

## **EXPLANATORY MEMORANDUM FOR CASE BUDGETING IN NON-CAPITAL PANEL ATTORNEY REPRESENTATIONS WITH THE POTENTIAL FOR EXTRAORDINARY COST**

At its September 2003 proceedings, the Judicial Conference of the United States (Judicial Conference) adopted a Criminal Justice Act (CJA) guideline encouraging courts to use case budgeting for any representation in which it is anticipated that the defense of an individual CJA defendant will cost in excess of \$30,000 or involve more than 300 hours of attorney time (section [230.26](#) of the Guidelines for Administering the CJA and Related Statutes, Vol. 7A, *Guide to Judiciary Policy*). (JCUS-SEP 03, p. 20.) It is hoped that the development of a case budget on behalf of a defendant in such a case will serve several purposes, all of which will help ensure that defense counsel will receive the resources necessary to represent the accused effectively while at the same time providing the court with sufficient information about the resources needed so that the court can assess and monitor the expenditure of public funds. Case-budgeting provisions had already been included in [§ 640](#) of the CJA Guidelines for capital cases. (JCUS-MAR 97, p. 23 and JCUS-SEP 98, pp. 72-73.)

The first determination that the court or counsel must make under CJA Guidelines [§ 230.26.10](#) is whether a particular case has the *potential* to exceed the \$30,000/300-hour threshold. The guideline contemplates that counsel, on behalf of a CJA client, would initiate a case budget or the court on its own initiative would request the development of a case budget. It is understood that, at the start of a case, it may be difficult for counsel or the court to know whether the case has the potential to exceed the threshold. For example, the indictment may not provide sufficient detail about the alleged offense to allow an accurate assessment of the scope of the charge, the degree of an individual defendant's involvement in the case, the volume of discovery that will be generated and provided, the number of witnesses, the precise disciplines that may be the subject of expert testimony, or the nature of the defense to the charge. Therefore, in some situations it may not become apparent that a case meets, or has the potential to reach, the case-budget

threshold until the litigation has proceeded through its preliminary stages and counsel or the court has had an opportunity to evaluate some of the key factors listed above. The court should be mindful that information could be provided by the prosecution, especially in the early stages of a case, about the anticipated quantity of discovery, the likelihood (and extent) of reliance upon scientific evidence and expert opinion, and the possible length of trial. The furnishing of this information would be of great assistance to the court in making the initial decision about whether to require a case budget.

The primary cost driver in a criminal case is generally attorney time. Hence, to the extent that counsel is able to advise the court about the expected quantity of discovery, the scope of the defense investigation, and the anticipated length of a trial, the court may have sufficient information at a relatively early stage of the case to consider requiring a case budget on behalf of one or more of the CJA defendants. As a simple rule of thumb, if counsel for the prosecution and defense estimate that a trial would take four weeks, the cost of a *single* defense attorney's time would be \$20,000 (160 hours at \$125 per hour) for in-court time during the trial alone. Considering the out-of-court time expended by counsel preceding and during such a trial, and the time spent organizing and reviewing discovery as well as conducting a defense investigation and litigating motions, such a case is very likely to exceed the threshold of CJA Guidelines [§ 230.26.10](#). Furthermore, if the court has appointed two CJA counsel on behalf of a single defendant, a trial of only two-week duration could potentially exceed the guideline's threshold.

Increasingly, discovery-related costs have been identified as a significant cost driver. Under CJA Guidelines [§ 320.70.40](#), appointed counsel must consult the National Litigation Support Team in the Administrative Office of the United States Courts (AO), Office of Defender Services (ODS) (510-637-3500) before procuring computer hardware or software with a cost exceeding the limitations in CJA Guidelines [§ 310.20.30](#) or utilizing computer systems, litigation support products, services, personnel, or experts with an expected combined cost exceeding \$10,000.

After the court has made the decision to require a case budget on behalf of a CJA defendant, it must determine what type – and quantity – of information should be provided by counsel to the court. It is important that a realistic budget be developed – one that has been carefully formulated by counsel and is based on tangible factors. The well-planned budget will help the court make informed decisions about the resources necessary for the defense of the case and, to a certain extent, help ensure that expenditures do not simply escalate without the court first being advised of significant changes in the nature of the prosecution or defense of the case, which would warrant an adjustment to the budget. Such a budget will, hopefully, avoid situations where inadequate resources would be provided to the defense and where compensation of counsel and other members of the defense team would be delayed or ultimately disallowed. By virtue of the dollar amounts, the budgets submitted by CJA panel attorneys almost certainly will implicate the case compensation maximums for panel attorneys and, most likely, for some of their investigative, expert and other service providers. Thus, it is recommended that the presiding judicial officer send a case budget to the chief judge of the court of appeals (or his or her delegate) for approval.

To assist the court and counsel in this process, the AO developed case-budgeting worksheets ([CJA Forms 28A - H](#)) that isolate important categories of information, with sufficient detail, to enable the preparation of a realistic case budget. There are both *detailed* and *summary* worksheets for each of the four types of services: attorney, investigator, expert, and “other”. It is anticipated that both the detailed *and* the summary worksheets for each service provider (in some instances, the work of several providers of the same type of service could be combined on one form) would be completed by appointed counsel in preparing the case budget, and the court could then choose whether to review the detailed worksheets or the summary worksheets alone. The court’s decision would likely be affected by the size of the requested case budget, the extent to which the court has experience with complex criminal litigation, and the court’s familiarity with the practice of the appointed attorney(s). In some cases, the court may choose to review the summary

worksheets for certain services – e.g., those of defense counsel or investigators – and the detailed worksheets for experts and other service providers. Preparation of a detailed worksheet will serve the dual purpose of assuring that cost drivers are not underestimated or overlooked, and that the ultimate cost estimates are tied to tangible, identifiable, and to a large extent quantifiable factors.

Please note that the Ninth Circuit, as part of the circuit CJA case-budgeting attorney pilot project (2007 - 2011), developed Microsoft Excel worksheets to assist in the case-budgeting process. One major feature of these documents is that the attorney budgeting categories correspond to the in-court and out-of-court categories on the CJA Form 20 (Appointment and Authority to Pay Court-Appointed Counsel). The Ninth Circuit worksheets can be obtained by contacting the ODS Legal and Policy Duty Attorney at 202-502-3030, or via email at [ods\\_lpb@ao.uscourts.gov](mailto:ods_lpb@ao.uscourts.gov); judges and panel attorneys in circuits with a circuit CJA case-budgeting attorney should contact that individual. A condensed Excel version of the worksheets is available on [http://www.fd.org/odstb\\_casebudget.htm](http://www.fd.org/odstb_casebudget.htm).

In reviewing a budget, judges may contact the ODS Legal and Policy Branch Duty Attorney to obtain information about available personnel resources who can provide objective case-budgeting advice to the court.

Case budgets should not be viewed as etched in stone, and may, even in the best of circumstances, be the subject of subsequent modification as the case progresses. The simplest example of this would be where the budget was developed at an early stage of the case, prior to the completion of the discovery process and before counsel had an opportunity to assess the nature of the defense and/or the need for expert services. Even where a case budget has been carefully prepared based on counsel's best assessment of the above factors, subsequent events can have a major impact on a case budget. Obvious examples of the latter would be a superceding indictment that adds new charges and/or additional defendants to the case, a prosecutor's

decision to rely upon evidence of other criminal conduct not alleged in the indictment, or events that call into question the mental status of the defendant. The court and counsel should be alert to such possibilities, and, in a given case, the court may wish to delay the development of a case budget, or develop the budget in stages as the case proceeds. As part of this process, the court may specify the assumptions upon which the budget is based – e.g., that there will not be an issue of the defendant’s sanity or competency, that DNA evidence will not be contested in the case, or that the indictment will not be broadened. Should one of the foundations upon which the budget is based dramatically shift, the court should have counsel modify the case budget accordingly and seek approval of the court for any additional funds and resources.

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