

Judicial Conference of the United States Committee on Defender Services

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September 30, 2019

MEMORANDUM

To: Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrate Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts of Appeals
Senior Staff Attorneys
Circuit CJA Case-Budgeting/CJA Supervising Attorneys

From: Judge Raymond J. Lohier, Jr.
Chair, Judicial Conference Committee on Defender Services

Judge Eric F. Melgren
Chair, Committee on Defender Services Budget Subcommittee

RE: REVISED EXPERIENCE-BASED HOURLY RATE RANGES FOR EXPERTS AND SERVICE PROVIDERS IN CJA MEGA CASES

The purpose of this memorandum is to provide notice that the Judicial Conference Committee on Defender Services (Committee), at its June 2019 meeting, approved a recommendation to update the experience-based hourly rate ranges for certain experts and other service providers (collectively “service providers”) in Criminal Justice Act (CJA) “mega cases,”¹ which the Committee adopted as a cost-containment measure in December 2013 and began implementing in 2014. *See* “Cost-Containment Initiatives Regarding CJA Service Providers,” February 26, 2014, available at <http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/cost-containment-initiatives-regarding-cja-service-providers>.

¹ CJA panel attorney mega cases are representations that qualify for case budgeting under the CJA Guidelines, which include all capital representations and non-capital representations that appear likely to become, or have become, extraordinary in terms of potential cost—i.e., attorney hours are expected to

The Committee's experience-based ranges were developed to serve as presumptively reasonable, national hourly-rate ranges for five categories of service providers commonly used in CJA mega cases: (1) law students, (2) investigators, (3) paralegals, (4) mitigation specialists, and (5) jury consultants. The ranges apply in both CJA panel attorney mega cases and federal defender organization (FDO) mega cases (*see supra* note 1) and were devised in 2013 with extensive input from an expert panel of Defender Services program stakeholders and working and advisory group members.

The Committee adopted presumptive ranges in December 2013 in an effort to reduce service provider costs in potentially high-cost CJA representations in response to severe budgetary constraints that the judiciary experienced from FY 2012 through FY 2014.² The Committee's February 26, 2014 memorandum announcing the policy urged courts to require adherence to the experience-based ranges in CJA mega cases and provided guidance on applying them. Importantly, the memorandum also noted that while the ranges were devised to achieve cost-efficiencies, the Committee expressly sought to ensure that they would permit continued provision of high-quality representation under the CJA.

A reexamination of the 2013 experience-based ranges was undertaken in 2018 in response to reports from Defender Services program stakeholders indicating that the 2013 ranges are no longer sufficient to assure provision of CJA representation consistent with the best practices of the legal profession. As with the development of the 2013 ranges, the reassessment was accomplished with significant input from Defender Services program constituents.

The reassessment involved a six-month, national survey of relevant stakeholders (including, federal defenders, CJA panel attorneys, CJA service providers, and circuit CJA case-budgeting attorneys) and culminated in recommending that the Committee: (1) reiterate and reemphasize the need for flexibility in applying the ranges (as some courts have interpreted them as absolute ceilings); (2) establish a practice of regularly reviewing the experience-based ranges to ensure that they continue to permit retention of qualified service providers; and (3) increase the hourly rate ranges for paralegals, investigators, and mitigation specialists, as the survey revealed that currently the 2013 ranges often impede retention of these types of service providers for CJA panel attorney mega cases.

exceed 300 or total expenditures (for appointed counsel and services other than counsel) are expected to exceed an amount equal to 300 times the prevailing CJA panel attorney non-capital hourly rate, rounded up to the nearest thousand. Federal defender organization (FDO) mega cases are representations whose anticipated costs cannot be subsumed within an FDO's existing budget and whose funding requirements exceed authority that the Committee has delegated to DSO to increase an FDO's budget. Because FDOs are funded through budgets approved by the Committee, service provider funding requests in FDO mega cases are reviewed by the Committee's Budget Subcommittee rather than by presiding judges, as is done in CJA panel attorney mega cases.

² This includes the period when automatic budget reductions mandated by sequestration severely impacted the Defender Services program, resulting in temporary suspension of CJA panel attorney payments, a temporary reduction in CJA panel attorney hourly rates, and furloughs and layoffs of federal defender office staff.

At its June 2019 meeting, the Committee approved the recommendation and adopted the following adjusted ranges: (1) paralegals \$75-\$125 (increased from \$25-\$55), with the higher end of the range available for paralegals with the IT skills to perform complex litigation support; (2) investigators \$75-\$125 (increased from \$55-\$100), with the higher end of the range available for investigators with specialized skills, such as foreign-language fluency or mastery of one or more relevant areas of forensic science; and (3) mitigation specialists \$125-\$175 (increased from \$75-\$100), with the higher end of the range available for mitigation specialists with specialized skills, such as foreign-language fluency, particular mental health expertise, or mastery of important legal developments, such as the *Atkins* intellectual disability exemption from execution.³

Because the reassessment indicated that currently there is no need to increase the ranges for jury consultants and law students, the Committee did not increase the ranges for those two groups of service providers. The Committee also agreed to reiterate the need for flexibility in applying the ranges and to review the ranges every two to three years, or sooner if necessary.

The Committee recognizes that the amended ranges for paralegals, investigators, and mitigation specialists reflect significant increases above the 2013 experience-based ranges. The Committee adopted the increases for several reasons, including:

- the 2013 ranges were based on rates that had been in effect for several years prior to 2013 and have remained unchanged (in contrast to CJA panel attorney rates which have risen steadily) even as the duties, skills, and knowledge required of service providers within this group have grown more complex;⁴
- paralegals, investigators, and mitigation specialists with specialized skills are often critical for CJA mega cases and, in recognition of their importance, some federal districts and circuits already authorize hourly rates higher than the 2013 experience-based ranges for these service providers;
- the revised ranges take into account the full spectrum of services that might be needed of paralegals, investigators, and mitigation specialists—from routine to highly specialized—and thus encompass rates appropriate for tasks and levels of specialization from across the entire spectrum;
- there is a relative scarcity of private practitioners within these three categories of service providers, and the revised ranges may help expand the pool of qualified private practice service providers, which would facilitate greater parity between CJA panel attorneys and FDOs in the provision of representation in CJA mega cases; and

³ See *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴ For example, paralegal functions have grown more technological and have expanded to include IT skills necessary to perform complex litigation support. Similarly, investigators with specialized expertise, such as foreign-language fluency and/or mastery of one or more areas of forensic science (e.g., forensic psychology, digital forensics) are increasingly necessary in CJA mega cases. Mitigation specialists are required to have expert knowledge of continually shifting medical, mental health, sociological, and legal concepts; participate in ongoing, exhaustive investigations; and develop and present evidence at multiple stages of long-running cases.

- judicial officers retain the authority to approve rates outside the revised ranges for good cause and are not precluded from authorizing lower rates, e.g., for less-experienced associate staff performing work under the direction of more experienced professionals.

Importantly, the Committee's original guidance on applying the experience-based ranges remains unchanged: Presiding judges retain the discretion to approve rates outside the experience-based ranges where justified by case-specific circumstances, such as unique qualifications of service providers or relative scarcity of service providers, and the Committee encourages all judicial officers to interpret and apply the ranges flexibly based on the individual circumstances of each case.

A chart of the revised experience-based ranges and accompanying guidance are attached. If you have any questions or concerns, please feel free to contact the Defender Service Office, Legal and Policy Division at (202) 502-3030 or DSO_LPD@ao.uscourts.gov.

Attachment

cc: CJA Panel Attorney District Representatives