between Defender Organizations and the Panel. Recognizing that federal defender organizations consistently furnish high-quality representation to CJA defendants and provide a cost-effective alternative to representation by CJA panel attorneys, the Judicial Conference has recommended that courts take steps to increase the number of cases assigned to federal defender organizations.

In districts currently served by a defender organization these steps should include:

- (1) approval of additional assistant federal defender staff in appropriate circumstances; and
- (2) review and adjustment of district appointment procedures.

**Chapter VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES AND IN
FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS**

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CHAPTER VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES AND IN FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, amended 21 U.S.C. § 848(q), in a manner that creates a two-tiered structure for the compensation of counsel and the approval and payment of persons providing investigative, expert, and other services in capital cases. The pertinent provisions of the AEDPA are applicable to capital cases commenced, and appellate proceedings in which an appeal is perfected, on or after the date of enactment of the AEDPA (April 24, 1996). Thus, this chapter retains guidelines applicable to cases that pre-date the AEDPA, and adds, where appropriate, new guidelines for cases subject to the AEDPA. Unless otherwise specified, provisions in this chapter apply to all capital cases.

NOTE REGARDING FEDERAL DEATH PENALTY CASES: Detailed recommendations concerning the appointment and compensation of counsel in federal death penalty cases were adopted by the Judicial Conference on September 15, 1998. Those recommendations, and accompanying commentary by the Defender Services Committee's Subcommittee on Federal Death Penalty Cases, are set forth in Appendix I to this volume. The complete report, entitled *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, is available on the judiciary's web site (www.uscourts.gov) or from the Office of Defender Services of the AOUSC, 202-502-3030.

6.01 Appointment of Counsel in Capital Cases.

A. Number of Counsel.

- (1) Federal Death Penalty Cases. As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Pursuant to 21 U.S.C. § 848(q)(4), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case. While courts should not appoint more than two lawyers unless exceptional circumstances and good cause are shown, appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.
- (2) Habeas Corpus Proceedings. Pursuant to 21 U.S.C. § 848(q)(4), a financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 or 2255 is entitled

to appointment of one or more qualified attorneys. Due to the complex, demanding and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel.

The judicial officer may appoint an attorney, if qualified under paragraph 6.01 C, who is furnished by a state or local public defender organization or by a legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief. Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or a CJA panel attorney or an attorney appointed *pro hac vice* in accordance with paragraph 2.01 D of the *CJA Guidelines*. Such appointments should be made when the court determines that they will provide the most effective representation. In making this determination, the court should take into consideration whether the attorney represented the person during prior state court proceedings.

B. Procedures for Appointment in Federal Death Penalty Cases.

(1) In appointing counsel in federal death penalty cases, the court shall consider the recommendation of the federal public defender, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. In fulfilling this responsibility, the federal public defender organization or Administrative Office should consult with counsel (if counsel has already been appointed or retained) and the court regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation. In evaluating the qualifications of counsel considered for appointment, the federal public defender organization or Administrative Office should consider:

(a) the minimum experience standards set forth in 21 U.S.C. § 848(q), 18 U.S.C. § 3005, and other applicable laws or rules;

(b) the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;

(c) the recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;

(d) the proposed counsel's commitment to the defense of capital cases; and

(e) the availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.

Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation. Ordinarily, "learned counsel" (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

(2) Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing counsel the court should, among other relevant factors, consider:

(a) the attorney's experience in federal criminal appeals and capital appeals;

(b) the general qualifications identified in paragraph 6.01 B(1); and

(c) the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

(3) Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications identified in paragraphs 6.01 B(1) and 6.01 C(2).

C. Statutory Attorney Qualification Requirements.

- (1) Appointment of Counsel Prior to Judgment. Pursuant to 21 U.S.C. § 848(q)(5), at least one of the attorneys appointed must have been admitted to practice in the court in which the case will be prosecuted for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court. Pursuant to 18 U.S.C. § 3005, at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.
- (2) Appointment of Counsel After Judgment. Pursuant to 21 U.S.C. § 848(q)(6), at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in felony cases in the court.
- (3) Attorney Qualification Waiver. Pursuant to 21 U.S.C. § 848(q)(7), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under 21 U.S.C. § 848(q)(5) or (q)(6), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

D. Continuity of Representation.

- (1) In the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified under paragraph 6.01 C, when the case enters the federal system.
- (2) Section 848(q)(8) of title 21, U.S.C., provides that, unless replaced by an attorney similarly qualified under paragraph 6.01 C pursuant to counsel's own motion or upon motion of the defendant, counsel shall represent the defendant in every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motion for a new trial, appeal, application for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

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 may consider the question of the number of counsel needed and the rate of compensation needed for the duration of the proceeding. After considering whether the number of counsel initially appointed is necessary to ensure effective representation or to avoid disruption of the proceeding, the court may continue such appointments or make an appropriate reduction. After considering the need to compensate appointed counsel fairly, taking into account the commitment of time and resources appointed counsel has made and will continue to make, the court may continue to pay the rate previously approved or prospectively reduce such rate.

- 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 A

CRIMINAL JUSTICE ACT FORMS

1. List of Criminal Justice Act Forms:

CJA Form 7 - Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds (Revised 2/84)

CJA Form 19 - Notice to Court-Appointed Counsel of Public Disclosure of Attorney Fee Information (Revised 4/01)

CJA Form 20 - Appointment of and Authority to Pay Court Appointed Counsel (Revised 5/99)

CJA Form 21 - Authorization and Voucher for Expert and Other Services (Revised 5/99)

CJA Form 22 - Statement of Parolee or Mandatory Releasee Concerning Appointment of Counsel Under the Criminal Justice Act (9/76)

CJA Form 23 - Financial Affidavit (Revised 5/98)

NOTE: This form may be used in determining eligibility for the appointment of counsel or authorization of other services. Whether or not this affidavit shall be required, as opposed to using alternative means of determining the financial status of the "person represented," such as through oral swearing, will be at the court's discretion. Where a judge or the court requires a written affidavit for local court files, no copy should be submitted to the Administrative Office.

CJA Form 24 - Authorization and Voucher for Payment of Transcript (Revised 5/99)

CJA Form 25 - Notice to CJA Panel Attorneys Regarding Availability of Investigative, Expert and Other Services (Revised 6/94)

CJA Forms 26 and 27 - Supplemental Information Statement for a Compensation Claim in Excess of the Statutory Case Compensation Maximum (for use in district court and court of appeals, respectively) (Revised 10/00)

NOTE: These forms, which are designed only for non-capital cases, may be used at the discretion of the courts. They do not replace any other documentation requirements to support the payment request.

CJA Forms 26A and 27A - Guidance to Attorneys in Drafting the Memorandum Required for a Compensation Claim in Excess of the Case Compensation Maximum (for use in district court and court of appeals, respectively) (Revised 4/00)

NOTE: These forms, which are designed only for non-capital cases, may be used at the discretion of the courts and are offered as possible alternatives to Forms 26 and 27. They do not replace any other documentation requirements to support the payment request.

CJA Form 30 - Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel (Revised 5/99)

CJA Form 31 - Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services (Revised 5/99)

2. **Samples**: Sample copies of CJA Forms 7, 19, 20, 21, 22, 23, 24, 25, 26, 27, 26A, 27A, 30, and 31, along with explanatory notes and comments, are included in this appendix.
3. **Obtaining Forms**: WordPerfect versions of Forms 7, 19, 20, 21, 22, 23, 24, 25, 26, 26A, 27, 27A, 30, and 31 are available on the J-Net (Forms/Judiciary/Criminal Justice Act). http://jnet.ao.dcn/Forms/CJA_Forms.html.
4. **Questions/Suggestions**: Questions concerning any of these forms, or suggestions for improvement, should be addressed to the Office of Defender Services, Administrative Office of the United States Courts, Washington, D.C. 20544 (202-502-3030).

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

APPENDIX C

MODEL ORDER AUTHORIZING THE ACQUISITION OF COMPUTER [HARDWARE
and/or SOFTWARE] UNDER THE CRIMINAL JUSTICE ACT

NOTE: Footnotes explain options or provide suggestions to the presiding judicial officer.

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

United States of America

v.

No. _____

Defendant #1
Defendant #2
Defendant #3
Defendant #4

ORDER AUTHORIZING ACQUISITION
OF [HARDWARE AND/OR SOFTWARE]
UNDER THE CRIMINAL JUSTICE
ACT

The above-named defendants,¹ having been found to be eligible for services under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, have submitted an *ex parte*² application for the approval of CJA funds to purchase computer [hardware and/or software³], as authorized by subsection (e) of the CJA.

¹ In most cases, counsel for one defendant is likely to make application on behalf of all co-defendants. Courts should encourage cooperation among defendants in multi-defendant cases and urge them to agree on needs before application is made.

² In accordance with subsection (e) of the CJA, paragraph 3.03 of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*, anticipates an *ex parte* application for “services other than counsel” and instructs that applications “shall be heard *in camera*” and are not to be revealed without the consent of the defendant.

³ Hardware includes computers, laptops, CD drives, printers, scanners, memory boards or related tangible items. Software includes operating and application programs.

The Court finds, after inquiry and counsel's consultation with the Office of Defender Services of the Administrative Office of the United States Courts,⁴ that the [hardware and/or software] detailed in items [1. through . . .] is [are] necessary for an adequate defense and constitute unusual or extraordinary expenses.⁵

The Court, therefore, approves the acquisition of the following items:

[1.]

[2.]

[3.]

[4.]

in the amounts listed for each item and a total expenditure not to exceed [the sum of all items approved⁶].

⁴ In all cases, applicants shall consult with the Office of Defender Services of the Administrative Office of the United States Courts, (202) 502-3030, **before** submitting an application for funds to the Court. The Office of Defender Services will provide technical advice to counsel to ensure the items requested are necessary, appropriate, and compatible with systems in use within the federal defender system. Counsel is required to include, in writing, the advice and recommendation of the Office of Defender Services in the application to the Court. *See* CJA Guideline 3.16. The presiding judicial officer or the clerk also may wish to seek advice from the Office of Defender Services.

⁵ CJA Guideline 3.16 authorizes approval for "unusual or extraordinary expenses" when "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." The Court has discretion to determine when that condition is met. Circumstances of extraordinary expense may include, but are not limited to: massive documentary discovery; numerous hours of wiretap tapes; complex financial transactions; and national security concerns requiring disclosure, but no copying, of discovery. In all cases, the decision to approve expenses for hardware or software is a matter for the presiding judge (and if above the case compensation maximum, for the chief judge of the court of appeals, or designee of the chief judge).

⁶ The Court may wish to authorize acquisition of each specific item and a total cost ceiling, but allow the Office of Defender Services or the designated purchaser some leeway to negotiate prices for individual items.

It is further ordered that the Federal Defender Organization for the District of [____],⁷ as designated by the Office of Defender Services, shall acquire the approved items utilizing the Criminal Justice Act appropriation, in conformance with CJA Guideline 3.16.

Because this [hardware and/or software] is [are] for the use of counsel appointed under the Criminal Justice Act and is being purchased with United States government funds, it is further ordered that the approved items are and shall remain the property of the United States. The item[s] is [are] to be used only in the course of the representation of the above-named defendant[s]. Counsel shall use due diligence and care to maintain the property in good condition.

Unless otherwise ordered by the Court, within 30 days after final judgment is entered as to a defendant, appointed counsel for that defendant is directed to return all items acquired under authorization of this Order to a Federal Defender Organization designated by the Office of Defender Services, for assignment by the Office of Defender Services for any other appropriate use under the Criminal Justice Act.

Counsel for the defendant[s] is [are] further instructed to remove and delete all case-related data and software from any hardware before delivering the equipment to the Federal Defender Organization.⁸ Software should be returned with all original disks and manuals. Counsel should retain copies, electronic or otherwise, of the deleted information for the client's file.⁹

⁷After the Court issues this order, a Federal Defender Organization (FDO) designated by the Office of Defender Services, or the Office of Defender Services, will purchase the approved items in accordance with judiciary procurement procedures and charge the costs to the CJA panel attorney line of the appropriation. Payment will be made through the CJA Panel Attorney Payment System by means of a CJA Form 21 or 31 (to which this order should be attached), which has been approved by the presiding judge (and if above the case compensation maximum, by the chief judge of the court of appeals, or designee of the chief judge). The FDO or the Office of Defender Services will also maintain the tangible items on its inventory of property, noting the items are on loan to appointed counsel.

⁸Returning equipment cleaned of data and software will minimize risk of inadvertent disclosure of information protected by work product or attorney-client privilege.

⁹While it is preferable that counsel retain copies of the deleted information in the client files, there may be some cases where it is impossible or prohibited by law. For example, the retention of discovery that implicates a national security concern may be barred by federal law.

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APPENDIX D
JUDICIAL CONFERENCE
OF THE UNITED STATES OF AMERICA
AND
COMMUNITY DEFENDER ORGANIZATION
FOR THE _____ DISTRICT(S) OF _____
FISCAL YEAR _____
GRANT AND CONDITIONS

The Community Defender Organization named _____ (hereinafter grantee), operating as a non-profit defense counsel service, has been authorized by the Criminal Justice Act Plan(s) of the _____ District(s) of _____ to provide representation, and related defense services to eligible persons pursuant to the Criminal Justice Act, as amended, 18 U.S.C. 3006A (g)(2)(B) (hereinafter CJA); and

By submitting an application for a sustaining grant for fiscal year ____, the grantee has elected to receive periodic sustaining grants to provide representation and related defense services in lieu of payments under subsections (d) and (e) of the CJA; and

The grantee has submitted the required application materials to the Judicial Conference of the United States (hereinafter Conference) via the Administrative Office of the United States Courts (hereinafter A.O.), including an annual report setting forth the activities and financial position and the anticipated expenses for the coming year; and

Pursuant to the authority delegated to it by the Conference, the Judicial Conference Committee on Defender Services (Defender Services Committee) has approved, subject to the availability of appropriated funds, a grant in the amount of \$ _____ for fiscal year ____, commencing on October 1, ____ and terminating on September 30, ____ as further detailed by budget categories contained in Attachment 1; and

Pursuant to its authority under subsections (g)(2)(B) and (h) of the CJA, and in consideration of this sustaining grant, the Conference requires that funds will not be expended from the grant except pursuant to the following terms and conditions;

The grantee, by its signature, or that of its authorized representative, at the end hereof, signifies its acceptance of and agreement to the terms and conditions set forth below, as well as its agreement to comply with the provisions of the CJA, the *Guidelines for the Administration of the*

Criminal Justice Act and any other policies or directives issued by the Conference, and the court plans of the judicial district and circuit in which the grantee will operate.

Once executed, this agreement shall be returned to the Office of Defender Services together with a current list of the names and addresses of all officers and directors of the organization.

1. USE OF GRANT FUNDS: Grant funds, once awarded to the grantee, generally will be distributed pursuant to a schedule promulgated by the A.O. Except as authorized by the A.O., the grantee will expend such funds only for obligations incurred within the period stipulated in the grant award, and, except as provided in Clause 4, only in accordance with and in such amounts as are provided in designated budget categories as authorized by the Conference. Except as authorized by the A.O., grantee will use such funds solely for the purpose of providing representation and appropriate other services in accordance with the CJA, the *Guidelines for the Administration of the Criminal Justice Act*, and the plans of the District and Circuit Courts.

2. BANK ACCOUNTS FOR GRANT FUNDS: Except as authorized by the A.O., the grantee will maintain grant funds in federally insured interest bearing accounts in accordance with provisions of 31 CFR 202 and will ensure that amounts in excess of federal insurance limits are collateralized before depositing the funds; grant funds will be maintained separately and will not be commingled with any non-grant funds maintained by grantee; and interest earned on the deposit of grant funds will be deposited with grant funds and may not be obligated or expended by the grantee, and will be returned to the A. O. at the end of the fiscal year for which the grant was awarded.

3. GRANT-RELATED INCOME: Unless otherwise authorized or directed by the A.O., any income arising or developing from grantee operations supported by grant funds shall inure to the benefit of the United States, shall not be commingled with any non-grant funds maintained by grantee, and shall be deposited and maintained in federally insured, interest bearing accounts until returned to the A.O. along with unobligated grant funds. The grantee may not obligate or expend this income without specific authorization from the A.O.

4. REALLOCATING FUNDS: Subject to such limitations as the Defender Services Committee may establish, the grantee may reallocate grant funds between budget categories (i.e., for purposes not specifically identified in the funding justification), provided that the aggregate of the amounts transferred within the fiscal year does not exceed 15% of the organization's total fiscal year grant amount approved by the Defender Services Committee. Subject to such limitations as the Defender Services Committee may establish, the A.O. may authorize reallocation between budget categories in any amount.

5. RETURN OF UNOBLIGATED OR UNEXPENDED BALANCES: Within 60 days of the end of the fiscal year, the grantee shall return to the A.O.'s Accounting and Financial Systems Division the actual or estimated amount of all unobligated or unexpended grant funds, grant interest, and grant-related income remaining at the end of the fiscal year, unless otherwise authorized by the A.O. Along with funds returned, the grantee shall include a statement identifying which portion of the funds returned represents grant funds, grant interest, and grant-related income. The amount of any funds returned as an estimate will be adjusted, if necessary, following completion of the annual A.O. audit specified in clause 8.

6. ANNUAL REPORTS: As required by subsection (g)(2)(B) of the CJA, the grantee must submit an annual report setting forth its activities, financial position, the anticipated caseload, support services, and all other expenses for the coming fiscal year, and a current roster of attorneys and other personnel employed by the grantee. Instructions for completing the annual report and its date of submission will be provided to the grantee by the A.O. at least thirty (30) days prior to the submission date.

7. GRANT RECORDS AND REPORTS: The grantee shall keep financial books and all records in accordance with the federal fiscal year unless a waiver is granted by the A.O. Such records shall be maintained and submitted in such manner and form as required by the A.O. Such records shall disclose the amount of grant funds, grant interest, and grant-related income received during the fiscal year, as well as the amount of grant funds expended by budget category and the total amount of grant funds expended during the fiscal year.

The record keeping procedures utilized by the grantee shall provide for the accurate and timely recordation and determination of all income and funds received, all expenditures and obligations, and the balance of unexpended and unobligated grant funds, grant interest, and grant-related income. In addition, the grantee shall maintain the records in such a manner as to permit the determination of the propriety of all expenditures of grant funds and the charges to specific budget categories.

Grantee shall maintain records concerning expenditures of all funds subject to audit (as specified in Clause 8) in such a manner as to allow the Auditor access to said records without compromising client files and other attorney-client privileged material. The grantee is obligated to maintain the confidentiality of information protected by the attorney-client privilege or any ethical, Constitutional, statutory or other mandate.

The A.O. may inspect and audit the financial records, bank statements, and other records related to the expenditure of grant funds, except for privileged information, at any reasonable time upon request. If, because of inadequate records, documentation, or explanation, the propriety of an expenditure cannot readily be determined, questionable costs and expenditures may be disallowed.

The grantee shall maintain and submit such statistical records and reports as may be required by the A.O. The grantee must keep financial and statistical records and reports for a period of at least seven years after the expiration of the fiscal year for which the grant was awarded unless otherwise authorized by the A.O. If audit issues remain unresolved, records must be retained until all such issues have been resolved.

8. AUDITS: Within 120 days of the end of the fiscal year, a contract auditor (hereafter, "Auditor") selected and paid for by the A.O. will perform an audit of the grantee's financial activities occurring during the grant period. Such audit will express an opinion on whether the grantee's statement of financial position, report of revenue and expenditures by budget category (as designated in the approved grant), and inventory of equipment, furniture, and furnishings purchased with federal funds present fairly the financial position of the grantee.

The grantee will make its financial records/books and supporting documents available to the Auditor (as specified in clause 7) and will prepare or assist the Auditor in the compilation and preparation of the required statements and reports.

The Auditor will perform the audit in accordance with the Government Auditing Standards promulgated by the U.S. General Accounting Office. In accordance with those standards, the Auditor also will prepare a report on the grantee's internal controls over its financial activities and a report on the grantee's compliance with the terms and conditions of the grant and other rules and regulations pertinent to the grant. The Auditor will also adhere to the principles of confidentiality embodied in the Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor of the American Bar Association.

The grantee may contract with local accountants for any accounting and financial services necessary for the operation of its office, including, but not limited to, the preparation of all required federal and state tax returns; payroll, disbursing, and record-keeping services; and any additional annual audit reports required by the Board of Directors that do not duplicate the national contract audit. Notwithstanding the foregoing, a grantee may use grant funds to contract with an expert for the purpose of responding to a finding of the Auditor in the annual audit when authorized in advance to do so by the Office of Defender Services.

9. INFORMAL REPORTS: The grantee shall submit informal reports, at least semi-annually, setting forth its financial position. Additionally, the grantee shall submit to the A.O. quarterly statements of expenditures of grant funds in such form and manner as requested by the A.O. These reports need not be certified.

10. GRANTEE STATUS: Neither the grantee nor any of its employees are officers, employees, or agents of the United States. The United States shall in no way be obligated under leases, contracts, or other agreements entered into by the grantee.

11. PROPERTY AND SERVICES: Title to all property purchased with grant funds or grant related income will be in the United States. Procurement of all property and all services other than services under subsection (e) of the CJA shall be conducted in a manner promoting free and open competition in the procurement process.¹ Unless otherwise authorized by the A.O., no equipment, furniture, furnishings or other property, and no services (except for services under subsection (e) of the CJA, leasing of office space, and procurement of liability insurance) shall be obtained with such funds at a total cost of more than \$25,000 without advance approval of the A.O. In addition, no single automation hardware item or software title with a cost of more than \$1,000 shall be purchased without the prior approval of the A.O.

The grantee shall not sell, assign, dispose of, or encumber any property of the United States, having an acquisition cost of more than \$250 without the prior approval of the A.O.²

The grantee shall maintain an inventory of all United States property reflecting the date and cost of purchase of such property and the date and manner of disposition of excess or surplus property. This inventory shall be available to the A.O. upon request.³

Grantee will provide the A.O. with at least 15 working days advance notification of its intention to enter into a lease for office space. Such notice shall include the total number of square feet, cost per square foot, the duration of the lease, and certification that at least two other competitive proposals were considered.

12. DISSOLUTION OF GRANTEE ORGANIZATION OR TERMINATION OF GRANT FUNDS: The grantee may dissolve on its own accord in accordance with the laws of the state in which it is organized. Grantee shall provide the A.O., chief judge of the district court, and chief judge of the court of appeals 90 days' advance notice of its intent to dissolve. Additionally, the

¹ For guidance in determining what constitutes "free and open competition" grantees should consult (1) the *Guide to Judiciary Policies and Procedures (Guide)*, [Volume I, Chapter VIII](#), and (2) regarding acquisition of automation equipment and software, the [Judiciary Procurement Program Procedures \(JP3\)](#).

² For guidance regarding procedures and preferred methods of disposal of property, grantees should consult the *Guide*, [Volume I, Chapter V](#).

³ For further guidance regarding maintaining an inventory, grantees should consult the *Guide*, [Volume I, Chapter V](#).

Conference in its discretion may determine to terminate or not renew the grant. In either event, unless otherwise authorized by the A.O., the grantee shall properly inventory and make available for reclamation, all property in the care and custody of the grantee purchased with grant funds or related income. Within 75 days of dissolution, the Auditor will perform a final financial audit of the grant. The audit will be of the same scope as discussed in clause 8. Upon receipt of the report of this audit, grantee shall remit to the A.O.'s Accounting and Financial Systems Division all remaining unobligated or unexpended grant funds, grant interest, and grant-related income. The United States shall not be responsible for any obligations or debts incurred by the grantee and the grantee shall hold the United States harmless for such obligations or debts.

13. MULTI-SERVICE DEFENDER ORGANIZATIONS: Consistent with clause 2 of this agreement, if the grantee is part of a larger defender organization which is not exclusively providing services under the CJA, grant funds received from the Conference pursuant to the CJA, grant interest, and grant related income may not be commingled with those of the general organization unless otherwise authorized by the A.O. Also, expenses, inventory, payroll, and other records pertaining to CJA funds and operations of the grantee must be maintained separately by the grantee unless otherwise approved by the A.O.

14. TRAVEL, MEALS, AND LODGING: The grantee's reimbursement policies regarding expenses for official travel, meals, and lodging shall be in writing. Grantee shall furnish the A.O. a current copy of the written policies, and all changes thereto. Unless approved by the A.O., grantee's reimbursement policies for official travel, lodging and meals shall not exceed the maximum allowances to be paid for per diem, actual expenses, and travel prescribed for federal employees. Grantee shall maintain records of travel and reimbursement acceptable to the A.O.

Grantee must obtain advance written authorization from the Office of Defender Services for all administrative travel outside the district(s) in which the grantee is designated to provide defense services and for all administrative and case-related travel outside the 48 contiguous United States. The Office of Defender Services may approve written requests for waivers to this policy for organizations in which individuals are required to travel frequently to Mexico or Canada on case-related matters.

15. PERSONNEL: Personnel policies and other terms and conditions of employment shall be in writing. The A.O. shall be furnished a current copy of such policies, and subsequently, any changes to those policies.

Grantee shall maintain leave records in a form acceptable to the A.O.

No personnel vacancy shall be filled without prior notice to the A.O. Such notice shall include all relevant data concerning the employee candidate, including his or her name, position,

starting salary (including grade and step for graded employees), education, experience and compensation history. Information regarding attorneys must indicate the month and year they received their law degree, the month and year they first became a member of a bar, and their prior relevant work experience.

16. INVESTIGATIVE, EXPERT, OR OTHER SERVICES: Pursuant to subsection (e) of the CJA, and to the extent that they are necessary for adequate representation of a person who is financially eligible under the CJA, the grantee may engage and compensate investigators, experts, or others from grant funds made available for that purpose.

17. BUSINESS, ENTERTAINMENT, OR PERSONAL EXPENSES: The grantee may not use grant funds to pay for business or personal entertainment, or items of property or services of a personal nature.

18. TRAINING: Funds for training of employees are provided in the "other services" budget category. Grantees shall submit annual reports of training activities including travel and other expenses associated therewith.

19. EMPLOYMENT: The grantee shall not discriminate against any employee, or applicant for employment, on the basis of race, color, national origin, religion, sex, age,⁴ or handicap. The grantee shall not hire, promote or advance within the organization any individual who is a relative⁵ of: (1) the federal defender, (2) any superior of the federal defender, or (3) any member of the board of directors. No employee of the grantee shall hire, promote, advance, or advocate the hiring, promotion or advancement of his or her relative by the grantee.

The grantee agrees to place in effect a program for providing equal employment to all persons regardless of their race, color, national origin, religion, sex, age or handicap. This program shall encompass all facets of personnel management including recruitment, hiring, promotion, and advancement. The program shall also provide for a system, whereby all applicants for employment, and all employees, may seek timely redress of discrimination complaints. A copy of the grantee's program will be filed with the Office of Defender Services of the A.O.

Upon request, grantee shall submit to the A.O. statistical and other reports relating to its equal employment opportunity practices. Grantee also agrees to notify the Office of Defender Services of any equal employment opportunity related grievance or suit filed against the organization

⁴ Judicial Conference policy with respect to age discrimination is that the complainant must have been at least 40 years of age at the time of the alleged discrimination.

⁵ For purposes of this clause, the term "relative," is defined the same as in 5 U.S.C. §3110 (a)(3).

or any of its employees and of the outcome of all such grievances or suits, and upon request, shall provide the Office of Defender Services with any additional information regarding any such grievance or suit.

20. OUTSIDE PRACTICE OF LAW: Unless otherwise authorized by the A.O., no employee of the grantee organization (including the federal defender) may engage in the practice of law outside the scope of his or her official duties with the grantee. Notwithstanding this prohibition, an employee may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the employee's family.⁶

21. LIABILITY INSURANCE: Unless otherwise authorized by the A.O., grantee shall maintain insurance, in reasonable amounts, to cover the costs of representation and liability for claims alleging malpractice, negligence, unfair personnel practices, and "errors and omissions" of officers, directors, and employees of the organization. Upon receiving or amending coverage, grantee shall notify the A.O. of the amount of coverage per event, the aggregate limit, the amount of deductible, and the cost for each type of insurance obtained, and shall certify that competitive proposals were sought.

Grantee also agrees to notify the Office of Defender Services of any such claims filed and their disposition, and upon request shall provide the Office of Defender Services with any additional information regarding any such claim.

22. CHANGES OR MODIFICATIONS: Upon their adoption, the grantee shall forward to the A.O. any amendment to the Articles of Incorporation or the By-laws under which the grantee operates, or any changes in the grantee's Board of Directors.

23. PAYMENTS FROM OR ON BEHALF OF CLIENTS: Except as authorized pursuant to subsection (f) of the CJA and corresponding provisions in the CJA Guidelines, neither the grantee nor its employees will take, request, demand, accept, receive or agree to receive anything of value from or on behalf of a person who is to be, is being, or has been furnished representation by grantee. Grantee will take appropriate measures to enforce this clause and advise the A.O. of any violation.

24. NON-ASSIGNABILITY: No obligations or responsibilities of the grantee, and no grant funds or benefits accruing under the grant, may be transferred, assigned, sub-contracted, or otherwise conveyed without the express written approval of the A.O., except as specifically authorized in the Grant and Conditions.

⁶ For purposes of this clause, the term "family" includes all relatives listed in 5 U.S.C. §3110 (a)(3).

25. FAILURE TO COMPLY WITH TERMS AND CONDITIONS: In the event the grantee fails to comply substantially with any of the terms or conditions of the grant award set forth herein, or it is unable to deliver the representation and other services which are the subject of this agreement, the Conference, or its authorized representative, may reduce, suspend, or terminate, or disallow payments under this grant award as it deems appropriate. The Conference, or its authorized representative, shall give notice to the grantee of an intent to reduce, suspend, or terminate payments at least 10 days prior to taking action. Such notice shall indicate the intended action and the reason therefor. The Conference reserves the right to pursue all remedies, including, but not limited to, recovery of monetary damages and accrued interest, for grantee's failure to comply with any of the terms and conditions of the grant award or to deliver the representation and other services which are the subject of the agreement.

DATE

AUTHORIZED REPRESENTATIVE OF GRANTEE

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