

Office of the Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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TO: Criminal Justice Act Audit Clerks
Courtroom Deputy Clerks

FROM: Larry Baerman

DATE: January 28, 2002

SUBJECT: CJA Excess Voucher Payments

CC: Office Managers, Supervisors
Alex Bunin, Federal Public Defender

The Second Circuit has implemented a new procedure governing district Court excess CJA vouchers. As you know, many requests for CJA payments that exceed the CJA cap are returned to the CJA-Appointed lawyer because the reviewing judge in the Second Circuit - (currently Judge Sonia Sotomayor) - has determined that a lawyer's supporting affidavit is incorrect, incomplete, or missing altogether. In an effort to assist those attorneys preparing their affidavits and to eliminate problems which can result in delays in payments, the Circuit has developed guidelines that lawyers can use in preparing their affidavits. Attached is a copy of the guidelines that should be provided to lawyers who plan to submit CJA excess vouchers.

I would like you to provide a copy of these guidelines with all CJA appointments. My office will mail a copy to all CJA counsel that presently are assigned cases. I will let you know once that mailing has been completed, in the meantime, if you receive a voucher that exceeds the maximum allowance (see attached copy of the Guide to Policy and Procedure) please contact the lawyer and fax them a copy of the guidelines.

The Circuit will no longer return unprocessed vouchers to the district courts when an affidavit is incomplete or missing. Instead, they will notify the attorney themselves and assist them with the completion of the affidavit in accordance with these guidelines.

A copy of these guidelines will be posted on our external web site under CJA.

What constitutes a deficient affidavit

In general, a deficient affidavit is one that does not provide any explanation or justification as to why the claim is in excess. These affidavits may describe some or all of the following:

- Refer to the attached time sheet(s) as an explanation, or recite the time sheet in length as a justification ("I spent 2.5 hours doing X, 0.5 doing Y," and so on)
- Attests that the time was "necessary and reasonable in order to provide meaningful and effective representation in light of the substantial issues" but does not go any further
- State that "several issues" were present and/or "several charges" were involved, but fail to explain these in light of the excess claim

These affidavits are incomplete. They only state what the (approving) Circuit Judge can already tell from either a time sheet or an additional attachment(s). They do not give the Judge the insight that he/she needs to determine if the excess claim is justifiable.

What constitutes an acceptable affidavit

An acceptable affidavit is one that succinctly justifies an excess claim. It should contain statements addressing some or all of the following (depending on the circumstances of the case):

- Description of the nature of the complexity of the case, and problems encountered with them (i.e., voluminous discovery, lengthy proffer sessions with the government, etc.)
- Description of the substantial issue(s) and their complexities
- Explanation of the charge(s), and why they were complex
- Why extra work was needed and performed
- Accessibility of the defendant
- Justification of the excess claim for any other circumstances involved in the work performed

An acceptable affidavit does not necessarily need to consist of several pages, as long as some or all of the above-mentioned issues are addressed. The affidavit should offer sound reasons to support the excess, and not just refer to the completed time sheets and/or state that the claim was necessary "in order to provide meaningful representation."

In addition, please note:

- Each voucher submitted for approval to the approving Circuit Judge is examined individually and requires its own affidavit - regardless of whether it is an interim claim, part of a package of vouchers from a single attorney, etc.
- Attorneys will be contacted by the Court of Appeals' Clerk's Office should an affidavit be deemed deficient. A supplemental affidavit will be requested, and upon receipt, resubmitted to the approving Circuit Judge. This will lengthen the reimbursement process. Thus, adherence to the above guidelines is encouraged.

B. Case Compensation Maximums.

(1) General.

- (i) Applicability and Exclusions. The Federal Courts Improvement Act of 2000, effective November 13, 2000, amended subsection (d)(2) of the CJA to increase the case compensation maximum amounts for attorneys. The new case compensation maximum amounts are indicated in paragraph 2.22 B(2) below. All compensation limits are for each attorney in each case. The case compensation limits are not applicable in federal capital cases and in death penalty federal habeas corpus proceedings. (See paragraph 6.02 A.) As further explained in paragraph 2.22 B(3), the CJA places limitations on the general authority of presiding judicial officers to unilaterally approve attorney compensation. Payments above case compensation limits referred to in subparagraph (2) below may be authorized when certified by the presiding judicial officer and approved by the chief judge of the circuit. The chief judge of the circuit is permitted to delegate this approval authority to another active circuit judge. Presiding judicial officers should certify excess compensation payments to counsel whenever in their judgment the case involves extended or complex representation and the amount certified is necessary to provide fair compensation. (See paragraph 2.22 B(3)). Case compensation limits apply only to attorney fees. There is no limit on the presiding judicial officer's authority to approve the reimbursement of expenses of counsel and the chief judge of the circuit has no role in authorizing the payment of such expenses. (See paragraph 2.27 for an explanation of reimbursable out-of-pocket expenses.)
- (ii) Change in Offense Classification Level. If a case is disposed of at an offense level lower than the offense originally charged, the compensation maximum is determined by the higher offense level.
- (iii) More than One Counsel. In difficult cases in which the court finds it necessary to appoint more than one attorney, the limitations apply to each attorney.

- (2) Specific Proceedings.
- (i) Felonies [except federal capital prosecutions].
- \$5,200 for trial court level.
\$3,700 for appeal.
- (ii) Misdemeanors [including petty offenses (class B or C misdemeanors or infractions) as set forth in subsection (a)(2)(A) of the Act].
- \$1,500 for trial court level.
\$3,700 for appeal.
- (iii) Proceedings under section 4106A of title 18, United States Code [in connection with paroled prisoners transferred to the United States].
- \$1,200 for representation before the United States Parole Commission.
\$3,900 for appeal.
- (iv) Proceedings under sections 4107 or 4108 of title 18, United States Code [for counsel and guardians ad litem providing services in connection with prisoner transfer proceedings. See Regulations for the Appointment of Counsel Pursuant to a Prisoner Transfer Treaty, which appears at Section B of this Volume, regarding appointment of counsel or guardians ad litem under 18 U.S.C. §4109].
- \$1,500 for each verification proceeding.
- (v) Pre-Trial Diversion.
- \$5,200 if offense alleged by the U.S. Attorney is a felony.
\$1,500 if offense alleged by the U.S. Attorney is a misdemeanor.
- (vi) Proceedings under section 983 of title 18, United States Code [for services provided by counsel appointed under 18 U.S.C. §983(b)(1) in connection with certain judicial civil forfeiture proceedings].
- \$5,200 for trial court level.
\$3,700 for appeal.

(vii) Non-capital Post-Conviction Proceedings under sections 2241, 2254 or 2255 of title 18, United States Code.

\$5,200 for trial court level.

\$3,700 for appeal.

(viii) Other Representations required or authorized by the CJA.

\$1,200 for trial court level.

\$1,200 for each level of appeal.

[This category includes but is not limited to the following representations:

(a) Probation Violation;

(b) Supervised Release Hearing [for persons charged with a violation of supervised release or facing modification, reduction or enlargement of a condition or extension or revocation of a term of supervised release];

(c) Parole Proceedings under chapter 311 of title 18, U.S.C.;

(d) Material Witness in Custody;

(e) Mental Condition Hearings Pursuant to chapter 313 of title 18, U.S.C. [with the exception of hearings pursuant to sections 4241 and 4244 of title 18, U.S.C., which are considered part of the case in chief with no separate compensation maximums applying. (A chart detailing the treatment for the purpose of compensation of representation at each hearing pursuant to chapter 313 is included as Appendix H.)];

(f) Civil or Criminal Contempt [Where the person faces loss of liberty];

(g) Witness [before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, where there is a reason to believe either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty];

- (h) International Extradition [under chapter 209 of title 18, U.S.C.].
 - (ix) Ancillary Matters. Representation in ancillary matters shall be compensable as part of the representation in the principal matter for which counsel has been appointed, and shall not be considered a separate appointment for which a separate compensation maximum would apply.
- (3) Waiving Case Compensation Maximums. Payments in excess of CJA compensation maximums may be made to provide fair compensation in cases involving extended or complex representation when so certified by the court or magistrate and approved by the chief judge of the circuit (or by an active circuit judge to whom excess compensation approval authority has been delegated).

In determining if an excess payment is warranted, the court or magistrate and the chief judge of the circuit (or an active circuit judge to whom excess compensation approval authority has been delegated) should make a threshold determination as to whether the case is either extended or complex. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex." If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is "extended."

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard: responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed; knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and injury thereto; any extraordinary pressure of time or other factors under which services were rendered; and any other circumstances relevant and material to a determination of a fair and reasonable fee.

C. Supporting Memorandum

- (1) Claim for Less than the Case Compensation Maximum. In any case in which the total compensation claimed is less than the statutory case compensation maximum, counsel may be required to submit a memorandum supporting and justifying the compensation claimed, whenever called for by local rule, standing order, or by the presiding judicial officer.

- (2) Claim for More than the Case Compensation Maximum. In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel shall submit with the voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. Upon preliminary approval of such claim by the presiding judicial officer, the court should furnish to the chief judge of the circuit a memorandum containing its recommendation and a detailed statement of reasons.