

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

) No. CV-XX-XXXX-XXX-XXX
)
) <u>DEATH PENALTY CASE</u>
Petitioner,)
)
vs.)
) EX PARTE COST
) MANAGEMENT ORDER
Respondents.)
)

IT IS ORDERED that, in addition to the Guide to Judiciary Policies and Procedures for administration of the Criminal Justice Act (CJA), Volume VII (Appointment of Counsel in Criminal Cases), the following rules shall apply in this case as supplementing and interpreting those guidelines:

I. COST MANAGEMENT

A. Budgeting

It is the intent of this Court to work with counsel in an effort to manage the costs of capital habeas litigation. In furtherance of this objective, Petitioners counsel are expected to prepare a budget for tasks to be performed by attorneys and paralegals, and expenses to be incurred for investigative, expert, and other services for each of the four phases of the case: Phase IB Preliminary Record Review; Phase IIB Preparation of Amended Petition; Phase IIIB Preparation of Traverse and Other Pleadings; and Phase IVB Evidentiary Development (if authorized by the Court). A case management conference (CMC) will be held in advance of most phases.

Phase I encompasses preliminary review and organization of the record, preliminary identification of claims, and preliminary investigation. Counsel are immediately authorized to assemble and review the record and to prepare a budget for Phase I. After the first case management conference, the Court will enter an order approving a budget for Phase I. *Counsel are also authorized to submit interim vouchers bi-monthly during Phase I and shall submit a final interim for Phase I and a proposed budget for Phase II at least seven (7) days prior to CMC #2, the date for which will be set at CMC #1.*

Phase II encompasses completion of issue identification and investigation, legal research, and preparation of the amended petition. Phase II is completed when the amended petition is filed. Counsel are authorized to submit interim vouchers bi-monthly during Phase II and shall submit a final interim for Phase II within 10 days of the filing of the amended petition.

Phase III encompasses preparation of the traverse, as well as any motions for evidentiary development. *The budget for Phase III shall be submitted to the Court within 10 days of the filing of Respondents Answer to the Amended Petition.* Counsel are authorized to submit interim vouchers bi-monthly during Phase III and shall submit a final interim for Phase III within 10 days of the filing of the traverse or any motions for evidentiary development, whichever is later.

If the Court grants any motions for evidentiary development (i.e., discovery or evidentiary

hearing), a CMC will be scheduled and a deadline set for submission of a Phase IV budget.

Budgets in this District must be prepared and submitted electronically. A Microsoft Excel-based spreadsheet has been developed to facilitate creation and management of budgets. If counsel do not have access to Microsoft Excel, counsel must contact the Court's Capital Case Staff Attorney immediately upon receipt of this Order. Similarly, if counsel has not attended an automated budgeting training session offered by the Court, counsel must contact the Court's Capital Case Staff Attorney to make arrangements for training and to receive an automated budgeting manual.

Upon entry of this Order, the CJA Voucher Review Analyst will electronically forward to *lead* counsel budget spreadsheets for Phases I-III (each phase has its own spreadsheet). Lead counsel shall complete the Phase I worksheet and send the file electronically to the CJA Voucher Review Analyst *at least seven (7) days prior to the first Case Management Conference*. In addition, counsel shall prepare and file with the Court, *ex parte* (without service on Respondents) and under seal, a detailed declaration in support of the proposed budget and a Confidential Case Evaluation Form (CCEF), which is attached to this Order. The declaration shall explain with specificity the basis for the time estimate in each budget category, including any requests for experts or investigators. See *infra* Section III.

The Court will review the proposed budget, CCEF and declaration, and may discuss the proposed budget with counsel during the case management conference. Once approved, the CJA Voucher Review Analyst will enter the amounts of the approved budget in the Authorized columns of the spreadsheet and return the file to all counsel electronically. This file will serve as the authorized budget as well as the mechanism for each counsel to generate interim vouchers for payment of fees and expenses. See *infra* Section II. Once a budget for a phase is approved, Petitioner's counsel may not seek amendment of the budget without explaining and documenting expenditures to date, as well as explaining with specificity the need for additional funding.

Please note that counsel will be compensated for budget preparation, but not for timekeeping or generation of interim vouchers. To obtain budgeting information or training, counsel should contact the District's Capital Case Staff Attorneys. Questions regarding submission of vouchers and compensability of specific tasks or expenses should be directed to the District's CJA Voucher Review Analysts.

B. Cost Effective Use of Staff

Appointed counsel are expected to use paralegals and other cost-effective means to minimize costs where attorney expertise is not required. Appointed counsel are not permitted to earn a profit from use of support staff. *See Guidelines for the Administration of the Criminal Justice Act*, Ch. 2, Pt. C and Ch. 3, Pt. B.

Independent contractors will be reimbursed for the amount actually paid unless otherwise authorized by the Court. In-house staff will be reimbursed based on the cost to the firm (including salary, benefits and overhead). ***Use of associates, paralegals, law clerks, summer associates, and law students must be pre-approved in connection with the budget.*** The Court expects that counsel will develop a reasonable division of labor between counsel, and between counsel and other staff, to avoid duplication of effort and excessive staff conferencing.

C. Maintenance of Files

Appointed counsel are expected to maintain the records and files in this case in an organized and accessible fashion to ensure that if substitution of counsel is required, duplication of efforts will be

minimized. The Court may condition final payment upon compliance with this requirement.

II. SUBMISSION OF CJA VOUCHERS

A. Interim Payment Procedures

Because of the expected length of this case and the anticipated hardship on counsel in undertaking representation for such a period without compensation, pursuant to § 2.30B of the *Guidelines for the Administration of the Criminal Justice Act*, the Court has authorized the submission of interim vouchers during the course of counsel's representation. Counsel shall request payment on CJA Form 30, Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel, as set forth in Section I(A), *supra*.

As noted previously, the Microsoft Excel-based budget spreadsheets also include a mechanism for generation of interim vouchers. The automated CJA Form 30 voucher contained in the program is designed to minimize attorney input. Once counsel has received the authorized budget spreadsheet file from the CJA Voucher Review Analyst, counsel will record time and expenses on the appropriate spreadsheet pages. All of the actual time and expense data entered in the spreadsheet automatically transfers to the voucher. Once counsel has completed the additional information needed on the voucher page and reviewed the voucher for accuracy, counsel must print, sign and mail the voucher, along with any supporting worksheets,¹ to the Court. Counsel must also send the spreadsheet file electronically to the CJA Voucher Review Analyst.

The Court will review the interim vouchers in light of the approved budget. Variances in excess of the budgeted amounts must be pre-approved and will be authorized only for good cause. The Court also will authorize payment for all miscellaneous expenses such as postage, copying, etc., reasonably incurred, properly documented, and subject to national and district policies and procedures.

Within 30 days of the conclusion of proceedings in this Court, each counsel shall submit a final voucher seeking payment for representation provided during the final interim period.

B. Supporting Documentation

In addition to a signed copy of the CJA Form 30 generated from the Excel spreadsheet, counsel shall submit to the Court, with each interim voucher, itemized time worksheets (unless such detail is already included within the spreadsheet, *see supra* note 2), as well as receipts for all expenses.

1. Timekeeping

Counsel are expected to maintain accurate time records; such records are subject to audit and must be maintained for a period of six years and three months after approval of the final voucher. Hours billed must be divided in tenths of an hour. ***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 sufficient detail to permit meaningful review, e.g., identification of individual witnesses interviewed, identification of persons involved in telephone conversations or conferences, specific topics researched, identification of pleadings drafted or reviewed by title and number of pages, and, if necessary for an understanding of any task, an explanation of its relevance to the

1. If counsel elect to use the Excel spreadsheets as their sole timekeeping mechanism, the entries on the spreadsheet must be detailed in accordance with section II(B)(1), *infra*. In that case, supporting worksheets do not have to accompany the signed voucher. However, if counsel use a separate timekeeping program for billing which already contains the detail required in section II(B)(1), counsel's entries into the Timesheet portion of the Excel spreadsheet may be summarized (i.e., a date range in the description column and hours totaled by category), and supporting worksheets must be submitted with the signed voucher.

federal proceedings. However, counsel need not articulate the topic of any discussion with Petitioner. **Aggregate time blocks or entries which are vague or ambiguous will not be approved for payment.** If the level of detail is insufficient for auditing purposes, the vouchers may be returned to counsel for resubmission with adequate detail or the Court may reduce the total amount approved for payment.

2. Associates

If counsel enlists associate counsel with his or her firm to work on this case, such associate shall be compensated at the rate of \$75.00 per hour or the associate's usual billing rate, whichever is less. Because the automated budgeting forms do not provide a budget or timesheet for associates, compensation for in-house associates must be claimed on a standard CJA Form 30. Counsel must also submit separate worksheets for each associate, detailing the billed time as set forth in Section II (B)(1), *supra*.

3. Support Staff

Vouchers for independent contractors such as paralegal, law clerk, or law student services, should be submitted by the individual(s) performing the service on a CJA Form 31, Request for Authorization and Voucher for Expert and Other Services. A detailed description of the services rendered, including dates each task was performed, must be attached to the voucher.

For in-house staff, counsel may claim the cost of paralegal services as an expense on a CJA Form 30. If such expense is claimed, counsel shall submit to the court as supporting documentation (1) worksheets detailing the paralegal's time as set forth in Section II (B)(1), *supra*, and (2) an affidavit declaring that the hourly rate billed for the paralegal's service is equal to or less than the hourly cost of the paralegal to the firm.

4. Noncompensable Services

Compensation will not be approved for administrative, clerical, secretarial or word processing services, regardless of whether the person performing the function is an attorney, law clerk, paralegal or secretary, even if counsel has no regularly employed secretary. Compensation will not be approved for work performed which is exclusively related to exhaustion in state court. Nor will compensation be approved for tasks related to appeals (whether from interlocutory orders or final judgments) or other work related to the review of proceedings before this Court. Counsel are to seek compensation for work done at the appellate level from the Ninth Circuit Court of Appeals after having obtained an appointment as counsel of record from that court.

III. FUNDING FOR ANCILLARY SERVICES

A petitioner in a capital habeas corpus case may be entitled to funding for investigative, expert, and other services reasonably necessary for the representation of the petitioner. See 21 U.S.C. §848(q)(9). Under the District's budgeting plan, requests for such services are incorporated into counsel's proposed budget as indicated on the appropriate sheet within the Excel spreadsheet (including number of hours, hourly rate and estimated expenses). **However, no expenditures for investigators, experts, or other services may be incurred until a budget is approved by the Court.** Along with the proposed budget, counsel must submit documentation identifying the investigator or expert and his or her qualifications, specifying the factual issues counsel intends to investigate and the facts demonstrating that investigative or expert assistance is warranted, and explaining the need for confidentiality. *See* 21 U.S.C. § 848(q)(9).

Upon approval of budget items for investigative, expert or other services, 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. Service providers will not be paid in excess of amounts authorized and are not entitled to interim payment procedures, unless specifically authorized by the Court.

The voucher submission for fees and expenses of investigators, experts and other service providers must be made on a CJA Form 31, Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services. The submission must include a copy of the approved budget order authorizing employment of the person whose services are being billed and an itemized statement of the service provider's time and expenses in a similar format to that required of appointed counsel. Travel expenses of service providers must follow the procedures for court-appointed counsel as set forth in ¶¶ IV (A) & (B), *infra*.

IV. REIMBURSABLE EXPENSES

Counsel may be reimbursed for out-of-pocket expenses reasonably incurred incident to representation of Petitioner. However, counsel must seek prior approval for any expenditure in excess of \$300.00.

Subject to the guidelines in ¶¶ IV(A) & (B), *infra*, when traveling outside of the District for the purpose of consulting with the client or his/her former counsel, interviewing witnesses, etc., expenses such as air fare, mileage, parking fees, meals and lodging, are to be claimed as itemized expenses. Proof of payment by an original paid receipt, copy of a canceled check or credit card receipt shall be submitted for any individual expense.

Reimbursable expenses are subject to the following additional guidelines:

A. Case-related travel by privately-owned automobile should be claimed at the current government authorized rate, plus parking fees and tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

B. Actual expenses incurred for meals and lodging while traveling outside of the District in the course of Petitioner's representation must conform to the prevailing rates placed upon travel and subsistence expenses of federal judiciary employees in accordance with existing government travel regulations. All overnight travel must be pre-approved in conjunction with the case budget or specific funding request. Appointed attorneys and experts must take advantage of government travel rates through the government authorized travel service when most economical. Air travel in First Class is prohibited.

C. Telephone toll calls, photocopies, facsimiles, and photographs are reimbursable expenses if reasonably incurred. However, general office overhead, such as rent, secretarial help, telephone service, publications, supplies, and costs related to educational seminars, or time expended for preparation of vouchers are not reimbursable expenses, nor are expenditures for personal items for the client.

Photocopying will be reimbursed at actual cost or \$0.20 per page, whichever is less. Large copy orders should be reproduced by an outside copy service unless in-house photocopying is more economically efficient. Facsimiles will be reimbursed at actual cost or \$0.10 per page, whichever is less. In addition, expenses for service of subpoenas on fact witnesses are not reimbursable, but rather are governed by Rule 17, Fed. R. Crim. P. and 28 U.S.C. § 1825.

D. Reimbursement is permitted for the actual cost of case-related regular U.S. postage. Counsel are to make every effort to use regular U.S. mail whenever possible. Reimbursement for the actual cost of other postal services or for the use of non-federal carriers (such as overnight or two-day delivery) will be permitted only if there is a genuine necessity for such a service. A copy of an itemized bill and statement detailing the requisite necessity for expedited delivery is required for reimbursement.

E. The Court will not reimburse for messenger or attorney service without valid justification for the use of such services.

F. Computerized research fees are considered office overhead, as are other fees for library items. Given the availability of flat-fee subscriptions for computerized research services, the Court will reimburse counsel for the costs of computerized research only upon a showing of good cause, such as that fees imposed are outside the scope of the flat fee plan or an explanation of why a flat fee plan is not feasible. If the Court authorizes reimbursement for computer-related research, counsel must attach to any voucher claiming such expense: (1) a statement detailing the subject matter of the legal research and the estimated number of hours manual research would have taken, and (2) a copy of the bill.

G. In the event transcripts from this proceeding are required, counsel should arrange with the court reporter(s) to bill the Court directly through use of a CJA Form 24. Counsel shall not include the cost of transcripts as an out-of-pocket expense on a CJA Form 30.

H. Counsel may be required to provide further documentation substantiating the fees or expenses claimed, or to submit a declaration under penalty of perjury detailing counsel s compliance with the standards and procedures established herein.

IT IS FURTHER ORDERED that the CJA Voucher Review Analyst initiate a Microsoft Excel Budget spreadsheet for this case and electronically forward the spreadsheet to lead counsel.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Petitioner s counsel, the CJA Voucher Review Analyst, and the Capital Case Staff Attorney *only*.

DATED this ___ day of _____, 2004.

United States District Judge

CONFIDENTIAL CASE EVALUATION FORM (CCEF)
DISTRICT OF ARIZONA²

The answers to these questions are for case management and budgeting purposes only and will not be binding in any respect on substantive issues to be raised in the course of litigation.

Name of Attorney(s):

Lead Counsel: _____

Co-Counsel: _____

State Level Proceedings:

1. Did (or does) either lawyer represent the petitioner during any part of the state proceedings? No Yes (indicate which lawyer) _____

If yes, in what aspects of the case? _____

2. Has a state post-conviction proceeding involving the same judgment and sentence been filed? No Yes Date: _____ Court: _____

3. Were funds requested at the state level for state post-conviction investigation?
 No Yes:

2. This form will be sent to counsel with the Ex Parte Cost Management Order. Counsel will complete it to the extent possible prior to CMC #1. Subsequently, it will be updated and submitted to the court as the information becomes available, but not later than CMC #2.

Purpose	Amount Requested	Amount Authorized

4. Was discovery requested at the state level? No Yes

Nature of Discovery Requested	Granted	Denied

5. Was an evidentiary hearing held in the state post-conviction proceeding?
 No Yes

Statute of Limitations:

Based on current information, what is the petitioner's position as to the statute of limitations for filing the amended petition?

State Court Record:

1. Has the record been assembled?

Yes No - Location of record: _____

2. Have the files of all prior counsel been obtained? Yes No - Explain

3. As accurately as possible (recognizing that it may be an estimate at this point), provide information about the size of the record:

Type of Record	# pages
Trial transcript and exhibits	
State court record on appeal	
Arizona Supreme Court record (appellate pleadings and decision)	
State post-conviction record (including transcripts, pleadings, motions, and exhibits)	
Ancillary files and records (including prior counsels' case files, co-defendant's files, investigative reports, etc.)	
Total pages	

Please enter your estimate of the time required to review the record on the Phase I Case Management Plan and Budget Form. *Note:* Counsel will be expected to review the record at a rate of 60 pages per hour.

Factors Affecting Case Complexity:

Check all the factors applicable to this case and provide information that will allow determination of whether the case may be especially complex or costly.

Age of defendant at time of offense: _____ Number codefendants _____

Elapsed time since offense: _____ Number of victims _____

Elapsed time since trial: _____

Related cases (summarize):

Prior convictions (number and type):

Informant involved (number, type, and availability of informant(s)):

Serial homicides (number of different offenses at separate locations):

Aggravating factors found (list):

Other crimes evidence relevant to capital proceedings (list):

Defendant spent extended time out of state or country (location, how long):

Defendant's family presently out of state or country (location):

Witnesses or other investigation will require travel

Defendant's and/or family's background records were not obtained in state proceedings

There are issues as to competency/mental illness or other disabilities

Explain impact on legal issues: _____

Explain impact on client relations: _____

Use of drugs or alcohol at time of offense

Translator required for defendant

Translator required for witnesses (number of witnesses and types)

Defendant suffered physical/mental abuse as a child

Scientific procedures will be required

Types: _____

Other issues (describe)
