Tab 3

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MEMORANDUM

To: CJA Trial Panel Attorneys

From: Criminal Justice Act Committee

Re: Billing

Date: January 23, 2015

I. Introduction

Members of the CJA Trial Attorney Panel have recently raised questions and concerns – both general and specific – about voucher review and processing procedures. The purposes of this memorandum are to provide basic information concerning the statutory obligations of both the district court and the circuit court when reviewing and approving requests for compensation under the Criminal Justice Act (CJA), and to make suggestions about how to expedite the processing of attorney vouchers.

In general, CJA counsel are entitled to compensation for only "hours reasonably expended completing work necessary for adequate representation." A "meaningful review" of the hours expended and compensation requested can be accomplished only after the final voucher has been submitted. Circuit approval (as discussed below) is required in all cases exceeding the statutory maximums. Therefore, preliminary approval by the district court and payment of an interim voucher by the Administrative Office of the Court (AO), does not establish entitlement to the amount paid.

The vast majority of vouchers are approved at both the district and circuit levels without question or reduction. There is no presumption that vouchers are unreasonable or that the time billed was not actually worked.

Submitting vouchers that comply with the suggestions below will increase the likelihood that your vouchers will be processed and approved expeditiously, and without reduction.

II. The Criminal Justice Act and The "Guide"

The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, provides the statutory framework for the appointment and compensation of indigent defense counsel.

Section 3006A(d)(5), "Filing claims," states in part:

> A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate judge and the court, and to each appellate court before which the attorney provided representation to the person involved. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate judge and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney.

As long as the total amount claimed in a case falls within certain statutory maximums (for example, as of January 1, 2015, $9,900 per attorney and $2,400 for outside service providers for a felony case in the district court), the district court determines the amount of compensation. Id.

Although the CJA permits payment in excess of statutory maximums for "extended or complex" representation, it imposes two requirements on these payments. Id. § 3006A(d)(3). First, the district court "[must] certif[y] that the amount of the excess payment is necessary to provide fair compensation." Id.

Second, "the payment [must be] approved by the chief judge of the circuit," or a circuit judge delegated by the chief judge. Id. Thus, approval by the district court in such cases is only preliminary; it does not establish entitlement to the requested fees.

Attorneys generally submit CJA vouchers after the final disposition of the case. See Judicial Conference of the United States, Guide to Judiciary Policy, Vol. 7: Defender Services, Part A: Guidelines for Administering the CJA and Related Services § 230.13 (Revised Dec. 18, 2014) (Guide). "Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to counsel." Id. § 230.73.10(a). In such cases, the Guide provides for two alternative payment options. See id. at App. 2C. The payment options "are designed to strike a balance between the interest in relieving court-appointed attorneys of financial hardships in extended and complex cases, and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation." Id. § 230.73.10(c). Pursuant to the Guide, in most districts 20% of the approved interim payment is withheld, and is payable either on an interim basis or at the end of the representation. Due to the number of interim vouchers processed, the Central District does not presently withhold any portion of the preliminarily approved amount.

III. District Court Review

The Central District has a "CJA Supervising Attorney" – a staff attorney in the Legal Services Unit of the clerk's office with the authority to review and approve vouchers.[1]

CJA panel members are currently required to submit their vouchers quarterly in all cases in which accrued fees exceed $500, and – in all cases – within 45 days of the final disposition. Guidance concerning billing requirements, etc. is provided in the "CJA Trial Attorney Panel Manual." United States District Court Central District of California, CJA Trial Attorney Panel Manual (updated 2014),

[1] A few other courts have staff attorneys who perform similar functions. Other courts delegate responsibility for voucher review to other kinds of non-judicial officers, such as the Federal Public Defender.

(http://www.cacd.uscourts.gov/sites/default/files/documents/CJA-Trial-Attorney-Panel-Manual.pdf.

All vouchers are reviewed by CJA staff for mathematical and technical accuracy. The mathematical review includes a re-calculation of all hours submitted by the panel attorney and a verification that all hours were submitted in tenths of an hour. The technical review includes verification of required receipts, correct mileage rates, and required prior authorization for travel. Staff may advise counsel of the need for more detailed descriptions of services rendered. Improper submission of hours, calculation mistakes, inadequate descriptions, and failure to submit supporting documentation delays the processing of the individual attorney's vouchers and the processing of all other panel members' vouchers. In order not to penalize those attorneys whose vouchers are submitted properly, vouchers that must be resubmitted due to attorney errors do not get priority. Once a voucher passes the mathematical and technical review, staff submits it to the CJA Supervising Attorney with comments regarding any irregularities found in the first stage of review.

The CJA Supervising Attorney then performs what is commonly referred to as the "reasonableness review." If the amount requested is reasonable and appropriate and does not exceed the statutory maximum, the voucher is approved for payment. There is no further review; the information is electronically transmitted to the AO, and the AO issues payment directly to the attorney.

In cases that exceed the statutory maximum – as most Central District cases do – counsel must submit "a detailed memorandum supporting and justifying counsel's claim that the representation was given in an extended or complex case," and "the excess payment is necessary to provide fair compensation." Guide § 230.30(b) (citations omitted). In this District, the long-standing practice has been to submit a CJA 26 form as the justification memorandum with the final voucher rather than at the point in time when the statutory maximum has been exceeded.

The justification for treating the case as "extended or complex" is often readily apparent, and many panel members have fallen into the habit of describing only briefly why "excess payment is necessary to provide fair compensation." E.g., "This is a RICO case." Such cursory statements provide no assistance in determining why the amount of excess compensation requested is "necessary to provide fair compensation."

As Circuit Judge Richard Tallman, acting in his capacity as the delegate of the Chief Judge of the Ninth Circuit,[2] stated in In re Smith:

> [T]he purpose of the Act is not to compensate counsel with fees rivaling those available to attorneys representing nonindigent clients. See generally United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) ("[T]he obligation of the legal profession to serve indigents on court order is an ancient and established tradition, and . . . appointed counsel have generally been compensated, if at all, only by statutory fees which would be inadequate under just compensation principles, and which are usually payable only in limited types of cases."). Instead, Congress enacted the CJA to both "assure adequate representation in the Federal courts of accused persons with insufficient means," and "afford[] reasonable compensation to counsel who are assigned." S. REP. No. 88-346, at 1 (1963).
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> The question thus becomes not "what hours were *actually* expended," but "what hours were *reasonably* expended completing work necessary for adequate representation." See 18 U.S.C. § 3006A(a).

586 F.3d 1169, 1175 (9th Cir. 2009).

In answering this question, the CJA Supervising Attorney performs a line-by-line review of each voucher. She considers whether each line item is compensable and whether the amount billed for the task is reasonable. In addition, to the extent possible, she considers whether the total amount claimed in the quarterly submission (either alone or when considered in light of previous submissions) is reasonable, appropriate, and necessary to provide fair compensation.

In practice, the CJA Supervising Attorney often consults with the assigned judge and the Chair of the Central District CJA Committee during her review. Consultation in individual cases may be triggered by such things as questionable patterns in billing, seemingly excessive charges for mundane matters, and charges for unique or questionable tasks. Before reducing or denying a voucher for other

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[2] Judge Tallman is now Chair of the Ninth Circuit CJA Oversight Committee.

than mathematical or technical errors, the CJA Supervising Attorney will either give counsel notice of the intended reduction, or make the reduction and provide a brief statement of the reasons for it. Guide § 230.36 (a), (b). In either case, counsel is provided due process – notice and an opportunity to be heard regarding reconsideration. Id. If the CJA Supervising Attorney denies a request for reconsideration, in whole or in part, counsel may appeal to the assigned judge. At the district court level, the judge's decision is final.

Determining whether the requested excess payment is reasonable and necessary to provide fair compensation for work essential to providing the indigent defendant with adequate representation can be arduous and time-consuming, especially in light of the number of cases, attorneys, and vouchers submitted in the Central District. It is especially difficult to analyze whether the time spent collectively in certain categories has become excessive.

It is not feasible for the Court to identify for CJA counsel all of the services for which compensation is permitted, or all of the services for which compensation cannot be paid. In re Smith and other cases, the Guide, the ABA and California Rules of Professional Conduct, and the memoranda contained in the CJA Trial Attorney Panel Manual as revised from time to time, provide significant guidance. Ultimately, the Court depends on the exercise of reasonable professional judgment subject to later review by the district and circuit judges, if necessary.

You should not rely on the experience of other panel members, or even your own experience, to conclude that certain services are compensable, or descriptions of services are adequate. That certain services or descriptions have not been questioned by CJA staff, including the CJA Supervising Attorney, in the past does not mean that those practices are acceptable. Although our CJA Supervising Attorney and her staff are hard-working and diligent, they simply cannot spend the time it would take to identify and advise counsel of every error or inadequate description on every voucher. It is CJA counsel's responsibility to be familiar with all of the relevant authority and requirements – and to use common sense when submitting claims for compensation.

The more detailed the description of the services, and the more closely panel members adhere to the guidance provided as to appropriate billing and voucher submission, the more likely they are to have their vouchers approved as submitted.

When an interim voucher is preliminarily approved, it is submitted to the AO for payment directly to the attorney. Final vouchers in cases where compensation requests exceed statutory maximums are sent to the circuit for review and approval of the entire amount billed in the case before being submitted to the AO.

The following steps will assist in prompt processing of your vouchers:

- Be sure there are no mathematical errors.

- Be sure there are no technical errors.

- Evaluate the time spent, and determine whether the services were performed at peak efficiency and whether a private client would pay for the number of hours submitted for the task.

- Provide sufficient detail for the reviewer to determine what services were performed, and why those services were necessary for adequate representation.

- Indicate the time spent on individual tasks within the subcategories on the voucher worksheets. E.g., "16a. Interviews and Conferences: Met with defendant at MDC to review and discuss plea agreement 1.3; Met with AUSA to discuss defendant's concerns regarding plea agreement 0.3."

- Have paralegals, investigators, or other staff perform appropriate tasks, including discovery review.

- Do not bill for services performed for the comfort or convenience of the client, such as traveling to meet an out-of-custody client, or updating the client's family or friends about the case.

- Do not bill for items and services of a personal nature. Guide § 230.66.20. This is true regardless of whether performing such services will make the client feel better, increase his or her ability to focus on the case, ease his or her mind, etc.

- Obtain permission through the CJA Supervising Attorney before handling ancillary matters or civil forfeiture proceedings. Guide § 210.20.30.

- Provide more detailed information in your CJA 26, describing the services performed, why those services were necessary for adequate representation, and why the amount of payment requested is necessary for adequate compensation. Of course, you will need to provide more detailed information for the out-of-court fees and expenses than for the in-court fees and related expenses.

IV. Ninth Circuit Practice

As expressly permitted by 18 U.S.C. § 3006A(d)(3), the Chief Judge of the Ninth Circuit has regularly delegated approval authority among the circuit judges on a rotating three-year basis. The circuit is split into three administrative units; the Central District is in the Southern Administrative Unit. Circuit Judge Milan Smith, Jr. is the present delegate for the Southern Administrative Unit. For these purposes, the unit delegate is designated the "Chief Administrative Unit Judge."

It is important to remember that when Judge Smith reviews the form CJA 26 attached to your final voucher, he typically knows nothing about the case. He does not receive copies of your interim vouchers, nor does he receive copies of any pleadings in the case. In some cases, a panel member's CJA 26 explanation does not provide sufficient information to permit him to perform his statutory obligation to consider "what hours were reasonably expended completing work necessary for adequate representation" and whether the amount requested is "necessary to provide fair compensation." Id. at § 3006A(d)(3). Therefore, Judge Smith may request that you provide a much more detailed summary to justify the time spent in each category of the CJA 20 worksheets. If counsel fails to provide the requested information, or if, after reviewing the information requested, Judge Smith has significant concerns about the reasonableness of the amount of time spent, he may ask the district judge who handled the case to review the vouchers for reasonableness and report the findings to him.

Judge Smith has authorized the Committee to provide some guidance that may expedite his processing of your vouchers. Of course, you should follow the

Central District's billing requirements. If provided at the time of submission of your final voucher, in a CJA 26 or a supplement thereto, the following information will reduce the likelihood that Judge Smith will require a further explanation from you or a review of your billing by the district judge.

- Provide a summary of "each aspect" or "each category" of the case to justify the total time spent. This refers to the categories listed on the CJA 20 worksheets, e.g., "15. In Court, 16. Out of Court, 17. Travel, and 18. Other Expenses," and the sub-categories therein, e.g., "16. b. Obtaining and Reviewing Records (discovery review)." You have access, through CJA Services, to the total time spent in the basic categories. Judge Smith is particularly interested in the amount of time spent in court, in the preparation of pleadings filed with the court, and in the breakdown of time spent doing discovery.

- Describe in a reasonable amount of detail the services provided, as well as the number of hours spent and the total dollars billed. Remember that Judge Smith does not have your previous vouchers. It is most helpful to Judge Smith if you describe the services performed separately by month or by quarter. As quarterly billing is now required, it would seem most efficient to prepare a summary when you submit your vouchers every quarter and maintain it in your files for submission with the final voucher. Remember that the question is not whether you actually worked the hours represented in your voucher (though that is certainly a requirement), but whether the time billed was reasonable. Consider what a client in the private sector paying for your services by the hour would expect to see as justification for the fee charged.

- If you have spent a significant amount of time in certain categories, such as legal research or brief writing, describe what you did and why it may have taken more time than might otherwise seem reasonable. Stating that you billed 200 hours preparing motions, for example, is not sufficient.

- If substantial amounts of time are spent on discovery review, explain not only the volume of discovery, but your reasoned approach to

> assessing and reviewing it in an efficient and cost-effective manner. Explain whether you obtained paralegal services to assist in that regard, or why you did not do so. (Remember that if you choose to perform services yourself that could have been adequately performed by a paralegal, or investigator, you must bill for those services at the appropriate rate and on a separate CJA 20.)

When Judge Smith approves the final voucher, the Central District CJA Office staff enters the certified/approved amounts in the CJA Panel Attorney Payment System.

If you disagree with a district judge's ruling on a reduction, you may appeal that decision to the Ninth Circuit delegate. See In re Smith, 586 F.3d at 1173. There appears to be no appeal from the decision of the Ninth Circuit delegate, either from his or her determination of your appeal from the district judge's determination or from his or her determination as to the final amount of compensation approved. Id.

We hope this explanation has been helpful. If you have questions concerning the billing process, you may contact Cynthia Dixon at (213)894-0978.