

Judicial Council of the Ninth Circuit
Amended CJA Capital Habeas Costs Policy
October 30, 2008

1. Establish Case Budgeting. As a cost-containment mechanism, up-front budgeting is required for all capital habeas cases in the Ninth Circuit's district courts. With the court and attorneys working together to reach an early agreement on case budgets, there is much less chance that costs will run out of control.

Budgets will be developed for all capital habeas cases currently open in the district courts and new capital cases will start budgeting at the beginning of federal capital habeas proceedings. Petitioner's counsel will submit a proposed budget to be reviewed by the court. The court and counsel will reach an agreement on the proposed budget and the court-approved budget will be submitted for review by the Judicial Council of the Ninth Circuit (see below for further details). It will be possible to amend the budget at a later date, provided sufficient justification is presented in advance to the court.

Courts should require that budgets be submitted using the electronic Excel budgeting system, developed specifically for budgeting cases in the Ninth Circuit's district courts. Courts should be prepared to justify why a case is not being budgeted using this system.

2. CJA Training for All Judges. All of the Ninth Circuit's district and magistrate judges who have capital cases should receive training on case management and budgeting of death penalty cases.

3. Establish and Adhere to Approved Rates. The maximum rate for lead counsel is \$170.00 per hour. This rate is reserved for those who have substantial experience and skill in federal capital habeas corpus proceedings. The rate for those with less than substantial experience handling capital habeas corpus proceedings but who have other comparable experience, such as substantial experience with capital cases or with federal habeas corpus proceedings, is \$155 per hour. All other lead counsel should be compensated at a rate between \$135 and \$150 per hour taking into account their experience and skill. Second counsel shall be compensated at a lower rate between \$110 and \$135 per hour taking into account their experience and skill.

Two lead counsel may be appointed only if they will not be doing duplicative work. For example, they may be appointed to each handle separate parts of the case (*e.g.*, guilt/penalty). If appropriate, a district judge may authorize both counsel to each read the core materials (the trial transcript from opening to verdict, substantial motions, the state appellate briefs and decisions, and the state habeas briefs and decisions). The rate for review of the core materials is 60 pages an hour.

4. In considering proposed capital habeas budgets, it is often difficult to determine

what additional money is reasonable to allow for review of documents not encompassed in the core materials. One approach for cases with voluminous documents would be to approve money in two stages. The first stage would be approval of a modest amount (*e.g.* 40-60 hours), for a preliminary review. The primary goal of this review would be to obtain an understanding of the materials the capital habeas attorney believes must be more thoroughly reviewed. The second stage would be approval of a more detailed budget that would permit a reasonable in-depth review of the material. The amount to be budgeted for any necessary review of these non-core materials will be based upon the type of materials involved. (*See* Document Review Protocol, Staged Budgeting For Capital Habeas Cases on the Ninth Circuit Capital Habeas Intranet site.)

5. Rates and Pre-Approval of Associates and Paralegals. The rates for associate counsel should be between \$69 and \$89 per hour. The rate that can be approved for paralegals and law clerks is up to \$45.00 per hour. Rates for all staff, whether on the appointed attorney's staff or independent, may not exceed the Judicial Council's maximum rates, unless otherwise authorized by the court and the Judicial Council. It should be explicitly noted that attorneys and/or law firms are not to make a profit on these positions. In other words, the court should not authorize a higher hourly rate than the actual out-of-pocket costs, including benefits, to the firm. General overhead costs may not be included in the calculation of the hourly rate.

Appointed counsel are expected to use associates, paralegals or other cost effective means to minimize costs where lead attorney expertise is not required, such as legal research and file review. Use of associates and paralegals must be pre-approved in conjunction with case budgeting or a funding request; such requests must detail the projected number of hours, the hourly rate, and the total anticipated expenditure.

6. Rates for Investigators. The rate that can be approved for an investigator is up to \$75.00 per hour. Once funding for investigative services, experts and/or other services has been approved, counsel is responsible for communicating with the service provider to ensure that services comply with specific terms of the court order and do not exceed the amount authorized. Payments to service providers should only be authorized at the appropriate rate for the type of task performed -- *e.g.*, an investigator should only be paid at the paralegal rate for performing paralegal tasks (such as record gathering).

7. Additional Maximum Rates.

Strickland Experts – up to the maximum allowable for CJA counsel;

Psychiatrists and other medically licensed mental health experts -- \$275/hour;

Other forensic experts -- \$200/hour;

Psychologists (Ph.D.) -- \$200/hour;

Any expert testifying at a court proceeding shall receive eight times the hourly rate per

full day or four times the hourly rate per half day, or the actual number of hours, whichever is less. Absent court and Judicial Council approval, experts may not exceed the maximum rates.

8. Internal Staff Division of Labor. There should be reasonable division of labor between counsel and other staff to avoid both duplication of effort and excessive staff conferencing. Counsel should minimize time claimed for such items as internal conferences and memos, coordination between co-counsel, and coordination between counsel and staff, such as investigators and paralegals. Compensation will not be approved for unreasonable claims in these areas.

9. Attendance by Multiple Staff at Court Hearings. With the exception of evidentiary hearings, only one counsel will be compensated for attendance at court hearings unless otherwise ordered by the court. Compensation will not be approved for attendance at court hearings by additional support staff, including law clerks, paralegals and investigators without permission from the court.

10. Attendance by Multiple Staff in Sessions with Experts, Service Providers and Witnesses. Unless prior permission is granted by the court, no more than two persons (two attorneys or one attorney and one paralegal or investigator) will be compensated for time expended in interviews and meetings with experts, service providers and/or witnesses.

11. Client Visits. In cases where one attorney is appointed from within a district and another attorney is appointed from outside of the district, whenever possible, the counsel nearest the client should conduct most of the client visits.

12. Preliminary Juror Misconduct Investigation. There is no presumption that a judge will approve juror misconduct investigation. A judge may approve a maximum of 40 hours for such preliminary investigation if it is deemed appropriate, necessary, and within the scope provided by the local rules of the district court.

13. Resolving Discovery Issues. The preferred method for resolving discovery issues is for parties to meet and confer and for the court to then resolve the issues with less than formal discovery motion hearings. Counsel should be encouraged not to file formal discovery motions without first consulting with the court.

14. Specificity in Supporting Timesheets. In order to assist the court in reviewing vouchers, each time entry shall reflect discrete individual tasks and shall not simply list multiple tasks performed in a specified block of time. Information should be provided in detail sufficient to permit meaningful review, without violation of the canons of ethics or disclosure of attorney work product. Counsel should consult with the court regarding the level of specificity required in the voucher's supporting documentation.

15. Couriers, Messengers and Delivery Services. The use of couriers, messengers and other premium delivery services (*e.g.*, Express Mail, Federal Express, U.P.S., etc.) is discouraged unless there is a genuine necessity for this service. Receipts for all such services are required.

16. Reimbursement for Copying Charges. In-house copying is reimbursable at a rate of \$.10 per page.

17. Reimbursement for Computerized Legal Research. Computerized research fees are considered office overhead, as are other fees for library items. All CJA panel attorneys are expected to subscribe to a flat-fee research plan and the court should only provide reimbursement for computerized research when an explanation is provided -- *e.g.*, that fees imposed are outside the scope of the flat fee plan or why a flat fee plan is not feasible.

18. Judicial Council Review of Budgeted Cases. As an additional response to the concerns of the Judicial Conference of the United States, the district judges on the Judicial Council will review all budgets that have been approved by the district court. Each district judge on the Council will receive an equal share of the total number of budgets and will not be assigned budgets from their own district.

This review process includes budgets for both new cases and cases that are already open. The Council will also review any significant modifications to these budgets. A significant modification is defined as a ten percent (or more) increase in the total amount of the budget or \$15,000, whichever is less. However, the council is not required to review and consider for approval an attorney hourly rate increase that has been approved by the court, as long as the increase is within the approved rates described in section 3 above. The council is also not required to review a previously-approved budget that was modified solely as a result of a new attorney hourly rate, even if the new rate results in a modification to the budget that is more than ten percent or \$15,000.

Initial review of the budgets is done by the Capital Case Committee, appointed by the Chief Judge. Budgets are reviewed quarterly by the Committee which then makes recommendations to the assigned district judges on the Judicial Council prior to their next meeting. The recommendations can be either to accept the budget as approved by the district court, request additional information from the district court and/or attorney, or direct that the budget be modified. The Committee can also recommend that the approval of a budget be deferred if the budget is incomplete in some way. After any discussion deemed necessary by the assigned district judges, the Judicial Council will approve (or disapprove) the submitted budgets. This information is communicated to the presiding judges shortly thereafter.

As there can be a significant lapse between the time petitioner's counsel submits a budget to the court and the Judicial Council approves that budget, neither counsel nor the court is expected to suspend work on the case while waiting for Judicial Council approval. However, the court should inform counsel at the beginning of the budgeting process that the Judicial Council will review the budget and will provide ultimate approval and that no work at rates above the prescribed maximum rates can be performed without prior judicial council approval.

Through the process of evaluating capital habeas budgets in the district courts, the Capital Case Committee will be able to construct guidelines that provide greater uniformity of CJA costs among the cases in each district. As an added benefit, members of the Committee are available to answer questions, provide guidance and/or meet individually with judges in the district courts that may need assistance.