

Ninth Circuit Budgeting History

The nature and extent of CJA expenditures in capital cases have been a high priority for the Ninth Circuit for decades.

In 1987, concerns about the burden of capital habeas cases in the circuit—including the financial costs—led the Judicial Council of the Ninth Circuit to form the Death Penalty Task Force, chaired by Judge Lawrence Karlton, Eastern District of California. The Task Force made recommendations concerning recruitment of competent counsel, the development of compensation benchmarks, and other issues. The Task Force believed that benchmarks based on reasonable cost expectations would minimize voucher disputes and facilitate the recruitment of counsel.

In the 1990s, the Judicial Council formed the Capital Case Committee to succeed the Death Penalty Task Force. Chaired by Judge William Enright of San Diego, the committee focused on issues such as CJA expenditures in capital habeas cases. However, the lack of solid data hindered its efforts.

In 1995, a San Francisco legal newspaper published data suggesting that the Northern District of California had disproportionately large CJA payments in capital cases. Months later, the Administrative Office produced data indicating that the Ninth Circuit was responsible for more than 65 percent of the nation's total CJA capital habeas corpus expenditures, but had only 23 percent of the cases. This data would later be proved incorrect.

In late 1996, Chief Circuit Judge Procter Hug appointed the CJA Oversight Committee to address CJA expenditures in the circuit. The committee, chaired by Judge Barry Moskowitz of San Diego, found that the high costs of capital habeas cases in the circuit were attributable to a number of factors, including:

- **Lack of evidentiary hearings or fact finding in California state post-conviction proceedings**
- **Unexplained “post card” denials of post-conviction relief by the California Supreme Court**
- **Absence of cost controls or oversight**
- **Use of large civil law firms with no capital habeas experience**

In September 1997, the Judicial Conference of the United States adopted a policy mandating that each circuit judicial council establish a review process for any death penalty habeas corpus case within the circuit in which attorney compensation exceeds \$100,000. The next year, the Judicial Council of the Ninth Circuit adopted a policy

requiring budgeting and Judicial Council approval for all pending capital habeas corpus cases in the circuit if a CJA panel attorney is appointed to the case. Budgeting and case management are required at the very beginning of these cases. We do not wait to see if they exceed \$100,000. This policy has been amended numerous times and remains in effect today. To assist panel attorneys and district courts with budgeting, the Office of the Circuit Executive developed Excel-based spreadsheets and a model “Case Management and Budgeting” guide.

The CJA Oversight Committee was charged with reviewing budgeted cases and making recommendations to the Judicial Council as to whether the budget amounts approved by the court were reasonable, while the Capital Case Committee continued to focus on policy and procedures. In 2003, the two committees were merged into what is the current Capital Case Committee, which I have chaired since 2005. The committee continues to review budgets for reasonableness and to address policies and procedures for death penalty cases.

Innovative efforts made by the Ninth Circuit to provide better representation and manage costs in capital cases include:

- Model capital case management plans and orders
- Death Penalty Law Clerk positions to assist District Judges
- Capital Punishment Handbook, available as a resource for courts and attorneys
- CJA Supervising Attorney Pilot Project in Central and Northern Districts of California
- Capital Case Committee intranet website, providing budgeting information and guidance to district courts
- CJA Capital Habeas Costs Policy, including adoption of presumptive rates for attorneys and service providers

In 2009, the Judicial Council created an ad hoc CJA Oversight committee, which developed policies and procedures and set standards to improve all aspects of CJA administration in non-capital cases.

Budgeting Capital Habeas Cases

In the years I have served on the Ninth Circuit’s Capital Case Committee, I have been most concerned with (1) the quality of representation in capital habeas cases, and (2) the application of consistent standards across the circuit for CJA expenditures. The budgeting process we have developed has met both of these goals.

We learned early on that, due to their complexity, capital habeas cases cannot be budgeted in one sitting but rather should be done in stages. Oftentimes CJA counsel is new to the case and must expend significant efforts to gather the record and files from prior attorneys. These materials frequently number in the tens of thousands and not infrequently, hundreds of thousands of hardcopy pages. We therefore encourage the use of lower-cost service providers—such as a paralegal, law clerk, or an associate—to assist with record organization and review. Starting the budgeting process with this initial stage ensures that counsel get an early start on this critical work and do so in a cost effective manner.

Review of the record and case files is a necessary prerequisite to estimating the time needed to prepare a habeas petition. Consequently, we urge courts to work with counsel to develop an initial budget for record review, followed by another budget for the petition and other initial pleadings anticipated by the court. Additional budgets are then required as the litigation progresses.

By budgeting the case, a court is able to both manage the litigation more efficiently and ensure that counsel are undertaking the tasks necessary for high quality, effective representation. For counsel, having a budget and a case management plan greatly reduces the risk of voucher reductions and payment delays, making it more likely counsel will be willing to accept appointment in a future case.

Budgeting Direct Death Cases

Budgeting a federal death penalty case is equally beneficial. From my experience presiding over numerous multi-defendant federal death penalty cases, in my view, judicial oversight is the key to avoiding unnecessary expenditures while ensuring that counsel provide effective representation.

Because mitigation is one of the more costly aspects of these cases, I work with counsel to develop a case management plan and budget the mitigation investigation incrementally. Rather than authorize an extraordinary amount of resources at the start of the case, I require counsel to provide detailed descriptions of planned expenditures and the types of mitigation to be investigated, especially prior to a decision by the Department of Justice as to whether it intends to seek the death penalty. I also encourage counsel to avoid duplication of effort, to use lower-cost service providers whenever feasible for tasks such as gathering social history records, to negotiate hourly and travel rates for experts, and to utilize service providers from within the main geographic area where the work will be undertaken.

DOJ's decision whether and when to seek the death penalty has a significant impact on cost and case management. In addition, the vast majority of the defendants who are charged with death-eligible offenses are not death-authorized by the DOJ. Accordingly, I typically set a date certain for the Government to file notice of intent to seek the death penalty, which provides a concrete period of time for budgeting the initial stage of the case.

Because defendants charged with a death-eligible offense are entitled to the appointment of two attorneys at the start of a case, I usually inform counsel from the outset that work during the pre-authorization stage should be divided in such a way that, if DOJ decides against seeking death, removal of one counsel will not prejudice the defendant. In complex, multi-defendant cases, the Federal Public Defender should be appointed to represent the defendant most likely to undergo a lengthy trial.

Finally, if DOJ files notice of intent to seek death, I require the defense to submit additional budgets for various pretrial and trial stages of the case. This again ensures that counsel plan ahead and think through defense strategies, thus resulting in better managed cases overall.

I would be happy to discuss any of these issues in more detail when I appear before your committee. I look forward to your questions.