

**EXPLANATORY MEMORANDUM FOR CASE-BUDGETING IN NON-CAPITAL
PANEL ATTORNEY REPRESENTATIONS WITH THE POTENTIAL FOR
EXTRAORDINARY COST**

At its September 2003 proceedings, the Judicial Conference of the United States (Judicial Conference) adopted a new Criminal Justice Act (CJA) Guideline, 2.22B(4), which encourages courts to use case budgeting for any representation in which it is anticipated that the defense of an individual CJA defendant will cost in excess of \$30,000 or involve more than 300 hours of attorney time. (JCUS-SEP 03, p. 20.) It is hoped that the development of a case budget on behalf of a defendant in such a case will serve several purposes, all of which will help ensure that defense counsel will receive the resources necessary to represent the accused effectively while at the same time providing the court with sufficient information about the resources needed so that the court can assess and monitor the expenditure of public funds. Similar case-budgeting provisions have already been included in paragraph 6.02F of the CJA Guidelines for capital cases (JCUS-MAR 97, p. 23).

The first determination that the court or counsel must make under CJA Guideline 2.22B(4) is whether a particular case has the *potential* to exceed the \$30,000/300-hour threshold, so that the use of a case budget should be considered. The guideline contemplates that counsel, on behalf of a CJA client, or the court on its own initiative, may request the development of a case budget. It is understood that, at the start of a case, it may be difficult for counsel or the court to know whether it has the potential to exceed the threshold. For example, the indictment itself may not provide sufficient detail about the alleged offense to allow an accurate assessment of the scope of the charge, the degree of an individual defendant's involvement in the case, the volume of discovery that will be generated and provided, the number of witnesses involved in the case, the precise disciplines that may be the subject of expert testimony, or even the nature of

the defense to the charge. Therefore, in some situations it may not become apparent that a case meets, or has the potential to reach, the case-budget threshold until the litigation has proceeded through its preliminary stages and counsel or the court has had an opportunity to evaluate some of the key factors listed above. The court should be mindful that, especially in the early stages of a case, information about the anticipated quantity of discovery, the likelihood (and extent) of reliance upon scientific evidence and expert opinion, and the possible length of trial could be provided by the prosecution and would be of great assistance to the court in making the initial decision about whether to require a case budget.

The primary cost “driver” in a criminal case is attorney time. Hence, to the extent that counsel is able to advise the court about the expected quantity of discovery, the scope of the defense investigation, and the anticipated length of a trial, the court may have sufficient information at a relatively early stage of the case to consider requiring a case budget on behalf of one or more of the CJA defendants. As a simple “rule of thumb,” if counsel for the prosecution and defense are estimating that a trial would take four weeks, the cost of a *single* defense attorney’s time would be close to \$15,000 (160 hours) for in-court time during the trial alone. Considering the out-of-court time expended by counsel immediately preceding and during such a trial, and the time spent organizing and reviewing discovery as well as conducting a defense investigation and litigating motions, such a case is very likely to exceed the threshold of CJA Guideline 2.22B(4). Furthermore, if the court has appointed two CJA counsel on behalf of a single defendant, a trial of only two-week duration would be one that could, potentially, exceed the Guideline’s threshold.

After the court has made the decision to require a case budget on behalf of a CJA defendant, it must determine what type – and quantity – of information should be provided by counsel to the court. It is important that a “realistic” budget be developed – one that has been carefully formulated by counsel and is based on tangible factors. The well-planned budget will help the court make informed decisions about the resources necessary to defend the case and, to a certain extent, help ensure that expenditures do not simply escalate without the court first being advised of significant changes in the nature of the prosecution or defense of the case, which would warrant an adjustment to the budget. Such a budget will, hopefully, avoid situations where inadequate resources would be provided to the defense and where compensation of counsel and other members of the “defense team” would be delayed or ultimately disallowed. By virtue of the dollar amounts, the budgets submitted by CJA panel attorneys almost certainly will implicate the case compensation maximums for panel attorneys and, most likely, for some of their investigative, expert and other service providers. Thus, it is recommended that the presiding judicial officer send a case budget to the chief judge of the court of appeals (or his or her delegate) for approval.

To assist the court and counsel in this process, the Administrative Office has developed case-budgeting worksheets that isolate important categories of information, with sufficient detail, to enable the preparation of a realistic case budget. There are both *detailed* and *summary* worksheets for each of the four types of services: attorney, investigator, expert, and “other”. It is anticipated that both the detailed *and* the summary worksheets for each service provider (in some instances, the work of several providers of the same type of service could be combined on one form) would be completed by appointed counsel in preparing the case budget, and the court

could then choose whether to review the detailed worksheets or the summary worksheets alone. The court's decision would likely be affected by the size of the requested case budget, the extent to which the court has experience with complex criminal litigation, and the court's familiarity with the practice of the appointed attorney(s). In some cases, the court may choose to review the summary worksheets for certain services – e.g., those of defense counsel or investigators – and may wish to review the detailed worksheets for experts and “other” service providers. In any case, the fact that the CJA attorney has prepared a detailed worksheet will serve the dual purpose of assuring that cost “drivers” are not underestimated or simply overlooked, and that the ultimate cost estimates are tied to tangible, identifiable, and to a large extent *quantifiable* factors.

Case budgets should not necessarily be viewed as “etched in stone,” and may, even in the best of circumstances, be the subject of subsequent modification as the case progresses. The simplest example of this would be where the budget was developed at an early stage of the case, prior to the completion of the discovery process and before counsel had an opportunity to assess the nature of the defense and/or the need for expert services. Even where a case budget has been carefully prepared based on counsel's best assessment of the above factors, subsequent events can have a major impact on a case budget. Obvious examples of the latter would be a superceding indictment that adds new charges and/or additional defendants to the case, a prosecutor's decision to rely upon evidence of “other” criminal conduct not alleged in the indictment, or events that call into question the mental status of the defendant. The court and counsel should be alert to such possibilities, and, in a given case, the court may wish to delay the development of a case budget, or develop the budget in “stages” as the case proceeds. As part of this process, the court may even wish to specify the assumptions upon which the budget is based

– e.g., that there will not be an issue of the defendant’s sanity or competency, that DNA evidence will not be contested in the case, or that the indictment will not be broadened. Should one of the “foundations” upon which the budget is based dramatically shift, the court should have counsel modify the case budget accordingly and seek approval of the court for any additional funds and resources.

By careful planning, the use of a case budget should result in the availability of the resources necessary for the defense of a large and complex CJA case. The use of the case-budgeting worksheets should provide the necessary information, in sufficient detail, to facilitate this planning process. The request for resources, and the accompanying justification, should allow the court to see clearly how the resources are to be used, and thus to oversee the expenditure of public funds while, at the same time, permitting prompt and full payment of CJA counsel and other members of the “defense team.”