

Update on eVoucher, Excess Compensation Cases & Budgeting

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Dennis Alerding

- Case Budgeting Attorney
- Located in the Office of the Staff Attorney- work at the district & COA level-My Office is in Potter Stewart Courthouse in Cincinnati- I REVIEW ALL VOUCHERS IN EXCESS OF THE STATUTORY MAXIMUMS TO FACILITATE THEIR APPROVAL BY THE COA & ASSIST CJA COUNSEL IN THE PREPARATION OF CAPITAL & MEGA-CASE BUDGETS
- Program started 15 yrs ago- Bob Ranz
- I started as the Sixth Circuit's Case Budgeting Manager 5/1/19- always available Dennis.Alerding@ca6.uscourts.gov & (513) 564-7358
- Prior to 2019, I was always involved in the Crim Justice System-State PD in Kentucky and Ohio – 1995-2015. CJA Panel KYED – 1995-2019; OHSD – 1996-2010.

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What is an excess compensation case?

- Any non-capital felony representation in which attorney compensation exceeds the statutory maximum of \$12,800
- Approximately 75 hours of attorney time
- The statutory maximum includes your compensation as well as any prior CJA attorney's compensation- If appointed as 2ND COUNSEL WILL LIKELY BE EXCESS

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Three rules of excess compensation cases

- Submit a CJA 26 form when you submit your voucher-includes interims-attach to DOC section of eVoucher
- WHY-1st -Pursuant to Statute 3006A- The district court & COA must certify that the case involves *extended or complex representation and the amount certified is necessary to provide fair compensation- the 26 acts as your Certification-*
- All payments must be approved both by the presiding judge & the Chief Circuit Judge or his designee, which here is Judge Jane Stranch (Ron Gilman). I review the approved excess voucher and write a rec for Circuit approval-the CJA 26 is my primary source of information to do so

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Voucher best practices

- SO THE 2ND REASON WHY YOU MUST DO A CJA 26 excess compensation memo is-THE 26 IS MY PRIMARY SOURCE OF INFORMATION TO ADVISE THE COA TO SIGN OFF- IT BEHOOVES YOU TO CONVINC ME WHY
- Detail is important- Judge & I need to know what about the case justifies compensation over the statutory maximum-don't write a book- rather a concise explanation – type of case, most significant charge; nature, format & extent of discovery; motions done or contemplated, language issue, MH issues, client access (SHU or client location), whether cooperation/Safety Valve proffers are a factor, difficult client/family
- Describe your work in the "Services" section- e.g. discovery-describe what you reviewed-not just "reviewed discovery" in CJA 26 LMK format, videos, terabytes, nature ESI or ESI issues
- We want you to be compensated promptly -facilitates my review & ability to explain to the Court
- Remember bill in .1 increments-can group e-mails for the day-saves you time-
- WORD OF CAUTION-don't round things off- judges are not idiots- if most of your entries are in full ½ OR hour amts they know you rounded it off- some have issues with that-keep contemporaneous & accurate records of your time!

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Common Issues in Excess Compensation and Budgeted Cases

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Associates and non-appointed co-counsel

- Associates and non-appointed co-counsel are a great cost-saving resource, in addition to enabling you to take on more CJA cases and maintain your retained practice
- Great asset to acquire a 2nd atty to assist in complex case-level the playing field
- You must seek **prior** approval to use an associate if counsel is not a partner or associate in your office.
- Generally, you may not charge more than 80% of the hourly CJA rate for your associate's work, unless that associate is a CJA panel member-
 - If your associate is a panel member, they get the full panel rate
 - Several districts have a mentee program rate – rates vary but 80% is used in some
 - Associate use is a great manner in which to facilitate the goal of panel diversity & re-stocking the greying panel for the future

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Service providers and expert witnesses

- Service providers include anyone who is not an attorney – paralegals, investigators, mitigation specialists, psychologists, computer forensics, etc.
- The Sixth Circuit and the Defender Services Offices **encourage** the use of service providers because they are cost-efficient and/or provide necessary expertise
- Effective 1/29/2020 there are circuit-wide presumptive rates for any type of service providers- Investigators-\$75-\$125; Paralegals \$75-\$125; Mitigation Specialists \$125-\$175- interpreters paid \$50-\$71 on ½ & full day basis- 16.5 cents word translation
- I can approve excess- you must show “value added”-Spanish speaking, IT
- If you have questions about what a reasonable rate for a particular type of expert or service provider would be, or need a referral, please contact me

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Approval and payment of service providers

- For service provider expenditures over \$900, you must get **prior** approval from the District Court
- Over \$2,800, you must get **prior** approval from the District Court and the Circuit-this actually means me b/c once the district court approves - the voucher request come to me
- This is cumulative - If a service provider's total compensation is over \$2,800, their vouchers must be approved by the District Court and the Circuit- again I'm the conduit
- Providers cannot double bill i.e. bill for travel & work – Incumbent on you to check their billing- you are certifying it
- Approval is acquired by creating an "AUTH" in eVoucher, you must then create a CJA 21 & upon approval of the AUTH link the 2- Instructions on the district's website under CJA
- In any large provider matter you should give your service providers an Engagement letter with the terms of their service-protects you- attached is a sample-ACCT-diff rates

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Mitigation Experts in Non-Capital Cases

- I want to disabuse you of the belief that a Mitigation Expert is a necessity in every case- this has been a hot potato issue with the Judiciary on a national basis- to get a much fuller grasp on the evolution of this growing trend I attended the National CJA Rep Conference in Philadelphia-My fellow CBA's & I do not agree, based both on our experience & interaction with the Judiciary in our respective Circuits, with the Mitigation Specialists' mantra of every case needs a MS-
- This is our takeaway-unlike a Capital Case you must have **an articulable basis** concerning something you have discerned concerning your client that warrants further specialized investigation- it is NOT a substitute for you doing your jobs
- You must be able to answer these three questions to the Court & my satisfaction to acquire approval for & the extent of funding for a mitigation specialist in a Non-Capital case:
- What work has the attorney done that would suggest that further work by a mitigation specialist would be helpful?
- Is there room to negotiate the Guideline Range or a specific articulable basis for a variance for mitigation to make a difference?
- What does the attorney specifically expect the mitigation expert to do?
- If you can answer these questions- I'm totally in & will go to bat for you as you know I can & do- if you can't it's a NO

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Discovery and technology

To provide constitutionally effective assistance of counsel, you must have the technological capability, resources and facilities to manage cases where discovery comes in giga & terabytes which contains electronically stored information you need:

- Sufficient hardware to enable discovery storage and review discovery fast
- Familiarity with the ESI Protocol- I attached DOJ Protocol & Judges Handbook on Discovery & ESI- USE IT!- Rule 16.1 allows judges to Order the gov't to comply cite it in your requests
- That can make for another lecture- but for one they must provide the ESI particularly social media
- You need discovery review and litigation support software - Adobe Acrobat Pro, dtSearch, CaseMap & TrialDirector-NLST provides significant discounts to acquire
- Online discovery review platforms such as Casepoint – NLST has a national contract for it- its paid for by them not the district court
- IF YOU HAVE TROUBLE REVIEWING DISCOVERY-WHAT ABOUT YOUR CLIENTS?
- COVID PRESENTED NEW CHALLENGES- WE HAVE MET THEM & HAS ALLOWED US TO CATCH UP WITH THE VOLUME & FORMAT DISCO IS NOW PROVIDED IN-WE SUCCEEDED IN ACQUIRING APPROVAL FOR INDIVIDUAL LAPTOPS FOR INCARCERATED CLIENTS in multiple districts

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National Litigation Support Team

- Resource for CJA attorneys
- CJA panel software discounts (PC software only)
- Individualized training and limited direct case assistance
- B/F REQ CDA YOU **MUST** CONTACT NLST TO DISCUSS
- NLST IS THE CONDUIT FOR ACQUIRING A CDA-THIS IS MANDATED BY STATUTE- THE NLST MUST APPROVE ANY LITIGATION IN EXCESS OF 10,000
- You can contact me to discuss whether acquiring a CDA is appropriate & I will assist you-ltd number of CDA's nationwide has necessitated CDA's be reserved for multi-defendant or capital cases-in individual cases I can work with you in acquiring contract discovery platform coordinators with the assistance of NLST-
- They are fantastic – this is their contact info- Sean Broderick & Kelly Scribner

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NLST contact information

www.fd.org/litigation-support

Kelly Scribner

kelly_scribner@fd.org

510-435-9979

Sean Broderick

sean_Broderick@fd.org

510-637-1950

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Out of State Client Travel & Expenses

- The U. S. Marshall's Service has the statutory obligation to transport financially eligible defendants to the place of court proceedings but is not authorized to fund lodging or meals in-district or return travel (See 18 U.S.C. 4285)
- CJA funding is also not available to assist with court proceedings or other non-representational services- i.e CJA will not pay for your client's return trip, lodgings or meals for Court proceedings – INSANE- Legislation is proposed to "fill this gap"-
- SO WHAT CAN YOU DO?
- While CJA funds cannot be used for the sole purpose of facilitating a CJA client's court appearance, an **"independent defense-specific purpose for client travel"** could support CJA funding of the client's return trip & lodging
- EXAMPLES- PLEA(DISCUSS SENTENCING ISSUES) SENT(DISCUSS PLACEMENT/SURRENDER/PROGRAMS)
- YOU MUST ACQUIRE A PRIOR COURT FINDING THAT A "BONA FIDE INDEPENDENT DEFENSE PURPOSE EXISTS" IN AN ORDER SO FINDING –YOU MUST MAKE A PRIOR APPLICATION TO GET REIMBURSED FOR LAYING OUT FUNDS

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Help on the Way-Electronic Fund Transfers

- As part of its FY 2024 budget request, the Judiciary through DSO is seeking a legislative provision to amend 18 U.S.C. 3006A to allow payments to CJA counsel & their service providers by EFT
- Enactment of this provision will facilitate the Judiciary's transition from paper checks to a safer, more secure & cost efficient direct deposit of payments through EFT for Panel members & their service providers
- When- Who knows
- But be on the look-out for correspondence from your Panel Reps to sign off on a letter to your local Congressperson to support the proposed legislation that will be in the 2024 budget- it's the kind of thing that bi-partisan support might actually happen on

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Case Budgeting Basics

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Which cases should be budgeted?

- All capital or potential capital cases MUST BE BUDGETED
- Non –capital “mega-cases” –where the attorney hours are anticipated to exceed 300 or the total cost is over \$46,000
- When you receive a “no seek” in a Capital case you should contact me to discuss the case status & determine if preparation of a mega case budget is appropriate- 30 is always a 30- Additionally you must notify the clerk- eVoucher can't change the rate automatically w/o the clerk knowing its a no seek

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What is a case budget?

- Tool to get the resources you need in the most cost-intensive cases
- Three page spreadsheet IN XL- I attach a blank XL mega-case budget form to your materials
- 1ST PAGE Covers attorney time – it basically tracks the CJA 20- 2ND PAGE attorney travel & expenses, 3RD PAGE service provider rates, time, travel & expenses
- Budgeted in phases-pre-trial, trial & sentencing- with supplemental budgets available- In Capital cases I request 6 month review-
- Provides all necessary prior approval in one document- Still must do AUTHS & CJA 21's-CHANGE COMING THIS YR-a new version of eVoucher is to be implemented later this year integrating eVoucher & Budgeting-

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Some advantages of case budgeting

- Once a budget is approved interim vouchers are approved without further application to the Court
- Circuit-level review of interim voucher isn't required
- Assistance of the CBA (YOURS TRULY) in getting through the process & strategize the case
- I'm available to make expert referrals and advise regarding rates
- e-mail or call me-I'll send you the XL, e-mail back & I'll send an e-mail to schedule a convenient date for us to have budget conference by phone and complete the budget
- Opportunity to show the Court the amount of work required and find out in advance what the judge will pay for
- Demonstrate for the Court your cost-consciousness and accountability
- Commence early focus & strategy for you case

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You should think about budgeting if:

The anticipate attorney hours exceed 300 or the total cost with service providers exceeds \$46,000

The AUSA starts talking about discovery in terms of hard drives, gigabytes or terabytes

- There is a complex case order-You are requesting permission to submit interim vouchers
- RICO, no-seeq Capital, multiple acts of violence, conspiracy, complex fraud charges, multiple defendants, a CDA is assigned
- You want to use more than one service provider
- The trial is expected to take more than two weeks

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When should I think about budgeting?

- For capital or potentially capital cases, as soon as you are appointed (even pre-indictment)-we will immediately give you a "Seed" budget to establish your team
- For non-capital cases, as soon as you get the sense that this case might require more than 300 hours of your time or significant service provider expenditures for total cost of over \$46,000
- Budgeting can start at any time, but it is more useful earlier in the case-facilitates cost efficiency, ESI issues, whether a CDA or contract discovery attny needed & sharing resources

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Key cost-containment tools for budgeting

- GUIDE TO JUDICIARY POLICY STATES-Case budgeting SHALL not reduce the quality of representation which the courts have come to expect from CJA panel members-IT'S YOUR FRIEND NOT AN IMPEDIMENT
- Finding cost-efficient ways to get through large volume discovery
- Shopping around and negotiating hourly rates for experts
- Using associates, paralegals and service providers
- Identify opportunities to share service providers or minimize duplication of work in multi-defendant cases-e.g. STATE JAIL CALL
- Advance planning
- Taking things one step at a time

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How do cases get budgeted?

- REFERRAL TO THE CBA BY THE COURT, CLERK OR REQUEST BY COUNSEL TO ME TO DISCUSS
- Counsel confers with me, I forward you a case budget in XL format- counsel prepares a draft budget spreadsheet and returns to me-
- Once I receive the completed budget I will e-mail you to schedule a budget conference call and finalize the budget proposal

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Other resources for CJA attorneys

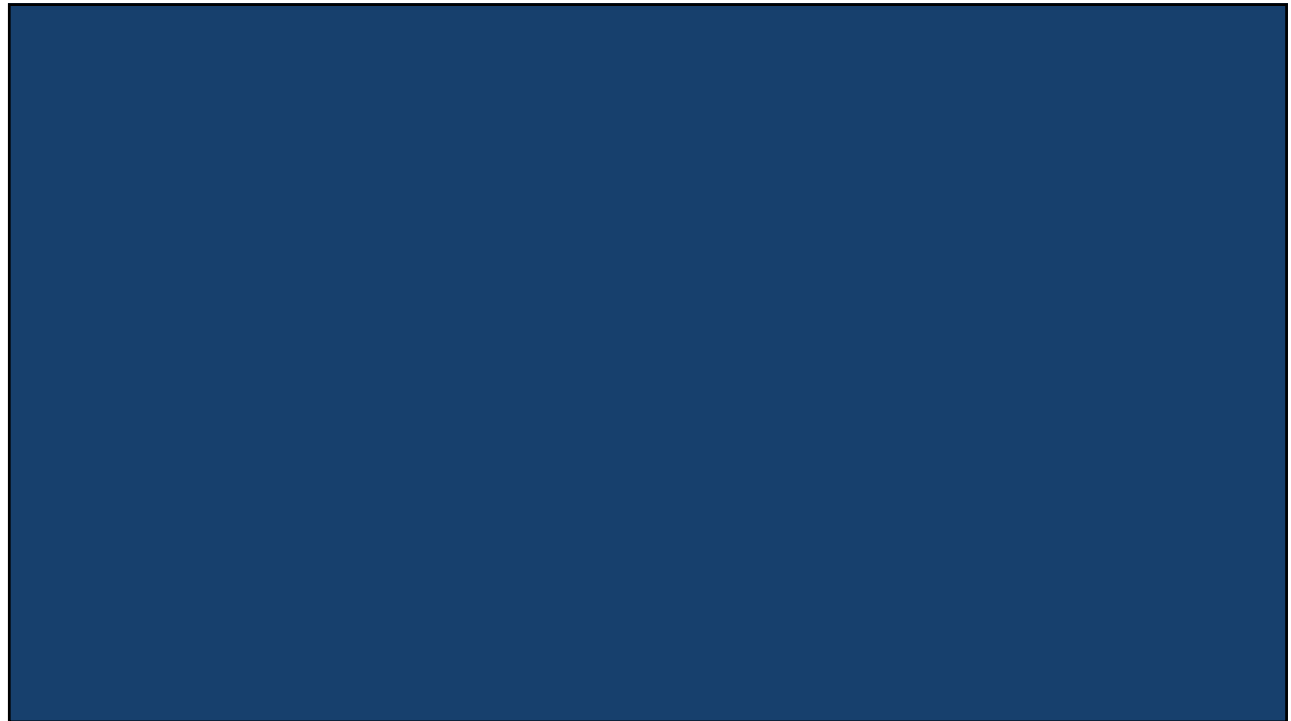
- Defender Services Office
 - Training Division – www.fd.org
 - Legal & Policy Division Duty Day Attorney – (202) 502-3030
- CJA Guidelines – available on www.uscourts.gov

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If you have a case that may be appropriate for budgeting or have CJA-related questions, please contact me:

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(513) 564-7358

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