

RE: COST-CONTAINMENT INITIATIVES REGARDING CJA INVESTIGATORS, EXPERTS,
AND OTHER SERVICE PROVIDERS (**INFORMATION**)

In an effort to address costs in Criminal Justice Act (CJA) “mega cases,”¹ the Committee on Defender Services (Committee), at its December 2013 meeting, identified several areas for potential savings associated with the hourly rates, retention, and billing practices of investigators,

¹ A CJA panel attorney mega case refers to a representation that qualifies for case budgeting under sections 640 and 230.26 of the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), *Guide to Judiciary Policy*, Vol. 7, Part A: (a) all capital representations and (b) non-capital representations that appear likely to become or have become extraordinary in terms of potential cost (i.e., attorney hours are expected to exceed 300 or total expenditures are expected to exceed \$30,000 for appointed counsel and services other than counsel).

experts, and other service providers (service providers). The Committee developed three service provider cost-containment initiatives which it strongly urges courts to adopt (unless such practices are already in place) in CJA panel attorney mega cases, recognizing that cost-containment and efficiency efforts can be made while maintaining the quality of representation.

The following three initiatives are further explained in the attachments:

1. **Require the use of experience-based ranges (reasonable hourly rate ranges) for commonly used service providers and require further justification and the permission of the presiding judicial officer to exceed the ranges.** (See Attachment 1)
2. **Require counsel to use written retainer agreements for investigators, experts, and other service providers, setting forth details of their engagement, including the hourly rate, the approved number of hours, and contemporaneous time record requirements. A sample engagement letter (contents of financial arrangements) and recommended time sheet are included with the attachment.** (See Attachment 2)
3. **Require that privately retained investigators, experts, and other service providers bill travel time at 50 percent of the approved normal billing rate, subject to described exceptions.** (See Attachment 3)

These initiatives will be required in federal defender mega cases as well. A separate memorandum will be sent to federal defenders to explain how these initiatives apply to them in relation to the Committee's oversight of their budgets and grants.

To enable the Committee to identify and fashion well-informed decisions regarding issues involved with each initiative, it solicited the input from an expert panel of federal defenders, CJA panel attorneys, circuit CJA case-budgeting attorneys, the national mitigation coordinator, as well as the Administrative Office's Defender Services Office. Recognizing that each case is unique, a key component of the Committee's recommendations is that the presiding judge always retains the authority to exceed the recommended experience-based hourly rates or permit full compensation for travel time if the individual case warrants the exception.

To ensure proper notification and education about the initiatives to all interested stakeholders, a multi-step process has been designed to inform, explain, and reinforce the initiatives through a combination of in-person discussions, webinars, and trainings. This memorandum and one to be sent to federal defenders regarding their mega cases are among the early steps. Information about the initiatives has been provided during case-budgeting webinars held earlier this year (to be posted soon on the JNet) for judges and court staff and at the annual

Federal Defender Conference at the end of January 2014, and will be provided at the CJA Panel Attorney District Representatives Conference in early March 2014. Additional training will be provided through the creation of materials, presentations, and webinars (especially for CJA voucher reviewers). The federal defenders have been encouraged to conduct local panel attorney training on the initiatives.

Experience-Based Compensation Ranges for Certain Service Providers

Require the use of experience-based ranges (reasonable hourly rate ranges) for commonly used service providers in CJA mega cases¹ and require permission of the presiding judicial officer to exceed the ranges.

Experience-Based Ranges

| Category | Experience-Based Hourly Ranges |
|------------------------|---------------------------------------|
| Law Students | \$15-\$25 |
| Paralegals | \$25-\$55 |
| Investigators | \$55-\$100 |
| Mitigation Specialists | \$75-\$100 |
| Jury Consultants | \$150-\$225 |

To develop these experience-based hourly rate ranges, the Committee on Defender Services (Committee) received input from an expert panel of federal defenders, CJA panel attorneys, circuit CJA case-budgeting attorneys, the national mitigation coordinator, as well as Defender Services Office staff. These national ranges are intended to help contain costs, and still enable appointed counsel to find a qualified service provider within the experience-based ranges without diminishing the quality of representation.

The Committee recognizes that a critical component of establishing national experience-based hourly rate ranges is that the presiding judge has the authority to approve rates outside of the recommended ranges for demonstrated good cause. Factors that a court may wish to consider in determining whether to exceed an experience-based range include the uniqueness of the service or the service provider; the education, training, reputation, or specialization of the service provider; the availability, or lack of availability, of this or similar service providers; the seriousness of the case; any time limitations on the case that may affect how quickly the service needs to be completed; and any other factors relevant to the circuit or district.

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Established hourly rate ranges for certain service providers have been utilized by some circuit and district courts, including those with CJA circuit case-budgeting attorneys and CJA supervising attorneys, for a number of years. Recognizing that there are regional and geographic differences that influence the costs of a case, the Committee determined that trying to set national ranges for most or all categories of service providers would prove burdensome and result in ranges too large to account for the national variances. Instead, the Committee focused on the five categories of commonly used service providers, listed in the chart, that account for more than half of the CJA subsection (e) service provider expenditures each year. The Committee understands that a district or circuit may choose to use ranges already developed based on its particular geographic area. The chart should be utilized where no current experience-based ranges exist and can serve as a basis to evaluate existing ranges or to develop district or circuit specific ranges.

Engagement Letter for Service Providers

Require counsel in CJA mega cases¹ to use written retainer agreements for investigators, experts, and other service providers setting forth details of their engagement, including the hourly rate, the approved number of hours, and contemporaneous time record requirements.

Federal defender organizations are required by procurement regulations to use written engagement letters when retaining experts and service providers. Likewise, panel attorneys in mega cases should use written engagement letters/agreements² when they engage an investigator, expert, or other service provider (service provider) who will be compensated with CJA funds.³ This initiative would ensure that service providers have a clear understanding of: (1) their hourly rate of compensation, (2) the maximum number of hours or amount of compensation approved by the court, (3) the scope of the work for which they are engaged, and (4) other appropriate billing practices. Specifically, the engagement letter should include language pertaining to the possible reduced hourly rate for travel, as provided in Attachment 3.

In an effort to decrease instances when service providers, without prior approval, exceed an authorized limit (total hours or total compensation) established by the court, the engagement letter should also include language indicating that the service provider should not exceed the maximum number of authorized hours or dollar amount without prior written authorization from counsel and the approval of the court. The letter should explain that the service provider's voucher must be based on contemporaneous time records.

An exception to requiring the use of written engagement letters in CJA panel attorney mega cases would be permissible if the total compensation for the individual service provider is below the CJA dollar threshold requiring prior authorization for service providers (currently \$800, see CJA Guidelines § 310.20.30).

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² The terms of the engagement may be set forth in a letter, memorandum, or other form of writing.

³ Written engagement letters should also be utilized by retained counsel when they seek to use CJA funds to engage a service provider. See CJA Guidelines § 310.10.20.

To assist counsel, sample engagement letter language is included as part of this attachment. In an effort to assist judges and CJA voucher reviewers, an Expert and Service Provider Time Worksheet, which could be used by service providers when submitting compensation vouchers, is also included. The worksheet sets forth an itemized description of the work completed, categories to enter the number of hours for that work, and subtotals and totals for each column. The worksheet will be posted soon on the JNet and www.fd.org in automated formats.

Sample Engagement Letter: Contents of Financial Arrangements

Case name: _____

Case number: _____

The engagement of your services for this case is subject to the following:

- (1) You will be compensated at a rate of \$ _____ per hour [or specify some other fee arrangement], and [\$ _____ per hour for long-distance travel-related time that will be explained in correspondence to you]. The maximum payment amount authorized by the court as of this date for your services is \$ _____, which includes any expenses incurred by you.
- (2) You will submit your voucher(s) (CJA Form 21 in a non-capital representation and CJA Form 31 in a capital representation) to me, and it is my responsibility as counsel to certify to the court that the services were rendered. Payment for your services is subject to approval by the presiding judge and, in certain circumstances, the chief judge of the court of appeals. Approved payments are made by the Department of the Treasury out of the federal judiciary's Defender Services account, not by me or my law firm.
- (3) The presiding judge (and the circuit chief judge, if applicable) has discretion to reduce a voucher. Specific reasons include: (a) a mathematical error; (b) non-compliance with the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), *Guide to Judiciary Policy*, Volume 7, Part A, or court policies; and (c) a determination that the services claimed are unreasonable either in terms of the work performed or the amount of time and expenses submitted. Accordingly, this Engagement Letter is not a guarantee of payment for all services rendered or expenses incurred.
- (4) **Do not perform services or incur expenses that would result in an invoice in excess of the maximum payment amount authorized by the court** (as set forth in paragraph (1)). Doing so creates a risk that the court will not authorize the payment for the work done or expenses incurred in excess of the maximum authorized amount, even if the services performed or expenses incurred are necessary. You must advise me **before** you exceed the court's maximum authorized payment amount, and if I determine such additional work and/or expenses are necessary for the representation, I will seek approval from the court for a new maximum authorization level, before such work is performed or expenses incurred.
- (5) Travel expenses will be reimbursed on the basis of actual expenses incurred. Please consult with me regarding the maximum reimbursement amounts for travel expenses. Airline travel must be authorized by the court by my application. If airline travel is authorized, I will provide guidance to you regarding the purchase of a ticket.

- (6) Record Keeping – Consistent with CJA Guidelines § 320.90, you are required to maintain contemporaneous time and attendance records for all work/services billed, including work performed by associates, partners, and support staff, as well as expense records. These records should be submitted with your CJA voucher for payment, and must be retained for three years after approval of the appointed counsel’s or the service provider’s final voucher, whichever is later.

- (7) Unless otherwise authorized by the court, a voucher for services performed and expenses incurred for the representation will be submitted at the conclusion of your services. While the court attempts to process invoices as quickly as possible, there may be delays in payment due to workload and other factors.

- (8) Scope of Work – You are authorized to do the following work:

Accepted by: _____

Date: _____

Expert and Service Provider Time Worksheet in Mega Cases (02/14)

Case Name: _____

Case Number: _____

| DESCRIPTION OF WORK | | HOURS | | | | | | |
|----------------------------|-------------------------------|---|--|--|---|---|----------------|-------|
| Date | Brief Description of Services | Confer with Counsel, Client, Team Members, or Other (please specify in previous column) | Obtaining Records and Reports | Reading File, Records, and Reports | Investigative Work and Interviews | Research, Writing, & Records Analysis | Travel Time | Other |
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I hereby certify that this worksheet is for services rendered and is correct.

Name _____ Date Submitted _____ Page _____ of _____

Travel by Service Providers

Unless otherwise approved by the presiding judge, require that privately retained investigators, experts, and other service providers in CJA mega cases¹ bill travel time at 50 percent of the approved normal billing rate, subject to exceptions (A) and (B) below.

- (A) The first six hours traveling by automobile to, and the first six hours traveling by automobile from, a case-related destination (i.e., a destination relevant to the responsibilities or duties assigned to the expert or service provider by the attorney for the defendant).**
- (B) Reasonable travel time at or around the case-related destination in order for the expert or service provider to complete the responsibilities or duties assigned to the expert or service provider by the attorney for the defendant.**

Time spent performing case-related work while traveling, by any mode of transportation, is not “travel time” and should be compensated at the full (i.e., not reduced) hourly rate. Case-related work is work relevant to the responsibilities or duties assigned to the expert or service provider by the attorney for the defendant.

The Committee on Defender Services (Committee) is concerned that investigators, experts, and other service providers (service providers) should not be compensated at their full hourly rate for unlimited travel time, particularly if the service provider can work on a case while traveling but chooses not to work. Conversely, the Committee recognizes that for certain service providers, driving is an essential part of their primary duties, during which they are unable to actively work on a case.

A critical component of this initiative is that the presiding judge, upon application by counsel, may authorize payment at the full hourly rate for travel in appropriate circumstances. Examples of such instances may include when a medical doctor is retained and must leave his or her practice to fly to a prison to examine a defendant, or when service providers have to travel because of the requirements of the government (for example, prosecutors might not release evidence, such as photos and hard drives, to be sent to service providers, instead requiring the service provider to travel to the prosecutor’s office or a lab).

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The Committee does not recommend that courts utilize a blanket rule requiring a reduced travel rate for service providers in all situations. The Committee feels that its recommended exception for the first six hours traveling by automobile to, and the first six hours traveling by automobile from, a destination addresses many of the issues surrounding this initiative.² Additionally, once a service provider arrives at a distant location, driving around that area, or driving around the geographic area of the case, should be considered a core job responsibility and, therefore, not subject to a reduced hourly rate.

Notification of the reduced travel rate should be included in counsel's engagement letter with the service provider.

² As noted previously, service providers cannot work on a case while driving. Additionally, a blanket rule requiring a reduced hourly travel rate for all driving may cause service providers to travel less and rely on less effective means of accomplishing their duties, resulting in lower quality of representation (e.g., rather than arranging lengthy roundtrip travel to interview witnesses, the investigator or mitigation specialist may instead conduct a telephone interview of a witness when it would be important to evaluate the witness in person).