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Committee on Defender Services
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To: All Federal Public/Community Defenders, CJA Panel Attorney District
Representatives

From: Judge Catherine C. Blake, Chair, Committee on Defender Services

RE: NEGOTIATING RATES OF RETAINED EXPERTS, INVESTIGATORS, AND OTHER
SERVICE PROVIDERS

Dear Federal Public and Community Defenders and CJA Panel Attorneys:

The members of the Committee on Defender Services (Committee) are mindful of the actions that have been, or will be, taken by federal defenders and executive directors to keep their offices within the constrained budgetary allotments caused by reduced funding and sequestration. Many offices are facing a reduction in staff, and most defenders will be required to furlough personnel. Additionally, almost every office has dramatically reduced or eliminated travel, training, and experts budgets in order to reduce the amount of time that staff would need to be furloughed. CJA panel attorneys are facing a multi-week suspension of payments at the end of the fiscal year.

Despite the difficult economic times, defender organizations and CJA panel attorneys continue to furnish representations in complex cases that require the use of experts. The Committee shares your concerns about the adverse effects that the budget cuts have had on the quality of services guaranteed by the Sixth Amendment to CJA-eligible clients; however, payments to experts, investigators, and other service providers constitute an area in which the Committee believes there is potentially more room for savings to the program.

The consequences of sequestration and other governmental cuts are well publicized and understood by the private sector. Given the difficult financial circumstances that federal defender organizations (FDOs) and CJA panel attorneys are facing, it is reasonable to ask experts and service providers to reduce the fees that they charge when working on a CJA case.

While many FDOs and CJA panel attorneys have taken steps to negotiate lower rates with experts, the Committee encourages *every* organization and panel attorney to employ the following techniques, as appropriate, to reduce the costs expended when hiring experts, investigators, or other service providers. Furthermore, these efforts should be utilized, to the extent possible, with respect to service providers who may already be hired and working on CJA cases. Please discuss these suggestions within your district (including it in any panel attorney training, if possible), and share success stories with the FDO and panel members.

- Negotiate lower rates when hiring any expert or service provider.
 - Explain to experts and service providers who are already retained and working on CJA cases the severe financial difficulties that your office (or the panel) is going through, and ask if they would agree to reduce their rate.
- Send out a request to all current and previous experts and service providers explaining the economic situation and asking them to reduce the rates they charge for CJA cases. Several FDOs have taken this approach, proposing a minimum percentage cut and asking if the expert would reduce rates even more, with good success.
- Negotiate substantially lower rates for travel time. Any time spent working on a case is compensable at the full rate, whether the work is performed in an office or on an airplane. However, a lower rate is appropriate for travel time when a service provider is unable to work on the case (*i.e.*, while the expert is driving or standing in the airport security line).
- When compensating experts for travel time, try to have them travel to perform work on more than one case. For example, if an expert, mitigation specialist, or interpreter is traveling to the prison to examine or visit a client, coordinate the trip to have him or her meet with other clients requiring the same services (for your or another FDO).
- Ask the U.S. Marshals to transport the client closer to the expert to reduce travel costs.

- When possible, if more than one area of expertise is necessary, retain an expert who is multi-disciplined and able to provide broad expertise.
- In a multi-defendant CJA case, counsel should advise other appointed counsel or the court what service provider work can be shared without creating a conflict of interest or compromising quality (*e.g.*, translation of documents, background investigations, discovery management).
- Utilize written contract fee agreements or retainer letters to monitor and control costs.
 - Start with a lower number of authorized hours or fixed rate, requiring written approval before additional work would be compensated. This allows you to monitor the work performed and make determinations if additional work is necessary. Consider a requirement that the expert or service provider advise the office as he or she approaches the limit.
 - Have experts and service providers work in stages, if possible, to prevent unnecessary work being performed.
 - Include a maximum fee that cannot be exceeded without prior written approval from a designated FDO staff member or the CJA panel attorney.
- Utilize, to the extent possible, your office staff or professional staff of the expert or service provider (billed at a lower hourly rate) for work that involves a lower level of expertise (*i.e.*, gathering records or performing initial interviews of individuals).

Controlling service provider costs, through the use of these and other suggestions, is particularly significant when it comes to hiring mitigation specialists. Work performed by mitigation specialists is unique to criminal defense work and CJA work in particular – in both capital and non-capital cases. Mitigation specialists should be amenable to maintaining reasonable hourly rates given the high volume of federal CJA mitigation work, and the substantially higher rates paid by FDOs and federal courts than those paid in state court proceedings, and the guarantee of payment. Districts and circuits that employ CJA supervising attorneys and circuit case-budgeting attorneys have established presumptive hourly rates for particular types of service providers. Presumptive rates are rebuttable in suitable cases, but they provide guidance for determining appropriate compensation levels. (Courts and panel attorneys may want to consult with the local FDO regarding the appropriate rates of compensation for certain “high-cost” expert

services.) In addition, FDOs that expend considerable amounts of funding for mitigation work should consider hiring a mitigation specialist on staff, or training a staff investigator to do mitigation work. FDOs should also consider utilizing the non-attorney loaning protocol found in chapter 11 of the Federal Defender Operations Manual to obtain the services of a trained staff member from another FDO, especially from one that has a capital habeas unit and does a lot of mitigation work.

While the Department of Justice and private law firms may pay higher rates for experts and service providers, FDOs and CJA panel attorneys are able to offer repeat business and assurances of payment. The initiatives suggested above are offered in an effort to responsibly contain and reduce program costs, while continuing to provide effective representation. Nothing in this letter should be interpreted as a request for appointed counsel to refrain from hiring an expert or service provider that is necessary for the proper defense of a case.¹ The Committee would request that each FDO keep track of and document the techniques utilized to reduce expert and service provider expenditures as well as the amount saved. This information will be valuable as we respond to various inquiries regarding Defender Services spending. We appreciate the work that you do and your commitment to providing quality representation.

Sincerely,



Catherine C. Blake

¹ In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court recognized the constitutional right to expert assistance in criminal cases.