

The Federal Criminal Mega Case

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What is a Federal Criminal Mega Case?

According to the Judicial Conference of the United States, a Federal Criminal Mega Case:

- ◆ Will cost in excess of \$30,000 [under the CJA] or;
- ◆ Will involve more than 300 hours of attorney time

Mega Issues in Mega Cases:

- ◆ Getting and managing discovery
- ◆ Getting paid under the CJA
- ◆ Getting the CJA resources to provide your client “adequate representation”
- ◆ Special mega case issues for retained counsel

#1 – Discovery Issues in Mega Cases

Discovery Volume and Management

- ◆ Likely to be massive volume – electronic and paper
- ◆ Impossible to manage alone – requires vendor assistance and litigation management software
- ◆ Seek inventory:
 - Ask government to provide – careful not to demand work product
 - Ask Court to order
 - Failing above, try to construct from search warrant inventories, other sources
- ◆ Request electronic discovery from government in “post-processed” format
- ◆ Get discovery to incarcerated defendants in electronic format – BOP WILL allow access to laptops
- ◆ In multi-defendant case, consider asking court to appoint coordinating discovery attorney

#2 – Getting Paid Under the CJA

How to maximize your chances of getting paid in a mega case

- ◆ Do case budgets
 - Attorney
 - Experts and other services
 - Investigative work
- ◆ Interim billing
 - Request interim billing from presiding judge
 - Bill regularly
 - Keep track of interim billing to ensure don't exceed budget
- ◆ Justify your “excess compensation” claim
 - Keep good records
 - Submit detailed explanatory memorandum
- ◆ Use mandatory CJA timekeeping system

Case Budgeting

- ◆ Budgets required when case has “extraordinary” potential cost of 300 or more attorney hours or \$30,000 or more in fees/expenses per defendant
- ◆ Rule of thumb:
 - If trial predicted to last four weeks
 - 160 attorney hours times \$125 per hour equals \$20,000 in in-court lawyer time alone
 - Longer trial or appointment of additional counsel means greater cost
- ◆ Case budgeting rule very inclusive – lots of cases will qualify

Attorney Budget

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Attorney Services Detailed Budget Worksheet for Non-capital Representations with the Potential for Extraordinary Cost

This detailed budget worksheet is for use by counsel in preparing the summary of anticipated attorney services for representations that "appear likely to become or have become extraordinary in terms of potential cost" as set forth in subparagraph 2.22B(4) of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*. The figure at the end of each section should be transferred to the summary budget worksheet for submission to the court. (In some instances, the court may request the detailed worksheet as well as the summary.) The document automatically totals hours and dollar amounts.

Date: _____

Case Name: _____

Case Number: _____

Name of Appointed Attorney: _____

Date of Appointment: _____

Hourly Rate: \$0.00

Trial Date: _____

List additional attorneys authorized pursuant to paragraph 2.11A of CJA Guidelines: _____

Hours

I. Discovery Retrieval, Organization, and Review (including documents and information generated by defense investigation)

A. Estimated Quantity of Discovery

1. Pages of Discovery/Documents: _____

2. Number of Audiotapes: _____

Hours of Tape: _____

3. Number of Videotapes: _____

Hours of Tape: _____

4. Other (specify): _____

B. Discovery Retrieval (including printing of CD ROMs): _____

C. Discovery Review and Organization

1. Documents: _____

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3. Estimated out-of-court hours for preparation (including researching and writing pleadings, but excluding discovery review captured in I, supra): _____

C. Hearings on Challenges to Charges and Evidence

1. Estimated hours in court: _____

2. Estimated travel hours to/from court: _____

3. Estimated out-of-court hours for preparation (including researching and writing pleadings and preparing non-expert witnesses): _____

D. Hearings Related to Sentencing

1. Estimated hours in court: _____

2. Estimated travel hours to/from court: _____

3. Estimated out-of-court hours for preparation (including reviewing PSR, researching and writing pleadings and memoranda, and preparing non-expert witnesses): _____

Subtotal Hours:

0.0

Hours

IV. Witness Interviews and Other Investigation (including interviews of family members, but excluding expert witnesses, captured in VI, infra)

A. Local Witness Interviews

1. Number of potential witnesses to be contacted locally: _____

2. Estimated hours of investigation/interviews (including attorney travel time, but excluding travel costs, captured in IX, infra): _____

B. Non-Local Witness Interviews

1. Number of potential witnesses to be contacted non-locally: _____

2. Estimated hours of investigation/interviews (including attorney travel time, but excluding travel costs, captured in IX, infra): _____

C. Other Investigation

Expert Budgets

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Expert Services Detailed Budget Worksheet for Non-capital Representations with the Potential for Extraordinary Cost

This detailed budget worksheet is for use by counsel in preparing the summary of anticipated expert services for representations that "appear likely to become or have become extraordinary in terms of potential cost" as set forth in subparagraph 2.22B(4) of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*. The figure at the end of each section should be transferred to the summary budget worksheet for submission to the court. (In some instances, the court may request the detailed worksheet as well as the summary.) The document automatically totals hours and dollar amounts.

Date: _____

Case Name: _____

Case Number: _____

Expert's Name: _____

Type of Expert: _____

Hourly Rate: \$0.00

Hours

I. Discovery/Document Review

A. Medical/Psychological/Social History Records (_____ pages): _____

B. Offense Reports (_____ pages): _____

C. Videotapes: _____

D. Audiotapes: _____

E. Other (specify): _____

Subtotal Hours: _____

II. Meetings with Defendant for Interviews and Testing

A. Estimated number of meetings for interviews and testing: _____

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2. Total estimated hours of travel time: _____

Subtotal Hours: _____

V. Examination of Crime Scene(s) And/or Physical Evidence (including physical/scientific testing of evidence)

A. Estimated number of trips: _____

B. Time spent at crime scene and/or with physical evidence: _____

C. Lab time: _____

D. Travel time (see IX.A and B below for estimated travel costs)

1. Is out of district travel required (Y or N)? _____

2. Total estimated hours of travel time: _____

0.0

Hours

Subtotal Hours: _____

VI. Report Writing (including review of literature)

A. Type of Report: _____

Hours: _____

B. Type of Report: _____

Hours: _____

C. Type of Report: _____

Hours: _____

0.0

Hours

Subtotal Hours: _____

VII. Hearing and/or Trial Testimony

A. Type of Proceeding: _____

1. Exhibit preparation: _____

0.0

Hours

Investigator Budget

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Investigative Services Detailed Budget Worksheet for Non-capital Representations with the Potential for Extraordinary Cost

This detailed budget worksheet is for use by counsel in preparing the summary of anticipated investigative services for representations that "appear likely to become or have become extraordinary in terms of potential cost" as set forth in subparagraph 2.22B(4) of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, *Guide to Judiciary Policies and Procedures*. The figure at the end of each section should be transferred to the summary budget worksheet for submission to the court. (In some instances, the court may request the detailed worksheet as well as the summary.) The document automatically totals hours and dollar amounts.

Date: _____
Case Name: _____
Case Number: _____
Name of Investigator: _____
Hourly Rate: \$0.00

Hours

I. Discovery/Document Review

(including documents and information generated by defense investigation)

A. Estimated Quantity of Discovery

1. Pages of Discovery/Documents: _____
2. Number of Audiotapes: _____
Hours of Tape: _____
3. Number of Videotapes: _____
Hours of Tape: _____
4. Number of Court Files: _____
5. Other (specify): _____

B. Discovery Review

1. Documents: _____
2. Audiotapes: _____
3. Videotapes: _____
4. Court-Files: _____

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5. Other: _____

Subtotal Hours: _____

0.0

II. Investigation and Witness Interviews (including travel time)

A. Local Investigation

1. Collecting records: _____
2. Locating and interviewing witnesses: _____
a. Number of potential witnesses: _____
b. Will witnesses be difficult to locate (Y or N) ? _____
c. Estimated hours of investigation/interview: _____
3. Inspecting crime scene and other evidence: _____

Hours

B. Non-Local Investigation

1. Collecting records: _____
2. Locating and interviewing witnesses: _____
a. Number of Potential Witnesses: _____
b. Will witnesses be difficult to locate (Y or N) ? _____
c. Estimated hours of investigation/interview: _____
3. Crime Scene and Evidence Inspection: _____

Subtotal Hours: _____

0.0

III. Meetings with Defense Attorneys, Client, and Expert Witnesses

A. Meetings with Client

1. Time for meetings: _____
2. Travel time to meetings with client: _____

Hours

Disclosure/Non-Disclosure Issues

- ◆ Case budgets filed **ex parte, under seal**
- ◆ Motions to appoint experts, investigators, etc. filed **ex parte, under seal**
- ◆ Motion for preliminary determination that ancillary proceeding compensable filed **ex parte, under seal**
- ◆ Attorney payment vouchers **publicly disclosed**
- ◆ Supporting documentation attached to vouchers **not publicly disclosed**

Exceeding Attorney Case Maximum

- ◆ Current case maximum for attorneys fees is \$9,700
- ◆ Exceeding cap permissible when necessary to provide “fair compensation in cases involving extended or complex representation”
 - Magnitude/importance of case
 - Manner duties performed
 - Knowledge, skill, efficiency, professionalism, judgment
 - Nature of lawyer’s practice and injury to it
 - Extraordinary time pressure
 - Other relevant factors
- ◆ Presiding judge/magistrate judge must certify
- ◆ Circuit Chief Judge or designee must approve

Interim Payments

- ◆ Presiding judge authorizes when “necessary and appropriate” to have interim payments to counsel
- ◆ Chief Judge of Circuit or designee must give written approval
- ◆ Presiding judge issues memorandum with procedure to be followed
- ◆ 20% of each interim voucher withheld until case complete and final voucher submitted

Appointment of More Than One Lawyer

- ◆ General rule is only one lawyer per defendant in non-capital case
- ◆ Total compensation claim within case maximum:
 - No prior approval to claim work by partner or associate
 - Can obtain compensation for co-counsel who is not a partner or associate with prior approval
- ◆ In “extremely difficult case” when “in the interest of justice” court can appoint additional attorney
- ◆ If get approval to exceed case maximums, clarify with court whether work by partners, associates compensable

Representation in Ancillary Matters

- ◆ CJA counsel can claim compensation for representation of defendant in certain ancillary matters
- ◆ Representation in ancillary matter appropriate to:
 - Protect Constitutional Right
 - Contribute significantly to defense
 - Aid in preparation for trial
 - Enforce plea agreement
 - Preserve claim to interest/obtain return of property that could be used to repay CJA
- ◆ Ancillary matter part of original appointment
- ◆ Attorney's option to seek preliminary determination by court that representation be provided in ancillary matter

The Bane of Every Lawyer's Existence – VOUCHER CUTS

- ◆ Guidelines provide that vouchers should not be delayed or cut due to appropriations shortfall
- ◆ Voucher reductions by district court:
 - Prior notice of proposed reduction with statement of reasons
 - Opportunity to address the matter
 - No notice necessary if reduction because of math or technical errors
- ◆ Voucher reductions by circuit court:
 - When voucher reduced by Chief Judge's designee, can petition for rehearing
 - When voucher reduced by Chief Judge, only remedy is reconsideration or mandamus in Supreme Court
- ◆ CJA lawyer not liable to vendor for shortfall after court voucher reductions

3 – Resources for an “Adequate” Defense under the CJA

Services That Can be Claimed Under CJA

When necessary to provide “adequate representation”:

- ◆ Investigator
- ◆ Expert witness services
 - Medical experts
 - Lab experts (e.g. ballistics; fingerprinting etc.)
 - Computer experts
 - Other
- ◆ Psychiatrist/psychologist
- ◆ Transcripts (sometimes accelerated)
- ◆ Large volume copying
- ◆ Computer-assisted legal research
- ◆ Computer hardware and software
- ◆ Computer systems and automation litigation support personnel
- ◆ Interpreters/translators
- ◆ Paralegals, legal assistants and law students
- ◆ Stenographic and notarial expenses
- ◆ Extraordinary office expenses

Case Budgeting for Experts, Investigators and Other Services

- ◆ In a mega case, must budget for experts, investigators and other services just like attorney's fees
- ◆ Can hire experts and investigators prior to budget approval:
 - With authorization from presiding judge
 - Court can later reconsider amounts authorized
 - Not supposed to rescind prior authorization for work already performed

Case Maximums for Experts, Investigators and Other Services

◆ Without prior authorization of presiding judge:

- Current maximum \$800
- Maximum applies to each vendor
- Subject to later review

◆ With prior authorization of presiding judge:

- Current maximum \$2,400
- Maximum applies to each vendor
- Requires separate authorization for each vendor
- Maximum waivable if:
 - Certified by presiding judge or magistrate judge
 - Approved by Chief Judge of Circuit or designee

Special Issues in Obtaining Computer Hardware, Software or Litigation Support Services

- ◆ Before seeking court approval for computer hardware/software/litigation support products or services/computer experts expected to cost more than \$10,000
 - Must consult with National Litigation Support, Office of Defender Services
 - Must inform court in writing of ODS advice and recommendation
- ◆ Hardware/software property of U.S. and must be returned
 - Get ODS instructions for return
 - Delete all data, software
 - Provide all serial numbers, codes etc.

Rule 15 Depositions

◆ DOJ (not CJA) pays for:

- Expenses for fact witness depositions
- Costs of attendance of fact witnesses – both parties
- Expenses of counsel and defendant to attend – only if government is requesting party

◆ CJA pays for:

- Costs of defense expert witness attendance
- Expenses of counsel and defendant to attend if defense is requesting party

4 – Mega Case Issues For Retained Counsel

Services for Defendants with Retained Counsel under CJA

- ◆ Court can provide investigator, expert or other services to defendant with retained counsel
 - Must be “necessary to adequate representation”
 - Defendant must be found financially unable to obtain necessary services
- ◆ CJA directs court to “inquire into the fee arrangement”
 - ◆ Court can make counsel pay for all or part of expenses if:
 - Fee “unreasonable in relation to fees customarily paid” for “matters of similar duration and complexity” or
 - Fee arrangement made with “gross disregard” of trial expenses