

Case Budgeting: Strategies for Planning and Funding Litigation in Capital and Mega-Cases

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Benefits of Budgeting

- ❑ Enhances the quality of representation
- ❑ Assists panel attorneys in obtaining funding for service providers
- ❑ Allows for interim payments in lengthy and time intensive litigation
- ❑ Ensures that counsel and service providers will be paid for budgeted work

Types of Cases to Budget

- Capital prosecutions
- Capital habeas cases
 - 28 U.S.C. § 2254
 - 28 U.S.C. § 2255
- Capital clemency and stay proceedings
- Non capital mega cases
 - 300 + attorney hours
 - total expenditures expected to exceed 300 times the prevailing CJA non-capital hourly rate (approximately \$39,000)

Examples of Mega cases

- ❑ Extensive Discovery
- ❑ Multiple Defendants
- ❑ RICO /ITAR
- ❑ Gang Cases
- ❑ Major Narcotics conspiracies
- ❑ Major Fraud
- ❑ Wiretap Cases
- ❑ Terrorism Cases or Cases with Classified Documents

Capital Cases- Special Considerations

- Capital cases
 - Circuit approval needed when attorney fees exceed \$100,000 at trial level, \$50,000 appellate (5th Circuit Judicial Council Special Procedures for Reviewing Attorney Compensation Request)
- Capital habeas cases
 - \$35,000 District Court
 - \$15,000 Circuit Court
- Figure is a threshold which triggers the need for circuit review
- Budgeting is an effective mechanism for complying with these circuit procedures when fees expected to exceed the limit

Effect of Budget Order on Interim Vouchers

□ Non-Budgeted Cases

- Payments below case maximum: District court can authorize if payment + all prior payments do not exceed the case maximum. Circuit approval not required.
- Payments exceeding case maximum: Circuit approval required.
- Circuit approved interim vouchers may be paid at 100%.

□ Budgeted Cases

- District court may approve payment of interim vouchers consistent with the budgeted amount. Circuit approval not required.
- District court approved interim vouchers: fees paid at 80%.
- Counsel may claim the 20% retainage in the final voucher.
- Final voucher requires circuit approval.
- Practice applies to attorney and service provider fees.
- expenses reimbursed in full.

When to Begin Budgeting

- ❑ Earlier the Better
- ❑ Ideally at the time of appointment
- ❑ Contact the Case Budgeting Attorney to discuss case and how to proceed

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Work with the Case Budgeting Attorney

- ❑ Ex parte communication
- ❑ Sample materials available
- ❑ Develop overall litigation and investigation strategies
- ❑ Identify cost drivers
- ❑ Discovery – litigation support needs
- ❑ Streamline funding authorization process – district and circuit court

The Process in a Nutshell

- ❑ The district court may order that a case be budgeted.
- ❑ Alternatively, counsel may request to budget a case.
- ❑ Preference for budgeting in phases.
- ❑ Counsel prepares initial budget with supporting memorandum.
- ❑ The budget proposal should be submitted *ex parte* under seal.
- ❑ Capital cases: proper showing required to proceed *ex parte*.
- ❑ Request funding authorization for service providers.
- ❑ Budget may be amended or supplemented.

The Process in a Nutshell

- ❑ District court reviews the proposed budget.
- ❑ District court's order is forwarded to the chief judge of the circuit, or designee, for review.
- ❑ Circuit chief judge or designee will issue the budget order to be filed under seal.
- ❑ If budget request is reduced or denied altogether by the district court, counsel may move the district court for reconsideration.
- ❑ Denial or reduction of a budget request may be reviewable on appeal or in post-conviction proceedings whereas a voucher reduction is not.

How to go about Budgeting

- Identify core team members and service providers
 - Paralegal
 - Investigator
 - Mitigation specialist
 - Experts
 - ❖ Evolves as you get into the case and identify issues
- Identify factual and legal issues
- Identify complex or unique issues for motion practice
- Discovery management
- Projected length of trial

Associate Counsel

- Without Separate Appointment:
 - Appointed counsel may claim compensation for services provided by partner or associate but must identify who did what work on voucher.**
 - Prior court authorization needed if counsel is not a partner or associate. § 230.53.10 (b).
- With Separate Appointment:
 - Each attorney may receive up to maximum compensation.
 - Each appointed attorney will file a separate voucher. § 230.53.20.
- Capital Cases:
 - Counsel may use attorneys “who work in association with them” at a reduced hourly rate if it diminishes the overall cost or needed to meet time limitations. **
- **** Preference is for each attorney to file a separate voucher because of eVoucher considerations.**

Calculating Attorney hours

- Plan the Case Strategy
 - Estimate times for client contact, court appearances, document review, research, investigations
- Review Time in Prior Similar Cases
 - Review your past vouchers and take into account differences in cases
- Assess Your Availability
 - Estimate how many hours per week you have available to work on the case
 - Practical awareness of court or statutory deadlines
- Use the Worksheets to identify the work and the time needed to perform it

Service Providers

- Know your case –
 - What indicates the need for this type of expert or service provider
 - How can this expert's potential findings support the defense theory of the case
 - Or rebut the government's evidence or theory
- Consulting or testifying expert
- Due diligence search for favorable rates
- Vet the expert

Need for Prior Authorization

Non-capital cases:

- ❑ *Any individual service provider* in excess of \$2,500 (excluding expenses): district court must certify and prior circuit authorization required.
- ❑ Less than \$2,500: prior authorization must be obtained from the district court; circuit authorization is not required.

Capital Cases:

- ❑ *Combined compensation and expenses for all service providers* including investigators, mitigation specialists and experts in excess of \$7,500 must be certified by the district court and approved by the circuit.

Non Capital and Capital Cases:

- ❑ Total cost of *all service providers combined* does not exceed \$800 (excluding expenses), prior authorization is not necessary.

NOTE: Service providers will be separately entered into eVoucher.

Calculating Service Provider Hours

- ❑ Identify the need for a particular service provider
- ❑ Define their roles
- ❑ Assess the scope of the work identifying any obvious complexities or cost-drivers
- ❑ Confer on time needed to perform it

Working with Service Providers

- ❑ Fee schedule
- ❑ Document review
- ❑ Interviews
 - Client
 - Witnesses
- ❑ Travel
- ❑ Evidence examination and testing
- ❑ Consult with Counsel
- ❑ Report writing
- ❑ Preparation to testify
- ❑ Testimony
- ❑ Engagement Letter and Confidentiality Agreement
- ❑ Periodic Vouchers - stay w/in approved funds

Funding Service Providers

- ❑ Retained counsel can move for funding for service providers. CJA Guidelines § 310.10.10
- ❑ Notify the court if the service provider is related to counsel § 310.20
- ❑ Negotiate on fees
- ❑ Preference for geographic proximity
- ❑ Share resources among counsel where no conflict is created
- ❑ ***Monitor work and billing for budget compliance***

Travel Guidelines

- ❑ Service Providers may bill full hourly rate for up to six hours of travel by automobile to or from a destination, but more than six hours should be billed at half the hourly rate.
- ❑ Travel time at or around the destination may be billed at full hourly rate.
- ❑ Work performed while traveling (i.e., while on a plane) should be billed at full hourly rate, but otherwise non-automobile travel time should be billed at half the hourly rate if work not performed.
- ❑ Check local rules regarding travel authorization.

Highlight Cost Efficiencies!

- Explain cost saving measures
 - Shared resources
 - Negotiated a lower rate or a travel rate
 - Use of associate or paralegal time
 - Combine court searches / interviews on trips
 - Work that is not billed

Prepare Budget and Supporting Documents

- Budgeting Worksheet / Excel Spreadsheet
- Motion with supporting Memorandum to Approve Budget – ex parte under seal
 - Budget – ex parte under seal
 - Proposed Order Approving Budget to be filed under seal

What
Happens
When your
Funding
Request is
Denied or
Reduced?

- ❑ Move for reconsideration in the district court
- ❑ Request evidentiary hearing
- ❑ May be appealable (unlike voucher review)

Managing Discovery in Mega Cases

NATIONAL LITIGATION SUPPORT TEAM

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ESI

Electronically Stored Information

Mixed media from multiple sources

- ❑ Electronic surveillance (audio and video)
- ❑ Jail calls and visits
- ❑ Computers, laptops, mobile devices
- ❑ Social media
- ❑ Electronic communications (email, texts)
- ❑ Cell phone data
- ❑ GPS tracker
- ❑ Bank records and financial documents

Ask the Judge to Help

- ❑ Ask for definite discovery cut-off dates.
- ❑ Ask for an order requiring the government to pinpoint relevant discovery – Which materials are relevant to which Defendant?
- ❑ Ask for an order requiring the government to provide discovery indices.
- ❑ Ask for an order requiring the government to prepare transcripts of recordings.

Get a Plan

- Organization
 - Telescope the materials into manageable, searchable folders.
- Prioritization via a broad understanding of the case through:
 - Law enforcement reports
 - affidavits in support of warrant applications
 - Client interviews
- Targeted Review
 - Hone in on materials most relevant to guilt for productive plea discussions or trial prep.

ESI Issues

- ❑ Project Management by skilled staff
- ❑ Sheer volume of unorganized materials in multiple formats
- ❑ Searchability – requires formatting or search software
- ❑ Compatibility problems
- ❑ Queries – key word searches
- ❑ File Naming – lack of consistency
- ❑ Lack of Index or Bates numbering
- ❑ Redundant files
- ❑ Corrupted files
- ❑ Incomplete or missing discovery – what should have been included but was not

Issues in Capital Cases

- Develop a team which includes adequate support person(s) for records collection and organization
- Pre-Authorization budget
 - DOJ / USAO case specific considerations
 - Need for team member(s) trained in detecting mental health and/or intellectual impairment
 - Funding for fact and mitigation investigation
 - Investigate alleged aggravators
 - Broad investigation of mitigating evidence
 - Budget for ample client contacts
 - Identify mental health issues / intellectual disability as categorical bar
 - Potential for offering life plea early on
 - Budget for attorney fees not mandatory (\$100,000 threshold) but advisable

Issues in Capital Cases

- Post-Authorization Budget
 - Client – centered representation
 - ❖ Uncover mental health / ID / Mitigation
 - ❖ Build relationship for plea potential
 - ❖ Enable discovery review with incarcerated client
 - ❖ NOTE travel issues!
 - Team Approach
 - ❖ Plan to use lower cost service providers especially for records collection and document management
 - ❖ Need for regular team meetings among core members
 - Involve resource counsel for assistance
 - ❖ Developing funding requests
 - ❖ Identifying experts
 - ❖ Research e.g.
 - ❖ Evolving 8th Amendment jurisprudence
 - ❖ National issues and trends (e.g. categorical exclusions, discovery in BOP cases)

Issues in Capital Habeas Cases

- ❑ Continuity of representation including stays, clemency, competency, Rule 60(b) motion
 - 2254 – may extend to exhaustion in state court
- ❑ One year statutory deadline
- ❑ Fact based support for need to proceed *ex parte*
- ❑ Record collection and review
- ❑ Client communications
- ❑ 2254 counsel – Martinez / Trevino claims
 - Factual support for investigation to establish IATC
 - Move for supplemental or conflict free counsel

Suggested
phases
Capital
2254 Cases

- Phase I – appointment, review of record and initial investigation
 - Assemble record of all prior proceedings, counsel and DA files
 - Review, digest, develop issues
 - Client interviews
 - Initial investigation
 - Indicia of state habeas ineffectiveness claims
- Phase II – preparation of petition
 - Cause and Prejudice Review (*Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013))
 - Remand to state for exhaustion – *Harbison v. Bell*, 556 U.S. 180 (2009) fn 7
- Phase III – exhaustion, motion for evidentiary hearing, briefing on claims
- Phase IV – discovery, evidentiary hearing, final briefing

Suggested
phases
Capital
2255 Cases

- ❑ Phase I – appointment, review of record and initial investigation
- ❑ Phase II – preparation of petition
- ❑ Phase III – exhaustion, motion for evidentiary hearing, briefing on claims
- ❑ Phase IV – discovery, evidentiary hearing, final briefing
- ❑ Phase V - Stay of Execution, Rule 60(b) motion, Clemency Petition
- ❑ 18 USC § 3599 (e); Guidelines, §680.30

Links and Resources

CJA Guidelines:

<http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines>

Worksheets and explanatory memoranda:

www.fd.org

National Litigation Support <https://www.fd.org/navigation/litigation-support/subsections/what-is-litigation-support>

Federal Death Penalty Resource Counsel:

<https://www.capdefnet.org/>

National Mitigation Coordinator:

<https://www.fd.org/cjaort/cjaort/contacts.html#!/?page=13>

Habeas Assistance and Training Counsel (HAT):

<https://www.fd.org/cjaort/cjaort/contacts.html#!/?page=10>

Federal Capital Appellate Resource Counsel:

<https://www.fd.org/cjaort/cjaort/contacts.html#!/?page=8>

Federal Capital Habeas Project (2255 Project):

<https://www.fd.org/cjaort/cjaort/contacts.html#!/?page=9>