

Guide to Judiciary Policy

Vol 7: Defender Services

Pt A: Guidelines for Administering the CJA and Related Statutes

Ch 6: Federal Death Penalty and Capital Habeas Corpus Representations

§ 610 Overview

§ 610.10 Statutory Authority and Applicability

§ 610.20 Judicial Conference Recommendations

§ 610.30 Contact Information

§ 620 Appointment of Counsel in Capital Cases

§ 620.10 Number of Counsel

§ 620.20 Appointment of State Public Defenders or Legal Aid Attorneys

§ 620.30 Procedures for Appointment of Counsel in Federal Death Penalty Cases

§ 620.40 Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel on Appeal

§ 620.50 Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings

§ 620.60 Attorney Qualification Requirements Under 18 U.S.C. § 3599 in Federal Death Penalty Cases and Habeas Corpus Proceedings

§ 620.70 Continuity of Representation

§ 630 Compensation of Appointed Counsel in Capital Cases

§ 630.10 Hourly Rates and Inapplicability of Compensation Maximums

§ 630.20 Adequate Compensation of Counsel

§ 630.30 Death Eligible Cases Where Death Penalty Is Not Sought

§ 630.40 Interim Payments to Counsel

§ 630.50 Timely Review of Vouchers

§ 630.60 Forms

§ 640 Case Budgeting

§ 640.10 Overview

§ 640.20 Purpose and Procedures

§ 640.30 Matters for Inclusion in the Capital Case Budget

§ 640.40 Authorization for Investigative, Expert, and Other Services Prior to Submission of Case Budget

§ 650 Case Management in Federal Capital Habeas Corpus Proceedings

Last substantive revision (Transmittal 07-004) May 5, 2011

Last revised (minor technical changes) June 3, 2011

- § 660 Authorization and Payment for Investigative, Expert, and Other Services in Capital Cases
 - § 660.10 In General
 - § 660.20 Limitations On Payment for Investigative, Expert, and Other Services
 - § 660.30 Consulting Services
 - § 660.40 Interim Payments to Service Providers
 - § 660.50 Forms
 - § 660.60 Timely Review of Vouchers

§ 670 Scheduling of Federal Death Penalty Case Authorization to Control Costs

- § 680 Clemency
 - § 680.10 Clemency Representation by Counsel
 - § 680.20 Clemency Vouchers
 - § 680.30 Budgeting Clemency Work

Appendix

[Appx 6A: Recommendations Concerning the Cost and Quality of Defense Representation \(Updated Spencer Report, September 2010\)](#)

§ 610 Overview

§ 610.10 Statutory Authority and Applicability

- (a) The appointment and compensation of counsel and the approval and payment of persons providing investigative, expert, and other services in federal capital cases is governed by 21 U.S.C. § 848(q), which was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and recodified as [18 U.S.C. § 3599](#).
- (b) 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).
- (c) This chapter retains guidelines applicable to cases that pre-date the AEDPA, and adds, where appropriate, guidelines for cases subject to the AEDPA.
- (d) Unless otherwise specified, provisions in this chapter apply to all capital cases.

§ 610.20 Judicial Conference Recommendations

Detailed recommendations on the appointment and compensation of counsel in federal death penalty cases were adopted by the Judicial Conference, upon recommendation of the Defender Services Committee, on September 15, 1998 ([JCUS-SEP 98](#), pp. 67-74). The recommendations were contained in the May 1998 report entitled [Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation](#) (Spencer Report). The Defender Services Committee approved the initial Spencer report, including the commentary that accompanied the recommendations. In September 2010, following a comprehensive update of the report's contents, the Defender Services Committee endorsed revised commentary to the 1998 recommendations. The recommendations and the accompanying revised commentary are set forth in [Appx 6A \(Recommendations Concerning the Cost and Quality of Defense Representation \(Updated Spencer Report, September 2010\)\)](#) of Part A of this volume. The updated 2010 report, which includes additional information, is available on the [judiciary's public website](#).

§ 610.30 Contact Information

Questions about the appointment and compensation of counsel and the approval and payment of investigative, expert, and other service providers in federal capital cases should be directed to the Office of Defender Services, Administrative Office of the United States Courts (AO), Legal and Policy Branch Duty Attorney at 202-502-3030 or via email at ods_lpb@ao.uscourts.gov.

§ 620 Appointment of Counsel in Capital Cases

§ 620.10 Number of Counsel

§ 620.10.10 Federal Death Penalty Cases

- (a) As required by [18 U.S.C. § 3005](#), at the outset of every capital case, courts should appoint two attorneys, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases.
- (b) Under [18 U.S.C. § 3599\(a\)\(1\)](#), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case.
- (c) While courts should not appoint more than two attorneys 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.

§ 620.10.20 Habeas Corpus Proceedings

- (a) Under [18 U.S.C. § 3599\(a\)\(2\)](#), 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.
- (b) Due to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two attorneys.

§ 620.20 Appointment of State Public Defenders or Legal Aid Attorneys

- (a) The judicial officer may appoint an attorney, if qualified under [Guide, Vol 7A, § 620.60](#), 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.
- (b) 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* according to the [Guide, Vol 7A, § 210.30](#).
- (c) 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.

§ 620.30 Procedures for Appointment of Counsel in Federal Death Penalty Cases

- (a) In appointing counsel in federal death penalty cases, [18 U.S.C. § 3005](#) requires the court to consider the recommendation of the federal defender, or, if no such organization exists in the district, of the AO Office of Defender Services.
- (b) In fulfilling this responsibility, the federal defender organization or AO Office of Defender Services 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.

- (c) In evaluating the qualifications of counsel considered for appointment, the federal defender organization or AO Office of Defender Services should consider the:
 - (1) minimum experience standards set forth in [18 U.S.C. § 3599\(b\)-\(d\)](#), [18 U.S.C. § 3005](#), and other applicable laws or rules;
 - (2) qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;
 - (3) recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;
 - (4) proposed counsel's commitment to the defense of capital cases; and
 - (5) availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.
- (d) 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.
- (e) 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.

§ 620.40 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 the:

- (a) attorney's experience in federal criminal appeals and capital appeals;
- (b) general qualifications identified in the [Guide, Vol 7A, § 620.30](#); and

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

§ 620.50 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 [§ 620.30](#) and [§ 620.60.20](#).

§ 620.60 Attorney Qualification Requirements Under [18 U.S.C. § 3599](#) in Federal Death Penalty Cases and Habeas Corpus Proceedings

§ 620.60.10 Appointment of Counsel Before Judgment

Under [18 U.S.C. § 3599\(b\)](#), 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. Under [18 U.S.C. § 3005](#), at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.

§ 620.60.20 Appointment of Counsel After Judgment

Under [18 U.S.C. § 3599\(c\)](#), 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.

§ 620.60.30 Attorney Qualification Waiver

Under [18 U.S.C. § 3599\(d\)](#), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under [18 U.S.C. § 3599\(b\)](#) or [\(c\)](#), 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.

§ 620.70 Continuity of Representation

- (a) 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 [Guide, Vol 7A, § 620.60](#), when the case enters the federal system.

(b) [Under 18 U.S.C. § 3599\(e\)](#), unless replaced by an attorney similarly qualified under [Guide, Vol 7A, § 620.60](#) by counsel's own motion or upon motion of the defendant, counsel “shall represent the defendant throughout every subsequent stage of available judicial proceedings,” including:

- pretrial proceedings;
- trial;
- sentencing;
- motion for a new trial;
- appeals;
- applications for writ of certiorari to the Supreme Court of the United States;
- all post-conviction processes;
- applications for stays of execution and other appropriate motions and procedures;
- competency proceedings; and
- proceedings for executive or other clemency.

§ 630 Compensation of Appointed Counsel in Capital Cases

§ 630.10 Hourly Rates and Inapplicability of Compensation Maximums

§ 630.10.10 Hourly Rates

Under 21 U.S.C. § 848(q)(10)(A), recodified in [18 U.S.C. § 3599\(g\)\(1\)](#), the presiding judicial officer will set the hourly compensation at a rate not to exceed the following amounts, for appointed counsel in 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:

§ 630.10.10(a) Capital Hourly Rates		
If services were performed between...	The hourly rate maximum is...	Authority
01/01/2010 to present	\$178 (unless raised by the Judicial Conference under 18 U.S.C. § 3599(g)(1)).	Pub. L. No. 111-117 (2009). See H. Rep. No. 111-366/Pub. L. No. 111-117 Consolidated Appropriations Act, 2010 (Dec. 16, 2009; 123 Stat. 3034).

§ 630.10.10(a) Capital Hourly Rates		
If services were performed between...	The hourly rate maximum is...	Authority
03/11/2009 through 12/31/2009	\$175	H. Rep. No. 1105/Pub. L. No. 111-8 Omnibus Appropriations Act, 2009 (Mar. 11, 2009; 123 Stat. 524).
01/01/2008 through 03/10/2009	\$170	H. Rep. No. 110-497, 2007 WL 4402532, December 17, 2007. <i>See also</i> The Consolidated Appropriations Act of 2008 (Pub. L. No. 110-161, 121 Stat. 1844, 1987 (2007)).
05/20/2007 through 12/31/2007	\$166	Based on the appropriation amounts enacted on February 15, 2007 (Pub. L. No. 110-5, 121 Stat. 8 (2007)), the U.S. House and Senate Appropriations Committees subsequently approved the judiciary financial plans for FY2007, which included a cost-of-living adjustment to increase the maximum capital hourly rate to \$166.
01/01/2006 through 05/19/2007	\$163	Congress approved a cost-of-living increase to \$163 in the Judiciary Appropriations Act, Fiscal Year 2006, Pub. L. No. 109-115, 119 Stat. 2396 (2005). See also: H. Rep. No. 109-307, at 73, 112, 279 (2005) (Conf. Rep.), 2005 WL 3131557, and S. Rep. No. 109-109, at 196 (2005), 2005 WL 1774046.
02/01/2005 through 12/31/2005	\$160	Congress approved the judiciary's request for an hourly rate increase from \$125 to \$160 when it enacted the Omnibus Appropriations Act, Fiscal Year 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004). See also: The Joint Explanatory Statement of the Committee on the Conference, 150 CONG. REC. H10235-01, November 19, 2004, 2004 WL 2658652, and S. Rep. No. 108-344 (2004), 2004 WL 3044802.

(b) Annual Increase in Hourly Rate Maximum

- (1) [Under 18 U.S.C. § 3599\(g\)\(1\)](#), the Judicial Conference is authorized to increase annually the hourly rate maximum by an

amount not to exceed the federal pay comparability raises given to federal employees.

- (2) The Judicial Conference has determined that the hourly rate maximum will be adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds. **See:** [JCUS-MAR 02](#), pp. 13-14.
- (3) Newly established rates will apply with respect to services performed on or after their effective dates.

§ 630.10.20 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.

§ 630.20 Adequate Compensation of Counsel

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:** [Guide, Vol 7A, § 620.60](#)), 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.

§ 630.30 Death Eligible Cases Where Death Penalty Is Not Sought

§ 630.30.10 General Considerations

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.

§ 630.30.20 Number of Counsel

- (a) The court should, absent extenuating circumstances, make an appropriate reduction in the number of counsel.
- (b) In deciding whether there are extenuating circumstances, the court should consider the following factors:
 - (1) the need to avoid disruption of the proceedings;

- (2) whether the decision not to seek the death penalty occurred late in the litigation;
- (3) whether the case is unusually complex; and
- (4) any other factors that would interfere with the need to ensure effective representation of the defendant.

§ 630.30.30 Compensation Rate

- (a) The court should, absent extenuating circumstances, reduce the compensation rate.
- (b) In determining whether there are extenuating circumstances, the court should consider the following factors:
 - (1) the extent to which this representation precludes counsel from taking other work;
 - (2) the commitment of time and resources counsel has made and will continue to make in the case; and
 - (3) the need to compensate appointed counsel fairly.
- (c) Any reduction in the compensation rate will apply prospectively only.

§ 630.40 Interim Payments to Counsel

It is urged that the court permit interim payment of compensation in capital cases. For information on interim payments to counsel in death penalty cases, **see:** [§ 230.73.20](#) and [Appx 2D \(Procedures for Interim Payments to Counsel in Death Penalty Cases\)](#).

§ 630.50 Timely Review of Vouchers

Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

§ 630.60 Forms

Claims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted on [Form CJA 30 \(Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel\)](#).

§ 640 Case Budgeting

§ 640.10 Overview

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.

§ 640.20 Purpose and Procedures

- (a) 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.
- (b) Case budgets should be submitted *ex parte* and filed and maintained under seal.
- (c) Consideration should be given to employing an *ex parte* pretrial conference to facilitate reaching agreement on a litigation budget at the earliest opportunity.
- (d) 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.
- (e) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized.
- (f) 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.

§ 640.30 Matters for Inclusion in the Capital Case Budget

Matters that may affect the compensation and reimbursement of counsel and payments for investigative, expert, and other services (**see:** [Guide, Vol 7A, § 640.20\(d\)](#)) include, but are not limited to the following:

- (a) The hourly rate at which counsel will be compensated (**see:** [§ 630.10](#) and [§ 630.20](#));

(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:

(1) 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 (DOJ) determines whether to authorize the death penalty;

(2) 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);

(3) 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 according to [§ 630.30](#);

(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:** [§ 660.40.10](#) and [§ 660.60](#));

(g) The form in which claims for compensation and reimbursement should be submitted (**see:** [§ 630.60](#)) and the matters that those submissions should address; and

- (h) The authorization and payment for investigative, expert, and other services. **See:** [§ 660](#).

§ 640.40 Authorization for Investigative, Expert, and Other Services Prior to Submission of Case Budget

- (a) Recognizing that investigative, expert, and other services may be required before there is an opportunity for counsel to prepare a case budget or for the court to approve it, courts should act upon requests for services where prompt authorization is necessary for adequate representation.
- (b) Courts, in examining the case budget, may reconsider amounts authorized for services prior to the budget's approval; however, courts may not rescind prior authorization where work has already been performed.

§ 650 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.

§ 660 Authorization and Payment for Investigative, Expert, and Other Services in Capital Cases

§ 660.10 In General

§ 660.10.10 Cases Commenced After April 24, 1996 (Post-AEDPA)

- (a) 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.
- (b) 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.

§ 660.10.20 Cases Commenced Before April 24, 1996 (Pre-AEDPA)

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, according to 21 U.S.C. § 848(q)(9) before 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 will authorize the defendant's counsel to obtain such services on behalf of the defendant.

§ 660.10.30 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 [§ 310.20.30\(b\)](#).

§ 660.10.40 Applicability of Chapter 3 Guidelines

Except as otherwise specified in § 660, the provisions set forth in the [Guide, Vol 7A, Ch 3](#), including [§ 310.20.30](#), are applicable to the authorization and payment for investigative, expert, and other services in capital cases.

§ 660.20 Limitations On Payment for Investigative, Expert, and Other Services

§ 660.20.10 Inapplicability of Compensation Maximums

For all capital cases, the compensation maximum amounts for investigative, expert, and other services set forth in the [Guide, Vol 7A, § 310.20.10](#) are inapplicable.

§ 660.20.20 Cases Commenced After April 24, 1996 (Post-AEDPA)

- (a) 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, under [18 U.S.C. § 3599\(g\)\(2\)](#), the fees and expenses for investigative, expert, and other services are limited to \$7,500 in any case unless:
 - (1) payment in excess of that amount is certified by the court, or U.S. 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

- (2) the amount of the excess payment is approved by the chief judge of the circuit (or an active or senior circuit judge to whom the chief judge has delegated this authority).
- (b) The \$7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually.
- (c) 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 or senior circuit judge to whom the chief judge has delegated this authority). Accordingly, the court will monitor all payments for investigative, expert, and other services.
- (d) 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 or senior circuit judge to whom the chief judge has delegated this authority). **See:** [Guide, Vol 7A, Appx 3A \(Sample Request for Advance Authorization for Investigative, Expert, or Other Services\)](#).
- (e) Rather than submitting multiple requests, where possible, courts should submit the expert, investigative, and other services portion of the approved case budget to the chief judge of the circuit (or designee of the chief judge) for advance approval. **See:** [§ 640](#).

§ 660.20.30 Cases Commenced Before April 24, 1996 (Pre-AEDPA)

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, according to 21 U.S.C. § 848(q)(10) before that provision's amendment by the AEDPA, the presiding judicial officer will 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.

§ 660.30 Consulting Services

- (a) Where necessary for adequate representation, [18 U.S.C. § 3006A\(e\)](#) and [18 U.S.C. § 3599\(f\)](#) authorize the reasonable employment and compensation of expert attorney consultants to provide “**light consultation**” services to appointed and *pro bono* attorneys 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; and
 - authorization process to seek the death penalty.
- (b) “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.
- (c) An expert attorney consultant will not be paid an hourly rate exceeding that which an appointed counsel could be authorized to be paid.
- (d) Courts may wish to require that an appointed attorney who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the AO 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.

§ 660.40 Interim Payments to Service Providers

§ 660.40.10 In General

It is urged that the court or U.S. magistrate judge permit interim payment of compensation in capital cases.

§ 660.40.20 Cases Commenced After April 24, 1996 (Post-AEDPA)

- (a) 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 the [Guide, Vol 7A, Appx 3C \(Procedures for Interim Payments to Service Providers in Capital Proceedings\)](#). For limitations on payment for investigative, expert, and other services with respect to federal death penalty cases and federal capital habeas corpus proceedings, **see:** [§ 660.20.20](#).

See also: the case budgeting techniques recommended in [§ 640](#).

- (b) 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 AO Office of Defender Services.

§ 660.40.30 Cases Commenced Before April 24, 1996 (Pre-AEDPA)

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 the [Guide, Vol 7A, Appx 3C \(Procedures for Interim Payments to Service Providers in Capital Proceedings\)](#). For procedures governing federal death penalty cases and federal capital habeas corpus proceedings, **see:** [§ 660.20.30](#).

§ 660.50 Forms

Claims for compensation and reimbursement of expenses for investigative, expert, or other services in death penalty proceedings should be submitted on [Form CJA 31 \(Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services\)](#).

§ 660.60 Timely Review of Vouchers

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

§ 670 Scheduling of Federal Death Penalty Case Authorization to Control Costs

- (a) Within a reasonable period of time after appointment of counsel under [18 U.S.C. § 3005](#), and only after consultation with counsel for the government and for the defendant (including, as appropriate, in an *ex parte* application or proceeding), the court should establish a schedule for resolution of whether the government will seek the death penalty.

- (b) This schedule should include dates for:
- (1) the submission by the defendant to the U.S. attorney of any reasons why the government should not seek the death penalty;
 - (2) the submission by the U.S. attorney to the appropriate officials of the DOJ of a recommendation and any supporting documentation concerning whether the death penalty should be sought; and
 - (3) filing of a notice under [18 U.S.C. § 3593\(a\)](#) that the government will seek the death penalty, or notification to the court and the defendant that it will not.
- (c) The schedule should be flexible and subject to extension for good cause at the request of either party (again, as appropriate, in an *ex parte* application or proceeding).
- (d) The schedule should allow reasonable time for counsel for the parties to discharge their respective duties with respect to the question of whether the death penalty should be sought, with due regard to:
- the factual complexity of the case;
 - the status of any continuing investigation of the crimes and related criminal conduct;
 - the anticipated or actual progress of discovery;
 - the potential for successful plea negotiations; and
 - any other relevant factors.
- (e) It is also recognized that scheduling extensions may be necessary because the full development of facts related to guilt and aggravating and mitigating factors may continue even after the case is submitted to the DOJ for review.

§ 680 Clemency

§ 680.10 Clemency Representation by Counsel

§ 680.10.10 New Appointments

A new appointment for clemency representation is not necessary since, under [18 U.S.C. § 3599\(e\)](#), each attorney appointed to represent the defendant for habeas corpus proceedings under [28 U.S.C. § 2254](#), unless replaced by similarly qualified counsel, "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

§ 680.10.20 Motions to Withdraw

- (a) Motions to withdraw from the clemency representation should be brought in the federal district court where the habeas corpus matter was filed.
- (b) Upon granting a motion to withdraw, unless the defendant is represented by similarly qualified counsel or representation is waived by the defendant, the court shall appoint counsel to represent the defendant for any available clemency proceedings.

§ 680.20 Clemency Vouchers

§ 680.20.10 Issuance of Voucher for Clemency Work

Upon appointment of counsel for habeas corpus proceedings brought under [28 U.S.C. § 2254](#), the district court should issue appointed counsel two CJA payment vouchers ([Form CJA 30 \(Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel\)](#)); one designated for the habeas corpus proceeding and one designated for a potential clemency proceeding.

§ 680.20.20 Processing of Clemency Vouchers

All attorney compensation ([Form CJA 30 \(Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel\)](#)) and investigative, expert, or other services vouchers ([Form CJA 31 \(Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services\)](#)) pertaining to the clemency representation should be submitted to the district court, regardless of whether the habeas corpus case is on appeal at the time.

§ 680.30 Budgeting Clemency Work

- (a) Consistent with [§ 640](#), courts are encouraged to require counsel appointed in [28 U.S.C. § 2254](#) proceedings to submit a proposed initial clemency budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds.

- (b) The district court, in consultation with counsel, should determine when the clemency budget should be submitted — early in the habeas corpus proceedings, or at the beginning of the clemency work. In order to allow sufficient time for clemency preparation, budgeting should occur well in advance of final resolution of the case in the courts.