

TABLE OF CONTENTS FOR 2024 NCM and NCW CJA/FPD TRAINING

1. Power Point Slides
2. CJA Guidelines Chapter 2 (Payment of Attorneys)
3. CJA Guidelines Chapter 3 (Experts)
4. Criminal ESI Pocket Guide
5. Fourth Circuit Compensability Guide
6. CJA 20 Billing Tips
7. CJA 21 and 31 Billing Tips
8. Discovery Billing Tips
9. Expert Presumptive Rates
10. Sample Engagement Letter
11. Service Provider Advance Authorization form (fillable PDF)

CLIMBING THE DISCOVERY MOUNTAIN: WHAT EVERY CRIMINAL DEFENSE ATTORNEY SHOULD KNOW

NCM/NCW CJA/FPD Training

August 23, 2024

Presented By

Larry Dash, 4th Circuit Case Budgeting Attorney





WHAT WE WILL COVER TODAY

What is a Budget – When and Why You Need One

What are Service Providers and Why You
Should Consider Using Them

Authority to Obtain Service Providers

Being an Effective Advocate for your
Provider

Mechanics of Your Request

Miscellaneous Issues

WHEN TO BUDGET

When You Anticipate Your Case Will
Exceed 300 Hours of Attorney Time

When You Anticipate Your Case Will
Exceed \$52,000

HOW TO BUDGET

Currently Using Electronic Budgeting
Application

Call me at 804-916-2177 or email me at
Larry_Dash@ca4.uscourts.gov
for access to the Program

HOW TO SUBMIT YOUR BUDGET

Submit the Budget in eVoucher using the BudgetAUTH function

I will give you specific Step-by-step instructions on how to file



TYPES OF RESOURCES THAT MAY BE AVAILABLE

- Accountant
- Ballistics expert
- Computer assisted legal research
- Chemist, toxicologist
- Computer (hardware, software)
- Computer forensics expert
- Documents examiner
- Duplication services
- Fingerprint analysis
- Hair/Fiber analyst
- Interpreter/translator
- Investigator
- Jury consultant
- Legal analyst/Consultant
- Litigation support services
- Mitigation specialist
- Other
- Other medical expert
- Paralegal
- Pathologist
- Polygraph
- Psychologist
- Psychiatrist
- Voice/Audio analyst
- Weapons/Firearms/Explosive analyst

DUTY TO YOUR CLIENT

NC Rules of Professional Conduct Rule 1.1

Duty to render competent representation including understanding the benefits and risks associated with the technology relevant to your practice

NC Rules of Professional Conduct 1.3 and ABA Criminal Justice Standards for the Defense Function 4-4.8

Duty to monitor your workload and ensure adequate time to carry out your responsibilities

CJA Plan Section XI.C.1. (NCM) or XII.C.1 (NCW) Duties of CJA Panel Members

Attorneys must have facilities, resources, and technological capability to effectively and efficiently manage assigned cases

DUTY TO INVESTIGATE

NC Rules of Professional Conduct 3.1

Counsel's duty to inform themselves about the facts of the client's case and applicable law

ABA Criminal Justice Standards for the Defense Function 4-4.1

Defense counsel's duty to conduct an independent investigation of the "circumstances of the case"

ABA Standard 4-8.3

Defense counsel's duty to "verify" PSR

DUTY TO CONSIDER HIRING A PARALEGAL, INTERN, OR OTHER LITIGATION SUPPORT PERSON TO FURTHER YOUR CASE

Electronic Evidence is the New
Normal

No Going Back

Must Fully Accept that Electronically Stored
Information (ESI) is Here to Stay

VOLUME OF DISCOVERY IN DAYS PAST



ORGANIZATION OF DISCOVERY IN DAYS PAST



VOLUME OF DISCOVERY TODAY



DISCOVERY

- Voluminous
 - 1 TB could be about 3.5 million documents
 - 1 TB may be about 2 million photos

ORGANIZATION OF DISCOVERY IN THE ELECTRONIC ERA



WAYS TO USE A PARALEGAL, INTERN AND/OR LITIGATION SUPPORT TO FURTHER YOUR CASE

Obtain Discovery - Organize, Index, and Analyze

Prepare Summaries, Outlines, and Chronologies

Create, Update, and Maintain eDiscovery Data

Conduct Automated Searches of eDiscovery

Draft Affidavits, Motions, Trial Memorandum, Subpoenas, etc.

Obtain Jury List and Biographical Information on Jurors

Prepare Trial Notebooks, Organize and Mark Trial Exhibits

Work with Experts, Consultants and Witnesses

Gather and Prepare Sentencing Information

Research the Law

WAYS TO USE AN INVESTIGATOR TO FURTHER YOUR CASE

Find New Leads / Evidence / Witnesses

Meetings with Client

Public / Social Media Profile

Prep for Cross Examination

Obtain Mitigating Evidence

Crime Scene Reconstruction

HOW DO I FIND AN INVESTIGATOR, INTERN, OR PARALEGAL

Fellow CJA Attorneys

Your CJA Panel Representative

Colleges/Universities/Law Schools

Professional Organizations

Federal Public Defender/Case Budgeting Attorney

GUIDE TO JUDICIARY POLICY

VOLUME 7, CHAPTER 3

(SEE 18 USC § 3006A(E))

\$1,000 maximum, without prior approval (all Service Providers combined)

\$3,000 maximum, with prior approval by District Court Judge (per Service Provider)

Anything above \$3,000 needs Circuit Court Chief Judge approval

GUIDE TO JUDICIARY POLICY

VOLUME 7, CHAPTER 3

(SEE 18 USC § 3006A(E))

Waiving the Case Compensation Maximum

Advance Approval should be obtained from the court and the Chief Judge of the Circuit (See § 310.20.20(b))

Without Prior Authorization

May be waived if the judge finds “in the interest of justice,” “timely procurement could not await prior authorization” (See § 310.20.30(b))

EFFECTIVE REQUESTS



UNITED STATES DISTRICT COURT
***EX PARTE* REQUEST FORM SEEKING ADVANCE AUTHORIZATION**
FOR INVESTIGATIVE, EXPERT, OR OTHER SERVICES

Name of Attorney:

Case Name:

Case No.:

Name of Service Provider:

Hourly Rate Requested:

Number of Hours Requested:

Total Amount Requested:

Justification for Requesting Service:

Provider's Relevant Experience and Qualifications (attach a CV if appropriate):

Fee Arrangement, if Applicable:

Brief Explanation of Services and Expenses to Be Included:

Whether You Anticipate Requesting Additional Services/Funding from/for This Provider (if so, please provide details):

Attorney's Electronic Signature:

Date:

GETTING YOUR SERVICE PROVIDER PAID

Use an Engagement Letter

Monitor their hours and work

Submit their vouchers before you file
your own final voucher

YOUR EXCESS VOUCHER PROCESSING

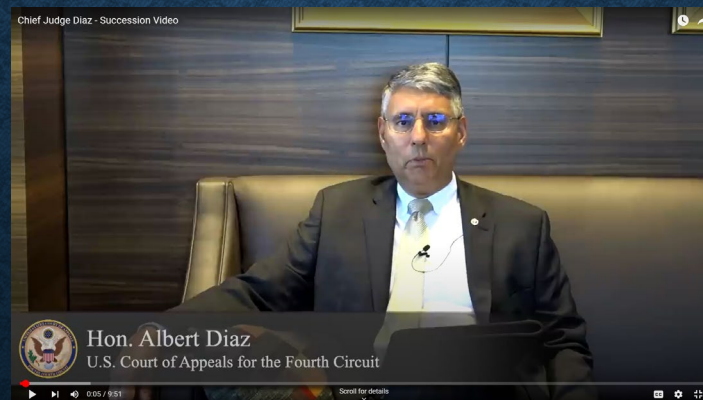
Submission of Voucher with Memo or CJA 26

Review by District Court or FPD Staff

Review and Preliminary Approval by District Judge

Review by Circuit CJA Staff

Final approval by Chief Judge Diaz



MISCELLANEOUS MATTERS

Standard for Voucher Review

Work billed is not compensable

Hours billed are clearly in excess of what was reasonably required to complete the task

Vague Entries (Discovery Review, Research, etc.)

Administrative Work

Copy Costs

Transcripts in Multi-Defendant Cases

Hardware/Software Requests

Handling eDiscovery

Circuit-wide CJA policies, procedures, and relevant information for CJA attorneys, administrators and staff.



Fourth Circuit CJA Unit

► WHAT WE DO

► **Tip Sheets**

- CJA-20 Billing Tips
- CJA-21 and 31 Billing Tips
- Discovery Billing Tips

► Budget Process Overview

► Fact Witness Compensation Guidelines

► Electronic Budgeting Application

► [Contact Us](#)

CJA Circuit-Wide Home

Expert Presumptive Rates

National CJA Guidelines

Federal Defender Training
Hotline

National Litigation Support
Team

CJA Panel Attorney District
Representatives

District Court Sites

Appellate CJA Practice
and Resources

CALL FOR ASSISTANCE

Larry Dash

804-916-2177

Larry_Dash@ca4.uscourts.gov

[CJA Circuit-Wide \(uscourts.gov\)](https://uscourts.gov)

Guide to Judiciary Policy

Vol. 7: Defender Services

Pt. A: Guidelines for Administering the CJA and Related Statutes

Ch. 2: Appointment and Payment of Counsel

[§ 210 Representation under the Criminal Justice Act \(CJA\)](#)

[§ 210.10 District Plans](#)

[§ 210.20 Proceedings Covered by and Compensable under the CJA](#)

[§ 210.30 Composition and Management of the CJA Panel](#)

[§ 210.40 Determining Financial Eligibility for Representation Under the CJA](#)

[§ 210.50 CJA Forms](#)

[§ 220 Appointment of Counsel](#)

[§ 220.10 Timely Appointment of Counsel](#)

[§ 220.15 Forms for the Appointment of Counsel](#)

[§ 220.18 Notification of Relationship](#)

[§ 220.20 Duration of Appointment](#)

[§ 220.25 Continuity of Representation](#)

[§ 220.30 New Appointments Following Earlier Representations](#)

[§ 220.35 Federal Defender Organizations](#)

[§ 220.40 Appointment of Counsel to Represent More Than One Individual in a Case](#)

[§ 220.45 Appointment of Counsel in Habeas Corpus and Proceedings Under 28 U.S.C. § 2255](#)

[§ 220.50 Waiver of Counsel](#)

[§ 220.55 Standby Counsel](#)

[§ 220.60 Termination of Appointment](#)

[§ 230 Compensation and Expenses of Appointed Counsel](#)

[§ 230.10 Forms for Compensation and Reimbursement of Expenses](#)

[§ 230.13 Time Limits](#)

[§ 230.16 Hourly Rates and Effective Dates in Non-Capital Cases](#)

[§ 230.20 Annual Increase in Hourly Rate Maximums](#)

[§ 230.23 Case Compensation Maximums](#)

[§ 230.26 Case Budgeting](#)

[§ 230.30 Supporting Memorandum Justifying Compensation Claimed](#)

[§ 230.33 Review and Approval of CJA Vouchers](#)

[§ 230.40 Payments by a Defendant](#)

[§ 230.43 Approval Authority of U.S. Magistrate Judges](#)

[§ 230.46 Prior Authorization for Appointed Counsel to Incur Expenses](#)

[§ 230.50 Proration of Claims](#)

[§ 230.53 Compensation of Co-Counsel](#)

[§ 230.56 Substitution of Counsel](#)

[§ 230.60 Attorney Compensation for Travel Time](#)
[§ 230.63 Reimbursable Out-of-Pocket Expenses](#)
[§ 230.66 Non-Reimbursable Expenses](#)
[§ 230.70 Writ of Certiorari](#)
[§ 230.73 Interim Payments to Counsel](#)
[§ 230.76 Record Keeping](#)
[§ 230.80 Annual Report of Attorney Compensation Exceeding 1,000 Hours](#)

Appendices

[Appx. 2A Model Plan for Implementation and Administration of the Criminal Justice Act](#)
[Appx. 2C Procedures for Interim Payments to Counsel in Non-Death Penalty Cases](#)
[Appx. 2D Procedures for Interim Payments to Counsel in Death Penalty Cases](#)

§ 210 Representation under the Criminal Justice Act (CJA)

§ 210.10 District Plans

§ 210.10.10 Overview

- (a) Each district court, with the approval of the judicial council of the circuit, is required to have a plan for furnishing representation for any person financially unable to obtain adequate representation. **See:** [18 U.S.C. § 3006A\(a\)](#).
- (b) “Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation.” **See:** [18 U.S.C. § 3006A\(a\)](#).
- (c) The CJA, [18 U.S.C. § 3006A\(a\)](#), mandates that each district plan provide for representation in the circumstances identified in [§ 210.20](#) and specify how such representation will be delivered as provided in [§ 210.10.20](#).
- (d) A Model Plan for Implementation and Administration of the Criminal Justice Act (Model Plan) is included as [Appx. 2A](#).
- (e) Each district court should review, and amend as appropriate, the CJA Plan every five years to ensure compliance with applicable statutory authorities, CJA Guidelines, and other relevant Judicial Conference policies.

§ 210.10.15 Developing a CJA Plan

- (a) All districts must develop, regularly review and update, and adhere to a CJA plan. **See:** § 210.10.10(e), above.

- (b) A district's CJA plan should reference the most recent model plan and best practices.
- (c) The plan should include:
 - (1) Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
 - (2) A training requirement to be appointed to and then remain on the panel.
 - (3) A mentoring program to increase the pool of qualified candidates.

See: [JCUS-SEP 2018](#), pp. 39-40. **See also:** [Guide, Vol. 7A, Appx. 2A, §§ VIII.B.7; IX.B.2, IX.C; and XI.B.1-5.](#)

§ 210.10.20 Attorneys Who May Be Appointed Under the CJA

- (a) Each district plan must include a provision for private attorneys. "Private attorneys shall be appointed in a substantial proportion of the cases."
See: [18 U.S.C. § 3006A\(a\)\(3\)](#).
- (b) The district plan may include, in addition to a provision for private attorneys, either of the following or both:
 - attorneys furnished by a bar association or a legal aid agency; or
 - attorneys furnished by a defender organization established according to the provisions of [18 U.S.C. § 3006A\(g\)](#).

See: [18 U.S.C. § 3006A\(a\)\(3\)](#).

§ 210.10.25 Managing the Selection, Appointment, Retention, and Removal of Panel Attorneys

Every district should form a committee or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, and removal of panel attorneys from the district's CJA panel. The process must incorporate judicial input into panel administration. **See:** [JCUS-SEP 2018](#), p. 39. **See also:** [Guide, Vol. 7A, Appx. 2A, § VIII.A.](#)

§ 210.10.30 Counsel's Obligation to Advise the Court of Client's Ability to Pay

Each plan should contain a provision to the effect:

If, at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with the client's representation, and the source of the attorney's information is not protected as a privileged communication, counsel will advise the court.

§ 210.20 Proceedings Covered by and Compensable under the CJA

§ 210.20.10 Mandatory Appointments

The CJA, [18 U.S.C. § 3006A\(a\)\(1\)](#), requires that representation must be provided for any financially eligible person who is:

- (a) charged with a felony or with a Class A misdemeanor;
- (b) a juvenile alleged to have committed an act of juvenile delinquency as defined in [18 U.S.C. § 5031](#) (**see:** [18 U.S.C. § 5034](#) (on appointment of counsel); [Guide, Vol. 7A, § 320.50](#) (on appointment of a guardian ad litem));
- (c) charged with a violation of probation;
- (d) under arrest, when such representation is required by law;
- (e) entitled to appointment of counsel in parole proceedings;

[Note: The reference to representation at parole proceedings was deleted from the [CJA](#) according to the November 1, 1987 repeal of [18 U.S.C. chapter 311](#). However, the savings provisions of the Sentencing Reform Act of 1984, as amended by the United States Parole Commission Extension Act of 2018 (Pub. L. No. 115-274 (October 31, 2018)), state that existing law pertaining to parole will remain effective for 33 years after November 1, 1987, with regard to persons specified in the savings provisions, and certain laws relating to parole will remain effective until the expiration of the sentence received by other persons specified in the savings provisions. This includes laws governing the right to counsel in parole proceedings.]

- (f) charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release (e.g., *Guide to Judiciary Policy*, Vol. 8G (Criminal Monetary Penalties (Monograph 114)), Ch. 6);
- (g) subject to a mental condition hearing under [18 U.S.C. chapter 313](#) (**see:** [Guide, Vol. 7A, § 220.30\(f\)](#) and [§ 230.23.20\(i\)\(5\)](#));
- (h) in custody as a material witness;

- (i) entitled to appointment of counsel under the sixth amendment to the Constitution, or faces loss of liberty in a case and federal law requires the appointment of counsel;

[**Note:** This provision obviates the need for future amendments to the CJA each time the right to counsel is extended to new situations by judicial decision or federal statute.]

- (j) seeking to set aside or vacate a death sentence in proceedings under [28 U.S.C. § 2254](#) or [§ 2255](#); or
- (k) is entitled to appointment of counsel in connection with prisoner transfer proceedings under [18 U.S.C. § 4109](#).

For applicable case compensation limits, **see:** [§ 230.23.20](#).

§ 210.20.20 Discretionary Appointments

- (a) Whenever the U.S. magistrate judge or the court determines that the interests of justice so require, representation **may** be provided for any financially eligible person who is:
 - (1) charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized; or
 - (2) seeking relief under [28 U.S.C. §§ 2241, 2254, or 2255](#) (**but see:** [Guide, Vol. 7A, § 210.20.10\(j\)](#) on the mandatory appointment of counsel in death penalty habeas corpus cases and [§ 220.45](#) on the requirement for appointment of counsel for an evidentiary hearing).
- (b) Counsel may be appointed under the CJA for a person charged with civil or criminal contempt who faces loss of liberty.
- (c) Upon application of a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, counsel may be appointed where there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty.
- (d) Counsel may be appointed for financially eligible persons proposed by the U.S. attorney for processing under a “pretrial diversion” program.
- (e) Counsel may be appointed for persons held for international extradition under [18 U.S.C. chapter 209](#).
- (f) For appointments in civil forfeiture proceedings, **see:** [§ 210.20.40](#).

For applicable case compensation limits, **see:** [§ 230.23.20](#).

§ 210.20.30 Ancillary Matters

- (a) Representation may be furnished for financially eligible persons in “ancillary matters appropriate to the proceedings” under [18 U.S.C. § 3006A\(c\)](#).
- (b) In determining whether a matter is ancillary to the proceedings, the court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge.
- (c) In determining whether representation in an ancillary matter is appropriate to the proceedings, the court should consider whether such representation is reasonably necessary to accomplish, among other things, one of the following objectives:
 - (1) to protect a Constitutional right;
 - (2) to contribute in some significant way to the defense of the principal criminal charge;
 - (3) to aid in preparation for the trial or disposition of the principal criminal charge;
 - (4) to enforce the terms of a plea agreement in the principal criminal charge;
 - (5) to preserve the claim of the CJA client to an interest in real or personal property subject to a civil forfeiture proceeding under [21 U.S.C. § 881](#), [19 U.S.C. § 1602](#) or similar statutes, which property, if recovered by the CJA client, may be considered for reimbursement under [18 U.S.C. § 3006A\(f\)](#) and [Guide, Vol. 7A, § 210.40.30](#); or
 - (6) to effectuate the return of real or personal property belonging to the CJA client which may be subject to a motion for return of property under [Fed. R. Crim. P. 41\(g\)](#), which property, if recovered by the CJA client, may be considered for reimbursement under [18 U.S.C. § 3006A\(f\)](#) and [Guide, Vol. 7A, § 210.40.30](#).
- (d) The scope of representation in the ancillary matter should extend only to the part of the ancillary matter that relates to the principal criminal charge and to the **correlative objective sought** to be achieved in providing the representation (e.g., a CJA defendant in a criminal stock fraud case should be represented by CJA counsel at the defendant’s deposition in a

parallel civil fraud action for the limited purpose of advising the defendant concerning the defendant's Fifth Amendment rights).

- (e) Representation in an ancillary matter is compensable as part of the representation in the principal matter for which counsel has been appointed and is not considered a separate appointment for which a separate compensation maximum would be applicable under [§ 230.23.10\(g\)](#).
- (f) A private panel attorney appointed under the CJA may obtain, through an *ex parte* application to the court, a preliminary determination that the representation to be provided in an ancillary matter is appropriate to the principal criminal proceeding and compensable under [18 U.S.C. § 3006A\(c\)](#) and this guideline. However, failure to obtain such a preliminary determination does not bar the court from approving compensation for representation in an ancillary matter provided that the services and compensation related thereto are justified in a memorandum submitted by the attorney to the court at the conclusion of the principal criminal matter and the presiding judicial officer finds that such representation was appropriate.

§ 210.20.40 Civil Forfeiture Proceedings

- (a) Under [18 U.S.C. § 983\(b\)\(1\)](#), if a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under [18 U.S.C. § 3006A](#) in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.
- (b) In determining whether to authorize counsel to represent a person in a judicial civil forfeiture proceeding under a civil forfeiture statute, the court must take into account such factors as:
 - the person's standing to contest the forfeiture; and
 - whether the claim appears to be made in good faith.

§ 210.20.50 Proceedings Not Covered by or Compensable under the CJA

Cases or proceedings which are not covered by or compensable under the CJA include the following:

- (a) Petty offenses (Class B or C misdemeanors or infractions), except where confinement is authorized by statute and the court or U.S. magistrate judge determines that appointment of counsel is required in the interest of justice. **See:** [§ 210.20.20\(a\)\(1\)](#).

- (b) Representation of corporations or other business entities.
- (c) Prisoners bringing civil rights actions under [42 U.S.C. § 1983](#). Care should be taken to ensure that a prisoner is not denied the appointment of counsel due to the mislabelling of the prisoner's action as "civil rights" when the proceedings could also be considered as seeking relief under [28 U.S.C. § 2254](#).
- (d) Administrative proceedings before the U.S. Citizenship and Immigration Services (USCIS), removal or deportation proceedings before the Immigration Court, review of the Immigration Court's decision by the Board of Immigration Appeals, and judicial review by the federal courts of appeals of petitions for review from these administrative decisions. **But see:** [§ 210.20.30](#) (ancillary matters) and [§ 210.20.20\(a\)\(2\)](#) (habeas corpus cases).

§ 210.20.60 Civil Actions to Protect Federal Jurors' Employment

- (a) Although not an appointment under the authority of the CJA, Congress has included statutory language in the annual appropriation for the federal judiciary's Defender Services account to authorize "the compensation of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by [28 U.S.C. § 1875\(d\)](#)."
- (b) In these cases, the court appoints counsel under the standard provided in [28 U.S.C. § 1875\(d\)\(1\)](#), which does not require a finding of financial eligibility.
- (c) The court will appoint a private attorney, who may be a member of the CJA panel and should have employment law experience. A federal defender should not be appointed.
- (d) The court should use the eVoucher system and [Form CJA 20 \(Appointment of and Authority to Pay Court-Appointed Counsel\)](#) for the appointment and pay counsel "to the extent provided by [the CJA]," [28 U.S.C. § 1875\(d\)\(1\)](#), and the CJA Guidelines.
- (e) The court may, as authorized by [28 U.S.C. § 1875\(d\)\(2\)](#), order a defendant employer to pay the fees and expenses of counsel appointed under [28 U.S.C. § 1875\(d\)\(1\)](#); in such event, the court should follow the reimbursement procedures in [Guide, Vol. 7A, § 230.40](#).

§ 210.30 Composition and Management of the CJA Panel

§ 210.30.10 Overview

- (a) The CJA Panel must be designated or approved by the court. **See:** [18 U.S.C. § 3006A\(b\)](#).
- (b) The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation.
- (c) Members should serve at the pleasure of the court.
- (d) The Model Plan for Implementation and Administration of the Criminal Justice Act is included as [Appx. 2A](#).

§ 210.30.20 Selection of Panel Members

In part, [18 U.S.C. § 3006A\(b\)](#) provides that:

Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

§ 210.30.30 *Pro Hac Vice* Appointments

- (a) If the district judge presiding over the case, or the chief judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting the attorney's appointment, the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant.
- (b) Consideration for preserving the integrity of the panel selection process suggests that *pro hac vice* appointments should be made only in exceptional circumstances.
- (c) The attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify the attorney for admission to the district's CJA panel in the ordinary course of panel selection.

§ 210.30.40 Centralization of Panel Administration and Management

Administration and management of the CJA Panel should be centralized in one organizational element (such as the clerk's office or, where appropriate, the federal defender organization) to ensure that counsel is appointed as expeditiously as possible, appointments are equitably distributed, and information on availability of counsel is maintained.

§ 210.30.50 Distribution of Appointments

- (a) Appointments should be made in a manner which results in both
 - a balanced distribution of appointments and compensation among members of the CJA Panel, and
 - quality representation for each CJA defendant.
- (b) These objectives can be accomplished by making appointments on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations.

§ 210.40 Determining Financial Eligibility for Representation Under the CJA**§ 210.40.10 Timely Appointment of Counsel**

A person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, whichever occurs earliest.

§ 210.40.20 Fact-Finding

- (a) The determination of eligibility for representation under the CJA is a judicial function to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition.
- (b) Unless it will result in undue delay, fact-finding concerning the person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court.
- (c) Other officers or employees of the court (e.g., clerk, deputy clerk, or pretrial services officer) may be designated by the court to obtain or verify the facts upon which such determination is to be made.

- (d) Relevant information bearing on the person's financial eligibility should be reflected on [Form CJA 23 \(Financial Affidavit\)](#) and the form must be completed and executed before a judicial officer or employee.
- (e) Employees of law enforcement agencies or U.S. attorney offices should not participate in the completion of the Form CJA 23 (Financial Affidavit) or seek to obtain information from a person requesting the appointment of counsel concerning the person's eligibility.
- (f) The person seeking appointment of counsel has the responsibility of providing the court with sufficient and accurate information upon which the court can make an eligibility determination. For guidance on counsel's obligation to advise the court about the client's ability to pay, **see:** [§ 210.10.30](#).
- (g) The prosecution and other interested entities may present to the court information concerning the person's eligibility, but the judicial inquiry into financial eligibility must **not** be utilized as a forum to discover whether the person has assets subject to forfeiture, or the ability to pay a fine, make restitution, or compensate another person under the Victim/Witness Protection Act or other purposes not related to the appointment of counsel. Such determinations, if appropriate, must be made at other stages of the proceedings in which the person seeking counsel is a party.
- (h) Financial affidavits (such as [Form CJA 23](#)) seeking the appointment of counsel should not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access. If the financial affidavit is docketed it should be filed under seal. **See:** [Privacy Policy for Electronic Case Files](#).

§ 210.40.30 Standards for Eligibility

- (a) A person is "financially unable to obtain counsel" within the meaning of [18 U.S.C. § 3006A\(b\)](#) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to:
 - (1) the cost of providing the person and his dependents with the necessities of life, and
 - (2) the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the case deposit defendant is required to make to secure release on bond.

- (b) Any doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time.
- (c) At the time of determining eligibility, the court or U.S. magistrate judge should inform the person of the penalties for making a false statement, and of the obligation to inform the court and the appointed attorney of any change in financial status.
- (d) Prior to sentencing, the court should consider pertinent information contained in the presentence report, the court's intention with respect to fines and restitution, and all other available data bearing on the person's financial condition, in order to make a final determination concerning whether the person then has funds available to pay for some or all of the costs of representation. At the time of sentencing, in appropriate circumstances, it should order the person to reimburse the CJA appropriation for such costs. **See:** [§ 230.40](#).
- (e) Future earnings should not be considered or subject to a reimbursement order; however, other income or after-acquired assets which will be received within 180 days after the date of the court's reimbursement order may be available as a source of reimbursement.

§ 210.40.40 Partial Eligibility

If a person's net financial resources and income anticipated prior to trial are in excess of the amount needed to provide the person and that person's dependents with the necessities of life and to provide the defendant's release on bond, but are insufficient to pay fully for retained counsel, the judicial officer should find the person eligible for the appointment of counsel under the CJA and should direct the person to pay the available excess funds to the clerk of the court at the time of such appointment or from time to time after that.

- (a) Such funds must be held subject to the provisions of [18 U.S.C. § 3006A\(f\)](#).
- (b) The judicial officer may increase or decrease the amount of such payments and may impose such other conditions from time to time as may be appropriate.
- (c) With respect to the disposition of such funds, **see:** [§ 230.40](#).

§ 210.40.50 Family Resources

The initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial

officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.

§ 210.50 CJA Forms

The Judicial Conference of the United States, at its meeting in January 1965, approved the recommendation of its Committee to Implement the Criminal Justice Act of 1964 (subsequently renamed the Committee on Defender Services), that every district incorporate in its plan a requirement that the standard forms, approved by the Conference, be used. **See:** [JCUS-JAN 1965](#), p. 6. The majority of CJA forms are now incorporated into the eVoucher system. In addition, copies of the pertinent forms may be found on the [public judiciary website](#).

§ 220 Appointment of Counsel

§ 220.10 Timely Appointment of Counsel

As noted in [§ 210.40.10](#), a person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, whichever occurs earliest.

§ 220.15 Forms for the Appointment of Counsel

Forms for the appointment of counsel, together with instructions for their use, may be found on the [public judiciary website](#).

§ 220.18 Notification of Relationship

Prior to appointment, counsel should notify the presiding judicial authority if counsel is aware that he or she is related (as the term is defined in [5 U.S.C. § 3110](#)) to any attorney on the same representation, or any attorney being considered for appointment. If appointment of related counsel is made prior to notification, counsel should provide notification as soon as practicable.

§ 220.20 Duration of Appointment

In part, [18 U.S.C. § 3006A\(c\)](#) provides that:

A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the U.S. magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.

§ 220.25 Continuity of Representation

- (a) If the attorney appointed by the U.S. magistrate judge is to continue to represent the defendant in the district court, no additional appointment by the district court should be made, except on appeal from a judgment rendered by the U.S. magistrate judge in a misdemeanor case.
- (b) Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered applicable to the case before the U.S. court of appeals and should be included on the voucher for services performed in that court.
- (c) An order extending [Appointment on Appeal \(Form CJA 20\)](#) should be executed for each appellant for whom counsel was appointed by a U.S. district judge or magistrate judge for representation at the trial level. In a federal capital prosecution, or a proceeding under [28 U.S.C. § 2254](#) or [§ 2255](#) challenging a death sentence, the appointment should be made on a [Form CJA 30 \(Death Penalty Proceedings: Appointment of and Authority to Pay Court-Appointed Counsel\)](#).
- (d) Absent special circumstances, whenever a case is transferred to another district, such as under [Federal Rules of Criminal Procedure Rules 20, 21, and 40](#), appointment of counsel should be made in the transferee district.

§ 220.30 New Appointments Following Earlier Representations

A new appointment on [Form CJA 20](#) should be made for each person represented in the following proceedings:

- (a) new trial after motion, mistrial, reversal, or remand on appeal;
- (b) probation or supervised release revocation proceedings;
- (c) appeal, including interlocutory appeals;
- (d) bail appeals to a court of appeals;
- (e) extraordinary writs;
- (f) mental condition hearings under:
 - (1) [18 U.S.C. § 4243](#) (Hospitalization of a Person Found Not Guilty only by Reason of Insanity);
 - (2) [18 U.S.C. § 4245](#) (Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect); and

- (3) [18 U.S.C. § 4246](#) (Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect). **See also:** [Guide, Vol. 7A, § 230.23.20](#).

Note: The chart below explains when a mental condition hearing is considered a new appointment or part of the case in chief.

§ 220.30(f) Insanity Defense Reform Act of 1984			
U.S. Code Section	Type of Hearing	New Case	Part of Case in Chief
18 U.S.C. § 4241(a)	Motion to determine competence to stand trial.	No	Yes
18 U.S.C. § 4241(e)	Hearing to determine whether person temporarily hospitalized as a result of incompetence to stand trial has recovered competence.	No	Yes
18 U.S.C. § 4243(c)	Hearing to determine whether release of person found not guilty by reason of insanity would create substantial risk of injury to person or property.	Yes	No
18 U.S.C. § 4243(f)	Hearing to determine whether person hospitalized following finding of not guilty by reason of insanity may be released conditionally or unconditionally.	Yes	No
	Hearing to modify or eliminate conditions of release.	Yes	No
18 U.S.C. § 4243(g)	Hearing on revocation of conditional release imposed under § 4243(f) .	Yes	No
18 U.S.C. § 4244(a)	Hearing to determine present mental condition of convicted defendant prior to sentencing.	No	Yes
18 U.S.C. § 4245(a)	Hearing to determine whether imprisoned person suffering from mental disease or defect should be hospitalized.	Yes	No
18 U.S.C. § 4246(a)	Hearing to determine whether a hospitalized person due for release is presently suffering from a mental disease or defect so that release would create a substantial risk of injury to persons or property.	Yes	No

§ 220.30(f) Insanity Defense Reform Act of 1984			
U.S. Code Section	Type of Hearing	New Case	Part of Case in Chief
18 U.S.C. § 4246(e)	Hearing to determine whether a person whose hospitalization was extended following a hearing under § 4246(a) may be released or conditionally released.	Yes	No
18 U.S.C. § 4246(f)	Hearing on revocation of conditional release imposed under § 4246(e) .	Yes	No

§ 220.35 Federal Defender Organizations

When cases are assigned to a federal public or community defender organization, the appointment should be made in the name of the organization (i.e., the federal public defender or community defender), rather than in the name of an individual staff attorney within the organization. **See:** [Guide, Vol. 7A, § 440](#).

§ 220.40 Appointment of Counsel to Represent More Than One Individual in a Case

- (a) Unless good cause is shown or in the absence of a waiver on the record by the defendants, in a criminal prosecution involving more than one defendant, or where separate charges arising out of the same or similar transactions are concurrently pending against two or more defendants, separate counsel should normally be appointed for each defendant. If an attorney is appointed to represent more than one person, a separate order of appointment must be entered with respect to each person.
- (b) An attorney who represents joint defendants may be compensated for services up to the statutory maximum for each person represented, unless the case involves extended or complex representation, in which case the attorney may be entitled to additional compensation above the statutory maximum rate. **See:** [§ 230.50 \(Proration of Claims\)](#) and [§ 230.23.10\(c\)](#).

§ 220.45 Appointment of Counsel in Habeas Corpus and Proceedings Under 28 U.S.C. § 2255

While the Rules Governing Section 2254 Cases in the U.S. District Courts and the Rules Governing Section 2255 Proceedings in the U.S. District Courts mention the appointment of counsel only with regard to discovery and evidentiary hearings, the CJA in [18 U.S.C. § 3006A\(a\)\(2\)\(B\)](#) permits discretionary appointment at any stage of the proceedings in the interest of justice. **See:** [Guide, Vol. 7A, § 210.20.20\(a\)\(2\)](#). Also,

[18 U.S.C. § 3599\(a\)\(1\)](#) **requires** the appointment of one or more attorneys in death penalty federal habeas corpus cases. **See:** [Guide, Vol. 7A, § 620.10](#).

§ 220.50 Waiver of Counsel

A waiver of assigned counsel by a defendant should be in writing. If the defendant refuses to sign the waiver, the court or U.S. magistrate judge should certify thereto. No standard form has been prescribed for this purpose.

§ 220.55 Standby Counsel

§ 220.55.10 Overview

- (a) Criminal defendants have both a constitutional and statutory right to self-representation in federal court. **See:** *Faretta v. California*, 422 U.S. 806 (1975); [28 U.S.C. § 1654](#).
- (b) In some cases, however, the court or U.S. magistrate judge may find it necessary to appoint “standby” counsel to be available to assist a pro se defendant in that defendant’s defense and also to protect the integrity and ensure the continuity of the judicial proceedings. **See:** *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Faretta*, supra.

§ 220.55.20 Standby Counsel Services Accepted by a Pro Se Defendant

- (a) The CJA provides that unless the financially eligible person waives representation by counsel, the court must appoint counsel to represent the person. [18 U.S.C. § 3006A\(b\)](#).
- (b) While the court has inherent authority to appoint standby counsel, such appointments may not be made and counsel may not be compensated **under the CJA** unless:
 - the defendant qualifies for appointed counsel, and
 - representation is actually rendered by counsel.

Therefore, if a financially eligible pro se defendant agrees to be represented, at least in part, by standby counsel, compensation may be provided under the CJA.

- (c) Similarly, if at any time during the course of the proceedings the services of standby counsel are accepted by a financially eligible pro se defendant, a *nunc pro tunc* CJA appointment order should be effected and counsel may be compensated under the CJA.

§ 220.55.30 Standby Counsel Appointed Under the Court's Inherent Authority

- (a) In circumstances in which standby counsel is appointed under the court's inherent authority, and counsel serves exclusively on behalf of the court to protect the integrity and continuity of the proceedings, and does not represent the defendant, any compensation to be paid counsel must be in the capacity of an "expert or consultant" under [5 U.S.C. § 3109](#).
- (b) Therefore, an appointment under this section may be made regardless of whether the defendant is financially able to obtain adequate representation. In such cases, compensation will be determined by the judicial officer according to CJA hourly rates and case compensation maximums.
- (c) The Administrative Office of the U.S. Courts' (AO) Defender Services Office should be consulted regarding appointment and payment procedures. If, during the course of the proceedings, a pro se defendant who is financially able to retain counsel elects to do so, the court's appointment of an attorney under [18 U.S.C. § 3006A\(c\)](#) may be terminated.

§ 220.60 Termination of Appointment

In any case in which appointment of counsel has been made under the CJA and the court subsequently finds that the person is financially able to obtain counsel, such appointment should be terminated using the eVoucher system or [Form CJA 7 \(Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds\)](#).

§ 230 Compensation and Expenses of Appointed Counsel**§ 230.10 Forms for Compensation and Reimbursement of Expenses**

The eVoucher system is the judiciary's primary method for CJA panel voucher submission and processing. **See:** [Guide, Vol. 7A, § 140](#). Legacy forms for the compensation and reimbursement of expenses to appointed counsel, together with instructions for their use, may be found on the [public judiciary website](#). A copy of all supporting documents that itemize or expand the amounts shown on the face of [Form CJA 20](#) must be attached when submitting vouchers in the eVoucher system.

§ 230.13 Time Limits

- (a) Vouchers should be submitted no later than 45 days after the representation concludes, unless good cause is shown. The clerks or CJA supervisory attorneys of the concerned courts should ensure that

panel attorneys comply with the prescribed limits. Every effort should be made to have counsel submit the claim as soon as possible upon completion of services rendered. While extremely late submissions may impact the ability to adequately substantiate claims, voucher reductions based solely on submissions outside of the 45-day time limit are not authorized. **See:** [§ 230.33.10 \(Standard for Voucher Review\)](#).

- (b) Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

§ 230.16 Hourly Rates and Effective Dates in Non-Capital Cases

- (a) Except in federal capital prosecutions and in death penalty federal habeas corpus proceedings, compensation paid to appointed counsel for time expended in court or out of court or before a U.S. magistrate judge may not exceed the rates in the following table. For information on compensation of counsel in federal capital cases and death penalty federal habeas corpus proceedings, **see:** [Guide, Vol. 7A, § 630](#).

§ 230.16(a) Non-Capital Hourly Rates	
If services were performed between...	The maximum hourly rate is...
01/01/2024 to present	\$172
01/01/2023 through 12/31/2023	\$164
01/01/2022 through 12/31/2022	\$158
01/01/2021 through 12/31/2021	\$155
01/01/2020 through 12/31/2020	\$152
02/15/2019 through 12/31/2019	\$148
03/23/2018 through 02/14/2019	\$140
05/05/2017 through 03/22/2018	\$132
01/01/2016 through 05/04/2017	\$129
01/01/2015 through 12/31/2015	\$127
03/01/2014 through 12/31/2014	\$126
09/01/2013 through 02/28/2014	\$110
01/01/2010 through 08/31/2013	\$125
03/11/2009 through 12/31/2009	\$110

§ 230.16(a) Non-Capital Hourly Rates	
If services were performed between...	The maximum hourly rate is...
01/01/2008 through 03/10/2009	\$100
05/20/2007 through 12/31/2007	\$94
01/01/2006 through 05/19/2007	\$92
05/01/2002 through 12/31/2005	\$90

- (b) For rates applicable to services performed prior to May 1, 2002 for non-capital cases, please contact the AO's Defender Services Office, Legal and Policy Division Duty Day Attorney, at 202-502-3030 or via email at DSO_LPD@ao.uscourts.gov.

§ 230.20 Annual Increase in Hourly Rate Maximums

Under [18 U.S.C. § 3006A\(d\)\(1\)](#), the Judicial Conference is authorized to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees. Hourly rate maximums will be adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rates will apply with respect to services performed on or after the effective date.

§ 230.23 Case Compensation Maximums

§ 230.23.10 Applicability and Exclusions

- (a) In General

All compensation limits apply to each attorney in each case.

- (b) Federal Death Penalty Cases and Federal Capital Habeas Corpus Proceedings

The case compensation limits are not applicable in federal death penalty cases and federal capital habeas corpus proceedings. **See:** [Guide, Vol. 7A, § 630.10.20](#).

- (c) Excess Compensation Vouchers

- (1) As further explained in [§ 230.23.40](#), the CJA places limitations on the general authority of presiding judicial officers to unilaterally approve attorney compensation.

- (2) Payments above case compensation limits referred to in [§ 230.23.20](#) may be authorized when certified by the presiding judicial officer and approved by the chief judge of the circuit. The chief judge of the circuit is permitted to delegate this approval authority to another active or senior circuit judge.
- (3) Presiding judicial officers should certify excess compensation payments to counsel whenever in their judgment the case involves extended or complex representation and the amount certified is necessary to provide fair compensation. **See:** [§ 230.23.40](#).

(d) Limitations Inapplicable to Expense Reimbursement

Case compensation limits apply only to attorney fees. There is no limit on the presiding judicial officer's authority to approve the reimbursement of expenses of counsel, and the chief judge of the circuit has no role in authorizing the payment of such expenses. For an explanation of reimbursable out-of-pocket expenses, **see:** [§ 230.63](#). **But see:** [§ 230.46 \(Prior Authorization for Appointed Counsel to Incur Expenses\)](#).

(e) Change in Offense Classification Level

If a case is disposed of at an offense level lower than the offense originally charged, the compensation maximum is determined by the higher offense level.

(f) More than One Counsel

In difficult cases in which the court finds it necessary to appoint more than one attorney, the limitations apply separately to each attorney.

(g) Ancillary Matters

Representation in ancillary matters is compensable as part of the representation in the principal matter for which counsel has been appointed and is not considered a separate appointment for which a separate compensation maximum would apply.

(h) Increases to the Maximum Compensation Rate

Under [18 U.S.C. § 3006A\(d\)\(2\)](#), the attorney case compensation maximums increase "simultaneously" with aggregate changes in the maximum attorney hourly compensation rate. Current case maximum amounts are identified below in [§ 230.23.20](#).

§ 230.23.20 Current Attorney Case Compensation Maximums

For work performed on or after January 1, 2024, the case compensation maximums are as follows:

§ 230.23.20 Current Attorney Case Compensation Maximums	
If the case is a...	the case maximum is...
(a) Felony (except federal capital prosecutions)	\$13,400 for trial court level \$9,600 for appeal
(b) Misdemeanors (including petty offenses (class B or C misdemeanors or infractions) as provided in 18 U.S.C. § 3006A(a)(2)(A)))	\$3,800 for trial court level \$9,600 for appeal
(c) Proceedings under 18 U.S.C. § 4106A (in connection with paroled prisoners transferred to the United States)	\$2,900 for representation before the U.S. Parole Commission \$9,600 for appeal
(d) Proceedings under 18 U.S.C. § 4107 or § 4108 (for counsel and guardians ad litem providing services in connection with prisoner transfer proceedings). Note: For information on appointment of counsel or guardians ad litem under 18 U.S.C. § 4109 , see: Guide, Vol. 7B (International Prisoner Transfer Proceedings) .	\$3,800 for each consent verification proceeding
(e) Pre-Trial Diversion	\$13,400 if offense alleged by the U.S. attorney is a felony \$3,800 if offense alleged by the U.S. attorney is a misdemeanor
(f) Proceedings under 18 U.S.C. § 983 (for services provided by counsel appointed under 18 U.S.C. § 983(b)(1) in connection with certain judicial civil forfeiture proceedings)	\$13,400 for trial court level \$9,600 for appeal
(g) Non-Capital Post-Conviction Proceedings under 28 U.S.C. § 2241 , § 2254 or § 2255	\$13,400 for trial court level \$9,600 for appeal
(h) Proceedings to Protect Federal Jurors Employment under 28 U.S.C. § 1875	\$13,400 for trial court level \$9,600 for appeal
(i) Other Representations Required or Authorized by the CJA Note: This category includes but is not limited to the following representations:	\$2,900 for trial court level \$2,900 for each level of appeal

§ 230.23.20 Current Attorney Case Compensation Maximums	
If the case is a...	the case maximum is...
(1) probation violation; (2) supervised release hearing (for persons charged with a violation of supervised release or facing modification, reduction, or enlargement of a condition or extension or revocation of a term of supervised release); (3) parole proceedings under 18 U.S.C. chapter 311 (repealed) (but see: note at Guide, Vol. 7A, § 210.20.10(a)(5)). (4) material witness in custody; (5) mental condition hearings under 18 U.S.C. chapter 313 (except for hearings under 18 U.S.C. § 4241 and § 4244, which are considered part of the case in chief with no separate compensation maximums applying. (For a chart detailing the treatment for the purpose of compensation of representation at each hearing under 18 U.S.C. chapter 313, see: Guide, Vol. 7A, § 220.30(f)); (6) civil or criminal contempt (where the person faces loss of liberty); (7) witness (before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, where there is a reason to believe either before or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty); and (8) international extradition (under 18 U.S.C. chapter 209).	

§ 230.23.30 History of Case Compensation Maximums

For work performed prior to January 1, 2024, the case compensation maximums are as follows:

§ 230.23.30 History of Case Compensation Maximums										
The case maximum if a case is a...	And services were completed...									
	3/1/2014- 12/31/2014	1/1/2015- 12/31/2015	1/1/2016- 5/4/2017	5/5/2017- 3/22/2018	3/23/2018- 2/14/2019	2/15/2019- 12/31/2019	1/1/2020- 12/31/2020	1/1/2021- 12/31/2021	1/1/2022- 12/31/2022	1/1/2023- 12/31/2023
(a) Felony (including pre-trial diversion of alleged felony)	\$9,800	\$9,900	\$10,000	\$10,300	\$10,900	\$11,500	\$11,800	\$12,100	\$12,300	\$12,800
(b) Misdemeanor (including pre-trial diversion of alleged misdemeanor)	\$2,800	\$2,800	\$2,900	\$2,900	\$3,100	\$3,300	\$3,400	\$3,400	\$3,500	\$3,600
(c) Proceeding under 18 U.S.C. § 4106A	\$2,100	\$2,100	\$2,100	\$2,200	\$2,300	\$2,500	\$2,500	\$2,600	\$2,600	\$2,700
(d) Proceeding under 18 U.S.C. § 4107 or § 4108 (for each verification proceeding)	\$2,800	\$2,800	\$2,900	\$2,900	\$3,100	\$3,300	\$3,400	\$3,400	\$3,500	\$3,600
(e) Proceeding under 18 U.S.C. § 983	\$9,800	\$9,900	\$10,000	\$10,300	\$10,900	\$11,500	\$11,800	\$12,100	\$12,300	\$12,800
(f) Post-conviction proceeding under 28 U.S.C. § 2241 , § 2254 or § 2255	\$9,800	\$9,900	\$10,000	\$10,300	\$10,900	\$11,500	\$11,800	\$12,100	\$12,300	\$12,800
(g) Proceeding under 28 U.S.C. § 1875	\$9,800	\$9,900	\$10,000	\$10,300	\$10,900	\$11,500	\$11,800	\$12,100	\$12,300	\$12,800

§ 230.23.30 History of Case Compensation Maximums										
The case maximum if a case is a...	And services were completed...									
	3/1/2014- 12/31/2014	1/1/2015- 12/31/2015	1/1/2016- 5/4/2017	5/5/2017- 3/22/2018	3/23/2018- 2/14/2019	2/15/2019- 12/31/2019	1/1/2020- 12/31/2020	1/1/2021- 12/31/2021	1/1/2022- 12/31/2022	1/1/2023- 12/31/2023
(h) Appeal from felony, misdemeanor, proceeding under 18 U.S.C. § 4106A , 18 U.S.C. § 983 , post-conviction proceeding under 28 U.S.C. § 2241 , § 2254 or § 2255 , and 28 U.S.C. § 1875	\$7,000	\$7,100	\$7,200	\$7,300	\$7,800	\$8,200	\$8,400	\$8,600	\$8,800	\$9,100
(i) Other representation required or authorized by the CJA (including, but not limited to probation, supervised release hearing, material witness, grand jury witness)	\$2,100	\$2,100	\$2,100	\$2,200	\$2,300	\$2,500	\$2,500	\$2,500	\$2,600	\$2,700
(j) Appeal of other representation	\$2,100	\$2,100	\$2,100	\$2,200	\$2,300	\$2,500	\$2,500	\$2,500	\$2,600	\$2,700

For inquiries concerning case compensation maximums, contact the AO's Defender Services Office, Legal and Policy Division Duty Day Attorney, at 202-502-3030 or via email at DSO_LPD@ao.uscourts.gov.

§ 230.23.40 Waiving Case Compensation Maximums

(a) Overview

Payments in excess of CJA compensation maximums may be made to provide fair compensation in cases involving extended **or** complex representation when so certified by the court or U.S. magistrate judge and approved by the chief judge of the circuit (or by an active or senior circuit judge to whom excess compensation approval authority has been delegated).

(b) Extended or Complex Cases

The approving judicial officer should first make a threshold determination as to whether the case **is either** extended or complex.

- (1) If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill, and effort by the lawyer than would normally be required in an average case, the case is “complex.”
 - (2) If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is “extended.”
- (c) Determining Fair Compensation

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard:

- responsibilities involved measured by the magnitude and importance of the case;
- manner in which duties were performed;
- knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel;
- nature of counsel’s practice and injury thereto;
- any extraordinary pressure of time or other factors under which services were rendered; and
- any other circumstances relevant and material to a determination of a fair and reasonable fee.

§ 230.26 Case Budgeting

§ 230.26.10 Overview

Courts are encouraged to use case-budgeting techniques in representations that appear likely to become or have become extraordinary in terms of potential cost (ordinarily, a representation in which attorney hours are expected to exceed 300 hours or total expenditures are expected to exceed 300 times the prevailing CJA panel attorney non-capital hourly rate, rounded up to the nearest thousand, for appointed counsel and services other than counsel for an individual CJA defendant).

§ 230.26.15 Case-Budgeting Attorneys

- (a) Every circuit should have available at least one case-budgeting attorney.
- (b) Reviewing judges should give due weight to the case-budgeting attorney’s recommendations in reviewing vouchers and requests for expert services, and must articulate their reasons for departing from those recommendations.

See: [JCUS-MAR 2019](#), p. 19.

§ 230.26.20 Case-Budgeting Procedures

- (a) If a court determines that case budgeting is appropriate (either on its own or upon request of counsel), counsel should submit a proposed initial litigation budget for court approval, subject to modification in light of facts and developments that emerge as the case proceeds.
- (b) Case-budgeting forms (Forms CJA 28A – CJA 28H), together with instructions for their use, may be found on the [public judiciary website](#).
- (c) Case budgets should be submitted *ex parte* and filed and maintained under seal.
- (d) For general information on case-budgeting principles relating to capital cases, see: [Guide, Vol. 7A, § 640](#).

§ 230.26.30 Investigative, Expert, and Other Services

- (a) Recognizing that investigative, expert, and other services may be required before there is an opportunity for counsel to prepare a case budget or for the court to approve it, courts should act upon requests for services where prompt authorization is necessary for adequate representation.
- (b) Courts, in examining the case budget, may reconsider amounts authorized for services before the budget's approval; however, courts must not rescind prior authorization where work has already been performed.

§ 230.30 Supporting Memorandum Justifying Compensation Claimed

- (a) Claim for Less than the Case Compensation Maximum

In any case in which the total compensation claimed is less than the statutory case compensation maximum, counsel may be required to submit a memorandum supporting and justifying the compensation claimed, when called for by local rule, standing order, or by the presiding judicial officer.

- (b) Claim for More than the Case Compensation Maximum

- (1) In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel will submit with the voucher a detailed memorandum supporting and justifying counsel's claim that:

- the representation given was in an extended or complex case (**see:** [§ 230.23.40\(b\)](#)), and
 - the excess payment is necessary to provide fair compensation (**see:** [§ 230.23.40\(c\)](#)).
- (2) Upon preliminary approval of such claim, the presiding judicial officer should furnish to the chief judge of the circuit a memorandum containing the recommendation and a detailed statement of reasons.

§ 230.33 Review and Approval of CJA Vouchers

§ 230.33.10 Standard for Voucher Review

Voucher reductions should be limited to:

- (a) Mathematical errors;
- (b) Instances in which work billed was not compensable;
- (c) Instances in which work billed was not undertaken or completed; and
- (d) Instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

See: [JCUS-SEP 2018](#), p. 42. For guidance on problems related to CJA voucher cutting, **see:** [2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act](#), pp. 96-103.

§ 230.33.20 Impact of an Appropriation Shortfall on Voucher Review

Vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.

§ 230.33.30 Notification of Proposed Reduction of CJA Compensation Vouchers

- (a) The CJA provides that the reviewing judge must fix the compensation and reimbursement to be paid to appointed counsel. If the court determines that a claim should be reduced, appointed counsel should be provided:
 - prior notice of the proposed reduction with a brief statement of the reason(s) for it, and
 - an opportunity to address the matter.

- (b) Notice need not be given to appointed counsel where the reduction is based on mathematical or technical errors.
- (c) Nothing contained in this guideline should be construed as requiring a hearing or as discouraging the court from communicating informally with counsel about questions or concerns in person, telephonically, or electronically, as deemed appropriate or necessary.

§ 230.33.40 Independent Review Process

- (a) Every district or division should implement an independent review process for panel attorneys who wish to challenge any reductions to vouchers that have been made by the presiding judge.
- (b) Any challenged reduction should be subject to review consistent with this independent review process.
- (c) All processes implemented by a district or division must be consistent with the statutory requirements for fixing compensation and reimbursement to be paid under [18 U.S.C. § 3006A\(d\)](#).

See: [JCUS-MAR 2019](#), p. 19.

§ 230.40 Payments by a Defendant

- (a) An attorney appointed under the CJA may not accept a payment from or on behalf of the person represented without authorization by a U.S. district, circuit, or magistrate judge on [Form CJA 7](#).
- (b) If such payment is authorized, it should be deducted from the fee to be approved by the court under [18 U.S.C. § 3006A\(d\)](#). The combined payment to any one attorney for compensation from both the person represented and the CJA is subject to applicable dollar limitations, unless excess compensation is approved under [18 U.S.C. § 3006A\(d\)\(3\)](#).
- (c) When the court determines that a person who received representation under the CJA was financially ineligible for those services at the time they were rendered, and directs that the person reimburse the government, the payment should be made by check or money order to the clerk of court for deposit into the Treasury. Such funds will be credited to the Defender Services appropriation.
- (d) Under [18 U.S.C. § 3006A\(f\)](#), a judicial officer is not authorized to require reimbursement as a condition of probation, and the Judicial Conference position is that reimbursement of the cost of representation under the CJA

should not be made a condition of probation under any other authority.
See: [JCUS-MAR 1985](#), p. 31.

§ 230.43 Approval Authority of U.S. Magistrate Judges

Absent delegated authority, U.S. magistrate judges may only approve vouchers for services rendered in connection with a case disposed of entirely before the U.S. magistrate judge.

§ 230.46 Prior Authorization for Appointed Counsel to Incur Expenses

Court plans may require advance authorization for such items as counsel's expenses over stipulated amounts or counsel's travel in excess of stipulated distances.

§ 230.50 Proration of Claims

- (a) When a defendant is charged in one indictment with severable counts, one voucher should be submitted and one maximum applied under [18 U.S.C. § 3006A\(d\)\(2\)](#), whether or not the counts are severed for trial.
- (b) When a defendant is charged in two or more indictments (other than a superseding indictment or information), a separate voucher should be submitted, and a separate maximum applied under 18 U.S.C. § 3006A(d)(2), for each indictment, whether or not the indictments are consolidated for trial.
- (c) Where single counsel is appointed to represent multiple defendants, separate vouchers should be submitted, and a separate maximum applied under 18 U.S.C. § 3006A(d)(2), for each defendant represented.
- (d) Whenever appointed counsel submit separate vouchers, as provided by this section, time spent in common on more than one indictment or case must be prorated among the indictments or cases on which the time was spent, and each indictment or case must be cross-referenced on the supporting materials to the vouchers. Time spent exclusively on any one indictment or case must properly be charged on the voucher for that indictment or case.
- (e) Time or expenses "spent in common" includes work performed simultaneously or within the same unit of time, or expenses incurred, for more than one representation (e.g., travel on behalf of more than one client). Double billing of time or expenses is prohibited (e.g., billing the same travel time or expenses to more than one representation).
- (f) While time spent in common on more than one CJA representation must be prorated, the entire amount of travel or other expenses applicable to

more than one CJA representation must be billed to one representation. The supporting materials to the voucher on which the expenses are billed must cross-reference the other CJA representations.

- (g) If the attorney is billing under the CJA for time or expenses, including travel, that were spent in common for a purpose other than a CJA representation, the attorney must report such information so that the court can determine whether, in fairness to counsel, the time or expenses should be apportioned and the attorney compensated for the time or expenses reasonably attributable to the CJA.
- (1) The attorney should explain the rationale for billing under the CJA, and the court may conduct a further inquiry.
- (2) In determining whether time or expenses spent in common for a purpose other than a CJA representation should be apportioned, the court should consider:
- the time or expenses reasonably expended in the performance of the attorney's duties under the CJA in relation to the time or expenses expended furthering other purposes;
 - the significance to the CJA representation of the duties performed or expenses incurred; and
 - the likelihood that the attorney would have performed the services or incurred the expenses under the CJA in the absence of the other purposes.
- (h) Proration of time among CJA representations must not result in an appointed counsel billing a larger amount than would have been billed if all the time was assigned to one representation.

§ 230.53 Compensation of Co-Counsel

§ 230.53.10 Without Separate Appointment

- (a) Unless separately appointed in accordance with [§ 230.53.20\(b\)](#) or [Guide, Vol. 7A, § 620.10](#), co-counsel or associate attorneys may not be compensated under the CJA.
- (b) However, an appointed counsel may claim compensation for services furnished by a partner or associate or, with prior authorization by the court, counsel who is not a partner or associate, within the maximum compensation allowed by the CJA, separately identifying the provider of each service.

§ 230.53.20 With Appointment

- (a) In an extremely difficult case where the court finds it in the interest of justice to appoint an additional attorney, each attorney is eligible to receive the maximum compensation allowable under the CJA.
- (b) The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice must appear on the Order of Appointment. For appointment of more than one attorney in capital cases, **see:** [Guide, Vol. 7A, § 620.10](#).

§ 230.56 Substitution of Counsel

If an attorney is substituted for an attorney previously appointed for a defendant in the same case, the total compensation paid to both attorneys may not exceed the statutory maximum for one defendant, unless the case involves extended or complex representation. In such cases, vouchers for attorney's services will not be approved by a judicial officer until the conclusion of the trial so that the judicial officer may make such apportionment between the attorneys as may be just.

§ 230.60 Attorney Compensation for Travel Time

- (a) Compensation must be approved for time spent in necessary and reasonable travel.
- (b) Ordinarily, compensable time for travel includes only those hours actually spent **in or awaiting transit**. Therefore, if a trip necessarily and reasonably requires overnight lodging, compensable travel time to the destination from the claimant's office would terminate upon arrival and check-in at the hotel or other place of accommodation and would include travel time returning directly to the claimant's office from said destination.
- (c) Compensation for travel time is paid at a rate not to exceed the rate provided in [18 U.S.C. § 3006A\(d\)](#) for "time reasonably expended out of court."
- (d) Necessary and reasonable travel includes travel time to meet and confer in-person with clients, including when clients are remotely detained, even if teleconferencing or videoconferencing technology is available.

[Note: The Judicial Conference Committee on Defender Services' Strategic Plan stresses the importance of CJA attorneys meeting in-person with their clients to build and maintain a relationship of trust necessary to provide high quality defense representation. Therefore, teleconferencing and videoconferencing technology should not be used as a substitute for in-person attorney-client meetings but may be used to

supplement in-person visits, at the sole discretion of counsel, where it would not diminish the quality of representation or adversely impact the attorney-client relationship.]

§ 230.63 Reimbursable Out-of-Pocket Expenses

§ 230.63.10 Overview

Out-of-pocket expenses reasonably incurred may be claimed on the voucher, and must be itemized and reasonably documented. Expenses for investigations or other services under [18 U.S.C. § 3006A\(e\)](#) are not considered out-of-pocket expenses.

§ 230.63.20 Reimbursement for Transcripts

- (a) Generally, court reporters or reporting services which furnish court authorized transcripts in CJA cases claim and receive compensation for their services through the eVoucher system on [Form CJA 24 \(Authorization and Voucher for Payment of Transcript\)](#). **See:** [Guide, Vol. 7A, § 320.30](#). While this is the preferred method for payment of transcripts, if appointed counsel has elected to pay for the court-authorized transcripts “out-of-pocket,” the cost may be claimed as a reimbursable expense, as provided for in [18 U.S.C. § 3006A\(d\)\(1\)](#), in eVoucher. However, unlike most reimbursable expenses, which should be claimed on the [Form CJA 20 \(Appointment of and Authority to Pay Court Appointed Counsel\)](#), reimbursement to the attorney who has paid for the transcript as an “out-of-pocket” expense should be claimed on a [Form CJA 24](#).
- (b) The cost of transcribing depositions in criminal cases is the responsibility of the Department of Justice under [Rule 17\(b\) of Fed. R. Crim. P.](#)

Exception: When the witness is a defense expert, the expert is paid out of CJA funds ([B-139703, 53 Comp. Gen. 638 \(1974\)](#)).

§ 230.63.30 Computer-Assisted Legal Research

- (a) The cost of use, by appointed counsel, of computer-assisted legal research services, may be allowed as a reimbursable out-of-pocket expense, provided that the amount claimed is reasonable.
- (b) Whenever appointed counsel incurs charges for computer-assisted legal research, counsel should attach to the compensation voucher a copy of the bill and receipt for the use of the legal research services or an explanation of the precise basis of the charge (e.g., indicating the extent to which it was derived by proration of monthly charges, or by charges identifiable to the specific research).

- (c) If the amount claimed is more than \$500 or if it includes costs for downloading or printing, counsel should include a brief statement of justification.

§ 230.63.40 Travel Expenses

- (a) Travel by privately owned automobile should be claimed at the mileage rate currently prescribed for federal judiciary employees who use a private automobile for conduct of official business. Parking fees, ferry fares, and bridge, road, and tunnel tolls may also be claimed. Transportation other than by privately owned automobile should be claimed on an actual expense basis.
- (b) Per diem in lieu of subsistence is not allowable, since the CJA provides for reimbursement of expenses actually incurred. Therefore, counsel's expenses for meals and lodging incurred in the representation of the defendant would constitute reimbursable "out-of-pocket" expenses.
- (c) In determining whether actual expenses incurred are "reasonable," counsel should be guided by travel and subsistence expense levels set by the [Judiciary Staff Travel Regulations](#).
- (d) Federal law authorizes attorneys, experts, and other persons traveling primarily in connection with carrying out responsibilities under the CJA to use government travel rates from common carriers and lodging providers. (See: [18 U.S.C. 3006A](#) note; Federal Courts Administration Act of 1992, Pub. L. No. 102-572, title VII, § 702, [106 Stat. 4515](#) (Oct. 29, 1992).)
 - (1) Government rates may provide substantial cost reductions or increased flexibility over ordinary commercial rates. To obtain such rates, prior approval must be obtained from the appointing authority.
 - (2) Government contract airfares must be booked through the carrier or the judiciary's contract travel agent using the court's centrally billed account.

§ 230.63.50 Interim Reimbursement for Expenses

- (a) Where it is considered necessary and appropriate in a specific case, the presiding judge or U.S. magistrate judge may, in consultation with the AO's Defender Services Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case.
- (b) Interim reimbursement should be authorized when counsel's reasonably incurred out-of-pocket expenses for duplication of discovery materials made available by the prosecution exceed \$500.

§ 230.63.60 Reimbursement for Expenses Incurred Defending Malpractice Allegations

- (a) Courts are authorized to reimburse panel attorneys for expenses reasonably incurred in defending actions alleging malpractice in furnishing representational services under the CJA. **See:** [18 U.S.C. § 3006A\(d\)\(1\)](#), as amended by the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, which covers expenses incurred on or after its effective date of Nov. 13, 2000.
- (b) The total reimbursement must not exceed the deductible amount of counsel's professional liability insurance policy or \$5,000, whichever is less. Expenses qualifying for reimbursement may include, but are not limited to:
 - the costs of transcripts;
 - witness fees and costs; and
 - attorney fees.
- (c) In determining reasonable attorney fees for this purpose, CJA rates are inapplicable.
- (d) Compensation for representing oneself in defending the action alleging malpractice, or, if represented by counsel, for time spent assisting that counsel in defending the action, is not reimbursable.
- (e) No reimbursement will be made if a judgment of malpractice is rendered against the attorney; in view of this prohibition, no reimbursement should be provided until the malpractice claim is resolved.
- (f) Reimbursement should be claimed under the expense categories on a [Form CJA 20](#) (or, where the appointment was in a capital matter, [Form CJA 30](#)), and supporting documentation should be attached.

§ 230.63.70 Other Reimbursable Expenses

Other reimbursable expenses include:

- telephone toll calls;
- case-related videoconferencing not covered by general office overhead;
- photographs or video duplication; and
- copying or laser printing (except commercial brief printing — **see:** [§ 230.66.40](#)).

§ 230.66 Non-Reimbursable Expenses

§ 230.66.10 General Office Overhead

- (a) General office overhead includes general office expenses that would normally be reflected in the fee charged to the client. The statutory fee is intended to include compensation for these general office expenses.
- (b) Except in extraordinary circumstances (**see:** [Guide, Vol. 7A, § 320.70.30](#)), whether work is performed by counsel or other personnel, the following expenses associated with CJA representation are not reimbursable:
 - personnel;
 - rent;
 - telephone, cell phone, or internet service; and
 - secretarial.

§ 230.66.20 Items and Services of Personal Nature

- (a) The cost of items of a personal nature purchased for or on behalf of the person represented are not reimbursable under the CJA. Such items include:
 - purchasing new clothing or having clothing cleaned;
 - getting a haircut;
 - furnishing cigarettes, candy, or meals, etc.
- (b) The cost of services of a personal nature and expenses incidental thereto which cannot be considered legal representation are not compensable under the CJA. Such services include:
 - assisting the defendant in the disposition of the defendant's personal property, unless obtaining access to the property could reasonably contribute to a representational purpose;
 - arranging for the placement of minor children of the defendant;
 - assisting the defendant in executing the conditions of probation;
 - providing legal assistance in matters unrelated to the litigation of the case, although incidental to the defendant's arrest, etc.

§ 230.66.30 Filing and Other Fees

Attorneys are not required to pay filing, *pro hac vice*, or PACER fees in connection with a CJA case, as such payment and reimbursement thereof is tantamount to the government billing itself to accomplish a transfer of appropriated funds into the General Fund of the Treasury. Panel attorneys and service providers should obtain a fee-exempt PACER account for use in connection with CJA appointments. More

information may be obtained from the [PACER Service Center](mailto:pacer@psc.uscourts.gov) (pacer@psc.uscourts.gov or 800-676-6856).

§ 230.66.40 Printing and Copying of Briefs

- (a) The expense of specialized typesetting, layout, or binding of appellate or other legal briefs (including Supreme Court booklets) exceeding requirements for individuals represented under the CJA, regardless of the printing method utilized, is not reimbursable.
- (b) The reasonable cost of laser printing, photocopying, or similar duplication expenses is reimbursable.

§ 230.66.50 Service of Process

- (a) Witness fees, travel costs, and expenses for service of subpoenas on fact witnesses, are not payable out of the CJA appropriation but are governed by [Fed. R. Crim. P. Rule 17](#) and [28 U.S.C. § 1825](#).
- (b) While not separately compensable, service of process incidental to a witness interview or other representational purpose is permissible.
- (c) If the U.S. Marshals Service is unavailable to serve a fact witness in time for a court proceeding, the circumstances should be documented, and prior approval obtained from the presiding judge or CJA supervisory attorney before incurring expenses for service of process. However, the judge or CJA supervisory attorney may waive prior approval if he or she determines that timely service of necessary process could not await preauthorization.

§ 230.66.60 Taxes

Taxes paid on attorney compensation received under CJA, whether based on income, sales or gross receipts, are not reimbursable expenses.

§ 230.70 Writ of Certiorari

Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered as applicable to the case before the U.S. court of appeals and should be included on the voucher for services performed in that court.

§ 230.73 Interim Payments to Counsel

§ 230.73.10 Non-Death Penalty Cases

- (a) Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to counsel.
- (b) [Appx. 2C \(Procedures for Interim Payments to Counsel in Non-Death Penalty Cases\)](#) contains instructions on the procedures for effecting interim payments to counsel, and a sample memorandum order on this subject that provides for two alternative payment methods.
- (c) The payment options provided in Appx. 2C are designed to strike a balance between the interest in relieving court-appointed attorneys of financial hardships in extended or 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.
- (d) Other interim payment arrangements which effectuate this balance may be devised in consultation with the AO's Defender Services Office.

§ 230.73.20 Death Penalty Cases

Presiding judicial officers are urged to permit interim payments in death penalty cases. Since the Anti-Drug Abuse Act of 1988 effectively repealed the CJA hourly rates and case maximums with respect to death penalty cases, a separate set of procedures and a separate memorandum order should be used in those cases. These procedures and a sample memorandum order are provided in [Appx. 2D \(Procedures for Interim Payments to Counsel in Death Penalty Cases\)](#).

§ 230.76 Record Keeping

Appointed counsel must maintain contemporaneous time and attendance records for all work performed, including work performed by associates, partners, and support staff, as well as expense records. Such records are subject to audit and must be retained for three years after approval of the final voucher for an appointment.

§ 230.80 Annual Report of Attorney Compensation Exceeding 1,000 Hours

Not later than three months after the end of each fiscal year, the AO's Defender Services Office will prepare reports listing all attorneys who have claimed compensation of more than 1,000 hours of services in the preceding fiscal year. The chief judge of each court of appeals and each district court will receive a copy of the report regarding attorneys within that district or circuit.

Guide to Judiciary Policy

Vol. 7: Defender Services

Pt. A: Guidelines for Administering the CJA and Related Statutes

Ch. 3: Authorization and Payment for Investigative, Expert, or Other Services

[§ 310 In General](#)

[§ 310.10 Availability](#)

[§ 310.20 Limitations](#)

[§ 310.30 *Ex Parte* Applications](#)

[§ 310.40 Claims for Services Other than Counsel](#)

[§ 310.50 Forms for the Authorization and Payment for Services Other than Counsel](#)

[§ 310.60 Interim Payments](#)

[§ 310.65 Proration of Claims](#)

[§ 310.70 Review of Vouchers](#)

[§ 320 Authorization of Investigative, Expert, and Other Services](#)

[§ 320.10 Investigators](#)

[§ 320.15 Interpreters](#)

[§ 320.20 Psychiatrists, Psychologists](#)

[§ 320.30 Transcripts](#)

[§ 320.40 Fact Witnesses and Depositions](#)

[§ 320.50 Guardian Ad Litem](#)

[§ 320.60 Commercial Computer-Assisted Legal Research Services](#)

[§ 320.70 Other Services and Computer Hardware and Software](#)

[§ 320.80 Reimbursement of Expenses](#)

[§ 320.90 Record Keeping](#)

Appendices

Appx 3A: Sample Request for Advance Authorization for Investigative, Expert, or Other Services ([pdf](#))([word](#))

Appx 3B: Procedures for Interim Payments to Service Providers in Non-Death Penalty Cases ([pdf](#))([word](#))

Appx 3C: Procedures for Interim Payments to Service Providers in Capital Proceedings ([pdf](#))([word](#))

Appx 3D: Sample Order Authorizing the Acquisition of Computer (Hardware and/or Software) under the CJA ([pdf](#))([word](#))

§ 310 In General

§ 310.10 Availability

§ 310.10.10 Overview

- (a) Investigative, expert, or other services necessary to adequate representation, as authorized by subsection (e) of the Criminal Justice Act (CJA) ([18 U.S.C. § 3006A](#)), are available to persons who are eligible under the CJA, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services.
- (b) In this connection, a person with retained counsel is financially unable to obtain the necessary services even if the person's resources are in excess of the amount needed to provide the person and the person's dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to the person's retained counsel, but are insufficient to pay for the necessary services.

§ 310.10.20 Retained Counsel and Fee Arrangements

- (a) In responding to requests for services under [18 U.S.C. § 3006A\(e\)](#) by a person represented by retained counsel, the court should inquire into the fee arrangement between the retained attorney and the client.
- (b) If the court finds the fee arrangement unreasonable in relation to fees customarily paid to qualified practitioners in the community for services in criminal matters of similar duration and complexity, or that it was made with a gross disregard of the defendant's trial expenses, the court may order the retained attorney to pay out of such fees all or such part of the costs and expenses as the court may direct.
- (c) The procedure outlined in [Guide, Vol. 7A, § 210.40.40](#) applies to such persons who are financially able to pay some, but unable to pay all, the costs of necessary services.

§ 310.10.30 Pro Se Representation

- (a) Persons who are eligible for representation under the CJA, but who have elected to proceed pro se, may, upon request, be authorized to obtain investigative, expert, and other services in accordance with [18 U.S.C. § 3006A\(e\)](#).
- (b) The court should authorize subsection (e) services for pro se litigants and review and approve resulting claims in the same manner as is its practice

with respect to requests made by CJA panel attorneys. However, in matters for which appointment of counsel is discretionary under [18 U.S.C. § 3006A\(a\)\(2\)](#), the court should make a threshold determination that the case is one in which the interests of justice would have required the furnishing of representation.

- (c) Although a federal defender organization may be requested to provide administrative assistance to pro se litigants who wish to arrange for subsection (e) services, the investigative, paralegal or other services or resources of the organization should ordinarily be employed only when the organization is appointed as counsel of record, responsible for the conduct of the litigation.

§ 310.20 Limitations

§ 310.20.05 Engaging Relatives for Compensable Services

- (a) Prior to engaging any relative (as the term is defined in [5 U.S.C. § 3110](#)) to perform CJA compensable services, other than as associate counsel in the same law firm (**see:** [Guide, Vol. 7A, § 230.53.10](#)), counsel should first provide notification of the relationship and potential services to the presiding judicial authority.
- (b) The court may, in the interest of justice, and upon finding that timely procurement of necessary services could not await prior notification, approve payment for such services up to the dollar threshold for obtaining services without prior authorization under [18 U.S.C. § 3006A\(e\)\(2\)](#) and the [CJA Guidelines \(Guide, Vol. 7A, § 310.20.30\)](#).

§ 310.20.10 With Prior Authorization

- (a) With prior authorization, compensation for investigative, expert, and other services is limited to the amounts in the following table for CJA-compensable work performed on or after the effective date. For guidelines applicable to capital cases, **see:** [Guide, Vol. 7A, § 660.10.40](#) and [§ 660.20](#).

§ 310.20.10(a) Waivable Case Compensation Maximums for Investigative, Expert, and Other Services	
If services were performed between...	The compensation maximum is...
01/01/2024 to present	\$3,000
01/01/2023 to 12/31/2023	\$2,800
01/01/2021 to 12/31/2022	\$2,700

§ 310.20.10(a) Waivable Case Compensation Maximums for Investigative, Expert, and Other Services	
If services were performed between...	The compensation maximum is...
02/15/2019 to 12/31/2020	\$2,600
01/01/16 to 02/14/2019	\$2,500
05/27/10 to 12/31/15	\$2,400
12/8/04 to 5/26/10	\$1,600
11/14/86 to 12/7/04	\$1,000

- (b) The waivable case compensation maximum amounts apply per organization or individual, exclusive of reimbursement for expenses reasonably incurred, and per individual authorization to perform said service, except with regard to capital cases. **See:** [Guide, Vol. 7A, § 660.20](#).
- (c) A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case.
- (d) While the service provider may be compensated separately for each person served, care should be taken to ensure that duplicate charges are not being made for the same services.
- (e) If, under [18 U.S.C. § 3006A\(e\)](#), such services are rendered by members of an organization such as a corporation, unincorporated association, or partnership (other than those created under [18 U.S.C. § 3006A\(g\)](#)), in their capacities as members of that organization, compensation is deemed to have been earned by the organization and is paid to it only once, per CJA client served, in an amount not to exceed the statutory maximum, exclusive of reimbursement for expenses reasonably incurred.

§ 310.20.20 Waiving the Case Compensation Maximums

- (a) Payment in excess of the case compensation limit for services authorized prior to the performance thereof may be made when certified by the court or U.S. magistrate judge and approved by the chief judge of the circuit (or an active or senior circuit judge to whom excess compensation approval authority has been delegated) as being necessary to provide fair compensation for services of an unusual character or duration.
- (b) If it can be anticipated that the compensation will exceed the statutory maximum, advance approval should be obtained from the court and the

chief judge of the circuit (or the active or senior circuit judge to whom excess compensation approval authority has been delegated). **See:** [Appx. 3A \(Sample Request for Advance Authorization for Investigative, Expert, or Other Services\)](#).

§ 310.20.30 Without Prior Authorization

- (a) [18 U.S.C. § 3006A\(e\)\(2\)\(A\)](#) authorizes the obtaining of investigative, expert, and other services, without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed the amounts listed in the following table, plus expenses reasonably incurred. For information regarding obtaining investigative, expert, and other services in capital cases, **see:** [Guide, Vol. 7A, § 660](#).

§ 310.20.30(a) Limitations on Services Without Prior Authorization	
If services were performed between...	The compensation maximum is...
01/01/2024 to present	\$1,000
02/15/2019 to 12/31/2023	\$900
05/27/10 to 02/14/2019	\$800
12/8/04 to 05/26/10	\$500
11/14/86 to 12/7/04	\$300

- (b) The limitation noted above in § 310.20.30(a) may be waived, however, if the presiding judge or U.S. magistrate judge (if the services were rendered in a case disposed of entirely before the U.S. magistrate judge), in the interest of justice, finds that timely procurement of necessary services could not await prior authorization. **See:** [18 U.S.C. § 3006A\(e\)\(2\)\(B\)](#).

§ 310.20.40 Periodic Increases to the Waivable Case Compensation Maximums

The Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111-174, enacted on May 27, 2010, amended the CJA to increase the waivable case compensation amounts listed in [§ 310.20.10](#) and [§ 310.20.30](#) simultaneously with any subsequent, cumulative adjustments under [5 U.S.C. § 5303](#) in the rates of pay under the General Schedule (currently calculated based on the determination of the annual Employment Cost Index adjustment), rounded to the nearest hundred dollars. The Administrative Office of the U.S. Courts (AO) will provide notice when new threshold amounts are effective under this provision.

§ 310.30 *Ex Parte* Applications

- (a) *Ex parte* applications for services other than counsel under [18 U.S.C. § 3006A\(e\)](#) must be heard *in camera* and must not be revealed without the consent of the defendant. The application must be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the confidentiality of the application prevents the possibility that an open hearing may cause defendants to reveal their defense.
- (b) Appointed counsel may not be required to submit evidence of a prior attempt to enter into a stipulation with the U.S. attorney as a prerequisite to obtaining services under 18 U.S.C. § 3006A(e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the *ex parte* application.
- (c) The use of eVoucher to request and authorize services other than counsel supports confidentiality and enhances efficiency. Such records should be made available to successor counsel for representational purposes upon request. However, further disclosure remains subject to the court's control over CJA information as provided in [Guide, Vol. 7A, Ch. 5 \(Disclosure of Information on CJA-Related Activities\)](#).

§ 310.40 Claims for Services Other than Counsel

All claims for services other than counsel, under [18 U.S.C. § 3006A\(e\)](#), must be submitted using the eVoucher system and should include the following:

- (a) a statement as to the type of, dates of, and time expended for, the services provided;
- (b) an explanation of the fee arrangement (e.g., hourly rate, etc.);
- (c) an itemized statement of all expenses for which reimbursement is claimed; and
- (d) supporting documentation, where practicable, for all expenses of lodgings and subsistence, and for any expenses in excess of \$50.

§ 310.50 Forms for the Authorization and Payment for Services Other than Counsel

Requests for authorization and payment for services other than counsel should be submitted using the judiciary's eVoucher system. Legacy forms, together with instructions, can be found on the [judiciary's public website](#).

§ 310.60 Interim Payments

§ 310.60.10 Non-Death Penalty Cases

- (a) Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to an individual whose services are obtained under [18 U.S.C. § 3006A\(e\)](#). For instructions on the procedures for effecting interim payments to persons other than counsel, as well as a sample memorandum order on this subject which provides for two alternative payment methods, **see:** [Appx. 3B \(Procedures for Interim Payments to Service Providers in Non-Death Penalty Cases\)](#).
- (b) The payment options provided in Appx. 3B are designed to strike a balance between the interest in relieving [subsection \(e\)](#) service providers 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. Other interim payment arrangements which effectuate this balance may be devised in consultation with the AO's Defender Services Office.

§ 310.60.20 Death Penalty Cases

Presiding judicial officers are urged to permit interim payment in death penalty cases. Because the CJA compensation maximums for investigative, expert, and other services set out in [§ 310.20.10\(a\)](#) do not apply in capital cases, different procedures and memorandum orders must be used in those cases. **See:** [Guide, Vol. 7A, § 660.20](#). These procedures and sample memorandum orders are also set forth in [Appx. 3C \(Procedures for Interim Payments to Service Providers in Capital Proceedings\)](#).

§ 310.65 Proration of Claims

§ 310.65.10 In General

- (a) If services were provided for more than one CJA representation, the time spent in common, including travel time, must be represented on the voucher forms by:
- prorating the service time among the representations on separate vouchers; or
 - billing the entire service time on a voucher pertaining to one of the representations

The supporting materials to the vouchers must explain the method of billing and, when applicable, cross-reference the other CJA representations (**see:** [§ 310.65.20](#)).

- (b) When a service provider incurs travel or other expenses applicable to more than one CJA representation, the entire amount of the expenses must be billed on one voucher.

Time or expenses “spent in common” includes work performed simultaneously or within the same unit of time, or expenses incurred, for more than one representation (e.g., travel for more than one client). Double billing of time or expenses is prohibited (e.g., billing the same travel time or expenses applicable to more than one representation on more than one voucher).

- (c) A “CJA representation” is one in which the attorney is:
- a federal public or community defender providing representation under the CJA or related statutes, or
 - a CJA panel attorney or other attorney or entity authorized to obtain services for a particular representation under the CJA or related statutes.

Reference to a “voucher” in this section includes invoices submitted to a federal public or community defender organization for work performed for that entity.

For information regarding the overlap of billing time periods in the interpreter context specifically, **see:** [§ 320.15.30](#).

§ 310.65.20 Cross-Referencing Vouchers

- (a) Whenever a service provider submits a voucher, as provided by this section, that includes time spent in common, if the time is prorated then each CJA representation must be cross-referenced on the supporting documentation to each voucher. If the time is billed to one representation, the other representations must be cross-referenced on the supporting documentation to that voucher. However, to ensure that an appointed attorney does not receive inappropriate information as to another attorney’s use of the service provider, the CJA representations that are cross-referenced should not be identified by name and case number if the work was performed for an attorney other than the one who will be certifying the voucher, although the number of other representations should be listed.
- (b) After the attorney certifies the service provider’s voucher, the service provider, upon the request of the court’s designated CJA voucher review personnel, must provide the name, case number, and any other identifying information for such representations.

§ 310.65.30 Prorating Time Limitation

Proration of time among CJA representations must not result in a service provider billing a larger amount than would have been billed if all the time was assigned to one voucher.

§ 310.65.40 Application of the Case Compensation Maximum

Where compensation is claimed on a voucher for time spent in common on more than one CJA representation, the compensation will be applied to the pre-authorized and case compensation maximum amounts for the representation on that voucher.

§ 310.65.50 Time Spent in Common with Non-CJA Representations

- (a) If the service provider is billing under the CJA for time or expenses, including travel, that were spent in common for a purpose other than a CJA representation, the service provider must report such information so that the court can determine whether, in fairness to the provider, the time or expenses should be apportioned and the provider compensated for the time or expenses reasonably attributable to the CJA.

Note: There is no apportionment between a contract court interpreter's work for a court unit and the CJA, **see:** [§ 320.15.30](#).

- (b) The service provider should explain the rationale for billing under the CJA, and the court may conduct a further inquiry.
- (c) In determining whether time or expenses spent in common for a purpose other than a CJA representation should be apportioned, the court should consider:
- the time or expenses reasonably expended in the performance of the service provider's duties under the CJA in relation to the time and expenses expended furthering other purposes;
 - the significance to the representation of the duties performed or expenses incurred; and
 - the likelihood that the service provider would have performed the services or incurred the expenses under the CJA in the absence of the other purposes.

§ 310.70 Review of Vouchers

Absent extraordinary circumstances, reviewers should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.

§ 320 Authorization of Investigative, Expert, and Other Services

§ 320.10 Investigators

When necessary to an adequate representation as described above, the court may authorize, under [18 U.S.C. § 3006A\(e\)](#), the services of an investigator.

§ 320.15 Interpreters

§ 320.15.10 Terms of Compensation

- (a) Interpreting services provided under the CJA may be compensated:
 - according to the terms and conditions set forth in the court interpreter services contract;
 - on an hourly rate basis; or
 - on another appropriate basis.
- (b) Interpreters should be compensated consistently throughout the district or, if applicable, in individual court locations.

§ 320.15.20 Reviewing the Rate of Compensation

- (a) In determining the reasonableness of rates paid to interpreters under the CJA, courts should utilize either:
 - (1) the half- and full-day rates established by the Director for contract court interpreters performing in-court services; or
 - (2) an hourly rate. The half- and full-day rates (prorated hourly) or the hourly overtime rate should be used as a guidepost for the reasonableness of the hourly rate.
- (b) Justification should be submitted to the presiding judicial officer if compensation is sought for an interpreter by a method different from or in an amount in excess of presumptive or maximum rates adopted by a court.
- (c) Appointed counsel may negotiate rates with the interpreter consistent with the guidance contained in this section.

§ 320.15.30 Overlap of Billing Time Periods

- (a) Contract court interpreters must not bill or receive funds from any other federal court unit, federal public defender, community defender organization, or other attorneys or entities obtaining interpreting services under the CJA or related statutes for any services rendered during the

same half- or full-day for which the contract court interpreter is being compensated pursuant to the court interpreter services contract. **See:** [Guide, Vol. 5, § 220.30.20](#). Thus, an interpreter retained by the court under the court contract for a one-half or full-day period may not bill the CJA for any work performed during that same half-day or full-day period even if the court no longer requires the interpreter's services.

- (b) An interpreter billing on a half- or full-day rate basis, hourly basis, or other unit of time under the CJA must not charge any other federal court unit, federal public defender, community defender, CJA panel attorney, or other person or entity otherwise authorized by the court to obtain the services of an interpreter under the CJA or related statutes for any services rendered within the same time period.
- (c) When an interpreter is invoicing under the CJA on a half-day rate basis and works one half-day for a court unit and another half-day for a CJA representation, or is invoicing two separate half-days for different CJA representations, then the first half-day should be billed at the half-day rate and the second at the difference between the half-day and full-day rates, unless otherwise negotiated.
- (d) It is permissible to prorate compensation among more than one CJA representation (but expenses must be invoiced to one CJA representation) or to apportion compensation, including expenses, between a CJA representation and a non-CJA purpose (not including a federal court unit). **See:** [§ 310.65](#).

§ 320.20 Psychiatrists, Psychologists

§ 320.20.10 Type of Examinations

[Chapter 313 of Title 18](#), as amended by the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984), provides for **court-directed** psychiatric or psychological examination of individuals in connection with the various proceedings to determine mental condition authorized under that chapter. The functions of these separate proceedings are to determine:

- (a) the mental competency of a defendant to stand trial ([18 U.S.C. § 4241](#));
- (b) insanity at the time of the offense ([18 U.S.C. § 4242](#));
- (c) the mental condition of an acquitted person hospitalized following a finding of not guilty only by reason of insanity ([18 U.S.C. § 4243](#));
- (d) the present mental condition of a convicted defendant ([18 U.S.C. § 4244](#));

- (e) the present mental condition of an imprisoned person who objects to transfer to a treatment facility ([18 U.S.C. § 4245](#)); and
- (f) the present mental condition of a hospitalized person due for release ([18 U.S.C. § 4246](#)).

In addition, mental condition examinations may be conducted for purposes other than those specified in [18 U.S.C. chapter 313](#), e.g., to aid the defendant in preparing a defense.

§ 320.20.20 Source of Payment

- (a) CJA funds are used to pay for psychiatric and related services obtained in accordance with [18 U.S.C. § 3006A\(e\)](#) upon a determination that the services are “necessary for an adequate defense.” These are “defense” services, where the defendant selects the expert and controls the disclosure of the expert’s report.
- (b) It is important to note that psychiatrists and related experts may be used in many circumstances in which payment is made from a source **other** than the CJA appropriation. In these situations, the court or the government selects the expert and persons other than the defendant also have access to the expert’s report. The Department of Justice (DOJ) generally pays for these “non-defense” services. The chart in [§ 320.20.60](#) summarizes payment responsibility for the various circumstances in which psychiatric and related services are utilized.
- (c) Court-ordered presentence examinations and reports under [18 U.S.C. § 3552\(c\)](#) are not paid by the CJA appropriation. However, funding for these examinations is available from the AO. Courts should contact the AO’s Probation and Pretrial Services Office at 202-502-1600 for guidance.

§ 320.20.30 Limitation of Amount

The limitations contained in [§ 310.20](#) apply to compensation claims submitted by “defense” psychiatrists and related experts, to be paid out of the CJA appropriation. For information regarding “dual purpose” examinations, **see:** [§ 320.20.50](#).

§ 320.20.40 Procedures for Payment

- (a) CJA Appropriation – Defense Services
 - (1) eVoucher should be used for all payments for “defense” services in non-capital cases. **See also:** [Form CJA 21 \(Authorization and Voucher for Expert and Other Services\)](#).

- (2) eVoucher should be used for all payments for “defense” services in death penalty cases. **See also:** [Form CJA 31 \(Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services\)](#).
 - (3) eVoucher submissions of form CJA 21 or CJA 31 should clearly describe the purpose of the expert’s service.
 - (4) If separate vouchers are submitted for examination and testimony, they should be cross-referenced by voucher number.
- (b) DOJ

Compensation claims for psychiatric and related services to be paid for by the DOJ should be referred to the U.S. attorney or assistant U.S. attorney.

§ 320.20.50 Dual Purpose Examinations

- (a) On occasion, a psychiatrist or related expert will be asked to examine an individual for both a “defense” purpose and a “non-defense” purpose. In these cases, the defense has waived the confidentiality of the “defense” portion of the examination. In such dual purpose examinations, for the convenience of the expert providing the service, the entire compensation claim may be submitted through eVoucher using [Form CJA 21](#), or, in a death penalty proceeding, [Form CJA 31](#). The CJA will pay the expert the total amount approved and obtain reimbursement to the CJA appropriation from the DOJ for one-half of the cost. As a result of the AO’s need to seek reimbursement from the DOJ, claims submitted for dual purpose examinations must be accompanied by separate court orders that indicate:
 - who requested the examination;
 - the specific purpose(s) of the examination;
 - to whom the examination is directed; and
 - to whom copies of the report are to be given.
- (b) The limitation in [§ 320.20.30](#) applies to 50 percent of the claim for a dual purpose examination in which a portion of the examination is for “defense” purposes.
- (c) In some “dual purpose” examinations both portions of the examination are chargeable to the same payment source. For instance, if the examination included evaluation of competency to stand trial under [18 U.S.C. § 4241](#) and evaluation of sanity at the time of the offense under [18 U.S.C. § 4242](#), the DOJ would be responsible for both portions of the examination and the

entire compensation claim should be submitted to the U.S. attorney or assistant U.S. attorney.

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	CJA	DOJ
(a) To determine mental competency to stand trial, under 18 U.S.C. § 4241		
(1) Examination costs		Yes, regardless of which party requests, including examination on court's own motion
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(3) Testimony costs for examiner if called at trial	If witness appears on behalf of defense	If witness appears on behalf of government
(b) To determine existence of insanity at time of offense, under 18 U.S.C. § 4242		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at trial		Yes, regardless of which party calls
(c) To determine existence of insanity at time of offense, under CJA subsection (e)		
(1) Examination costs	Yes	
(2) Testimony costs for examiner if called at trial	Yes	
(d) To determine mental condition of hospitalized person found not guilty only by reason of insanity, under 18 U.S.C. § 4243		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(e) To determine mental condition of convicted person suffering from mental disease or defect, under 18 U.S.C. § 4244		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	CJA	DOJ
(f) To determine mental condition of imprisoned person, under 18 U.S.C. § 4245		
(1) Examination costs		Yes, including costs of additional examiner selected by imprisoned person in accordance with 18 U.S.C. § 4247(b)
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by imprisoned person in accordance with 18 U.S.C. § 4247(b)
(g) To determine mental condition of hospitalized person due for release, under 18 U.S.C. § 4246		
(1) Examination costs		Yes, including costs of additional examiner selected by hospitalized person in accordance with 18 U.S.C. § 4247(b)
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by hospitalized person in accordance with 18 U.S.C. § 4247(b)
(h) Examination of a person in custody as a material witness		Yes, under all circumstances
(i) Examination and testimony costs for expert witnesses not appointed under 18 U.S.C. §§ 4241, 4242, 4243, 4244, 4245, 4246	If requested by the defense	If requested by the government, or if appointed as an independent expert on court's own motion under Fed. R. Evid. 706

§ 320.30 Transcripts

§ 320.30.10 Authorization and Payment

- (a) For panel attorneys, the preferred method for payment of transcripts authorized by the court is for the court reporter or reporting service to claim compensation directly through eVoucher's Authorization and Voucher for Payment of Transcript ([Form CJA 24](#)). Alternatively, the panel attorney may pay for transcripts for non-federal court proceedings and obtain reimbursement as an "out-of-pocket expense" in the eVoucher

system using Form CJA 20. **See:** [Guide, Vol. 7A, § 230.63.20](#) and [§ 320.30.40](#). Regardless of which method is used, the limitations set forth in [§ 310.20](#) and the \$7,500 limitation set forth in [Guide, Vol. 7A, Ch. 6](#) are inapplicable with regard to the cost of transcripts.

- (b) In a direct appeal in a case in which counsel is assigned under the CJA, neither the CJA nor [28 U.S.C. § 753\(f\)](#) requires the signing of a pauper's oath or certification by the court that the appeal is not frivolous in order to obtain a transcript.
- (c) For procedures regarding federal defender organization transcript payments, **see:** [Guide, Vol. 7A, § 430.10](#).

§ 320.30.20 Accelerated Transcript Costs

Routine apportionment of **accelerated** transcript costs among parties in CJA cases is prohibited. The following resolution was adopted by the Judicial Conference in March 1980, and modified in September 1986:

That the furnishing of accelerated transcript services in criminal proceedings should be discouraged; however, recognizing that there are some circumstances in which such transcript services are necessary and required by either the prosecution or the defense, or both, accelerated transcript services may be provided.

That in those cases where accelerated transcript services are provided, the party from whom the request or order emanates shall pay for the original, and if the requesting or ordering party is other than defense counsel appointed under the Criminal Justice Act, the CJA counsel shall be entitled to a copy at the copy rate.

That the present practice, in some districts, of routinely apportioning the total cost of accelerated transcript services equally among the parties should be abandoned.

See: [JCUS-SEP 1986](#), p. 90.

§ 320.30.30 Commercial Duplication in Multi-Defendant Cases

- (a) In multi-defendant cases involving CJA defendants, no more than one transcript should be purchased from the court reporter on behalf of CJA defendants. The appointed counsel or the clerk of court should share an electronic copy with each of the CJA defendants for whom a transcript has been approved. If the transcript was provided in printed format, counsel should arrange for duplication at commercially competitive rates. The cost of such duplication will be charged to the CJA appropriation. This policy

would not preclude the furnishing of duplication services by the court reporter at the commercially competitive rate.

- (b) In individual cases involving requests for **accelerated** transcripts, the court may grant an exception to the policy set forth in (a) of this subsection based upon a finding that application of the policy will unreasonably impede the delivery of accelerated transcripts to persons proceeding under the CJA. Such finding should be reflected on the transcript voucher.

§ 320.30.40 Standards for Transcripts of Other than Federal Court Proceedings

In negotiating agreements and contracts for providing transcripts of other than federal court proceedings, including, for example, transcription or translation of wiretap recordings, it is recommended that the standards for the size and format of a page be the same as those used for transcripts of federal court proceedings.

§ 320.40 Fact Witnesses and Depositions

§ 320.40.10 Fees and Expenses of Fact Witnesses

- (a) Generally speaking, fees and expenses of fact witnesses for defendants proceeding under the CJA are paid by the DOJ. **See:** [Fed. R. Crim. P., Rule 17\(b\)](#); [28 U.S.C. § 1825](#).
- (b) Section 1825 of 28 U.S.C. specifically provides for the payment of witness fees by the DOJ in all federal criminal proceedings, and in proceedings for a writ of habeas corpus or in proceedings under section 2255 of that title upon certification of a federal public defender or assistant federal public defender, or clerk of court upon the affidavit of other counsel appointed under the CJA.
- (c) If advance witness travel funds are required, the court should issue the subpoena order, so stating, to authorize the travel advance by the marshal. These expenses will not be paid from CJA funds.

§ 320.40.20 Depositions

Depositions are covered by [Fed. R. Crim. P., Rule 15](#), rather than 18 U.S.C. § 3503 (repealed).

- (a) Expenses incurred in the taking of fact witness depositions (notarial fees, interpreters, transcripts, etc.) are paid by the DOJ, regardless of which party requested the deposition.
- (b) The costs of attendance of fact witnesses for either party at the deposition are paid by the DOJ under Rule 17 (b).

- (c) The costs of attendance of expert witnesses for the defense at the deposition are paid under the CJA.
- (d) Reasonable travel and subsistence expenses incident to attendance of counsel and the defendant at the deposition are paid by the DOJ (1) if the government is the requesting party, or (2) if the defendant is the requesting party and is unable to bear the deposition expenses, based on resources that would be used to determine financial eligibility for appointed counsel. However, it should be noted that the presence of the defendant is not essential to defense depositions since the confrontation clause only requires the defendant's presence if the depositions are intended to be used against the defendant.

§ 320.40.30 Travel Expenses, Subsistence, and Fees of Counsel in Habeas Corpus Cases

In habeas corpus and [28 U.S.C. § 2255](#) cases, the court may order the state or the government to pay the “expenses of travel and subsistence and fees of counsel” to attend the taking of a deposition at the request of the state or government. **See:** [Rules Governing §§ 2254 and 2255 Cases in U.S. District Courts, Rule 6](#).

§ 320.50 Guardian Ad Litem

§ 320.50.10 Proceedings Involving Juveniles

- (a) A guardian ad litem appointed under [18 U.S.C. § 5034](#) is not eligible for compensation under the CJA or any other appropriated source. Any person who is appointed as both counsel and guardian ad litem in one case under § 5034 should prorate time spent fulfilling the duties of these two offices. Only time spent as counsel on a case is compensable and should be reflected on the CJA claim.
- (b) A guardian ad litem appointed for a child victim or witness under [18 U.S.C. § 3509\(h\)](#) must be compensated through decentralized court funds using BOC 2559, not the CJA or the attorney admission fund.

§ 320.50.20 Prisoner Transfer Proceedings

A guardian ad litem appointed in proceedings to verify consent of a minor or incompetent prisoner to transfer from the United States to a foreign country is eligible for compensation under the CJA under [18 U.S.C. § 4109\(b\)](#). **See:** [Guide, Vol. 7A, § 230.23.20\(d\)](#) on compensation limits and [Guide, Vol. 7B \(International Prisoner Transfer Proceedings\)](#).

§ 320.60 Commercial Computer-Assisted Legal Research Services

- (a) The court may authorize counsel to obtain computer-assisted legal research services, where the research is performed by employees of a

commercial legal research firm or organization rather than by appointed counsel, provided that the total amount charged for computer-assisted legal research services is reasonable. Requests by counsel for authority to obtain such computer-assisted legal research services should include: a brief explanation of the need for the research services; and an estimate of the charges.

- (b) Claims for compensation for such services should be submitted through eVoucher using [Form CJA 21 \(Authorization and Voucher for Expert and Other Services\)](#), or, in a death penalty proceeding, [Form CJA 31 \(Death Penalty Proceeding: Ex Parte Request for Authorization and Voucher for Expert and Other Services\)](#). For information concerning reimbursement for the cost of direct use, by appointed counsel, of computer-assisted legal research services, **see:** [Guide, Vol. 7A, § 230.63.30](#).

§ 320.70 Other Services and Computer Hardware and Software

§ 320.70.10 Other Services

In addition to investigators, psychiatrists, psychologists, and reporters, services other than counsel may include, but are not necessarily limited to:

- interpreters;
- computer systems and automation litigation support personnel and experts;
- paralegals and legal assistants, including law students;
- neurologists and other medical experts; and
- laboratory experts in such areas as ballistics, fingerprinting, and handwriting.

§ 320.70.20 Notarial and Stenographic Expenses

The use of CJA funds is authorized to pay expenses of eligible defendants for stenographic and notarial expenses required to perpetuate and authenticate testimony of expert witnesses for such defendants.

§ 320.70.30 Extraordinary Office Expenses

- (a) CJA attorneys are expected to use their own office resources, including secretarial help, for work on CJA cases. **See:** [Guide, Vol. 7A, § 230.66.10](#).
- (b) However, unusual or extraordinary expenses of these types may be considered “other services necessary for an adequate defense” and may be paid from CJA funds under [18 U.S.C. § 3006A\(e\)](#).
- (c) In determining whether the expense is unusual or extraordinary, consideration should be given to whether the circumstances from which

the need arose would normally result in an additional charge to a fee-paying client over and above that charged for overhead expenses. **See:** [Decision of the Comptroller General, B-139703, Feb. 28, 1974, 53 Comp. Gen. 638.](#)

§ 320.70.40 Computer Hardware, Software, or Litigation Support Services

(a) Overview

- (1) Providing an adequate defense may require CJA panel attorneys to utilize computer hardware, software, or litigation support services not typically available in a law office. In such cases, following the standards in [§ 320.70.30](#), counsel may apply to the court for authorization of CJA funds for the acquisition of such property or services.
- (2) Before seeking court approval for any computer hardware or software with a cost exceeding the limitations in [§ 310.20.30\(a\)](#), or for the utilization of computer systems, litigation support products, services, personnel, or experts with an expected combined cost exceeding \$10,000, appointed counsel must consult the National Litigation Support Team in the AO's Defender Services Office (phone number: 510-637-3500) for guidance. Counsel must inform the court in writing of the Defender Services Office's advice and recommendation regarding counsel's proposed expenditure. **See also:** [Appx. 3D \(Sample Order Authorizing the Acquisition of Computer \[Hardware and/or Software\] under the CJA\).](#)

(b) Acquisition of Computer Hardware and/or Software

- (1) The request for acquisition of the computer hardware and/or software, or for the procurement of litigation support services should be submitted through eVoucher using [Form CJA 21 \(Authorization and Voucher for Expert and Other Services\)](#), or, in a death penalty proceeding, [Form CJA 31 \(Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services\)](#).
- (2) Property purchased with CJA funds is the property of the United States and remains so after the case is completed.
- (3) When property is purchased, counsel must provide the Defender Services Office with a copy of the following documents to ensure the property is properly accounted for: a copy of the court's order approving the request; a copy of the completed [Form CJA 21](#) (or [Form CJA 31](#)); the purchase order from the vendor and any

receiving documents, such as a copy of the packing slip or the company's invoice.

- (4) Because computer hardware or storage devices being used by counsel may contain confidential or privileged information, all case-related materials must be removed before the hardware is returned as described below. Unless otherwise required by the court or by law, counsel should retain copies, electronic or otherwise, of the case-related materials for the client's file.

Note: When large amounts of electronic information are placed on drives or storage devices purchased with CJA funds, counsel may apply to the court to retain the drive or an alternative drive as the most cost-effective and efficient method for preserving the data.

- (5) Upon the completion of the case, counsel must contact the National Litigation Support Team in the Office of Defender Services at (510) 637-3500 for instructions on returning any software, and directions for deleting case-related material from any hardware and returning it to the National Litigation Support Team for the permanent removal of case-related material. If appointed counsel has acquired software, then counsel should provide all accounting information for the software, including any serial numbers, activation codes, or other identifying information, and remove the software from his or her machines. If appointed counsel acquired computer hardware, it must be returned in good condition.

§ 320.70.50 Paralegals, Legal Assistants, and Other Non-Secretarial Support

- (a) For services of paralegals, legal assistants, and other non-secretarial professional support personnel employed by appointed counsel, the court will determine a reasonable hourly compensation rate that may not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services.
- (b) Authorizing compensation at such rates should result in greater efficiency and lower costs for the CJA program than would occur if counsel performed and charged for these services.

§ 320.80 Reimbursement of Expenses

§ 320.80.10 Determination of Reasonableness

In determining the reasonableness of expenses of persons furnishing investigative, expert, or other services, claimants and the court should be guided by the provisions of these Guidelines regarding reimbursement of expenses of counsel. **See:** [Guide](#).

[Vol. 7A, § 230.63](#) and [§ 230.66](#). Gross receipts or other taxes levied on fees for expert services rendered under the CJA are not reimbursable expenses.

§ 320.80.20 Government Travel Rates

- (a) Federal law authorizes experts and other service providers traveling primarily in connection with carrying out responsibilities under the CJA the use of government travel rates from common carriers and lodging providers. **See:** [18 U.S.C. § 3006A note](#).
- (b) Government rates may provide substantial cost reductions or increased flexibility over ordinary commercial rates. To obtain such rates, service providers must obtain prior approval from the appointing authority. Government contract airfares must be booked through the carrier or a judiciary contract travel management center using the court's centrally billed account.

§ 320.90 Record Keeping

- (a) Investigative, expert, and other service providers must maintain contemporaneous time and attendance records for all work billed by them, as well as expense records.
- (b) Such records are subject to audit and must be retained for three years after approval of the appointed counsel's or the service provider's final voucher, whichever is later, for a representation.

CRIMINAL E-DISCOVERY

A Pocket Guide for Judges

SEAN BRODERICK

*National Litigation Support Administrator
Administrative Office of the U.S. Courts, Defender Services Office*

DONNA LEE ELM

*Federal Defender
Middle District of Florida*

ANDREW GOLDSMITH

*Associate Deputy Attorney General & National Criminal Discovery Coordinator
U.S. Department of Justice*

JOHN HARIED

*Co-Chair, eDiscovery Working Group — EOUSA
U.S. Department of Justice*

KIRAN RAJ

*Senior Counsel to the Deputy Attorney General
U.S. Department of Justice*

**Federal Judicial Center
2015**

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop educational materials for the judicial branch. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

second printing

Table of Contents

I. Overview	1
A. Lack of Criminal e-Discovery Guidance	1
B. Civil e-Discovery Rules and Practices Do Not Lend Themselves to Criminal e-Discovery	2
C. A Practitioner’s Guide to Criminal e-Discovery	4
II. Common Issues in Criminal e-Discovery	5
A. Funding the Defendant’s e-Discovery	5
B. Lack of ESI Experience, Knowledge, and Competency	10
C. Necessity of Litigation Support Assistance	11
D. The Workflow in Processing ESI	12
E. Varieties of Evidence-Review Software	13
F. Volume of e-Discovery	13
G. Form of Production — ESI Formats	14
H. Form of Production — Paper Formats	16
I. Disorganized and Redundant ESI	17
J. Providing Incarcerated Defendants Access to e-Discovery	17
K. Multiple Defendants	18
III. Judicial Management of Criminal e-Discovery	19
A. Managing Voluminous e-Discovery in Criminal Cases	19
B. Early Discussion of e-Discovery Issues	20
Ask About the Case	21
Advise About Expectations	21
Advise About Resources	22
Schedule Discovery Conferences	22
C. Subsequent Status of e-Discovery Issues	22
IV. Conclusion	23
Appendix A: ESI Protocol Description	25
Appendix B: ESI Protocol	35
Appendix C: First Appearance e-Discovery Colloquy	73
Appendix D: Discovery Status Conference e-Discovery Colloquy	81

I. Overview

The rapid growth of digital technology and its spread into every facet of life are producing increasingly complex discovery issues in federal criminal cases. There are several advantages to electronically stored information (ESI, or e-discovery), including speed, efficiency, and quality of information. To ensure these benefits are realized, judges and lawyers working on federal criminal cases need guidance on how best to address e-discovery issues.

Judges can play a vital oversight role to ensure that e-discovery moves smoothly, trial deadlines are met, and the parties and courts are able to review and identify critical evidence. This pocket guide was developed to help judges manage complex e-discovery in criminal cases. A note of appreciation goes to Judge Xavier Rodriguez (W.D. Tex.), and Magistrate Judges Laurel Beeler (N.D. Cal.) and Jonathan W. Feldman (W.D.N.Y.), for their suggestions and advice, as well as to our fellow members of the Joint Electronic Technology Working Group, who improved this publication.

A. Lack of Criminal e-Discovery Guidance

Although the Federal Rules of Criminal Procedure offer guidance on a number of topics, they offer little help to judges and litigants concerning how to conduct e-discovery. As the Sixth Circuit noted in *United States v. Warshak*, Rule 16 of the Federal Rules of Criminal Procedure is “entirely silent on the issue of the form that discovery must take; it contains no indication that documents must be organized or indexed.”¹ To be sure, Rule 16 provides a court the discretion to fashion discovery orders to serve the particular needs of a case, but it does not “specify the manner in which production is done.”²

1. 631 F.3d 266, 296 (6th Cir. 2010). In that case, the defendant argued that the “district court must order the government to produce electronic discovery in a particular fashion.” In rejecting this argument, the court noted that there is “a dearth of precedent suggesting that the district court was wrong” in allowing the government to produce discovery in an electronic format different from what the defendant sought. *Id.*

2. *See* Fed. Crim. Rules Handbook § IV (Arrest and Preparation for Trial) (Dec. 2012).

Criminal e-Discovery

B. Civil e-Discovery Rules and Practices Do Not Lend Themselves to Criminal e-Discovery

The rules governing civil and criminal discovery are fundamentally dissimilar due to the different public policies underlying criminal and civil litigation, constitutional requirements, and special ethical obligations of prosecutors and defense counsel. Consequently, courts have generally refrained from applying civil e-discovery rules to criminal discovery.³

An essential difference between civil and criminal discovery is breadth:

A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2. In a civil case, by contrast, a party is entitled as a general matter to discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." Fed. Rule Civ. Proc. 26(b)(1).⁴

Federal Rule of Criminal Procedure 16 does not mandate any mechanisms or procedures for addressing e-discovery equivalent to those found in Federal Rules of Civil Procedure 26 and 34. Rule 16 includes "data" as a proper object of criminal discovery, but the rule does not address the mechanics of e-discovery.

Furthermore, the nature of the parties and proceedings differ in criminal cases. Unlike civil cases, where discovery is an adversarial process in which the government's discovery obligations are similar to any litigant's, the government has unique nonadversarial discovery obligations in criminal cases. As a representative of the sovereign, prosecutors are obliged to prosecute impartially and ensure that justice

3. The Sixth Circuit rejected the defendant's argument that the electronic discovery format standards of Federal Rule of Civil Procedure 34(b)(2)(E)(i) should apply to criminal cases. *Warshak*, 631 F.3d at 296. Nonetheless, two magistrate judges have turned to civil e-discovery rules for guidance because there is a void in the criminal rules regarding this issue. *See* *United States v. O'Keefe*, 537 F. Supp. 2d 14, 18–19 (D.D.C. 2008); *United States v. Briggs*, No. 10CR184S, 2011 WL 4017886, at *8 (W.D.N.Y. Sept. 8, 2011).

4. *Degen v. United States*, 517 U.S. 820, 825–26 (1996).

I. Overview

is done.⁵ For example, the Due Process Clause imposes a “fundamental fairness” requirement on the government’s discovery, as expressed in the government’s *Brady* and *Giglio* obligations.⁶ Additionally, speedy trial rights may be implicated when defendants have little time to come to grips with vast e-discovery.⁷ Similarly, defendants are entitled to effective assistance of counsel at trial and during plea negotiations.⁸ Defense counsel’s effectiveness may depend on whether he or she has reviewed and understands the e-discovery in time to enter into informed plea negotiations.⁹ When the government provides e-discovery in a reasonably organized fashion, it can help the defense efficiently review discovery and can lead to more productive plea discussions, less litigation, and speedier resolution of a case.

Criminal investigations and third-party subpoenas by both the prosecution and defense often bring vast quantities of ESI to criminal e-discovery. Complex ESI cases usually require litigation support resources not typically found in criminal defense practices. Indigent defendants need adequate funding to obtain those resources.

5. ABA Model Rules of Professional Responsibility 3.8, comt. 1; *see also* *Berger v. United States*, 295 U.S. 78 (1935).

6. *See also* *United States v. Bagley*, 473 U.S. 667, 675 (1985) (withholding *Brady* evidence violates due process). The prosecutor’s *Brady* obligation is addressed in ABA Model Rule of Professional Conduct 3.8(d) (requiring prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”).

7. *See* U.S. Const. amend. VI; 18 U.S.C. § 3161 (“Speedy Trial Act”).

8. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

9. Although lawyers need not review every document in a voluminous e-discovery production before entering into a plea bargain, they should review a reasonable and targeted portion of discovery so as to provide reasonably effective advice regarding resolution. Thus, depending upon the nature and complexity of the e-discovery, to conduct plea negotiations the defense may need to have e-discovery in a reasonably useable format, and have engaged in thoughtful e-discovery review.

C. A Practitioner’s Guide to Criminal e-Discovery

One attempt to provide comprehensive, national guidance is the ESI Protocol (see Appendices A & B), which was produced by a joint working group composed of the Department of Justice and representatives of the criminal defense bar.¹⁰ The ESI Protocol is one approach for judges to use to encourage interparty cooperation and reduce the need for judicial intervention. Indeed, some federal district courts have begun integrating the ESI Protocol into their courtroom practices.¹¹

The ESI Protocol draws on many sources, including case law, local rules, and seasoned defense and prosecution practitioners’ experience. Its goal is to provide courts and litigants with best practices consisting of general principles, recommendations, and concrete strategies for improving efficiency, minimizing expense, increasing security, and decreasing frustration and litigation. Importantly, the ESI Protocol does not enlarge or diminish any party’s substantive legal discovery obligations imposed by applicable federal statutes, rules, or case law.¹²

10. The Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases (hereinafter “the ESI Protocol”) was produced by the Joint Electronic Technology Working Group (JETWG), which comprises representatives of the Administrative Office of the U.S. Courts (AOUSC), Defender Services Office (DSO), the Department of Justice (DOJ), Federal Public and Community Defender Organizations (FPDOs and CDOs), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices. The Federal Judicial Center does not endorse any specific discovery approach, including the ESI Protocol.

11. *See, e.g.*, Best Practices for Electronic Discovery in Criminal Cases: Western District of Washington (Mar. 21, 2013), *available at* <http://www.wawd.uscourts.gov/sites/wawd/files/32113BESTPRACTICESFORELECTRONIC.pdf>; Northern District of California, Criminal Justice Act, Capital and Non-Capital Criminal Representation (2001), *available at* <http://www.cand.uscourts.gov/pages/965> (linking to the ESI Protocol).

12. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); 18 U.S.C. § 3500 (the “Jencks Act”); *and* Federal Rules of Criminal Procedure 16 & 26.2.

II. Common Issues in Criminal e-Discovery

The ESI Protocol will be familiar to most federal criminal practitioners. The Department of Justice trains its prosecutors to use the ESI Protocol in cases involving complex e-discovery. Most federal defenders and Criminal Justice Act (CJA) representatives receive similar training on the ESI Protocol.

II. Common Issues in Criminal e-Discovery

Both prosecutors and defense attorneys struggle with the same e-discovery issues: large volume; a variety of sources and formats; hidden information (metadata and embedded data); differing formats for production; software and hardware limitations; and finding efficient, cost-effective ways to review ESI. Some challenges are unique to criminal practice, such as incarcerated defendants' access to e-discovery, while others are the same as those arising in civil practice. For many prosecutors and defense counsel, a lack of experience with ESI presents a significant challenge; but it is the lack of resources—money, personnel, training—that often overshadows all other problems. And even when resources are available, considerable time is often required to arrange for and execute the processing necessary to make ESI readily available.

For CJA counsel, the challenges of ESI may be especially daunting. Often, they are solo practitioners who lack the resources for sophisticated software tools. Because they are usually appointed post-indictment, they need to get up to speed on matters that the government may have spent many months or years investigating and preparing—while at the same time getting up to speed on how to manage electronic discovery. Besides training and software tools, they often may need experienced litigation support assistance, which can be provided pursuant to 18 U.S.C. § 3006A.

The following are e-discovery issues that judges may need to understand or address.

A. Funding the Defendant's e-Discovery

There was a time when voluminous e-discovery cases were confined to white-collar prosecutions, and those defendants typically paid the costs

Criminal e-Discovery

of their own defense. Today, even routine drug cases and bank robberies often involve extensive cell phone data or other ESI.¹³ This has funding consequences for indigent defendants and the court.

When a case has complex e-discovery issues, the judge considering a CJA appointment may need to factor in the additional cost of reviewing, organizing, and working with e-discovery.¹⁴ The Act is silent about when a defendant would be so destitute as to need appointed counsel, but the cost of working with complex e-discovery can itself exceed what many defendants can afford even if they are able to pay for counsel.¹⁵

Some CJA panels have formal tiers or informal lists of specialized lawyers for capital, financial, or immigration cases. Courts that take their CJA attorneys' skills into consideration can also consider creating

13. Smartphone data provides an example of the magnitude of e-discovery. Many smartphones hold sixteen to sixty-four gigabytes of data, not including storage cards (which can double that amount), and have cloud access to much more data. They contain emails, call history and contact information, calendars, text messages, GPS data, photographs, videos, internet history, and social media information, all of which can result in thousands of potentially relevant items of discovery. Multiple-defendant cases could dramatically increase that amount. Add to that the corresponding laptops, tablets, desktops, and surveillance data also readily accessible, and the amount of e-discovery can quickly exceed document-based paper discovery in a white-collar or corporate prosecution from fifteen years ago.

14. The court can ask the government to give it early notice if the case involves voluminous e-discovery.

15. The Criminal Justice Act can authorize payment of e-discovery review costs when the extent of those costs would render a defendant unable to pay for e-discovery review regardless of whether a defendant can otherwise afford retained counsel. 18 U.S.C. § 3006A(e)(1) allows retained counsel to apply for services to be paid through the CJA system. *See* Guide to Judiciary Policies and Procedures, Vol. VII, § 310.10.20, *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310_10. If outside assistance is needed, the protocol for authorization and payment for investigative, expert, or other services in CJA-appointed cases is governed by Vol. VII, Chapter 3 of the Guide to Judiciary Policies and Procedures. *See* <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter3.aspx>. If counsel anticipates that the costs will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or the active or senior circuit judge who has been delegated authority to approve excess compensation). *See* Vol. VII, § 310.20.20 for further information and a sample order, *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310_20.

II. Common Issues in Criminal e-Discovery

a list of those lawyers who are proficient in e-discovery.¹⁶ Although attorneys who lack familiarity with ESI will face a learning curve, experience with cases involving large amounts of ESI over time will develop a set of CJA lawyers readily capable of handling these cases.

In multidefendant cases, the court may be able to minimize costs by calling for cooperative sharing among defendants. This has been done for years whenever there is voluminous paper discovery, and many of those principles can apply to electronic discovery. One of the defense attorneys (often the federal defender) may take the lead for meet-and-confer discussions with the government regarding e-discovery productions and for distributing and providing basic organization of ESI when the defendants enter an agreement concerning discovery. The court can encourage centralizing e-discovery management and can approve a litigation support specialist, a technologist, or a paralegal working under that lawyer's supervision.

It also may be beneficial to place the discovery into a cloud-based document-review platform,¹⁷ so defendants, counsel, investigators, and experts can access it as needed from various locations. Depending on what software different CJA lawyers have, all codefendants may not be able to use or take advantage of the same format of ESI production.¹⁸ But any decision to rely on cloud-computing or reviewing services should include consideration of whether that service provider has provided adequate security to protect confidential, privileged, or oth-

16. On the other hand, courts must decide whether to expect all panel members to be prepared to handle e-discovery on a large scale, given that every practitioner should develop a baseline comfort with e-discovery. In August 2012, the ABA modified its ethics rule on competency to include familiarity with technology that may be used in representation. Comment 8 to Model Rule 1.1 provides: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the *benefits and risks associated with relevant technology*" (emphasis added).

17. A document-review platform uses a database and tools to capture, organize, analyze, and review e-discovery. Whether stand-alone, networked, or in the cloud, these platforms may enable multiple individuals to securely manage and access a large amount of data.

18. By way of example—and not as an endorsement of either Apple computer systems or Microsoft Windows—one common challenge is that a number of CJA-panel attorneys use Apple operating system ("Mac") computers, but Apple systems work differently than the Windows computers that are standard with the DOJ and FDOs.

Criminal e-Discovery

erwise sensitive e-discovery.¹⁹ The Department of Justice and the defense bar expect to address criminal e-discovery security best practices in the near future, but in the interim, counsel should remain vigilant in protecting e-discovery.

Processing “raw” ESI into usable evidence that can be reviewed electronically is expensive and time-consuming.²⁰ As of 2015, in a relatively small case, processing five boxes (12,500 sheets) of paper business records costs approximately \$4,800 and takes a trained DOJ litigation support professional employee three days. Similarly, processing twenty-five gigabytes of complex ESI costs approximately \$3,200 and takes an employee two weeks.²¹ Today, there is no software tool for producing all discovery in a single, easy-to-use package. Hopefully that will change as electronic discovery matures.

Fortunately, there are resources that can provide advice and guidance to judges about cost-effective means of managing e-discovery:

- The National Litigation Support Team (NLST), part of the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts, is available to help attorneys for indigent defendants struggling with extensive e-discovery. The NLST writes recommendations for funding requests, advises courts and parties about economical and practical solutions to e-discovery issues, and provides direct assistance to lawyers.²²

19. ESI protocol, Recommendation ¶ 10.

20. The term “processing” usually involves formatting ESI so that the native file can be placed into a review platform where it can be viewed, culled, organized, searched, and analyzed. For example, processing a native email container file (a collection of emails) involves extracting individual emails and their attachments, while keeping track of the relationship between the emails and attachments, and converting the files to formats that can be read through a review tool. For more information about processing raw ESI see *infra* section II.D.

21. The 2015 market rates for processing ESI range from \$125 to \$150 per gigabyte.

22. Before seeking court approval for any computer hardware or software with a cost exceeding \$800, or for utilizing computer systems, litigation support products, services, or experts exceeding \$10,000, appointed counsel must consult with the DSO for guidance. CJA counsel must then inform the court in writing of the DSO’s advice and recommendation regarding proposed expenditures. Guide to Judiciary Policies and Procedures, vol. VII, § 320.70.40, available at <http://www.uscourts.gov/>

II. Common Issues in Criminal e-Discovery

The court can ask for assistance from the NLST.²³

- The DSO has three national coordinating discovery attorneys (CDAs) who are experts in e-discovery, have experience with CJA cases, and are knowledgeable about litigation technology. They work with CJA counsel and federal defenders in multidefendant cases to manage large volumes of e-discovery efficiently and cost-effectively to best fit the defendants' needs. The court can ask CJA counsel to request that the case be referred to a CDA through the National Litigation Support Team.²⁴
- All circuits except the Fifth, Eleventh, and D.C. have case budgeting attorneys (CBAs) who work with judges and CJA panel attorneys to develop and review budgets for criminal "mega cases."²⁵ They assist in addressing attorney and paralegal time, as well as expert, investigative, and other costs, to ensure that critical defense needs are budgeted to optimize resources while fostering high-quality, cost-controlled represen-

FederalCourts/AppointmentOfCounsel/Viewer.aspx?doc=/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf.

23. The NLST can be contacted at (510) 637-3500. Further information about the NLST can be found on fd.org at <http://www.fd.org/navigation/litigation-support/subsections/who-is-the-national-litigation-support-team>.

24. Further information regarding CDAs can be found on the J-Net at <http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/services-coordinating-discovery-attorneys-available-selected-federal-criminal-justice-act-cases> (not accessible to the public).

25. For CJA panel attorneys, "mega cases" are either: (a) federal capital prosecutions and capital habeas corpus cases, or (b) noncapital representations with the potential for extraordinary cost (attorney work expected to exceed 300 hours or total expenditures for attorneys and investigative, expert, and other service providers expected to exceed \$30,000 for an individual CJA defendant). This is distinguished from "mega budget cases," referring to federal and community defender office cases that will substantially impact their office budgets (by a 10% or \$500,000 increase or more), so that an additional budget is developed to fund just that one case. *See Case-Budgeting Techniques and Other Cost-Containment Policies* (June 30, 2014), available at <http://www.fd.org/docs/select-topics/cja/case-budgeting-techniques-and-other-cost-containment-strategies.pdf?sfvrsn=8>.

Criminal e-Discovery

tation. In appropriate cases, the budgets may address litigation support costs, and the CBAs have working relationships with the NLST to consult on litigation support matters. Judges in a district without a CBA can contact the DSO for assistance.²⁶

There are considerable funding consequences to voluminous e-discovery. The court should expect additional CJA costs in these cases, but managing e-discovery can be done thoughtfully and reasonably to mitigate costs.

B. Lack of ESI Experience, Knowledge, and Competency

Unfortunately, many criminal practitioners still do not have an adequate understanding of e-discovery issues and litigation technology. However, attorney competency ethics standards are evolving to require an adequate understanding of e-discovery and the technology needed to review it.²⁷ Lawyers who are unfamiliar with e-discovery can associate or consult with others who have the expertise.²⁸ Nonetheless, they remain responsible for e-discovery decisions and should be able to do the following, either themselves or in association or consultation with others:

- Implement procedures to preserve potentially discoverable electronic information.

26. Further information on case budgeting and case budgeting attorneys can be found on the J-Net at <http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/case-budgeting> (not accessible to public). Judges who do not have a CBA in their circuit can contact the duty attorney for the Defender Services Office at (800) 788-9908.

27. For example, the State Bar of California issued a formal ethics opinion on this subject in the summer of 2015. *See* State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 2015-193 (2015). This development follows the 2012 American Bar Association amendment to its Model Rule 1.1, stating that lawyers need to “keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*.” ABA Model Rules of Professional Conduct, Model Rule 1.1, comt. 8 (emphasis added).

28. If a CJA attorney needs to retain expert assistance, payment would have to be approved by the court.

II. Common Issues in Criminal e-Discovery

- Assess e-discovery needs and issues.
- Plan and perform appropriate searches.
- Understand how to manage, review, and produce e-discovery in a manner that preserves its integrity.

Because discoverable information is increasingly found and produced electronically, lawyers who are e-discovery illiterate may delay trial preparation. Technological “dinosaurs” may also miss potentially beneficial evidence, for example, by overlooking valuable metadata in electronic records because they are entrenched in printing their discovery. They also may make critical mistakes early in the case, inadvertently choosing production formats that they cannot use or that will not help find the evidence they need. When such mistakes result in not finding exculpatory evidence, they risk being ineffective.

The benefits of e-discovery can be lost on uninformed counsel. In making counsel appointments and resourcing cases, judges should be mindful that handling complex e-discovery cases requires an adequate understanding of ESI and available technology.

C. Necessity of Litigation Support Assistance

In any sizeable e-discovery case, finding appropriately skilled expert assistance is critical to reviewing the evidence and deciding whether to negotiate a plea agreement or take the case to trial. Individuals with litigation support expertise can be found in a variety of traditional job roles, working as paralegals, investigators, information technology (IT) specialists, computer technicians, data processors, software specialists, and more. Finding the correct fit of litigation support staff to the case early is a priority.

Litigation support specialists should have legal and IT experience and training to organize, analyze, and present case materials through technology equipment and computer programs. They should have the ability to harvest and extract electronic data and metadata from ESI; assist in meet-and-confer sessions regarding the exchange of ESI; monitor and manage discovery productions (both production and receipt); provide advice on how to search data; and manage the day-to-day operations of strategically collecting, processing, organizing, reviewing,

Criminal e-Discovery

analyzing, and presenting case data. Using both project management and technology, they ensure that e-discovery is handled in a cost-effective and time-efficient manner that allows for effective organization, easy retrieval, and quality client representation.

Just as judges should be mindful of attorney knowledge and experience in managing e-discovery, they should also be aware that even knowledgeable attorneys need skilled litigation support.

D. The Workflow in Processing ESI

ESI generally takes one of two possible forms: preprocessed (raw) or postprocessed. Some raw ESI is not ready to be reviewed electronically; it must be processed²⁹ into a digital file that can be loaded into document-review software. Similarly, paper records can be processed into electronic files like TIFFs with extracted text or searchable PDFs with the extracted text embedded in the file itself.

The workflow for processing ESI can be complicated. When ESI is in a proprietary format (for example, a Google Mail file), it cannot be reviewed with industry-standard tools; instead, review requires specialized hardware, software, and expertise to convert the data into a form that can be reviewed with standard tools.³⁰ Even if the discovery is produced in an optimal way,³¹ defense counsel may still need expert assistance, such as litigation support personnel, paralegals, or database vendors, to convert e-discovery into a format they can use and to decide what processing, software, and expertise is needed to assess the ESI. Next, the ESI should be organized to facilitate finding informa-

29. *See supra* n. 20 for a definition of “processing.”

30. Many state and federal law enforcement agencies have outdated computer systems, so the data in these outdated systems cannot be viewed with current industry-standard litigation support software. This is particularly common with audio and video files, necessitating conversion to industry-standard formats.

31. Parties should not be obstructionist and ought to produce discovery in a usable format if they reasonably can. According to the ESI Protocol, when a producing party elects to engage in processing ESI, the results of that processing (unless it contains work product) should be produced as discovery; this saves the receiving party the expense of replicating the work. ESI Protocol, Recommendations ¶ 6(d). That said, the ESI Protocol states that the government is not obligated to convert ESI into a format specified by the defense beyond what it would do for its own case preparation or discovery production.

II. Common Issues in Criminal e-Discovery

tion. In voluminous e-discovery cases, parties must be able to rely on document-review software, which can be costly. Nonetheless, it saves money because it speeds up the review process and improves counsel's ability to find information. Such software affords counsel a variety of search strategies, including word searches, document searches, date searches, sender/recipient searches, concept searches, and predictive coding searches.³²

E. Varieties of Evidence-Review Software

There is a vast array of software tools for handling all of the stages of electronic discovery: preserving, collecting, and harvesting data; processing and/or converting ESI; searching and retrieving information; reviewing ESI; and presenting evidence. There is frequently overlap between what various products can do. No single software tool does everything needed for e-discovery. Some tools specialize in processing raw ESI into formats that another tool can then use, while other tools specialize in a discrete function such as document review, strategic analysis, case organization, production of discovery, or evidence display in the courtroom. As a result, litigants have different collections of tools. That creates compatibility and conversion issues.

A meet-and-confer is an important stage in tackling those compatibility and conversion issues, particularly when the parties do not already have an established routine for exchanging discovery or when they face novel or difficult ESI issues. One goal of the meet-and-confer is to address technical issues so that the ESI produced in discovery is readable and usable. An important part of that process is the parties' discussion of production formats, volume, timing, and other issues.³³

F. Volume of e-Discovery

The great volume of e-discovery poses a serious challenge due to the variety of devices on which ESI can be created and stored, the ease of

32. Technology-assisted review (also called predictive coding) is a process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents, and then extrapolates those judgments to the remaining data.

33. See ESI Protocol, attached as Appendix B.

Criminal e-Discovery

various forms of telecommunication (such as texting and social media), and the declining cost of storage. ESI can come from many custodians³⁴ or sources—mobile phones, smartphones, tablets, laptops, desktops, computer network servers, external ESI storage devices (such as flash drives or external hard drives), cloud storage, GPS tracking devices, social media. Because of this, the amount of ESI in criminal cases has grown exponentially, and this growth is expected to continue, significantly complicating management and review of evidence. For example, in 2011, court-appointed defense counsel in one multi-defendant case had to review discovery comprising 240,000 pages of documents on 19 DVDs and CD ROMs, 185 banker boxes of paper documents (approximately 460,000 pages), and 30 forensic images (that is, copies) of complete computers, servers, and thumb drives holding approximately 4.3 terabytes of data.³⁵ Additionally, the defendants gathered 750,000 pages of third-party information directly relevant to their defenses. Cases like this benefit substantially from sophisticated software and advanced review practices such as technology-assisted review.

It is important to recognize that complex ESI requiring technological assistance is not constrained to computer and white-collar fraud crimes. Vast amounts of ESI are found in small cases as well. Even relatively modest amounts of e-discovery, depending on format, can create obstacles to reviewing evidence. Moreover, simple cases of possession of drugs or guns, for example, can involve smartphones and computers containing gigabytes or even terabytes of data. Lawyers unaided by technology cannot review this much data.

G. Form of Production—ESI Formats

The format in which ESI is gathered affects how the data can be used. For example, text messages collected as text-only files can be searched for particular words or combinations of words. But if the metadata for those same text messages is also gathered, then thousands or millions of text messages can not only be searched for particular words, they

34. In e-discovery terms, “custodian” refers to the person whose data was collected.

35. Applying litigation support standard calculations, 4.3 terabytes of data is the equivalent of 215 million pages, or 86,000 banker boxes, of documents.

II. Common Issues in Criminal e-Discovery

can also be sorted by date, custodian, and author or addressee, and software can plot who communicated with whom, how frequently, when, and where. Such information can have tremendous utility in criminal cases.

Lawyers need specialized litigation software to work with ESI in its many formats. For example, they need software to review ESI documents, which can be as basic as a PDF viewer or far more complex. Most document-review platforms allow parties to view many file types. The DOJ and most civil law firms have managed their own discovery materials with software programs and technical personnel for years. Criminal defense practitioners, especially those involved in indigent defense, are relative latecomers to this world. Most CJA panel attorneys do not have litigation support software that can view and organize TIFF or native file productions. Similarly, most do not have tools to take advantage of a “load file,”³⁶ extracted metadata, or files in native or near-native ESI format.³⁷ It is only recently that federal defender offices gained that capability nationally. As a result, the DOJ may be able to produce discovery in a reasonably usable format, but CJA counsel may not be able to utilize the most robust litigation software available. To provide computer-challenged defense counsel with reasonably useable e-discovery, the U.S. Attorney’s Office typically provides e-discovery on disks that contain software for viewing, searching, and tagging documents. For more sophisticated defense counsel, the DOJ typically creates load files or otherwise configures its e-discovery productions in industry-standard formats. Of course, there are instances where typical practices do not work well, and those are proper subjects for a meet-and-confer.

To benefit from the information available in e-discovery, attorneys must know what format the original data was in, what formatting options are available, and how those options affect their potential review

36. A load file is a cross-reference file used to import images or data into databases. A data load file may contain Bates numbers, metadata, paths to native files, coded data, and extracted or OCR text. An image load file may contain document-boundary, image-type, and path information. Load files must be obtained and provided in software-specific formats to ensure they can be used by the receiving party.

37. A significant advantage to web-hosted document-review platforms for the CJA panel is that IT support is provided by the vendor, since most do not have in-house IT staff.

Criminal e-Discovery

of the data. Attorneys who do not understand the various formats should consult with a litigation support or IT expert before receiving or processing their e-discovery.

H. Form of Production—Paper Formats

Some contemporary records and many historical records only exist on paper. Converting paper discovery to electronic formats makes it easier to duplicate, exchange, and search. But converting voluminous paper records takes time and money. Accurate document breaks (also known as document unitization³⁸) too frequently are not captured when scanning paper records. When this happens, document unitization is lost, diminishing the utility of the resulting electronic files. Although the producing party is not obligated to reformat paper records into an electronic form,³⁹ in some cases both parties may save time and money by converting paper into electronic formats. Cost sharing may be an option if the parties agree that scanning serves both sides.

Scanning a paper record and making it searchable through optical character recognition (OCR) software is an improvement over leaving it in paper form, but it is not a perfect solution. Scanning can be prohibitively expensive. Moreover, OCR programs have established error rates, decreasing the accuracy and reliability of electronic searches of documents. That unreliability causes some attorneys to default to using their own eyes to search rather than scanning paper records for electronic review.

Today, some records custodians' systems still are configured to produce subpoenaed records in paper, even when they have the same data electronically. If a records custodian is willing to produce the information in an electronic format, the electronic version usually will yield more reliable searches.⁴⁰ However, what is efficient and afforda-

38. Document unitization is the process of determining where a document begins (its first page) and ends (its last page), with the goal of accurately describing what was a "unit" as it was received by the party or was kept in the ordinary course of business by the document's custodian.

39. *See* ESI Protocol, Principle 6.

40. There are several options for electronic formats. Sometimes the records custodian can produce the native-format version, for example, a Word document as a Word file as opposed to a paper document or a PDF. Sometimes the native format

II. Common Issues in Criminal e-Discovery

ble for records custodians, and what electronic formats they are willing or able to produce, varies widely.

I. Disorganized and Redundant ESI

E-discovery can come from records custodians as a disorganized and redundant jumble. That sometimes arises from how custodians store their data: multiple versions of the same computer record may coexist in unrelated computer systems, especially with cloud computing. Custodians may not be aware that copies of files exist in different parts of their system since files are often copied or backed up automatically without user interaction. With the ease of web communication, the multitude of different mobile devices, and inexpensive storage, ESI is frequently copied, recopied, forwarded, backed up, and archived many times over, resulting in multiple copies of the same files. Unlike paper records, where information was actively managed by records custodians who culled records to save money, there is often little need to organize ESI and delete duplicates or drafts. Although no single software quickly solves the issue of disorganized and redundant ESI, there are workflow processes combined with different types of software that can assist counsel in reducing duplicates, organizing the materials, and identifying the most relevant information more quickly than having a human look at every page.

J. Providing Incarcerated Defendants Access to e-Discovery

Defendants in pretrial detention face significant e-discovery challenges. Their rights to assist in their defense and confront the evidence against them contemplate reviewing that evidence. When out of custody, they can use their own (or their attorney's) computers to review electronic

is proprietary, and requires a proprietary viewer. Many video recording systems are proprietary. In some instances, a records custodian can produce a “near-native” version. For example, Google Mail (Gmail) is a web-based email system. For production, a Gmail file can be converted to an .msg file format that can be readily viewed. Alternatively, a document can be produced as an electronic TIFF image with extracted text that can be loaded into a database and electronically searched. Or documents can be converted to a searchable Adobe PDF format.

Criminal e-Discovery

discovery. When detained, their access to computers often is very limited. Although jails have long had policies for managing inmates' paper discovery, most do not have policies allowing inmates to review electronic discovery. Moreover, when the detention facilities do not have computers readily available for inmate evidence review, acceptable equipment and software must be purchased for incarcerated defendants to use. Although defender offices are budgeted for such equipment, CJA attorneys may need the court to fund equipment purchases or rentals.

Providing defendants in-custody access to technology that allows them to review their e-discovery reduces attorney time and costs. When incarcerated defendants cannot review e-discovery on their own time, the attorney or investigator has to bring a laptop or tablet containing the e-discovery to a jail visit and maintain control of the device while allowing the defendant to review the evidence, resulting in many hours of time billed to the CJA appropriations. Additionally, defendants may be able to locate critical evidence much more quickly than defense team members who are unfamiliar with the documentation. By reviewing and discussing evidence early, defendants help their counsel prioritize the investigation and limit the data that must be reviewed. This also creates more meaningful meetings, allowing both counsel and defendant to make timely decisions.

Jails have legitimate security and staffing interests in preventing inmates from having unfettered access to computers. A joint DOJ and defense attorney working group is studying the risks and benefits of allowing inmates access to computers for e-discovery review. They hope to produce practical recommendations. In the interim, consultation between the government, the defense, and the particular facility is most likely to result in an acceptable solution.

K. Multiple Defendants

Multidefendant, high-volume e-discovery cases are fertile ground for generating discovery disputes that require a judge's attention. For example, fraud cases involving multiple defendants may include millions of pages of documents. Multiple-defendant drug cases tend to have fewer documents, but they typically make up for that with wiretaps, surveillance photos and videos, text messages, GPS data, and social

III. Judicial Management of Criminal e-Discovery

media. These discovery items cannot be readily searched for defendant-specific materials without the use of litigation technology software. Even with software, it can take considerable time to review and analyze such complex and voluminous information.

With so many variables in play, multidefendant prosecutions may develop more conflicts over discovery than single-defendant prosecutions. One attorney may request additional information about the alleged criminal enterprise to receive more context about the case, while another may request different forms of production. Defense counsel may disagree with each other about formats of production, how the evidence is indexed and organized, and what information they are searching for. Prosecutors can find themselves caught in the middle of these competing demands and may not be able, or may not believe it is reasonable or affordable, to agree to varying (and potentially conflicting) defense counsel requests. This situation is ripe for pretrial e-discovery disputes. Judges can encourage the parties to attempt to resolve disputes without resorting to motion practice but may still be called upon to adjudicate competing discovery interests, especially where the government is subject to conflicting requests.

III. Judicial Management of Criminal e-Discovery

A. Managing Voluminous e-Discovery in Criminal Cases

As discussed earlier, voluminous e-discovery cases present difficult challenges for prosecutors and defense counsel. Depending upon the lawyers' familiarity with e-discovery, the court may need to exercise oversight in such cases. The ESI Protocol addresses the most common e-discovery issues, and the court can direct the parties to the ESI Protocol for guidance. Often, e-discovery disputes are simply the result of the lawyers' inexperience with e-discovery or their misunderstanding of technical terminology. Knowing that the lawyers are knowledgeable about e-discovery and/or that they have qualified litigation support, IT, or paralegal assistance will be of great assistance to judges managing these cases.

Criminal e-Discovery

One key to success with these cases is addressing e-discovery issues early. Missteps at the outset of the case are costly to unwind or correct, and they waste time and money. To get the parties to address e-discovery issues early, the ESI Protocol recommends three steps:

1. At the outset of the case, the parties should meet and confer about the nature, volume, and mechanics of producing e-discovery.⁴¹
2. At the meet-and-confer, the parties should address what is being produced; a table of contents; the forms of production; volume; software and hardware limitations; inspection of seized hardware; and a reasonable schedule for producing e-discovery.⁴²
3. The producing party transmits its e-discovery in sufficient time to permit reasonable management and review, and the receiving party should be proactive about testing the accessibility of the ESI when it is received.⁴³

Although the Federal Rules of Criminal Procedure do not specify when evidence must be produced, some judges find it useful to have standing orders that direct the parties to come up with a discovery plan when dealing with complex e-discovery matters.

To get the parties started on the right foot, the court may want to address the topic of e-discovery at one of the initial hearings, even before the parties have conducted their first meet-and-confer session. A discovery status conference can be scheduled after the meet-and-confer takes place. Proposed colloquies are offered in Appendices C and D.

B. Early Discussion of e-Discovery Issues

There are four steps courts can take early on in a large e-discovery criminal case. First, the court can ask the parties questions to ascertain what issues they are facing. Second, the court can be clear about its expectations for parties handling voluminous e-discovery. Third, the

41. ESI Protocol, Recommendations ¶ 5.

42. ESI Protocol, Strategies ¶ 5.

43. ESI Protocol, Strategies ¶ 5(o).

III. Judicial Management of Criminal e-Discovery

court can advise the parties of resources available to assist them. Finally, the court can schedule a discovery status conference as needed.

Ask About the Case: Appendix C offers a sample colloquy for the first appearance in the case. The court can ask the government the threshold question of whether this is a case in which the volume and/or nature of the e-discovery significantly increases the complexity of the case. In cases with court-appointed counsel, the answer may help the court decide whom to appoint and what resources and assistance appointed counsel may need.⁴⁴ Once both parties appear, the court can ask whether the parties have already addressed e-discovery issues, as that may obviate the need for further court involvement. The court can further ask if the parties are familiar with the ESI Protocol; if not, the prosecutor can provide a copy to defense counsel.

Advise About Expectations: Given the varying levels of experience and comfort with e-discovery and technology, as well as the rapid evolution of litigation software, the court can make clear from the outset its expectations for the lawyers in a complex e-discovery case.

Appendix C sets forth a list of reasonable expectations for the lawyers. These include the following:

- The lawyers should have an adequate understanding of e-discovery such that they can identify, communicate on, and solve common e-discovery problems and determine what forms of production are possible, how different software products and services can assist in the particular case, and what costs and cost savings result from their choices. The lawyers should be sufficiently familiar with the capabilities and limitations of software and services in order to select appropriate software and outside assistance. Lawyers can, of course, rely on experts to consult and advise them on what programs to use and what staff to retain.

44. See section II.A, *supra*, regarding funding electronic discovery.

Criminal e-Discovery

- Although the court will encourage parties to obtain technical assistance, the lawyers are ultimately responsible for decisions involving e-discovery.
- The parties will meet and confer once they have secured expert assistance. A meet-and-confer discussion should occur well before any discovery status conference. When appropriate, the lawyers should bring experts with them to the meet-and-confer to address the technical aspects of e-discovery.

Advise About Resources: Public defenders and CJA counsel in multidefendant, complex e-discovery cases can petition the court to appoint a coordinating discovery attorney. If the court appointed counsel (either an assistant federal defender or a CJA panel attorney), counsel can contact the NLST for assistance.⁴⁵

Schedule Discovery Conferences: Complex e-discovery cases may benefit from one or more discovery conferences, as the court deems appropriate.

C. Subsequent Status of e-Discovery Issues

Appendix D has a proposed colloquy for discovery status conferences. If status conferences are held, the judge can check on the progress of e-discovery. Depending on what the parties report has transpired since the last proceeding, the judge may remind them of the court's expectations as well as remind them of the resources available to them. Additionally, particular issues may arise that should be addressed in-depth.

Despite strong encouragement from the bench and the best intentions of the parties, the lawyers may not have conducted a meaningful meet-and-confer session. The Seventh Circuit's civil e-discovery pilot project revealed that many litigants are not diligent about conducting effective meet-and-confer sessions.⁴⁶ Even if meetings take place, if inexperienced lawyers did not bring expert assistance, or did not address

45. See section II.A, *supra*, for further discussion of the Defender Services Office's National Litigation Support program.

46. Seventh Circuit Electronic Discovery Pilot Program: Final Report on Phase Two 77, *available at* <http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf>.

IV. Conclusion

the matters in any depth (a so-called drive-by meet-and-confer), then problems with e-discovery may not have been avoided. Although not every case or lawyer needs these formal meetings, the court can satisfy itself that the parties have worked together to ensure productive access to e-discovery.

At the discovery status conference, the lawyers should provide a discovery disclosure schedule. The judge can clarify what is expected in continued “rolling” discovery, and that disclosure should take place expeditiously, since reviewing e-discovery can be very time-intensive. The court should take this opportunity to advise the parties about their discovery obligations. If the defense will have e-discovery, the court can check if the parties discussed that in the meet-and-confer session; if not, it could order a second meet-and-confer session.

There may be e-discovery issues that the parties have identified but have not been able to solve. If satisfied that they have tried in good faith to settle the matters first, the court can either decide the discovery dispute *impromptu*, or it can schedule a briefing and a discovery hearing. Subsequent discovery status conferences can be scheduled as needed.

IV. Conclusion

The purpose of this guide is to help judges give guidance and direction to lawyers handling complex criminal electronic discovery. It aims to ensure that the parties manage the case efficiently and thoughtfully, avoid unnecessary delay and costs occasioned by the nature of the e-discovery, and provide defendants full access to the evidence necessary to evaluate the case and make strategic decisions. Of course, this guide cannot answer every e-discovery question that will arise, so judges must be creative in dealing with the myriad of issues that naturally arise in this dynamic field. But this guide does offer an overall framework for addressing criminal e-discovery that can be adapted to virtually every case.

Judges using this publication are encouraged to comment and propose changes to keep it current and relevant.

Appendix A

ESI Protocol Description

Appendix A: ESI Protocol Description

A. ESI Protocol Helps Judges with e-Discovery in Criminal Cases

The ESI Protocol provides practical recommendations to facilitate electronic evidence discovery (e-discovery or ESI) in criminal cases. It seeks to increase efficiency, save money, and reduce litigation over e-discovery issues. To accomplish these goals, the ESI Protocol creates a predictable framework for e-discovery discussions and production, and encourages the parties to resolve e-discovery disputes without court intervention. It was designed to be enduring and flexible by providing both broad principles that will apply regardless of technical changes and detailed guidance that can be updated as technology evolves.

The ESI Protocol has four parts:

1. **Principles:** The 10 Principles are core tenets that set the framework for the recommendations and strategies, and they also serve as a starting place for the uninitiated. A judge can direct a lawyer to begin by reviewing the principles.
2. **Recommendations:** The 10 Recommendations address critical e-discovery topics at a policy level. They are based upon the principles' core tenets, and they are intended to endure inevitable changes in technology. The recommendations are a framework for informed discussions between the parties about e-discovery issues.
3. **Strategies and Commentary:** The strategies and commentary section addresses the same topics as the 10 Recommendations. It provides practical guidance on key practices. The strategies and commentary will evolve over time in response to changing technology and experience. This section concludes with definitions of e-discovery terms.
4. **Checklist:** This one-page checklist for lawyers and judges identifies the major specific topics to address at a meet-and-confer conference or discovery hearing.

B. Overview of the ESI Protocol

Guiding principles. The ESI Protocol is built upon ten principles:

Principle 1:

Lawyers have a responsibility to have an adequate understanding of electronic discovery.

Principle 2:

In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.

Principle 3:

At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue may be helpful.

Principle 4:

The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format.

Principle 5:

When producing ESI discovery, a party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what the party has already done or

Appendix A: ESI Protocol Description

would do for its own case preparation or discovery production.

Principle 6:

Following the meet-and-confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.

Principle 7:

The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.

Principle 8:

In multidefendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a coordinating discovery attorney.

Principle 9:

The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.

Criminal e-Discovery

Principle 10:

All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

Scope. The ESI Protocol is intended only for cases in which the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.⁴⁷ For example, cases involving a large volume of ESI, unique ESI issues, or multiple defendants may benefit from using the ESI Protocol. In simple or routine cases,⁴⁸ the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.⁴⁹

Limitations. The ESI Protocol does not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, other statutes, case law (for example, *Brady* and *Giglio*), or local rules.⁵⁰ It is not intended to serve as a basis for allegations of misconduct or claims for relief, nor does it create any rights or privileges for any party.⁵¹ Cases involving classified information have their own unique legal procedures that do not fit within the ESI Protocol.⁵² The ESI Protocol applies only to postindictment criminal discovery, not civil litigation or preindictment investigations, both of which are governed by existing legal standards.⁵³

An integrated process, not rules to be enforced. The ESI Protocol envisions a collaborative approach to e-discovery based upon

47. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. *See* ESI Protocol, Recommendations at 2.

48. Even small amounts of ESI in an unusual or difficult format can increase the complexity of e-discovery, which would counsel using the ESI Protocol.

49. *See* ESI Protocol, Recommendations ¶ 2.

50. ESI Protocol, Recommendations ¶ 3.

51. *Id.*

52. ESI Protocol, Recommendations ¶ 5.

53. ESI Protocol, Recommendations, fn. 1.

Appendix A: ESI Protocol Description

the mutual and interdependent responsibilities of the opposing parties.⁵⁴ As such, the ESI Protocol sets forth best practices for litigants, not a set of enforceable rules.

Balancing competing goals. As with the criminal discovery rules, the ESI Protocol seeks to balance competing goals. For example, to promote cost savings, the ESI Protocol states that if the producing party elects to process ESI for its own case preparation or discovery production, then the results of that processing should—unless they constitute work product—be produced in discovery to save the receiving party the expense of replicating that work. An illustration would be that if the producing party scans paper documents to a TIFF image and OCR text, then those should be provided in discovery rather than providing only the paper documents. Nonetheless, the producing party’s work product—for example, issue tags or document notes—should not be produced. Importantly, the producing party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what it has already done or would do for its own case preparation or discovery production.

No easy solutions. A natural human tendency when confronted with complex problems is to look for easy solutions. But the ESI Protocol recognizes that at this point in the evolution of e-discovery, there is no easy, one-size-fits-all solution.

Coordinating discovery for multiple defendants. In multiple-defendant cases, the ESI Protocol recommends that the defendants authorize one or more defense counsel to act as the discovery coordinator or seek the appointment of a coordinating discovery attorney (CDA). CDAs are Defender Services Program–contracted attorneys who have technological knowledge and experience, resources, and staff to assist with the effective management of complex e-discovery.⁵⁵

Communication, not litigation. To reduce costs and save time, the ESI Protocol avoids a purely adversarial and rules-driven approach to e-discovery. First, the ESI Protocol recommends that the parties meet and confer at the outset of a case. Second, it recommends

54. See ESI Protocol, Introduction at 2.

55. For more information on coordinating discovery attorneys, see section III.A, *supra*, at pp. 14–15.

Criminal e-Discovery

communication as a precondition to filing a motion about an e-discovery issue. An aggrieved party is directed to confer with opposing counsel in a good-faith effort to resolve the dispute, and to involve individuals with sufficient knowledge to understand the technical issues, or sufficient authority to settle the dispute cooperatively, before filing any motions. If a motion is filed, the ESI Protocol suggests including a statement of counsel for the moving party stating that, after consultation with the opposing party, they have been unable to resolve the dispute without court action.

Each U.S. Attorney's Office and Main Justice criminal component has one or more criminal discovery coordinators who are responsible for providing guidance to prosecutors on criminal discovery topics. Each federal and community defender office has IT or other staff and access to the National Litigation Support Team that can provide technical assistance in resolving discovery issues. Lawyers can take advantage of these resources to understand technical issues and facilitate meaningful discussion that may avoid or resolve conflicts.

To avoid unnecessary motions practice, the ESI Protocol calls for supervisor participation in resolving disputes and recommends that prosecutors and federal and community defender offices institute internal procedures that require line prosecutors and defenders to: (1) seek a supervisor's assistance in resolving an e-discovery dispute, (2) consult with supervisors before filing motions seeking judicial resolution of an e-discovery dispute; and (3) obtain a supervisor's authorization before alleging that opposing counsel has engaged in any misconduct, abuse, or neglect concerning the production of ESI. These recommendations were included to ensure that the parties explored technological and pragmatic solutions before resorting to e-discovery litigation. Of course, the recommendations for consulting with, or obtaining approval of, a supervisor do not apply to CJA or privately retained counsel.

Whether the ESI Protocol's meet-and-confer approach will succeed in our adversarial system will depend in some measure upon whether judges encourage the parties to follow the ESI Protocol. At the least, the involvement of technically knowledgeable personnel should help to avoid disputes based on technological misunderstandings.

Appendix A: ESI Protocol Description

Parties are responsible for identifying and solving e-discovery issues. The ESI Protocol identifies the responsibilities of both parties. Some examples follow.

Both Parties

- When gathering ESI, think about the nature, volume, and mechanics of managing ESI.⁵⁶
- Conduct a meet-and-confer to discuss e-discovery issues, and address eighteen specified topics as necessary.⁵⁷ Use the one-page checklist to help identify possible issues.
- Discuss any issues concerning information provided in discovery that implicates any privilege or that is protected as confidential or personal identifying information.⁵⁸
- Discuss a reasonable schedule for producing e-discovery.⁵⁹
- Discuss e-discovery security if either party intends to make discovery electronically available to others.⁶⁰
- Discuss protective orders if needed.⁶¹
- Memorialize any e-discovery agreements.⁶²
- Give the court advance notice of any issues that will significantly affect the production or review of e-discovery, the need to request supplemental funds, or the scheduling of pretrial motions or trial.⁶³

56. ESI Protocol, Strategies ¶ 2.

57. ESI Protocol, Strategies ¶ 5.

58. ESI Protocol, Strategies ¶ 5(e).

59. ESI Protocol, Strategies ¶ 5(o).

60. ESI Protocol, Strategies ¶ 5(p).

61. ESI Protocol, Strategies ¶ 5(q).

62. ESI Protocol, Strategies ¶ 5(r).

63. ESI Protocol, Strategies ¶ 5(s).

Criminal e-Discovery

Producing Party

- When possible, produce ESI as processed to save the receiving party the expense of replicating the processing.⁶⁴
- Create a table of contents.⁶⁵
- Give the receiving party an estimate of discovery volume.⁶⁶
- Identify any third-party ESI according to which device it came from.⁶⁷
- Produce third-party ESI in the format it was received or in a reasonably usable format.⁶⁸
- Produce discoverable materials generated by a party during its investigation in a searchable and reasonably usable format.⁶⁹
- Produce a cover letter to accompany e-discovery that describes the number of media, the unique identifiers of the media, a brief description of the contents including a table of contents if created, and any Bates ranges or other unique production identifiers.⁷⁰

Receiving Party

- Inspect e-discovery promptly after its receipt and give notice to the producing party of any production issues or problems that may impede using the e-discovery.⁷¹

64. ESI Protocol, Recommendations ¶ 6.

65. ESI Protocol, Strategies ¶ 5(b).

66. ESI Protocol, Strategies ¶ 5(h).

67. ESI Protocol, Strategies ¶ 5(l).

68. ESI Protocol, Strategies ¶ 6(g).

69. ESI Protocol, Strategies ¶ 6(h).

70. ESI Protocol, Strategies ¶ 7(c).

71. ESI Protocol, Strategies ¶ 5(o).

Appendix B

ESI Protocol

Appendix B: ESI Protocol

**Recommendations for Electronically
Stored Information (ESI) Discovery Production
in Federal Criminal Cases**

*Department of Justice (DOJ) and Administrative Office of the U.S.
Courts (AO) Joint Electronic Technology Working Group (JETWG)*

February 2012

Appendix B: ESI Protocol

Introduction to Recommendations for ESI Discovery in Federal Criminal Cases

Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption, and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery.

The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the government and defendants charged in federal criminal cases. JETWG was established in 1998 by the director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of the U.S. Courts, Defender Services Office (DSO), the Department of Justice (DOJ), Federal Public and Community Defender Organizations (FPDOs and CDOs), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States judiciary and other AOUSC offices.

JETWG has prepared recommendations for managing ESI discovery in federal criminal cases, which are contained in the following three documents:

1. **Recommendations for ESI Discovery in Federal Criminal Cases.** The Recommendations provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.
2. **Strategies and Commentary on ESI Discovery in Federal Criminal Cases.** The Strategies provide technical and more particularized guidance for implementing the recommendations, including definitions of terms. The Strategies will evolve in light of changing technology and experience.
3. **ESI Discovery Checklist.** A one-page checklist for addressing ESI production issues.

Criminal e-Discovery

The Recommendations, Strategies, and Checklist are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. They are not intended for all cases. The Recommendations, Strategies, and Checklist build upon the following basic principles:

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. (See #4 of the Recommendations.)

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI. (See #4 of the Recommendations.)

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue may be helpful. (See #5 of the Recommendations and Strategies.)

Principle 4: The parties should discuss what formats of production are possible and appropriate and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format. (See #6 of the Recommendations and Strategies.)

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. (See #6 of the Recommendations and Strategies.)

Principle 6: Following the meet-and-confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case. (See #5(s) of the Strategies.)

Appendix B: ESI Protocol

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted. (See #7 of the Recommendations and Strategies.)

Principle 8: In multidefendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek the appointment of a Coordinating Discovery Attorney. (See #8 of the Recommendations and Strategies.)

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI. (See #9 of the Recommendations.)

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need, and are approved for, access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure. (See #10 of the Recommendations.)

The Recommendations, Strategies, and Checklist set forth a collaborative approach to ESI discovery involving mutual and interdependent responsibilities. The goal is to benefit all parties by making ESI discovery more efficient and secure, and less costly.

**Recommendations for ESI Discovery Production
in Federal Criminal Cases**

1. Purpose

These Recommendations are intended to promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery⁷² between the government and defendants charged in federal criminal cases and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery and by establishing methods for resolving ESI discovery disputes without the need for court intervention.

ESI discovery production involves the balancing of several goals:

- a) The parties must comply with their legal discovery obligations;
- b) the volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable item, and, as a consequence, the parties increasingly will employ software tools for discovery review, so ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information;
- c) the parties should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI;
- d) subject to subparagraph (e), below, the producing party should produce its ESI discovery materials in industry-standard formats;

72. The Recommendations and Strategies are intended to apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio*, and the Jencks Act, and they do not apply to, nor do they create any rights, privileges, or benefits during, the gathering of ESI as part of the parties' criminal or civil investigations. The legal principles, standards, and practices applicable to the discovery phase of criminal cases serve different purposes than those applicable to criminal and civil investigations.

Appendix B: ESI Protocol

- e) the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production⁷³; and
- f) the parties must protect their work product, privileged, and other protected information.

The following Recommendations are a general framework for informed discussions between the parties about ESI discovery issues. The efficient and cost-effective production of ESI discovery materials is enhanced when the parties communicate early and regularly about any ESI discovery issues in their case, and when they give the court notice of ESI discovery issues that will significantly affect the handling of the case.

2. Scope: Cases Involving Significant ESI

No single approach to ESI discovery is suited to all cases. These Recommendations are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.⁷⁴ In simple or routine cases, the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.

Due to the evolving role of ESI in criminal cases, these Recommendations and the parties' practices will change with technology and experience. As managing ESI discovery becomes more routine, it is anticipated that the parties will develop standard processes for ESI discovery that become the accepted norm.

73. One example of the producing party undertaking additional processing for its discovery production is a load file that enables the receiving party to load discovery materials into its software.

74. Courts and litigants will continue to seek ways to identify cases deserving special consideration. While the facts and circumstances of cases will vary, some factors may include: (1) a large volume of ESI; (2) unique ESI issues, including native file formats, voluminous third-party records, nonstandard and proprietary software formats; and/or (3) multiple-defendant cases accompanied by a significant volume of ESI.

3. Limitations

These Recommendations and the accompanying Strategies do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. They may not serve as a basis for allegations of misconduct or claims for relief, and they do not create any rights or privileges for any party.

4. Technical Knowledge and Experience

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. Lawyers have a responsibility to have an adequate understanding of electronic discovery.

5. Planning for ESI Discovery Production—The Meet-and-Confer Process

At the outset of a case involving substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. The parties should determine how to ensure that any meet-and-confer process does not run afoul of speedy trial deadlines. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue during the discovery phase may be helpful. In cases where it is authorized, providing ESI discovery to an incarcerated defendant presents challenges that should be discussed early. Also, cases involving classified information will not fit within the Recommendations and Strategies due to the unique legal procedures applicable to those cases. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. The Strategies and Checklist provide detailed recommendations on planning for ESI discovery.

Appendix B: ESI Protocol

6. Production of ESI Discovery

Production of ESI discovery involves varied considerations depending upon the ESI's source, nature, and format. Unlike certain civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. The ESI gathered by the parties during their investigations may be affected or limited by many factors, including the original custodian's or source's information technology systems, data management practices, and resources; the party's understanding of the case at the time of collection; and other factors. Likewise, the electronic formats used by the parties for producing ESI discovery may be affected or limited by several factors, including the source of the ESI; the format(s) in which the ESI was originally obtained; and the party's legal discovery obligations, which may vary with the nature of the material. The Strategies and Checklist provide detailed recommendations on production of ESI discovery.

General recommendations for the production of ESI discovery are as follows:

- a. The parties should discuss what formats of production are possible and appropriate and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standards for the format.⁷⁵
- b. ESI received from third parties should be produced in the format(s) it was received or in reasonably usable format(s). ESI from the government's or defendant's business records should be produced in the format(s) in which it was maintained or in reasonably usable format(s).
- c. Discoverable ESI generated by the government or defense during the course of their investigations (*e.g.*, investigative reports, witness interviews, demonstrative exhibits, etc.) may be handled differently than in 6(a) and (b) above be-

75. An example of a format of production might be the production of TIFF images, OCR text files, and load files created for a specific software application. Another format of production would be native-file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases. ESI in a particular case might warrant more than one format of production depending upon the nature of the ESI.

Criminal e-Discovery

cause the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, the parties' policies, and the parties' evolving technological capabilities.

- d. When producing ESI discovery, a party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. For example, the producing party need not convert ESI from one format to another or undertake additional processing of ESI beyond what is required to satisfy its legal disclosure obligations. If the receiving party desires ESI in a condition different from what the producing party intends to produce, the parties should discuss what is reasonable in terms of expense and mechanics, who will bear the burden of any additional cost or work, and how to protect the producing party's work product or privileged information. Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

7. Transmitting ESI Discovery

The parties should discuss transmission methods and media that promote efficiency, security, and reduced costs. In conjunction with ESI transmission, the producing party should provide a general description and maintain a record of what was transmitted. Any media should be clearly labeled. The Strategies and Checklist contain detailed recommendations on transmission of ESI discovery, including the potential use of email to transmit ESI.

Appendix B: ESI Protocol

8. Coordinating Discovery Attorney

In cases involving multiple defendants, the defendants should authorize one or more counsel to act as the discovery coordinator(s), or seek the appointment of a Coordinating Discovery Attorney,⁷⁶ and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government. Generally, the format of production should be the same for all defendants, but the parties should be sensitive to different needs and interests in multiple-defendant cases.

9. Informal Resolution of ESI Discovery Matters

- a. Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.
- b. The Discovery Coordinator within each U.S. Attorney's Office should be consulted in cases presenting substantial issues or disputes.
- c. To avoid unnecessary litigation, prosecutors and Federal Defender Offices⁷⁷ should institute procedures that re-

76. Coordinating Discovery Attorneys (CDAs) are AOUSC-contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant cases. The CDAs may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the U.S. Attorney's Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If a panel attorney or FDO is interested in utilizing the services of the CDA, they should contact the National Litigation Support Administrator or Assistant National Litigation Support Administrator for the Office of Defender Services at 510-637-3500.

77. For private attorneys appointed under the Criminal Justice Act, this subsection (c) is not applicable.

Criminal e-Discovery

quire line prosecutors and defenders (1) to consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) to obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.

- d. Any motion addressing a discovery dispute concerning ESI production should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party, the parties have been unable to resolve the dispute without court action.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

Criminal case discovery entails certain responsibilities for all parties in the careful handling of a variety of sensitive information, for example, grand jury material, the defendant's records, witness identifying information, information about informants, information subject to court protective orders, confidential personal or business information, and privileged information. With ESI discovery, those responsibilities are increased because ESI is easily reproduced and disseminated, and unauthorized access or disclosure could, in certain circumstances, endanger witness safety; adversely affect national security or homeland security; leak information to adverse parties in civil suits; compromise privacy, trade secrets, or classified, tax return, or proprietary information; or prejudice the fair administration of justice. The parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.

All parties should limit dissemination of ESI discovery to members of their litigation team who need, and are approved for, access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

During the initial meet-and-confer and before ESI discovery is produced, the parties should discuss whether there is confidential, pri-

Appendix B: ESI Protocol

vate, or sensitive information in any ESI discovery they will be providing. If such information will be disclosed, then the parties should discuss how the recipients will prevent unauthorized access to, or disclosure of, that ESI discovery, and, absent agreement on appropriate security, the producing party should seek a protective order from the court addressing management of the particular ESI at issue. The producing party has the burden to raise the issue anew if it has concerns about any ESI discovery it will provide in subsequent productions. The parties may choose to have standing agreements so that their practices for managing ESI discovery are not discussed in each case. The Strategies contain additional guidance in sections 5(f), 5(p), and 7(e).

Criminal e-Discovery

Strategies and Commentary on ESI Discovery in Federal Criminal Cases

1. Purpose

This commentary contains strategies for implementing the ESI discovery Recommendations and specific technical guidance. Over time it will be modified in light of experience and changing technology. Definitions of common ESI terms are provided in paragraph 11, below.

2. Scope of ESI Gathered

In order to promote efficiency and avoid unnecessary costs, when gathering ESI, the parties should take into consideration the nature, volume, and mechanics of managing ESI.

3. Limitations

Nothing contained herein creates any rights or privileges for any party.

4. Technical Knowledge and Experience

No additional commentary.

5. Planning for e-Discovery Production—The Meet-and-Confer Process

To promote efficient ESI discovery, the parties may find it useful to discuss the following:

- a. **ESI discovery produced.** The parties should discuss the ESI being produced according to the following general categories:
 - i. *Investigative materials* (investigative reports, surveillance records, criminal histories, etc.)
 - ii. *Witness statements* (interview reports, transcripts of prior testimony, Jencks statements, etc.)

Appendix B: ESI Protocol

- iii. *Documentation of tangible objects* (e.g., records of seized items or forensic samples, search warrant returns, etc.)
 - iv. *Third parties' ESI digital devices* (computers, phones, hard drives, thumb drives, CDs, DVDs, cloud computing, etc., including forensic images)
 - v. *Photographs and video/audio recordings* (crime scene photos; photos of contraband, guns, money; surveillance recordings; surreptitious monitoring recordings; etc.)
 - vi. *Third-party records and materials* (including those seized, subpoenaed, and voluntarily disclosed)
 - vii. *Title III wiretap information* (audio recordings, transcripts, line sheets, call reports, court documents, etc.)
 - viii. *Court records* (affidavits, applications, and related documentation for search and arrest warrants, etc.)
 - ix. *Tests and examinations*
 - x. *Experts* (reports and related information)
 - xi. *Immunity agreements, plea agreements, and similar materials*
 - xii. *Discovery materials with special production considerations* (such as child pornography, trade secrets, tax return information, etc.)
 - xiii. *Related matters* (state or local investigative materials, parallel proceedings materials, etc.)
 - xiv. *Discovery materials available for inspection but not produced digitally*
 - xv. *Other information*
- b. **Table of contents.** If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI dis-

Criminal e-Discovery

covery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.⁷⁸ Because no single table of contents is appropriate for every case, the producing party may devise a table of contents that is suited to the materials it provides in discovery, its resources, and other considerations.⁷⁹

- c. **Forms of production.** The producing party should consider how discoverable materials were provided to it or maintained by the source (*e.g.*, paper or electronic), whether it has converted any materials to a digital format that can be used by the opposing party without disclosing the producing party's work product, and how those factors may affect the production of discovery materials in electronic formats. For particularized guidance see paragraph 6, below. The parties should be flexible in their application of the concept of "maintained by the source." The goals are to retain the ESI's integrity, to allow for reasonable usability, and to reasonably limit costs.⁸⁰
- d. **Proprietary or legacy data.** Special consideration should be given to data stored in proprietary or legacy sys-

78. See, *e.g.*, *U.S. v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) (no *Brady* violation where government disclosed several-hundred-million-page database with searchable files and produced set of hot documents and indices).

79. A table of contents is intended to be a general, high-level guide to the categories of ESI discovery. Because a table of contents may not be detailed, complete, or free of errors, the parties still have the responsibility to review the ESI discovery produced. With ESI, particular content usually can be located using available electronic search tools. There are many ways to construct a general table of contents. For example, a table of contents could be a folder structure as set forth above in paragraph 2(a)(i–xv), where like items are placed into folders.

80. For example, when the producing party processes ESI to apply Bates numbers, load it into litigation software, create TIFF images, etc., the ESI is slightly modified and no longer in its original state. Similarly, some modification of the ESI may be necessary and proper in order to allow the parties to protect privileged information, and the processing and production of ESI in certain formats may result in the loss or alteration of some metadata that is not significant in the circumstances of the particular case.

Appendix B: ESI Protocol

tems, for example, video surveillance recordings in an uncommon format, proprietary databases, or software that is no longer supported by the vendor. The parties should discuss whether a suitable generic-output format or report is available. If a generic output is not available, the parties should discuss the specific requirements necessary to access the data in its original format.

- e. **Attorney-client, work product, and protected information issues.**⁸¹ The parties should discuss whether there is privileged, work product, or other protected information in third-party ESI or their own discoverable ESI and should discuss proposed methods and procedures for segregating such information and resolving any disputes.⁸²
- f. **Confidential and personal information.** The parties should identify and discuss the types of confidential or personal information present in the ESI discovery, appropriate security for that information, and the need for any protective orders or redactions. See also section 5(p) below.
- g. **Incarcerated defendant.** If the defendant is incarcerated and the court or correctional institution has authorized discovery access in the custodial setting, the parties should consider what institutional requirements or limitations may affect the defendant's access to ESI discovery, such as limitations on hardware or software use.⁸³
- h. **ESI discovery volume.** To assist in estimating the receiving party's discovery costs and to the extent that the producing party knows the volume of discovery materials

81. Attorney-client and work-product issues (*see, e.g.*, F. R. Crim. P. 16(a)(2) and (b)(2)) arising from the parties' own case preparation are beyond the scope of these Recommendations, and they need not be part of the meet-and-confer discussion.

82. If third-party records are subject to an agreement or court order involving a selective waiver of attorney-client or work-product privileges (*see* F.R.E. 502), then the parties should discuss how to handle those materials.

83. Because pretrial detainees often are held in local jails (for space, protective custody, cost, or other reasons), which have varying resources and security needs, there are no uniform practices or rules for pretrial detainees' access to ESI discovery. Resolution of the issues associated with such access is beyond the scope of the Recommendations and Strategies.

Criminal e-Discovery

it intends to produce immediately or in the future, the producing party may provide such information if such disclosure would not compromise the producing party's interests. Examples of volume include the number of pages of electronic images of paper-based discovery, the volume (*e.g.*, gigabytes) of ESI, the number and aggregate length of any audio or video recordings, and the number and volume of digital devices. Disclosures concerning expected volume are not intended to be so detailed as to require a party to disclose what it intends to produce as discovery before it has a legal obligation to produce the particular discovery material (*e.g.*, Jencks material). Similarly, the parties' estimates are not binding and may not serve as the basis for allegations of misconduct or claims for relief.

- i. **Naming conventions and logistics.** The parties should, from the outset of a case, employ naming conventions that would make the production of discovery more efficient. For example, in a Title III wiretap case generally it is preferable that the naming conventions for the audio files, the monitoring logs, and the call transcripts be consistent so that it is easy to cross-reference the audio calls with the corresponding monitoring logs and transcripts. If at the outset of discovery production a naming convention has not yet been established, the parties should discuss a naming convention before the discovery is produced. The parties should discuss logistics and the sharing of costs or tasks that will enhance ESI production.
- j. **Paper materials.** For options and particularized guidance on paper materials see paragraphs 6(a) and (e), below.
- k. **Any software and hardware limitations.** As technology continues to evolve, the parties may have software and hardware constraints on how they can review ESI. Any limitations should be addressed during the meet-and-confer.
- l. **ESI from seized or searched third-party ESI digital devices.** When a party produces ESI from a seized or searched third-party digital device (*e.g.*, computer, cell

Appendix B: ESI Protocol

phone, hard drive, thumb drive, CD, DVD, cloud computing, or file share), the producing party should identify the digital device that held the ESI, and, to the extent that the producing party already knows, provide some indication of the device's probable owner or custodian and the location where the device was seized or searched. Where the producing party only has limited authority to search the digital device (*e.g.*, limits set by a search warrant's terms), the parties should discuss the need for protective orders or other mechanisms to regulate the receiving party's access to or inspection of the device.

- m. **Inspection of hard drives and/or forensic (mirror) images.** Any forensic examination of a hard drive, whether it is an examination of a hard drive itself or an examination of a forensic image of a hard drive, requires specialized software and expertise. A simple copy of the forensic image may not be sufficient to access the information stored, as specialized software may be needed. The parties should consider how to manage inspection of a hard drive and/or production of a forensic image of a hard drive and what software and expertise will be needed to access the information.
- n. **Metadata in third-party ESI.** If a producing party has already extracted metadata from third-party ESI, the parties should discuss whether the producing party should produce the extracted metadata together with an industry-standard load file or, alternatively, produce the files as received by the producing party from the third party.⁸⁴ Neither party need undertake additional processing beyond its own case preparation, and both parties are entitled to protect their work product and privileged or other protected information. Because the term "metadata" can encompass different categories of information, the parties should clearly describe what categories of metadata are

84. The producing party is, of course, limited to what it received from the third party. The third party's processing of the information can affect or limit what metadata is available.

Criminal e-Discovery

being discussed, what the producing party has agreed to produce, and any known problems or gaps in the metadata received from third parties.

- o. **A reasonable schedule for producing and reviewing ESI.** Because ESI involves complex technical issues, two stages should be addressed. First, the producing party should transmit its ESI in sufficient time to permit reasonable management and review. Second, the receiving party should be proactive about testing the accessibility of the ESI production *when it is received*. Thus, a schedule should include a date for the receiving party to notify the producing party of any production issues or problems that are impeding use of the ESI discovery.
- p. **ESI security.** During the first meet-and-confer, the parties should discuss ESI discovery security and, if necessary, the need for protective orders to prevent unauthorized access to, or disclosure of, ESI discovery that any party intends to share with team members via the Internet or similar system, including:
 - i. what discovery material will be produced that is confidential, private, or sensitive, including, but not limited to, grand jury material, witness identifying information, information about informants, a defendant's or co-defendant's personal or business information, information subject to court protective orders, confidential personal or business information, or privileged information;
 - ii. whether encryption or other security measures during transmission of ESI discovery are warranted;⁸⁵
 - iii. what steps will be taken to ensure that only authorized persons have access to the electronically stored or disseminated discovery materials;

85. The parties should consult their litigation support personnel concerning encryption or other security options.

Appendix B: ESI Protocol

- iv. what steps will be taken to ensure the security of any website or other electronic repository against unauthorized access;
- v. what steps will be taken at the conclusion of the case to remove discovery materials from a website or similar repository; and
- vi. what steps will be taken at the conclusion of the case to remove or return ESI discovery materials from the recipient's information system(s), or to securely archive them to prevent unauthorized access.

Note: Because all parties want to ensure that ESI discovery is secure, the Department of Justice, Federal Defender Offices, and CJA counsel are compiling an evolving list of security concerns and recommended best practices for appropriately securing discovery. Prosecutors and defense counsel with security concerns should direct inquiries to their respective ESI liaisons,⁸⁶ who, in turn, will work with their counterparts to develop best practice guidance.

- q. **Other issues.** The parties should address other issues they can anticipate, such as protective orders, “claw-back” agreements⁸⁷ between the government and criminal defendant(s), or any issues related to the preservation or collection of ESI discovery.
- r. **Memorializing agreements.** The parties should memorialize any agreements reached to help forestall later disputes.

86. Federal Defender Organizations and CJA panel attorneys should contact Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org. Prosecutors should contact Andrew Goldsmith (National Criminal Discovery Coordinator) at Andrew.Goldsmith@usdoj.gov or John Haried (Assistant National Criminal Discovery Coordinator) at John.Haried@usdoj.gov.

87. A “claw-back” agreement outlines procedures to be followed to protect against waiver of privilege or work-product protection due to inadvertent production of documents or data.

Criminal e-Discovery

s. **Notice to court.**

- i. *Preparing for the meet-and-confer.* A defendant who anticipates the need for technical assistance to conduct the meet-and-confer should give the court adequate advance notice if it will be filing an ex parte funds request for technical assistance.
- ii. *Following the meet-and-confer.* The parties should notify the court of ESI discovery production issues or problems that they anticipate will significantly affect when ESI discovery will be produced to the receiving party, when the receiving party will complete its accessibility assessment of the ESI discovery received,⁸⁸ whether the receiving party will need to make a request for supplemental funds to manage ESI discovery, or the scheduling of pretrial motions or trial.

6. Production of ESI Discovery

- a. **Paper Materials.** Materials received in paper form may be produced in that form,⁸⁹ made available for inspection, or, if they have already been converted to digital format, produced as electronic files that can be viewed and searched. Methods are described below in paragraph 6(b).
- b. **Electronic production of paper documents.** Three possible methodologies:
 - i. *Single-page TIFFs.* Production in TIFF and OCR format consists of the following three elements:
 - (1) Paper documents are scanned to a picture or image that produces one file per page. Documents should be unitized. Each elec-

88. See paragraph 5(o) of the Strategies, above.

89. The decision whether to scan paper documents requires striking a balance between resources (including personnel and cost) and efficiency. The parties should make that determination on a case-by-case basis.

Appendix B: ESI Protocol

- tronic image should be stamped with a unique page label or Bates number.
 - (2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as image file.
 - (3) Load files that tie together the images and text.
 - ii. *Multi-page TIFFS*. Production in TIFF and OCR format consists of the following two elements:
 - (1) Paper documents are scanned to a picture or image that produces one file per document. Each file may have multiple pages. Each page of the electronic image should be stamped with a unique page label or Bates number.
 - (2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as the image file.
 - iii. *PDF*. Production in multi-page, searchable PDF format consists of the following one element:
 - (1) Paper documents scanned to a PDF file with text generated by OCR included in the same file. This produces one file per document. Documents should be unitized. Each page of the PDF should be stamped with a unique Bates number.
 - iv. *Note re: color documents*. Paper documents should not be scanned in color unless the color content of an

Criminal e-Discovery

individual document is particularly significant to the case.⁹⁰

- c. **ESI production.** Three possible methodologies:
- i. *Native files as received.* Production in a native file format without any processing consists of a copy of ESI files in the same condition as they were received.
 - ii. *ESI converted to electronic image.* Production of ESI into a TIFF or PDF and extracted text format consists of the following four elements:
 - (1) Electronic documents converted from their native format into a picture/image. The electronic image files should be computer-generated, as opposed to printed and then imaged. Each electronic image should be stamped with a unique Bates number.
 - (2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.
 - (3) Metadata (*i.e.*, information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry-standard format. The metadata must include information about structural relationships between documents, *e.g.*, parent-child relationships.
 - (4) Load files that tie together the images, text, and metadata.

90. Color scanning substantially slows the scanning process and creates huge electronic files, which consume storage space, making the storage and transmission of information difficult. An original signature, handwritten marginalia in blue or red ink, and colored text highlights are examples of color content that may be particularly significant to the case.

Appendix B: ESI Protocol

- iii. *Native files with metadata.* Production of ESI in a processed native-file format consists of the following four elements:
 - (1) The native files.
 - (2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.
 - (3) Metadata (*i.e.*, information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry-standard format. The metadata must include information about structural relationships between documents, *e.g.*, parent-child relationships.
 - (4) Load files that tie together the native file, text, and metadata.
- d. **Forensic images of digital media.** Forensic images of digital media should be produced in an industry-standard forensic format, accompanied by notice of the format used.
- e. **Printing ESI to paper.** The producing party should not print ESI (including TIFF images or PDF files) to paper as a substitute for production of the ESI unless agreed to by the parties.
- f. **Preservation of ESI materials received from third parties.** A party receiving potentially discoverable ESI from a third party should, to the extent practicable, retain a copy of the ESI as it was originally produced in case it is subsequently needed to perform quality control or verification of what was produced.
- g. **Production of ESI from third parties.** ESI from third parties may have been received in a variety of formats, for example, in its original format (native, such as Excel or Word), as an image (TIFF or PDF), as an image with searchable text (TIFF or PDF with OCR text), or as a

Criminal e-Discovery

combination of any of these. The third party's format can affect or limit the available options for production as well as what associated information (metadata) might be available. ESI received from third parties should be produced in the format(s) it was received or in reasonably usable format(s). ESI received from a party's own business records should be produced in the format(s) in which it was maintained or in reasonably usable form(s). The parties should explore what formats of production⁹¹ are possible and appropriate and discuss what formats can be generated. Any format selected for producing discovery should, if possible and appropriate, conform to industry standards for the format.

- h. **ESI generated by the government or defense.** Paragraphs 6(f) and 6(g) do not apply to discoverable materials generated by the government or defense during the course of their investigations (*e.g.*, demonstrative exhibits, investigative reports and witness interviews—see subparagraph i, below, etc.) because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, and the parties' evolving technological capabilities. Thus, such materials may be produced differently from third-party ESI. However, to the extent practicable, this material should be produced in a searchable and reasonably usable format. Parties should consult with their investigators in advance of preparing discovery to ascertain the investigators' ESI capabilities and limitations.
- i. **Investigative reports and witness interviews.** Investigative reports and witness interviews may be produced in paper form if they were received in paper form or if the final version is in paper form. Alternatively, they may be produced as electronic images (TIFF images or PDF files),

91. An example of a format of production might be the production of TIFF images, OCR text files, and load files created for a specific software application. Another format of production would be native-file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases.

Appendix B: ESI Protocol

particularly when needed to accommodate any necessary redactions. Absent particular issues such as redactions or substantial costs or burdens of additional processing, electronic versions of investigative reports and witness interviews should be produced in a searchable text format (such as ASCII text, OCR text, or plain text (.txt)) in order to avoid the expense of reprocessing the files. To the extent possible, the electronic image files of investigative reports and witness interviews should be computer-generated (as opposed to printed to paper and then imaged) in order to produce a higher-quality, searchable text, which will enable the files to be more easily searched and more cost-effectively utilized.⁹²

- j. **Redactions.** ESI and/or images produced should identify the extent of redacted material and its location within the document.
- k. **Photographs and video and audio recordings.** A party producing photographs or video or audio recordings that either were originally created using digital devices or have previously been digitized should disclose the digital copies of the images or recordings if they are in the producing party's possession, custody or control. When technically feasible and cost-efficient, photographs and video and audio recordings that are not already in a digital format should be digitized into an industry-standard format if and when they are duplicated. The producing party is not required to convert materials obtained in analog format to digital format for discovery.
- l. **Test runs.** Before producing ESI discovery, a party should consider providing samples of the production format for a test run and, once a format is agreed upon, produce all ESI discovery in that format.

92. For guidance on making computer-generated versions of investigative reports and witness interview reports, see the description of production of TIFF, PDF, and extracted text formats in paragraphs 6(b)(ii)(1) and (ii).

Criminal e-Discovery

- m. **Access to originals.** If the producing party has converted paper materials to digital files, converted materials with color content to black and white images, or processed audio, video, or other materials for investigation or discovery, it should provide reasonable access to the originals for inspection and/or reprocessing.

7. Transmitting ESI Discovery

- a. ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production, for example, a CD, DVD, or thumb drive.⁹³ If the size of the production warrants a large-capacity hard drive, then the producing party may require the receiving party to bear the cost of the hard drive and to satisfy requirements for the hard drive that are necessary to protect the producing party's IT system from viruses or other harm.
- b. The media should be clearly labeled with the case name and number, the producing party, a unique identifier for the media, and a production date.
- c. A cover letter should accompany each transmission of ESI discovery providing basic information, including the number of media, the unique identifiers of the media, a brief description of the contents (including a table of contents if created), any applicable bates ranges or other unique production identifiers, and any necessary passwords to access the content. Passwords should not be in the cover letter accompanying the data, but in a separate communication.
- d. The producing party should retain a write-protected copy of all transmitted ESI as a preserved record to resolve any subsequent disputes.

93. Rolling productions may, of course, use multiple media. The producing party should avoid using multiple media when a single media will facilitate the receiving party's use of the material.

Appendix B: ESI Protocol

- e. **Email transmission.** When considering transmission of ESI discovery by email, the parties' obligation varies according to the sensitivity of the material, the risk of harm from unauthorized disclosure, and the relative security of email versus alternative transmission. The parties should consider three categories of security:
 - i. *Not appropriate for email transmission:* Certain categories of ESI discovery are never appropriate for email transmission, including, but not limited to, certain grand jury materials; materials affecting witness safety; materials containing classified, national security, homeland security, tax return, or trade secret information; or similar items.
 - ii. *Encrypted email transmission:* Certain categories of ESI discovery warrant encryption or other secure transmission due to their sensitive nature. The parties should discuss and identify those categories in their case. This would ordinarily include, but not be limited to, information about informants, confidential business or personal information, and information subject to court protective orders.
 - iii. *Unencrypted email transmission:* Other categories of ESI discovery not addressed above may be appropriate for email transmission, but the parties always need to be mindful of their ethical obligations.⁹⁴

8. Coordinating Discovery Attorney

Coordinating Discovery Attorneys (CDAs) are AOUSC-contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant

⁹⁴. Illustrative of the security issues in the attorney-client context are ABA Op. 11-459 (Duty to Protect the Confidentiality of E-mail Communications with One's Client) and ABA Op. 99-413 (Protecting the Confidentiality of Unencrypted E-Mail).

Criminal e-Discovery

cases. The CDAs may be appointed by the court to provide additional in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document-management assistance. They can serve as a primary point of contact for the U.S. Attorney's Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If you have any questions regarding the services of a CDA, please contact either Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org.

9. Informal Resolution of ESI Discovery Matters

No additional commentary.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

See sections 5(f) (Confidential and personal information), 5(p) (ESI security), and 7(e) (Email transmission) of the Strategies for additional guidance.

11. Definitions

To clearly communicate about ESI, it is important that the parties use ESI terms in the same way. Below are common ESI terms used when discussing ESI discovery:

- a. **Cloud computing.** With cloud computing, the user accesses a remote computer hosted by a cloud service provider over the Internet or an intranet to access software programs or create, save, or retrieve data, for example, to send messages or create documents, spreadsheets, or databases. Examples of cloud computing include Gmail, Hotmail, Yahoo! Mail, Facebook, and online banking.
- b. **Coordinating Discovery Attorney (CDA).** An AOUSC-contracted attorney who has technological know-

Appendix B: ESI Protocol

ledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant cases, and who may be appointed by a court in selected multiple-defendant cases to assist CJA panel attorneys and/or FDO staff with discovery management.

- c. **Document unitization.** Document unitization is the process of determining where a document begins (its first page) and ends (its last page), with the goal of accurately describing what was a “unit” as it was received by the party or was kept in the ordinary course of business by the document’s custodian. A “unit” includes attachments—for example, an email with an attached spreadsheet. Physical unitization utilizes actual objects such as staples, paper clips, and folders to determine pages that belong together as documents. Logical unitization is the process of human review of each individual page in an image collection using logical cues to determine pages that belong together as documents. Such cues can be consecutive page numbering, report titles, similar headers and footers, and other logical cues.
- d. **ESI (Electronically Stored Information).** Any information created, stored, or utilized with digital technology. Examples include, but are not limited to, word-processing files, e-mail and text messages (including attachments); voicemail; information accessed via the Internet, including social networking sites; information stored on cell phones; information stored on computers, computer systems, thumb drives, flash drives, CDs, tapes, and other digital media.
- e. **Extracted text.** The text of a native file extracted during ESI processing of the native file, most commonly when native files are converted to TIFF format. Extracted text is more accurate than text created by the OCR processing of document images that were created by scanning and will therefore provide higher quality search results.
- f. **Forensic image (mirror image) of a hard drive or other storage device.** A process that preserves the en-

tire contents of a hard drive or other storage device by creating a bit-by-bit copy of the original data without altering the original media. A forensic examination or analysis of an imaged hard drive requires specialized software and expertise to both create and read the image. User created files, such as email and other electronic documents, can be extracted, and a more complete analysis of the hard drive can be performed to find deleted files and/or access information. A forensic or mirror image is not a physical duplicate of the original drive or device; instead it is a file or set of files that contains all of the data bits from the source device. Thus a forensic or mirror image cannot simply be opened and viewed as if you were looking at the original device. Indeed, forensic or mirror images of multiple hard drives or other storage devices can be stored on a single hard drive of sufficient capacity.

- g. **Image of a document or document image.** An electronic “picture” of how the document would look if printed. Images can be stored in various file formats, the most common of which are TIFFs and PDFs. Document images, such as TIFFs and PDFs, can be created directly from native files or created by scanning hard copy.
- h. **Load file.** A cross-reference file used to import images or data into databases. A data load file may contain Bates numbers, metadata, paths to native files, coded data, and extracted or OCR text. An image load file may contain document boundary, image type, and path information. Load files must be obtained and provided in software-specific formats to ensure they can be used by the receiving party.
- i. **Metadata.** Data that describes characteristics of ESI, for example, the author, date created, and date last accessed of a word processing document. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. Metadata can describe how, when and by whom ESI was created, accessed, modified, formatted, or collected. Metadata can be supplied by applications, users, or the file system, and it can be altered

Appendix B: ESI Protocol

intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Metadata is found in different places and in different forms. Some metadata, such as file dates and sizes, can easily be accessed by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Note that some metadata may be lost or changed when an electronic copy of a file is made using ordinary file-copy methods.

- j. **Native file.** A file as it was created in its native software, for example a Word, Excel, or PowerPoint file, or an email in Outlook or Lotus Notes.
- k. **OCR (Optical Character Recognition).** A process that converts a picture of text into searchable text. The quality of the created text can vary greatly depending on the quality of the original document, the quality of the scanned image, the accuracy of the recognition software, and the quality control process of the provider. Generally speaking, OCR does not handle handwritten text or text in graphics well. OCR conversion rates can range from 50–98% accuracy depending on the underlying document. A full page of text is estimated to contain 2,000 characters, so OCR software with even 90% accuracy would create a page of text with approximately 200 errors.
- l. **Parent-child relationships.** Related documents are described as having a parent-child relationship, for example, where the email is the parent and an attached spreadsheet is the child.
- m. **PDF (Portable Document Format).** A file format created by Adobe that allows a range of options, including electronic transmission, viewing, and searching.
- n. **TIFF (Tagged Image File Format).** An industry-standard file format for storing scanned and other digital black-and-white, grey-scale, and full-color images.

ESI Discovery Production Checklist

- ☐ Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- ☐ Does this case involve classified information?
- ☐ Does this case involve trade secrets, or national security or homeland security information?
- ☐ Do the parties have appropriate technical advisors to assist?
- ☐ Have the parties met and conferred about ESI issues?
- ☐ Have the parties addressed the format of ESI being produced?
Categories may include:
 - ☐ Investigative reports and materials
 - ☐ Witness statements
 - ☐ Tangible objects
 - ☐ Third-party ESI digital devices (computers, phones, etc.)
 - ☐ Photos, video and audio recordings
 - ☐ Third-party records
 - ☐ Title III wiretap information
 - ☐ Court records
 - ☐ Tests and examinations
 - ☐ Experts
 - ☐ Immunity and plea agreements
 - ☐ Discovery materials with special production considerations
 - ☐ Related matters
 - ☐ Discovery materials available for inspection but not produced digitally
 - ☐ Other information
- ☐ Have the parties addressed ESI issues involving:
 - ☐ Table of contents?
 - ☐ Production of paper records as either paper or ESI?
 - ☐ Proprietary or legacy data?
 - ☐ Attorney-client, work-product, or other privilege issues?
 - ☐ Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?

Appendix B: ESI Protocol

- ☐ Whether email transmission is inappropriate for any categories of ESI discovery?
- ☐ Incarcerated defendant's access to discovery materials?
- ☐ ESI discovery volume for receiving party's planning purposes?
- ☐ Parties' software or hardware limitations?
- ☐ Production of ESI from third-party digital devices?
- ☐ Forensic images of ESI digital devices?
- ☐ Metadata in third-party ESI?
- ☐ Redactions?
- ☐ Reasonable schedule for producing party?
- ☐ Reasonable schedule for receiving party to give notice of issues?
- ☐ Appropriate security measures during transmission of ESI discovery, e.g., encryption?
- ☐ Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
- ☐ Need for protective orders, claw-back agreements, or similar orders or agreements?
- ☐ Collaboration on sharing costs or tasks?
- ☐ Need for receiving party's access to original ESI?
- ☐ Preserving a record of discovery produced?
- ☐ Have the parties memorialized their agreements and disagreements?
- ☐ Do the parties have a system for resolving disputes informally?
- ☐ Is there a need for a designated discovery coordinator for multiple defendants?
- ☐ Do the parties have a plan for managing/returning ESI at the conclusion of the case?

Appendix C
First Appearance e-Discovery Colloquy

Appendix C: First Appearance e-Discovery Colloquy

At the first appearance of a defendant and after appointment of counsel, engage parties in the following colloquy concerning e-discovery.

- A. Ask the **prosecutor** about possible e-discovery in the case, and generally how the government will proceed:
 - 1. Does the government intend to produce any discovery in electronic formats?
 - 2. Does the volume or nature of the government's electronic discovery significantly increase the complexity of the case?
 - 3. Are you familiar with the ESI Protocol?
 - 4. Are you going to utilize the ESI Protocol?

- B. Ask **defense counsel** about familiarity with managing e-discovery, and generally how the defense will proceed:
 - 1. Are you familiar with the ESI Protocol?
 - 2. Do you have a copy of the ESI Protocol to rely on as you work through the e-discovery? If not, the government can provide a copy.
 - 3. What is your experience with complex e-discovery cases?
 - 4. Are you familiar with various software products and e-discovery services that can be used to review and organize e-discovery? Have you used them before?
 - 5. Have you worked with litigation support, paralegals, or IT staff before to review e-discovery?
 - 6. Do you presently have litigation support, paralegals, or IT staff who can work with you to review and organize electronic evidence? If not, you may need to decide what type of expert or experts you will need. Do you know how to do that?

Criminal e-Discovery

- C. Engage **both parties** in a discussion of how they will cooperatively address complex e-discovery:
1. Are you utilizing the ESI Protocol?
 2. Have you already had a meet-and-confer to address e-discovery issues? If so, do you have any agreements or a discovery plan? If not, what is your plan for addressing e-discovery issues?
 3. Will the volume or nature of the e-discovery potentially affect:
 - a. Speedy trial deadlines for this case?
 - b. Scheduling pretrial motions?
 - c. Scheduling trial?
- D. Address **all attorneys** about what the court expects of them in managing a complex e-discovery criminal case:
1. I expect you already have, or will promptly gain, an adequate understanding of and adequate technical assistance in e-discovery matters.
 2. I expect the lawyers on this case to manage electronic discovery effectively, efficiently, and responsibly, and to seek cost savings.
 3. I also expect the lawyers on this case to determine what software programs and expert assistance you need to review the discovery. If you do not know what type of expert to retain or what software programs to use, you should consult with someone knowledgeable about e-discovery before making those decisions.
 4. While the lawyers may, and should, employ litigation support, paralegals, and/or IT staff, ultimately, the *lawyers* are responsible for e-discovery decisions made in this case.
 5. I encourage all parties to utilize a collaborative approach to e-discovery based upon the mutual

Appendix C: First Appearance e-Discovery Colloquy

and interdependent responsibilities of the opposing parties. The ESI Protocol offers a model of such an approach.

6. An important part of the process is a meet-and-confer discussion about the e-discovery issues in this case. I encourage you to use the checklist at the end of the ESI Protocol during your meet-and-confer session. For scheduling purposes, some of the key steps to pay attention to are:
 - a. The parties should discuss a reasonable e-discovery production schedule.
 - b. Defense counsel should be proactive about testing the accessibility of the e-discovery production when it is received, and promptly notify the government of any problems in accessing the materials.
 - c. If defense counsel determines that additional funds for expert assistance are needed, that needs to be brought to the court's attention promptly.
7. I expect that the parties will promptly notify the court of any e-discovery issues that might reasonably affect speedy trial deadlines, or the scheduling of pretrial motions or trial.

E. If there are **CJA attorneys** appointed to defend one or more defendants, address funding issues with them:

1. If you will be hiring expert assistance to organize and review the e-discovery, have them help you decide on a realistic estimation of the time that they will need to do so. If that exceeds the expert's costs "cap," file an ex parte, sealed motion asking to exceed the capped amount, explaining the work that would be done and how you or they arrived at that cost estimate.

Criminal e-Discovery

- F. If there are multiple defendants (so multiple defense counsel) in the case, the advisability of coordinating e-discovery among defendants should be raised at the first appearance. This gives counsel time to discuss and decide potential coordination before a meet-and-confer session.
 - 1. I am *not* ordering you to do this, but you may want to consider whether to designate one defense attorney to manage e-discovery.
- G. Advise **defense counsel** about the availability of resources to help guide them in managing complex e-discovery:
 - 1. If you need advice and guidance about getting started, there are resources available to help you decide how to productively get the information you need from the e-discovery. The National Litigation Support Team, part of the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts,⁹⁵ is available to provide guidance about how to efficiently, and cost-effectively, manage e-discovery. If you are not familiar with the technology and expert assistance you will need, you should contact them right away, well before the meet-and-confer session. They can also tell you about contracts they have secured for reduced prices on some of the software programs that may help you review and organize the evidence.
 - 2. Another resource available to defender offices and CJA counsel is appointment of a coordinating discovery attorney. Those handling voluminous or complex e-discovery (especially when there are multiple defendants) can have an attorney expert in e-discovery appointed to work with defense counsel to help coordinate, organize, and process e-discovery. After exploring the nature and vol-

⁹⁵ The National Litigation Support Team can be contacted at (510) 637-3500.

Appendix C: First Appearance e-Discovery Colloquy

ume of e-discovery, and what it will take for defense counsel to review it, if you think this case needs a coordinating discovery attorney appointed, then file an ex parte sealed motion explaining why, and the court will consider it.

H. Finally, the court may decide to set a discovery status conference (giving parties enough time to secure expert assistance if needed, and to hold a meaningful meet-and-confer session) to verify that e-discovery is moving smoothly, cooperatively, and effectively. Inform **all parties**:

1. I am going to schedule a discovery status conference to follow up on the progress the parties are making with the e-discovery, and ensure that any problems with it are resolved early.
2. I encourage you to conduct your meet-and-confer session well before the discovery status conference so that you can address and resolve any issues.

Appendix D
Discovery Status Conference e-Discovery
Colloquy

Appendix D: Discovery Status Conference e-Discovery Colloquy

Having already addressed e-discovery issues at the first appearance, the court may schedule a discovery status conference to confirm whether e-discovery is being addressed by parties intelligently, efficiently, and cost-effectively. At a discovery status conference, engage parties in the following colloquy concerning the status of their e-discovery.

- A. In cases with multiple defendants, the court would have asked parties to consider whether one defense attorney should be responsible for receiving, distributing, and possibly coordinating work on e-discovery for all defense teams. The court can follow up on that by asking **all multiple-defense counsel**:
 - 1. Is this a case where management of the e-discovery would benefit from having either:
 - a. A single defense attorney receiving e-discovery from the government for all defendants and being responsible for disseminating it to all defendants; or
 - b. A coordinating discovery attorney appointed by the court?
 - 2. If one of you will manage the discovery for all defendants, have you already selected that attorney? If you want to use a coordinating discovery attorney, have you contacted the National Litigation Support Team to ensure that doing so is appropriate for this case?
- B. The court can then check on the parties' success in trying to decide and resolve e-discovery issues. To that end, it should address **both parties**:
 - 1. Did the parties conduct a meet-and-confer session?
 - 2. Did you utilize the ESI Protocol?
 - 3. Did you have litigation support specialists (if needed) to help you decide how to manage the ESI dis-

Criminal e-Discovery

covery? Did you have your litigation support specialists with you at the meet-and-confer session?

4. Were the parties able to reach decisions as to when, how, and in what format the e-discovery will be produced?
5. Were the parties able to reach decisions on other e-discovery issues (such as those listed in the checklist of the ESI Protocol)?

C. Verify with the **government** whether there is an e-discovery production schedule agreed upon:

1. Do you have an e-discovery production schedule?
 - a. What is it?
 - b. Have you started producing e-discovery to the defense?
 - c. Do you anticipate a “rolling” production of e-discovery?

D. The court can also verify with the defense whether it has performed an initial review of any disclosures to ascertain that it can access and utilize the ESI. Then the court should inquire of **defense counsel** whether the defense has an e-discovery production schedule that was agreed upon:

1. Do you have a schedule as to when you will do a summary initial review of the e-discovery (to ascertain that you can open and use it as produced)?
 - a. What is it?
 - b. If production has started, have you performed a review of the e-discovery to verify that you can access and use it?
2. You may have e-discovery to disclose to the government. Did you already discuss any defense e-discovery in the meet-and-confer session?
3. Do you have an e-discovery production schedule?

Appendix D: Discovery Status Conference e-Discovery Colloquy

- a. What is it?
 - b. Have you started producing e-discovery to the government?
 - c. Do you anticipate a “rolling” production of discovery?
- E. If the parties did not accomplish all that was necessary, the court may want to reiterate to all parties some of its advisements about expectations and resources from the First Appearance e-Discovery Colloquy, sections D–G, contained in Appendix C.
- F. The court may decide to inquire about any unresolved discovery issues or disputes. If so, it could ask **both parties**:
 1. Were all e-discovery issues resolved by the meet-and-confer session? Were there any e-discovery issues that were not resolved?
- G. If there are unresolved issues, the court may want to set another discovery status conference to settle those matters.

The Federal Judicial Center

Board

The Chief Justice of the United States, Chair
Judge Catherine C. Blake, U.S. District Court for the District of Maryland
Judge Curtis L. Collier, U.S. District Court for the Eastern District of Tennessee
Magistrate Judge Jonathan W. Feldman, U.S. District Court for the Western District of New York
Judge Kent A. Jordan, U.S. Court of Appeals for the Third Circuit
Judge Michael J. Melloy, U.S. Court of Appeals for the Eighth Circuit
Judge Kimberly J. Mueller, U.S. District Court for the Eastern District of California
Chief Judge C. Ray Mullins, U.S. Bankruptcy Court for the Northern District of Georgia
James C. Duff, Director of the Administrative Office of the U.S. Courts

Director

Judge Jeremy D. Fogel

Deputy Director

John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.

FOURTH CIRCUIT CJA COMPENSABILITY HANDBOOK

**FOURTH CIRCUIT
CJA UNIT**

January 2024

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ADMINISTRATIVE WORK AND HOURS BILLED PER DAY	1
III.	INITIAL CASE MANAGEMENT	4
IV.	REQUESTING RESOURCES AND MANAGING COSTS	5
V.	CASE-RELATED COMMUNICATIONS	8
VI.	DISCOVERY MANAGEMENT AND INVESTIGATION.....	10
VII.	LEGAL RESEARCH AND WRITING.....	13
VIII.	TRIAL	14
IX.	POST-JUDGMENT AND APPELLATE MATTERS	16
X.	CLIENT SERVICES	20
XI.	TRAVEL AND WAIT TIME	22
XII.	GENERAL OFFICE OVERHEAD AND OTHER EXPENSES.....	25
XIII.	CONCLUSION.....	29

I. INTRODUCTION

The [Criminal Justice Act \(CJA\)](#) provides eligible individuals with the assistance of defense counsel and other reasonably necessary services at every stage of a criminal proceeding. Private attorneys appointed under the CJA are expected to provide high-quality representation and to be skilled in the numerous aspects of a federal criminal defense practice. In exchange, CJA-appointed attorneys are entitled to payment for all time expended that is reasonable and necessary to the representation.

In its [2017 report](#), the Ad Hoc Committee to Review the Criminal Justice Act (Cardone Committee) recognized that, in some districts and circuits, classes of otherwise compensable work are excluded from payment, resulting in substantial voucher reductions. To address this issue, the Cardone Committee recommended that comprehensive guidance be provided as to what constitutes a compensable CJA service. Although Volume 7 of the Guide to Judiciary Policy ([CJA Guidelines](#)), the [Fourth Circuit Court of Appeals CJA Policies and Procedures](#), and district-specific policies are useful resources, numerous gray areas have given rise to inconsistent conclusions regarding the compensability of certain tasks.

This Fourth Circuit CJA Compensability Handbook was created to provide additional guidance and detailed examples on what is presumptively compensable within the Fourth Circuit throughout the many stages of CJA representation.¹ It is offered to assist both panel attorneys and approving authorities in understanding and applying the CJA and the CJA Guidelines and to provide a framework for analyzing challenging compensability questions.

Because not every task undertaken in furtherance of a client's representation is compensable, counsel should strive to provide sufficient information in their billing to demonstrate both reasonableness and compensability. To that end, CJA counsel are encouraged to review the Fourth Circuit CJA Unit's billing tip sheets at <https://www.ca4.uscourts.gov/information-for/cja-circuit-wide#>.

In addition, before working on any matter that is ancillary to a criminal representation (e.g., a corollary state court prosecution or civil proceeding), counsel should seek advance authorization from the presiding judge or delegee to ensure such work may be compensated under CJA Guidelines [§ 210.20.30 \(Ancillary Matters\)](#).

II. ADMINISTRATIVE WORK AND HOURS BILLED PER DAY

Under CJA Guidelines [§ 230.66.10](#) and [§ 320.80.10](#), the authorized hourly rate for panel attorneys and service providers is intended to include compensation for general office expenses, including clerical assistance. Consequently, not all administrative tasks that must be carried out are compensable. However, unusual or extraordinary expenses of these types may rise to the level of "other services necessary for an adequate defense" under [18 U.S.C. § 3006A\(e\)](#), especially if the circumstances from which the need arises would normally result in an additional charge to a fee-paying client. CJA Guidelines [§ 320.70.30](#).

¹ This Guide was originally created by the Ninth Circuit, with amendments added that are specific to the Fourth Circuit.

In assessing whether administrative work is compensable, counsel should consider whether the task is purely clerical or rote. If so, then the administrative task likely is not compensable except in unusual situations where extraordinary overhead-type expenses are reasonably necessary to prepare and conduct an adequate defense.

Administrative work requiring some degree of legal knowledge, professional judgment, or strategy (including tasks undertaken by non-attorney service providers) is presumptively compensable. Examples of compensable administrative tasks include organizing case materials (which ordinarily requires thinking through the elements of the offense or other relevant factors) and preparing documentation for a hearing or trial.

Examples of administrative tasks that generally are not compensable, whether undertaken by an attorney or service provider, include: (1) accessing, downloading, opening, renaming, saving, printing, or forwarding electronic files (e.g., notices of electronic filing in CM/ECF) versus reviewing a document's substantive content (which is compensable); (2) entering calls, meetings, due dates, or court appearances in a calendar; (3) rote or routine communications regarding scheduling, including with the court; (4) leaving non-substantive voicemail messages; (5) filing or lodging electronic documents in CM/ECF, unless the filing is particularly voluminous or atypical such that filing takes an unusual or extraordinary amount of time; (6) creating payment vouchers in eVoucher and entering or justifying billed time and expenses; (7) emailing courtesy copies or proposed orders; (8) copying, scanning, or printing; (9) office filing; and (10) preparing documents for mailing.

Whenever appropriate and without compromising work quality, services should be performed by the least expensive, competent service provider capable of performing the compensable task. However, counsel must be careful not to delegate non-compensable administrative tasks to service providers such as contract paralegals, who may not be reimbursed for their time on such tasks.

Both counsel and providers must bill in tenth-hour increments. This means rounding off the amount of time spent working to the nearest tenth of an hour (6 minutes).

MINUTES	TENTHS
1 – 6	0.1
7 – 12	0.2
13 – 18	0.3
19 – 24	0.4
25 – 30	0.5
31 – 36	0.6
37 – 42	0.7
43 – 48	0.8
49 – 54	0.9
55 – 60	1.0

Discrete tasks should be billed separately except that those tasks taking less than 0.1 hours each should be aggregated into one block of time to ensure that billable time does not exceed actual hours worked. For example, if you spend 3 minutes on a client call in the morning and then have another 3-minute client call in the afternoon, you may not bill more than 0.1 hours total. Other common

tasks that should be aggregated in a single day include reading ECF documents and sending or reviewing emails. Billing to the correct voucher category also is necessary and will reduce delays in voucher processing. The Fourth Circuit CJA Unit's [CJA-20 Billing Tips](#) provides guidance on the types of tasks billable to each category.

Unless in trial or finalizing an appellate brief or habeas petition, 10 or more hours billed in a single day by an attorney or service provider across all cases is unusual, and the necessity for such time should be explained in the voucher (e.g., trial preparation, impending deadline, etc.). Otherwise, the voucher may be returned for additional information. Attorneys should have access in eVoucher to an Attorney Time Report (under the Reports tab) that can assist in comparing billed time across cases.

II. ADMINISTRATIVE WORK AND HOURS BILLED PER DAY	COMPENSABLE?
Filing or lodging electronic documents in CM/ECF Electronic filing by itself, which typically takes only a minute or two, is a non-compensable administrative task. In contrast, finalizing a document in preparation for filing (e.g., conducting final proofread or creating exhibits) is compensable. *If documents are particularly voluminous or atypical such that counsel or a service provider must expend an unusual or extraordinary amount of time to file in CM/ECF, such efforts may rise to the level of “other services necessary for an adequate defense” under 18 U.S.C. § 3006A(e), as provided in CJA Guidelines § 320.70.30. Counsel’s billing entry should provide sufficient detail to alert reviewers that the filing was not routine or rote.	NO*
Managing notices of electronic filing (NEF) Accessing, downloading, opening, renaming, saving, printing, or forwarding a NEF is not compensable, whereas reviewing substantive content or undertaking substantive work in response to a filing is compensable. Because reviewing a single NEF typically takes less than 0.1 hours, reviewing multiple NEFs in a day may be aggregated into one block of time to reflect actual time spent. NOTE: Counsel are expected to exercise professional judgment in billing time for reviewing NEFs that require no substantive response, especially in multi-defendant cases where notices or filed documents may be irrelevant to counsel’s specific client.	NO
Calendaring due dates, hearings, etc. Adding hearing dates or due dates to a calendar.	NO
Calculating due dates or filing deadlines Determining due date, limitations period, or other deadline based on local rule or statute.	YES
Photocopying, printing, and scanning While time spent reviewing, selecting, culling, or preparing	NO

II. ADMINISTRATIVE WORK AND HOURS BILLED PER DAY	COMPENSABLE?
documents to be copied, printed, or scanned is compensable representational work, time spent at a copy machine, waiting for printouts, or traveling to and waiting at a copy shop are non-compensable administrative tasks. See Section XI for more travel guidance. Counsel should make informed judgments about what needs to be printed and be mindful that proficiency with digital files is beneficial to both counsel's practice and client representation. See Section VI for guidance on managing discovery.	
Preparing mailings Preparing envelopes, affixing postage, looking up addresses, arranging for mail pick up or drop off, or traveling to and waiting at a post office.	NO
Transferring a case to successor counsel Including travel time if counsel's file cannot be sent electronically or delivered at a time both attorneys will be in the courthouse.	YES
More than 10 hours of billable time in one day *Because billing more than 10 hours in a day across all CJA representations may appear excessive if not in trial, counsel should provide an explanation in the voucher entry to facilitate reasonableness review.	YES*

III. INITIAL CASE MANAGEMENT

Counsel's initial case management responsibilities typically include, among other things, assessing charges against a client, checking for conflicts, calculating sentencing exposure, meeting with the client, obtaining discovery, and preparing for a detention hearing. Numerous administrative tasks are also often necessary at the outset of a case; however, as noted above, not all such tasks are compensable (regardless of who undertakes the task).

Examples of compensable administrative tasks include organizing case materials (which ordinarily requires thinking through the elements of the offense or other relevant factors) and preparing documentation for a detention hearing. Examples of non-compensable administrative tasks at the start of a representation include conducting the initial (routine) conflict check, creating a physical case file, calendaring due dates, and making physical space in an office to manage case materials.

III. INITIAL CASE MANAGEMENT	COMPENSABLE?
Preliminary case assessment Reviewing charges, taking case notes, and reviewing electronic discovery to set up infrastructure for discovery organization.	YES

III. INITIAL CASE MANAGEMENT	COMPENSABLE?
Preparing and labeling paper case folders or binders and general office filing Printing documents or creating labels to set up a paper case folder or binder and filing paper documents are non-compensable administrative tasks. *For unusual or extraordinary projects requiring paper folders or binders (e.g., voluminous witness files or trial exhibits), counsel should consider seeking prior authorization, especially if printing and/or binder costs are likely to exceed \$500, or provide a detailed billing explanation. See Section XII for guidance on reimbursable expenses.	NO*
Making physical space at office for case files Arranging files or office furniture to make space for voluminous discovery binders or boxes of records.	NO
Conducting initial routine conflict check An initial routine conflict check prior to accepting a CJA appointment is a non-compensable administrative task. *After appointment, if additional investigation or research is required to confirm that no conflict exists or to address potential conflicts, that time may be compensable. The services of an ethics attorney consultant will likely not be authorized absent a showing of reasonable necessity to the defendant's representation as opposed to counsel's interest in staying on the case.	NO*
Communicating with prior counsel For example, checking with prior counsel to avoid duplicate motion work or discovery organization or to obtain copies of trial exhibits or sealed filings for use on appeal.	YES
Performing work prior to formal appointment Counsel should obtain a <i>nunc pro tunc</i> appointment at the initial appearance or through their CJA administrator to enable entry in eVoucher of billable time incurred prior to entry of the appointment order.	YES

IV. REQUESTING RESOURCES AND MANAGING COSTS

Obtaining resources for a case is a critical component of effective representation. Because the procurement and management of service providers are compensable tasks, counsel may bill time for researching, interviewing, and negotiating with experts. This includes reasonable time spent consulting with panel attorney colleagues, a defender office, or CJA staff to identify potential providers, drafting the justification for resources, and completing any district-required forms via the

AUTH procedure in eVoucher. However, time spent figuring out how to request funding (e.g., reviewing a billing guide or communicating with CJA staff regarding logistics) is not compensable.

Under CJA Guidelines [§ 310.20.30](#), counsel may obtain expert, investigative, and other services without prior authorization for up to \$1,000 per representation (not per provider) unless a higher no-authorization limit (not in excess of the statutory maximum) is permitted under local court policy. For service provider fees in excess of the applicable statutory maximums set forth in CJA Guidelines [§ 310.20.10](#) and [§ 660.20.20](#), prior authorization of the chief circuit judge or delegee is required. In the rare instance preauthorization is not feasible, counsel must include with the authorization request or payment voucher an explanation of why procurement of necessary services could not await prior authorization.

Time spent reviewing a provider's invoice or CJA-21/31 payment voucher to certify that the services were rendered is compensated. Time spent creating, submitting, or checking the status of a voucher are typically not compensated, but may be if the circumstances from which the need arises would normally result in an additional charge to a fee-payment client. [CJA Guidelines Section 320.70.30](#).

Preparing and submitting an attorney's CJA-20/30 payment voucher is non-compensable administrative work. Where attorney fees in a non-capital case exceed the statutory maximum under CJA Guidelines [§ 230.23.20](#), time spent justifying excess fees already expended (e.g., completing a required justification form) also is not compensable because it is an administrative task and not representational work. However, in those courts where counsel must seek *prior* authorization before exceeding the statutory maximum, reasonable time spent estimating counsel's anticipated fees (in essence budgeting) and preparing any required forms in support of the excess request are compensable tasks because counsel must think through the case and plan for litigation. Similarly, because preparation of a case budget requires planning, projecting, and strategizing, reasonable time spent preparing a budget and conferring with a Circuit CJA Budgeting Attorney or local CJA supervisory attorney on substantive budget issues also is compensable.

To manage costs, counsel should routinely run a Defendant Detail Budget Report (DDBR) in eVoucher to ensure the defense team is within authorized funding levels and assess whether additional funding is needed prior to exceeding authorized limits. The report shows only what has been entered into eVoucher. Counsel and service providers should enter services timely to make this report as useful as possible.

IV. REQUESTING RESOURCES AND MANAGING COSTS	COMPENSABLE?
Researching, negotiating, and interviewing service providers Counsel should reach out to CJA panel attorney colleagues, the federal defender, Circuit Case Budgeting Attorney, or CJA Supervising Attorney if having difficulty locating a service provider. Time spent consulting with such individuals to identify potential providers is compensable, although consulting about hourly rates or the procedural mechanics of how to obtain funding is not.	YES
Creating AUTH for service provider, including <i>nunc pro tunc</i> or supplemental requests, and completing necessary supporting documentation (e.g., letter, memo, or court-provided form) Supporting justification should contain sufficient information for the court to assess reasonable necessity for the requested services. Reasonable time expended by a provider to estimate scope of work or needed hours may be compensated on the provider's voucher if the AUTH is approved.	YES
Preparing a case budget or litigation plan in collaboration with a Circuit Case Budgeting Attorney, or CJA Supervising Attorney Including preliminary review of discovery/legal issues and case discussion to forecast needed resources and costs. Does not include emails or calls inquiring about budget status or for procedural help.	YES
Requesting PRIOR authorization to exceed statutory maximum attorney fees Although traditionally this was considered a non-compensable administrative task, the Fourth Circuit has concluded that reasonable time spent preparing a request for future attorney fees is a compensable task because it requires litigation planning.	YES
Justifying attorney fees in excess of statutory maximum AFTER incurred Completing the necessary form(s) to retroactively justify attorney fees already expended is a non-compensable administrative task because it involves no litigation planning and is not representational work.	NO
Requesting authorization to perform work ancillary to the representation Assessing whether contemplated work is ancillary to the representation and seeking authorization to perform such work under CJA Guidelines § 210.20.30 is compensable.	YES
Discussing pending payment vouchers or CJA policies and procedures with a Circuit Case Budgeting Attorney, CJA Supervising Attorney, or other CJA administrative staff CJA administrators are a useful resource for answering compensability and funding-related procedural questions, but such consultation time is not compensable.	NO
Reviewing CJA billing, policy, or compensability resources	NO

IV. REQUESTING RESOURCES AND MANAGING COSTS	COMPENSABLE?
Entering attorney services and expenses into a CJA-20/30 Not compensable whether undertaken by counsel or support staff.	NO
Creating a CJA-21/31 for payment to service provider Although normally a non-compensable task, prompt creation of a payment voucher will assist with timely payment to service providers, particularly in those courts where providers may enter their own billable time.	DEPENDS
Entering service provider services and expenses into a CJA-21/31 Not normally compensable whether undertaken by counsel or the provider (where permitted), however, such efforts may rise to the level of “other services necessary for an adequate defense” under 18 U.S.C. § 3006A(e) , as provided in CJA Guidelines § 320.70.30 . Counsel’s billing entry should provide sufficient detail to alert reviewers that the filing was not routine or rote.	DEPENDS
Reviewing provider services as billed on CJA-21/31 Counsel must certify that services and expenses billed on a CJA-21/31 were rendered and that sufficient funds are available before submitting the voucher to the court. This task is compensable, but counsel should not bill for the administrative task of creating or submitting the CJA-21/31.	YES

V. CASE-RELATED COMMUNICATIONS

Communicating with a client and others in furtherance of the client’s representation is compensable. This includes time spent building trust with a client’s family or others close to the client to investigate, gather mitigation, communicate a plea, and explain the proceedings, as such relationships are often necessary for effective representation and resolution of the case. In situations where extensive communication is necessary, such efforts should be explained sufficiently in the voucher to help approving authorities determine reasonableness.

Routine or rote communications that are purely administrative in nature and require minimal effort (e.g., less than six minutes) are considered administrative overhead and are not compensable. Examples include checking the availability of the court or an individual for the purpose of scheduling a meeting, interview, or hearing. However, scheduling efforts requiring an unusual or extraordinary amount of coordination, especially between multiple parties or a detention facility, are compensable. For the latter, such tasks should be delegated to a lower-cost service provider if available and explained in the voucher with sufficient detail to alert reviewers that the scheduling work was not routine or rote. In addition, communications where a scheduling-related discussion is incidental to some other case-specific topic or issue are compensable. For these types of “mixed” calls or emails, counsel’s billing should identify only the non-administrative aspect of the communication.

Associates and service providers should exercise professional judgment in billing for reviewing communications and materials that do not pertain to their specific role or responsibility on the case. While defense team members need to stay informed of developments in a case, reviewing daily emails between other team members could be construed as not reasonably necessary.

As explained in Section II, a call or email that takes less than six minutes (0.1 hours) may be claimed at 0.1 hours if no other service is claimed for that day. Multiple communications (or other tasks) performed in a single day of less than 0.1 hours each must be aggregated to ensure that billable time does not exceed actual hours worked. For example, multiple short emails and/or phone calls made or received on the same day must be measured as a whole and billed accordingly.

V. CASE RELATED COMMUNICATIONS	COMPENSABLE?
Communicating with client's family Reasonable communications with a client's family or others close to the client are critical to building trust and a good working relationship with a client and are thus compensable.	YES
Scheduling meetings, client visits, interpreters, hearings, or interviews Routine or rote communications requiring minimal effort (e.g., solely checking availability of an individual or the court, relaying a schedule change, etc.) are part of administrative overhead and should not be charged unless incidental to some other case-related topic or requiring unusual or extraordinary effort.	NO
Defense team review of all emails and electronic filings on a case including by paralegals, investigators, and other experts Counsel and providers should exercise professional judgment in billing for review of communications or materials that do not pertain to their roles and responsibilities. Such efforts could be construed as not reasonably necessary to the representation by reviewing authorities.	DEPENDS
Defense team meetings Regular team meetings can be a valuable way to share information, and in-person meetings are at times necessary. However, counsel should assess in advance of each meeting whether its purpose can be met using video or audio conferencing to reduce travel and in-person meeting time.	YES
Obtaining clearance for service provider to access client in detention facility This is compensable whether undertaken by counsel or the service provider.	YES

VI. DISCOVERY MANAGEMENT AND INVESTIGATION

Discovery in federal cases has increased in complexity, and counsel must recognize when it's appropriate to solicit assistance from a litigation support expert such as a paralegal, discovery vendor, or the [National Litigation Support Team \(NLST\)](#). The NLST is funded by the Defender Services Office to support CJA panel attorneys. It provides technology, resources, education, and training to help CJA attorneys efficiently search, review, and analyze e-discovery and digital evidence. Keep up on the latest e-discovery tips by following NLST's blog at nlsblog.org.

Under Rule 16.1 of the Federal Rules of Criminal Procedure, no later than 14 days after arraignment, counsel must meet and confer with the government regarding a timetable and procedure for pretrial disclosures. Counsel may rely on the [ESI Protocol](#) to develop procedures for disclosure. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial. Having this information early in the case will help counsel determine what litigation support is needed. In addition, having organized discovery will make it easier to create a comprehensive investigative plan.

While counsel must review all relevant disclosures and documents, discretion must be exercised in determining the depth of review required to provide effective representation to the client. If discovery is voluminous, counsel should obtain assistance in organizing and isolating relevant documents to facilitate efficient review by attorneys, investigators, or experts. Time spent by counsel or a service provider assessing, reviewing, coding, or analyzing discovery is compensable whereas the mechanical act of downloading or copying is not.

Counsel also must exercise discretion when printing discovery materials for the purpose of initial review and should make an informed selection of materials instead of printing everything. Given the significant increase in e-discovery, counsel are expected to utilize digital review tools, which studies have shown are more effective than linear document review (see, e.g., [Anne Kershaw, Iterative Legal Analysis & Sampling vs. Linear Document Review—A Comparative Case Study](#)). See Sections II and XII for further guidance on reimbursement of printing time and costs.

Adequately articulating and explaining discovery-related billable time can be challenging, especially where page counts are difficult to ascertain (e.g., conducting a keyword search in a database). For this reason, billers should provide sufficient detail in their entries, including the type and explaining the difficulty or complexity of the materials, to enable voucher reviewers to understand the context of the work and its relevance to the case, without revealing privileged information. Below are examples of good billing descriptions for discovery-related tasks. Consult the Fourth Circuit CJA Unit's [Discovery Billing Tip Sheet](#) for more guidance and examples.

- Coded and indexed approx. [insert page count] of [insert file type] in Excel spreadsheet.
- Searched discovery with dtSearch, received approximately [insert #] hits and reviewed [actual # of documents] from these search results.
- Reviewed and summarized 30 min of recorded witness interviews and 6 hrs of pole cam video (some on fast forward).

- Reviewed approx. 200 pages of reports, warrants, and telephone records in Casepoint.
- Skimmed approx. [insert page count and/or Bates number range] of financial records to identify signatures of payee.

VI. DISCOVERY MANAGEMENT AND INVESTIGATION	COMPENSABLE?
Transferring, downloading, or manipulating discovery productions This includes performing quality control; renaming, unitizing, combining, or converting files; checking or running OCR; and consolidating/copying discs onto a single hard drive. Counsel are expected to enlist lower-cost service providers such as paralegals or litigation support specialists to organize voluminous discovery.	YES
Waiting for files to download, copy, transfer, OCR, or convert Counsel and providers are expected to perform other work during pure wait time. See Section II regarding administrative tasks.	NO
Negotiating fees to host discovery on cloud storage site Counsel must consult with the National Litigation Support Team, CJA Supervising Attorney, or Circuit Case Budgeting Attorney to ensure cloud storage fees are reasonable based on discovery volume. Because this is akin to budgeting and part of negotiating with a service provider, such time is compensable.	YES
Coding or indexing discovery or evidence and organizing into folders or binders Including organizing materials in a database or cloud storage site and selecting materials for issue or witness-specific paper files or binders. If counsel opts to perform these tasks instead of enlisting a paralegal or litigation support specialist, the work should be undertaken contemporaneously with substantive discovery review.	YES
Reviewing discovery For document review, indicate the number of pages or Bates range and type of materials to allow for a reasonableness assessment. Audio and video review should indicate the length and complexity of the recordings. See Discovery Billing Tip Sheet for additional guidance.	YES
Sorting and gathering materials for use by counsel, client, or service providers For voluminous discovery, counsel should consider working with the local CJA administrator, a discovery vendor, or the detention facility to provide in-custody clients with discovery in an electronically reviewable format. See Guidance for the Provision of ESI to Detainees. In addition, discovery can be made available to service providers via a secure cloud-hosted site such as Box.com.	YES

VI. DISCOVERY MANAGEMENT AND INVESTIGATION	COMPENSABLE?
Printing or copying discovery for use by counsel, client, or service providers After sorting and gathering materials to be duplicated (which is compensable work), time spent physically printing or copying is non-compensable administrative work as explained in Section II. However, reasonable copy costs may be reimbursed as an expense as discussed in Section XII.	NO
Selecting and marking exhibits in advance of a hearing or trial	YES
Reviewing co-defendant's or cellmate's plea agreement If not obvious, explain the relevance of the work (e.g., reviewed co-D's plea agreement to assess possibility of renegotiating terms or obtaining better offer; reviewed cellmate plea agreement to assuage client concerns regarding own agreement).	YES
Preparing subpoenas for witnesses and records Including filling out subpoena forms or preparing attachments. Expenses related to production of documents (e.g., copy charges) may be reimbursable. Counsel should seek prior authorization if such expenses are likely to exceed \$500.	YES
Serving subpoenas for fact witnesses and records Service of subpoenas is facilitated and paid by the Department of Justice through the U.S. Marshals Service as provided in FRCP 17 and the U.S. Marshals Service Public Defender Handbook. *While not separately compensable, service of process may be undertaken by a member of the defense team if incidental to some other task (such as a witness interview or other representational purpose). See CJA Guidelines § 230.66.50. Additionally, if the USMS is unavailable due to time or other representational constraints (e.g., the witness will likely avoid law enforcement), the circumstances should be documented and, whenever feasible, prior approval obtained before incurring expenses for service of process.	NO*
Paying for fact witness to travel and testify in court or at deposition The defense team should not front expenses such as travel costs or deposition transcripts related to the testimony of a fact witness. These costs are paid by the U.S. Marshals Service (DOJ) under 18 U.S.C. § 1825(b) and FCRP 15. See CJA Guidelines § 320.40. Please reference the Fourth Circuit Fact Witness Compensation Guidelines. If DOJ refuses to pay, inform your CJA administrator and the court directly.	NO

VII. LEGAL RESEARCH AND WRITING

CJA panel attorneys must thoroughly investigate and research all potentially viable legal defenses and are expected to do so efficiently by maintaining proficiency in federal practice and by using standard legal research techniques. Counsel are encouraged to build brief banks or utilize resources on FD.org or their local defender office for sample motions. Counsel are also expected to have a working knowledge of federal criminal law as well as local and federal rules of procedure and to keep current with the law.

For novel or complex areas of law specific to a client's representation, counsel will likely spend more time than usual on research and writing and should explain the necessity for this work in their vouchers to assist reasonableness review. Such research may go beyond reading caselaw to gain expertise in a new or unique area, such as securitization of assets, bankruptcy, intellectual property, human trafficking, international banking, or gang culture.

While time spent reading materials to get up to speed on a topic may be reimbursable if reasonably necessary to the effective representation of a specific client or representation, time spent on general caselaw reading, skill building, professional development, and CLE or other training events is generally not compensable. One exception is a "bring-your-case" type of training event sponsored by the Defender Services Office. Counsel must obtain prior authorization to bill time or travel expenses for such training.

VII. CASE RESEARCH AND WRITING	COMPENSABLE?
Conducting legal research If relevant to the specific representation to which it is billed. See Section XII concerning reimbursement of Computer Assisted Legal Research expenses.	YES
Editing a template or preexisting pleading for a similar case at hand CJA panel attorneys should use preexisting resources (e.g., briefs and pleadings prepared in similar cases) to the extent feasible. The time spent editing and adapting a template or preexisting pleading is compensable.	YES
Refreshing knowledge of federal criminal law or rules of procedure Counsel are expected to possess a working knowledge of federal criminal law and rules of procedure. Time spent reviewing newly issued caselaw not relevant to a specific representation or becoming familiar with or reviewing resources such as the Federal Rules of Criminal Procedure, Local Criminal Rules, and Federal Sentencing Guidelines is not compensable absent a specific representational purpose, which should be identified in the voucher.	NO

VII. CASE RESEARCH AND WRITING	COMPENSABLE?
Reviewing publications or other media uniquely related to specific case or client If reasonably necessary to a specific client’s representation (e.g., background about a particular gang, terrorist group, etc.) and outside the range of an experienced criminal defense attorney, reasonable time spent reading a book or viewing a documentary uniquely relevant to the case or client may be compensable. To assist voucher review, billing entries must provide a detailed explanation. Counsel should exercise professional judgment in assessing whether such time is better characterized as non-compensable training or continuing legal education.	DEPENDS
Reimbursement for a publication necessary to client’s representation and not accessible through a library or other means Before purchase, check with your local defender office, panel administrator, or CJA staff to see if the resource is available at no cost. To assist voucher review, the expense entry must explain the publication’s necessity to the representation. Counsel should exercise professional judgment in assessing whether the publication is a general resource for counsel’s law practice and thus not chargeable to CJA.	DEPENDS
Attending CLE related to the subject matter of your case Other than as explained under “Attending ‘bring your case’ style of workshop or conference,” time and expense related to educational seminars, including travel, attendance, registration, or materials, are not compensable or reimbursable under the CJA.	NO
Attending “bring your case” style workshop or conference Although time spent attending plenary sessions is not compensable at “bring your case” workshops, time spent discussing and strategizing about an individual case is compensable. The court may permit reimbursement of travel costs on a pro rata basis based on the conference agenda (plenary vs. specific case sessions); advance authorization to bill time and travel expenses must be sought.	YES

VIII. TRIAL

Incredible effort goes into preparing for and participating in a criminal trial. Counsel must be prepared for both the known and the unknown. The better prepared, the faster counsel can pivot as testimony and theories of the case unfold. Depending on case complexity, preparation may require longer than normal days in the days, weeks, or even months before trial.

During trial, counsel should plan to be in the courtroom 15-20 minutes before the scheduled start time to set up any equipment or evidence displays to avoid delay; this is compensable time. If the trial is complex and courtroom presentation assistance is needed, counsel should ask for such services in advance. Having a paralegal, investigator, or associate attorney to coordinate witnesses or display documents at trial is an effective way to stay organized and allow counsel to focus on direct and cross examination of witnesses.

On trial days, billable hours may easily exceed 10 hours or more a day between out-of-court preparation and in-court proceedings, and no additional justification is needed when billing.

After closing arguments, it is expected that counsel will spend time meeting with the client or co-defendant counsel, talking with witnesses and family members, outlining possible issues for post-trial motions or appeal, dealing with trial exhibits, reassembling the case file, etc. This is compensable time and should be billed as such to demonstrate that counsel was engaged in representational work as opposed to “waiting for jury verdict.” If jury deliberations move into subsequent days, counsel are expected to shift focus to other matters.

VIII. TRIAL	COMPENSABLE?
Creating witness, issue, or exhibit binders in preparation for trial If feasible, counsel should delegate this task to a lower-cost service provider.	YES
Preparing exhibit and witness lists	YES
Preparing demonstrative exhibits	YES
Practicing opening statement or closing argument	YES
Testing defense theories Reasonable time spent preparing and participating in mock cross examination, voir dire, or argument is compensable. In particularly complex or high-profile cases and where otherwise justified, counsel may seek funding to test defense theories before a mock jury or recruit an informal volunteer panel. Consult your local CJA Supervising Attorney or Circuit Case Budgeting Attorney if you think the case might qualify for such services.	YES
Arriving to court 15-20 minutes early to set up courtroom presentation materials and equipment or otherwise prepare	YES

VIII. TRIAL	COMPENSABLE?
Awaiting a jury verdict Compensable: Packing up and managing trial exhibits and files, debriefing or consulting with client or defense team, consulting with co-defendant counsel, making notes for possible post-trial motions or filings, considering possible appellate issues, preparing necessary motions or other filings, responding to jury questions, traveling to and from the courthouse if ordered to be in the building during deliberations or appear in court, and reading of the verdict. Pure wait time typically is not compensable, especially where the jury deliberates for more than one day. When ordered by a court to remain at a courthouse pending a verdict, counsel should exercise professional judgment in billing wait time and should be prepared to work on other matters while waiting.	DEPENDS
Speaking with jurors after verdict is reached If the purpose of speaking with jurors is to discern grounds for post-trial relief, such time is compensable and should be explained in the voucher. NOTE: Please remember that in some jurisdictions, advance approval is required from the court to speak to jurors.	DEPENDS
Preparing post-trial motions	YES

IX. POST-JUDGMENT AND APPELLATE MATTERS

Even after entry of judgment, counsel have obligations and responsibilities at the district court level to make sure the case is handled on appeal or transferred to another attorney for appellate appointment. If trial counsel stays on as appellate counsel, time spent working on the appeal is billed to the court of appeals.

Although in some cases, there may be benefits to maintaining continuity of counsel, the skills necessary to represent a client on appeal differ from those needed to excel at trial practice. Before continuing as counsel on appeal, trial counsel should consult with the client about potential issues for appeal and the appellate qualifications of trial counsel. Many districts have a specialized panel of appellate attorneys available for appointment in cases where trial counsel withdraws. The motion to withdraw need not list any type of deficiency in representation or conflict, merely that trial counsel has primarily a trial practice and prefers to hand the appeal over to qualified appellate counsel. This allows the case to return to trial counsel on remand if the appeal is successful.

As with representation in the district court, counsel representing a client on appeal may at times need to undertake work that is ancillary to the appeal and that may take place back in the district court, including litigation about the completeness of the record and access to sealed filings. Whenever feasible, prior authorization should be sought by contacting CJA administrative staff for the Fourth Circuit Court of Appeals, who can also provide guidance on when tasks by appellate counsel should be billed to the district court. If an ancillary matter, such as a limited remand or an initial motion for

bail pending appeal, is likely to involve significant work in district court and appellate counsel did not represent the defendant at trial, appellate counsel may be advised to seek appointment and an eVoucher representation in district court.

IX. POST-JUDGMENT AND APPELLATE MATTERS	COMPENSABLE?
Preparing interlocutory appeal or mandamus petition Billed to district court unless Court of Appeals accepts jurisdiction and appoints counsel.	YES
Drafting notice of appeal Billed to the district court, not the Court of Appeals.	YES
Moving to withdraw as counsel on appeal If trial counsel prefers to withdraw in favor of new counsel on appeal, trial counsel should first timely file the notice of appeal in the district court to preserve the client’s right to appeal and then move to withdraw as soon as possible in the Court of Appeals asking for appointment of substitute counsel. See Fourth Circuit Rule 46(c) . NOTE: Time spent moving to withdraw may be billed to the district court representation if counsel has no other billable time for the appellate representation and the motion to withdraw is filed prior to submission of counsel’s final voucher in district court.	YES
Coordinating case file transfer to new counsel after entry of judgment Including communicating with appellate counsel to discuss potential issues to raise on appeal, access to sealed filings, or other matters relevant to the appeal.	YES
Reasonable and necessary communications with client after entry of judgment or dismissal of district court proceedings Including reasonable time responding to client requests for case file or discovery materials or inquiries about post-conviction relief. Counsel should seek guidance from a CJA administrator concerning compensability of client communications that occur after submission of a final voucher in district court. Some courts have local orders governing representation or advice for matters such as 2255 motions resulting from changes in the law and compassionate release requests.	YES
Designating/ordering transcripts for appeal If the transcript-requesting attorney continues the representation on appeal, this time may be billed to the attorney’s district court appointment; otherwise, it should be billed to the Court of Appeals representation. NOTE: CJA-24 transcripts requests are always submitted in the district court’s eVoucher system under either the original district court representation (if counsel represented the client in district court)	YES

IX. POST-JUDGMENT AND APPELLATE MATTERS	COMPENSABLE?
or a new “expert-only” representation created by the district court for the limited purpose of facilitating submission of transcript requests by substitute appellate counsel.	
Designating/ordering transcripts other than for appeal Counsel must identify a representational purpose when ordering transcripts at a client’s request for reasons other than an appeal.	DEPENDS
Designating/ordering transcripts for BOP placement purposes Or for other purposes unrelated to the defense of the criminal case.	NO
Unsealing district court documents for appeal Counsel should consult with the Court of Appeals CJA Administrator about whether time spent in district court seeking to unseal documents for appeal should be billed to the Court of Appeals.	YES
Requesting or facilitating bail pending appeal If counsel represented the client in district court, this may be billed to the district court on a final or supplemental voucher; otherwise, the work can be billed to the Court of Appeals as an ancillary matter.	YES
Printing, scanning, or downloading transcripts or excerpts of record	NO
Preparing Certificate of Appealability (COA) for Habeas Consistent with Rule 11 of the Rules Governing § 2254 and § 2255 Cases, courts must issue or deny a COA when entering a final order adverse to the petitioner. Thus, COA briefing in the district court typically is permitted only if the court concludes that it cannot rule without additional argument from the parties. If a COA is denied by the district court and an NOA is filed, counsel may bill the appellate representation for preparing a COA request in the Court of Appeals, regardless if the COA is granted. If a COA is granted by the district court, appellate counsel should not prepare a COA request in the Court of Appeals but may brief uncertified claims in the opening brief, as provided by Fourth Circuit Rule 22(a).	DEPENDS
Preparing appellate briefs and motions Including time and expense for researching and drafting appellate briefs as well as motions, continuance requests, and petitions for rehearing filed in the Court of Appeals.	YES
Ordering duplication of briefs through copy service Time spent placing a copy order is non-compensable administrative work as explained in Section II. However, reasonable duplication costs may be reimbursed as an expense as discussed in Section XII.	NO
Copying briefs and mailing to client Time spent physically printing or copying is non-compensable administrative work as explained in Section II. However, reasonable	NO

IX. POST-JUDGMENT AND APPELLATE MATTERS	COMPENSABLE?
copy and mailing costs may be reimbursed as an expense as discussed in Section XII.	
Acknowledging oral argument date as required by the Court of Appeals Time spent to complete this ministerial task must not exceed 0.1 hours.	YES
Preparing or responding to certiorari petition Work related to a certiorari petition is billed to the Court of Appeals. If the petition is granted, counsel's time on merits briefs and oral argument is billed to the United States Supreme Court.	YES
Preparing a CJA-26 or CJA-27 Form or Detailed Memoranda for the Court A CJA-26 form (District) or CJA-27 form (Appellate) or a detailed memorandum must accompany every excess voucher submitted to the Court. Attorneys seeking compensation in excess of statutory limits must submit a separate, detailed memorandum demonstrating that the case is more complex or time consuming than the average case and that excess payment is necessary to provide fair compensation. A CJA-26 Excess Compensation Form or a CJA 27 Excess Compensation Form may be used for this purpose. The excess compensation memorandum or form must be uploaded as a PDF document to CJA eVoucher for submission with the CJA 20 voucher.	NO
Undertaking ancillary state court work Counsel must obtain prior court authorization to bill the federal district or appellate court for ancillary state court work, such as filing a successive state post-conviction petition or seeking other relief in state court.	DEPENDS
Responding to allegation of ineffectiveness in a 28 U.S.C. § 2255 petition Because defending against an IAC claim is not direct representational work, counsel may not be reimbursed through the CJA for time spent responding to a former client's allegation of ineffectiveness raised in a post-conviction proceeding.	NO
Preparing requests to file second or successive (SOS) habeas petition Whether work on an SOS request is billed to the district court or appellate court will depend on the specific circumstances of the case; counsel should consult with the local CJA administrator, Supervising Attorney or Court of Appeals CJA Administrative Attorney.	YES
Seeking relief based on a change in law or statute *Courts have discretion to appoint counsel to prepare a motion or petition seeking relief based on a change in law or statute (e.g., compassionate release, First Step Act litigation, <i>Johnson</i> relief, etc.). Counsel must seek PRIOR approval and move for appointment, even	YES

IX. POST-JUDGMENT AND APPELLATE MATTERS	COMPENSABLE?
if counsel represented the client at sentencing. If the case is pending appeal and appellate counsel wants to pursue relief, appellate counsel must seek appointment in district court to undertake the representation and bill to the district court.	

X. CLIENT SERVICES

The CJA Guidelines provide that items of a personal nature purchased for or on behalf of a client are not reimbursable. This includes clothing, haircuts, cigarettes, meals, candy, and other “incidental expenses of a personal nature” that are not considered legal representation. CJA Guidelines [§ 230.66.20](#). Incidental expenses of a personal nature include assisting the client in the disposition of the client’s personal property (unless obtaining access to the property could reasonably contribute to a representational purpose), arranging for the placement of the client’s minor children, assisting the client in executing the conditions of probation or supervised release (e.g., finding employment or housing or arranging for drug or alcohol counseling), and providing legal assistance in matters unrelated to litigation of the case though possibly incidental to the client’s arrest (e.g., helping a detained client execute a Power of Attorney to permit family members to transact on the client’s behalf).

Although defense attorneys often feel morally or even ethically obligated to assist their clients or their clients’ family members with personal matters, activities that are personal in nature are not reimbursable under the CJA absent an articulated and reasonable representational purpose. The determination of whether a service is personal in nature or compensable under the CJA is ultimately within the discretion of the approving authority.

The two most common quasi-personal services that frustrate both counsel and voucher reviewers involve clothing a detained client for court appearances and retrieving a client’s personal belongings seized at the time of arrest. While ensuring a client is dressed appropriately for court arguably has a representational purpose, the CJA Guidelines clearly preclude compensation for time spent by counsel to procure such clothing. However, similar to scheduling-related communications addressed in Section V, communications where a clothing-related discussion is incidental to some other case-specific topic or issue are compensable (e.g., asking a family member about arranging for clothing while also discussing what to expect at an upcoming court hearing). For these types of “mixed” calls or emails, counsel’s billing should identify the non-personal aspect of the communication.

With respect to a client’s personal property, counsel or a service provider may be compensated for retrieving or arranging for others to retrieve items that have potential evidentiary or investigative value relevant to the charges or to potential mitigation (e.g., immigration or other identification, cash, documents, address book, laptop, mobile phone, or other electronic device) or if the retrieval is incidental to some other task (e.g., interviewing a case agent). Billing entries for such work should explain how obtaining access to the personal property furthered a representational purpose to avoid being reduced as non-compensable services of a personal nature.

Work on legal matters ancillary to the criminal representation are not “services of a personal nature” and may be compensated as provided in CJA Guidelines [§ 210.20.30](#). The court is responsible for determining whether a matter is ancillary to the principal criminal charge and, whenever feasible, advance authorization should be sought. If authorized, the scope of representation extends only to the part of the ancillary matter that relates to the principal criminal charge and correlative objective in providing the representation.

X. CLIENT SERVICES	COMPENSABLE?
Procuring or arranging for others to procure clothing for client Time spent solely arranging clothing for court or release (e.g., communicating with a client or client’s family, visiting a defender office closet, shopping at a thrift store). However, the act of arranging for clothing may be accomplished contemporaneously with hearing preparation, interviews, family consultations, or other substantive matters as incidental to that work. In that event, counsel’s voucher should describe the non-clothing-related aspect of the billed time.	NO
Arranging for client haircut	NO
Furnishing cigarettes, candy, meals, etc. Including putting money on a client’s account at a detention center.	NO
Communicating with client, client’s family, or agents about client’s personal property if subject to civil forfeiture or return under Federal Rules of Criminal Procedure 41(g)	YES
Retrieving or arranging for others to retrieve critical client property that has potential evidentiary, investigatory, or other representational purpose Critical client property includes items such as immigration or other identification documents, cash, address or phone books, laptops, and mobile phones or other electronic devices that may support the resolution of criminal matters or assist foreign national clients in a safe return should they be removed. Counsel should utilize a lower-cost service provider to retrieve the property. Billing entries for property retrieval must explain the representational purpose to avoid being reduced as non-compensable services of a personal nature. If the work is found to be compensable, related expenses such as mileage or postage also are compensable.	YES
Assisting detained client in obtaining medical care or addressing a condition of confinement if there is a representational purpose Assisting a detained client to obtain medical care or address some other condition related to confinement must have a representational purpose (e.g., to facilitate attorney-client communication, access to the client, or client participation in their defense or court proceedings) for counsel to be reimbursed for this work. Billing entries should	YES

X. CLIENT SERVICES	COMPENSABLE?
explain the representational purpose to avoid being reduced as non-compensable services of a personal nature.	
Assisting client with requirements of pretrial diversion program This is distinguished from assisting a client after judgment in executing conditions of probation or supervised release, which is a non-compensable service of a personal nature under CJA Guidelines § 230.66.20 .	YES
Petitioning for modification of detention conditions Including for an in-custody client to attend a loved one’s funeral or an out-of-custody client to travel outside the district. Such efforts may require communicating with Pretrial Services or the U.S. Attorney’s Office, which are compensable tasks and not services of a personal nature. NOTE: Attorneys and service providers may not be reimbursed for the time and expense of transporting a client to attend a funeral or other personal matter.	YES
Arranging for the placement of minor children of the client	NO
Providing representation in related state court or other ancillary matters Work related to state court proceedings or other ancillary matters may be compensable. Counsel should obtain prior authorization from the court. CJA Guidelines § 210.20.30 .	DEPENDS

XI. TRAVEL AND WAIT TIME

Counsel and service providers are entitled to compensation for time spent conducting necessary and reasonable travel in furtherance of the representation. This includes travel to visit a detained client or interview a witness. While these are easy examples, others are more difficult, including travel related to non-compensable administrative tasks (such as photocopying or mailing documents to a client). As explained in Section II, the hourly rate paid to counsel and service providers is intended to compensate for general office overhead, including clerical assistance. Many CJA attorneys and providers work from home and lack conveniences such as a high-volume copier or daily express mail pickup. Thus, it may be necessary to take frequent trips to a post office, shipping company, copy center, or office supply store. However, such travel is generally considered part of office overhead (which is overall less costly when working solely from a home office) and thus not reimbursable except in extraordinary or unusual circumstances.

For air and overnight travel, authorization must be sought in advance unless court or district policy establishes otherwise. Prior authorization assists in obtaining reduced and refundable government travel rates. In the absence of exigent circumstances, travel authorization requests should be submitted at least 10 business days ahead of the proposed travel (using the procedures established by the court) and should detail the purpose, proposed itinerary, duration, and estimated

travel expenses. All air travel and car rentals must be pre-authorized by the court and should be booked through a judiciary contract travel agent.

Ordinarily, compensable time for travel includes only those hours actually spent in or awaiting transit. While traveling, time spent on substantive work should be billed separately from pure travel time (in which no work is performed, whether on CJA or privately retained cases) and clearly denoted on the voucher as work accomplished while in travel status. Compensation for pure travel time may not be claimed in one case if billable work in another case is undertaken at the same time while in travel status (double billing); if such work is for another CJA representation, the fact the work occurred while in travel status should be noted in the vouchers submitted for both representations. Counsel and service providers are expected to undertake substantive work whenever possible while in travel status (e.g., while waiting at an airport or on a plane) and excessive “travel only” time when work could have been undertaken while in transit is likely to be scrutinized.

CJA reimburses for reasonable expenses actually incurred during travel, rather than on a flat per-diem basis. In determining whether incurred expenses are “reasonable,” voucher reviewers are guided by travel and subsistence expense levels set by the [Judiciary Staff Travel Regulations](#). Expenses may include parking fees, tolls, mileage for personally owned vehicles, meals, and lodging. Receipts should include line-item details, especially for meals (i.e., not summary credit card receipts). Meal expenses for same-day travel in excess of 12 hours are reimbursable. NOTE: Actual expense receipts must be provided. Please note that same-day travel reimbursement may have tax implications. The maximum reimbursement for airfare booked by the traveler directly is the prevailing government contract rate. The U.S. General Services Administration’s (GSA) website (gsa.gov/travel-resources) publishes government rates for [air travel between most cities](#) and for daily [lodging/subsistence](#).

Alcoholic beverages, entertainment (e.g., movies), travel insurance, parking fines or fees for traffic violations, personal automobile expenses, increased costs incurred by traveling indirect routes for personal reasons, and use of taxis to obtain meals are not reimbursable. If a traveler lengthens a trip or incurs any cost for personal reasons or performs work that is not related to the purpose of the official travel, the increased cost caused by such action also is not reimbursable.

Under [18 U.S.C. § 4285](#), the U.S. Marshals Service is responsible for transporting out-of-custody clients to court. However, as explained in the Cardone Report, the cost of return transportation is not included in this statutory mandate, nor is the cost of lodging and subsistence while an out-of-custody client is attending proceedings in court (e.g., trial). Although not required by statute, the Marshals Service in some districts has acquiesced when ordered by courts to pay for return travel and lodging/subsistence of out-of-custody defendants. Similarly, the Pretrial Services Office in some districts has assisted with locating temporary housing. While the CJA generally may not be used to pay for client lodging or subsistence, at least one court has broadly construed the term “other services” in 18 U.S.C. § 3006A(e)(1) to include lodging for an out-of-state defendant during trial. See *United States v. Mendoza*, 734 F.Supp.2d 281 (E.D.N.Y. 2010). Questions concerning travel for out-of-custody clients should be directed to the presiding judge or other approving authority.

XI. TRAVEL AND WAIT TIME	COMPENSABLE?
Preparing a travel request Including time for estimating expenses. Counsel should consult GSA’s website for government airfare rates and per diem rates for lodging/meals & incidentals . It should not take more than 0.2 hours to conduct this research absent unique and extraordinary circumstances.	YES
Booking travel	NO
Traveling to courthouse for court appearances Subject to district-specific rules or limits.	YES
Traveling to courthouse for other representational purpose when required Including travel to courthouse to deliver required courtesy copies, file materials that cannot be submitted electronically, or obtain items not available in CM/ECF. If possible, attorneys should use the most cost-effective method for delivery, e.g., U.S. postal mail, or combine the task with other work requiring travel to the courthouse.	YES
Arriving before scheduled start time of hearing, meeting, or client visit Limited time before a hearing, meeting, or client visit is scheduled to begin (up to 0.3 hours unless ordered to arrive earlier by the court).	YES
Wait time between scheduled and actual start time of hearing, meeting, or client visit Unless counsel is able to conduct other work while waiting. Includes time waiting for matter to be called after court calendar begins.	YES
Traveling to meet with out-of-custody client For meetings at an attorney’s office that do not coincide with transportation to a court proceeding provided by the U.S. Marshals Service, out-of-custody clients should travel at their own expense when feasible. For clients that lack the means to travel, counsel may request that CJA cover the cost of transporting the client to meet with counsel when doing so would be economically advantageous to the CJA compared to counsel traveling to the client’s locale. Counsel should seek advance authorization and provide a comparison of costs for the client to be transported to and from the attorney’s office and for counsel to travel to and from the client’s locale (including attorney time and travel expenses). If approved, counsel should consult with a CJA administrator for guidance on booking client travel. Client travel expenses are ordinarily limited to the cost of transport and do not include lodging or subsistence.	YES
Traveling and wait time to meet with client at detention facility Subject to district-specific rules or limits.	YES
Traveling to meet with a defense team member	YES

XI. TRAVEL AND WAIT TIME	COMPENSABLE?
In furtherance of their fiduciary duty under the CJA to work efficiently, counsel and service providers should exercise professional judgment in determining whether a meeting’s objective can be accomplished using video or audio conferencing.	
Traveling to pick up discovery Whenever feasible, counsel should coordinate discovery pickup at the U.S. Attorney’s Office with other tasks such as meeting with the assigned AUSA and are encouraged to delegate pick up to a lower-cost service provider. While travel time to a commercial printing or copy center is not ordinarily compensable, it may be allowed if the vendor is used by the Government for discovery productions.	YES
Traveling to and wait time at print/copy center Except in unusual or extraordinary circumstances of the type that would normally result in an additional charge to a fee-paying client. See CJA Guidelines § 320.70.30 .	NO
Traveling to and wait time at post office	NO
Traveling to purchase a hard drive or other office supplies	NO
Traveling by car when mileage plus attorney travel time is less than airfare Travel should be by the most expeditious means of transportation practicable and commensurate with the nature and purpose of the duties of the individual requiring travel.	YES
Transporting client to/from court, airport, rehabilitation facility, or another locale Unless such travel is incidental to a client meeting, in which case the time would be billed as communicating with client, not traveling.	NO
Walking/escorting client within courthouse to probation, pretrial, or U.S. Marshals Service	YES

XII. GENERAL OFFICE OVERHEAD AND OTHER EXPENSES

As provided in CJA Guidelines [§ 230.66.10](#), counsel’s hourly rate is intended to include compensation for general office expenses, including personnel, rent, telephone, cell phone, internet, general video and teleconferencing services, and clerical assistance. However, unusual or extraordinary expenses of these types may rise to the level of “other services necessary for an adequate defense” under [18 U.S.C. § 3006A\(d\)\(1\)](#), especially if the circumstances from which the need arises would normally result in an additional charge to a fee-paying client. CJA Guidelines [§ 320.70.30](#). Prior authorization should be sought before incurring any unusual or extraordinary expenses.

Reasonable out-of-pocket expenses may be reimbursed if itemized and documented. Expenses for services such as interpretation or translation are not considered out-of-pocket expenses and should not be fronted by counsel. Rather, they should be submitted on form CJA-21/31 as services (after obtaining prior authorization, if required).

Similarly, the acquisition of computer hardware or software not typically available in a law office and reasonably necessary to the representation, including the procurement of litigation support services (e.g., cloud-hosted discovery), should be submitted on form CJA-21/31. Prior authorization for computer hardware, software, or litigation support services is required. If combined costs are expected to exceed \$10,000, appointed counsel must consult with the local CJA office or [National Litigation Support Team](#) for guidance.

As the amount of electronic discovery continues to expand, counsel are expected to be mindful of adjusting to new technologies that assist with organization and review of discovery and avoid unnecessary printing and copying of voluminous materials. Whenever feasible, discovery should be provided to a client or service providers in an electronic format.

This same guidance regarding reimbursement of counsel's expenses applies in determining the reasonableness of expenses incurred by service providers. CJA Guidelines [§ 320.80.10](#).

XII. GENERAL OFFICE OVERHEAD AND OTHER EXPENSES	REIMBURSABLE?
Administrative assistant to answer phones/reply to general office email	NO
Hard drives for discovery storage If the hard drive or other storage media is purchased with the intent that it stays with the case file or will be used in another CJA representation, reimbursement may be sought. Justification should be included on the voucher.	YES
Mobile printer for use during trial	NO
File folders, binders, and other supplies for office use However, in particularly complex cases requiring an unusual or extraordinary number of binders to provide exhibits to the court or opposing counsel, such expense may be construed as necessary for an adequate defense and thus reimbursed. Justification should be included on the voucher.	NO
Case organization tools unique to the needs of a case Proprietary software (including cloud-based discovery review platforms) or hardware not typically available in a law office needed to review evidence or organize discovery during pendency of a specific case. Counsel should discuss options with a CJA administrator, case budgeting attorney, or the National Litigation Support Team (NLST) and obtain prior authorization. See CJA Guidelines § 320.70.40 .	DEPENDS

XII. GENERAL OFFICE OVERHEAD AND OTHER EXPENSES	REIMBURSABLE?
Cloud storage subscription services Including Dropbox, Box, Sync, or other general storage services. NLST has a contract with Box and can provide free storage for CJA cases that qualify.	NO
General case organization or team communication tools E.g., Casemap, Everlaw, Basecamp, etc. Check with NLST for available discounts .	NO
Trial presentation tools E.g., TrialDirector 360, TrialPad, Sanction, ExhibitView, OnCue, etc. Check with NLST for available discounts or your local CJA Supervising Attorney for license information; some districts may have a limited number of licenses available for CJA use.	NO
Calendaring or billing software	NO
Photocopying or laser printing The Fourth Circuit’s maximum reimbursement rate for in-house copying or printing is 15 cents per page. District reimbursement rates may be lower.	YES
Scanning and OCR services by third-party vendors Third-party vendors may charge an hourly rate or per page fee. Check with your CJA administrator as reimbursement rates vary depending on documents form and quality. (See Section VI for compensability of attorney and service provider time for these tasks.)	YES
U.S. Postal fees	YES
Premium delivery services Use of couriers, messengers, and other premium delivery services (other than standard delivery) is discouraged absent a genuine necessity for the service. Explanations and receipts are required.	DEPENDS
Physical storage of paper materials Storage of hard-copy case files is typically office overhead. However, for an extraordinarily large volume of materials for which counsel lacks adequate space and for which physical storage is necessary for the representation, such expense may rise to the level of “other services necessary for an adequate defense” under 18 U.S.C. § 3006A(d)(1) and may be reimbursed during the representation. Prior authorization is required.	DEPENDS
Collect calls from client While it may be more cost efficient to deposit money into a detained client’s account to facilitate attorney-client communications, such funds are akin to services of a personal nature and not reimbursable under the CJA. Only reasonably documented actual expenses may be reimbursed.	YES

XII. GENERAL OFFICE OVERHEAD AND OTHER EXPENSES	REIMBURSABLE?
Communication with detained client on fee-based platforms Fees paid to detention center vendors for calls, emails, or video visits with a detained client are reimbursable if they can be reliably linked to a particular client/representation.	YES
Video or audio-conferencing tools Subscriptions to common audio or video services (e.g., Zoom, Skype, GoToMeeting, etc.) are considered overhead unless being employed solely for a specific representation and not general use. Any videoconference expense claimed on a voucher should explain why the service is not general office overhead.	DEPENDS
Equipment for in-custody client to review discovery Consult with a CJA administrator as prior authorization is required for the purchase of laptops, tablets, or audio devices.	DEPENDS
Expenses reasonably incurred in defending actions alleging malpractice in representational services under the CJA Reimbursable expenses include the cost of transcripts, witness fees and costs, and retained attorney fees. CJA Guidelines § 230.63.60. The total reimbursement must not exceed the deductible amount of counsel's professional liability insurance policy or \$5,000, whichever is less, and should be claimed as an expense on Form CJA-20/30. These expenses are not reimbursable if a judgment of malpractice is rendered against the attorney. As with § 2255 proceedings, compensation for representing oneself in defending malpractice allegations is not reimbursable.	YES
Computer-assisted legal research (CALR) services Panel attorneys are expected to have access to online legal research tools (e.g., Lexis, Westlaw) and should utilize the most cost-efficient pricing plan available. The CJA Guidelines provide that CALR services may be reimbursed if the amount is reasonable, although reimbursement policies may vary between districts. If submitting a claim for reimbursement, counsel must attach a copy of the bill, along with (1) an explanation of the precise basis for the charge, and (2) a statement of justification if the expense exceeds \$200 during a one-month period.	YES
Transcripts of federal proceedings Counsel should not pay out of pocket for transcripts. Rather, transcripts should be requested on CJA Form 24. Except during trial, expedited or daily copy is discouraged. Any requests for expedited or daily copy must be justified and pre-approved by the court. In multi-defendant cases involving CJA defendants, no more than one transcript should be purchased from the court reporter on behalf of CJA defendants. CJA Guidelines 320.30.30	NO

XII. GENERAL OFFICE OVERHEAD AND OTHER EXPENSES	REIMBURSABLE?
PACER fees Attorneys and service providers should apply for a no-fee account and may contact the PACER Service Center in San Antonio at 1-800-676-6856 for more information. Service providers may require documentation from a CJA administrator explaining their role and eligibility for the CJA exemption and should register at this link for a “case search only” account: https://pacer.psc.uscourts.gov/pscof/registration.jsf Additional information: https://www.pacer.gov/ecfcbt/cso/PACER_Job_Aids/Activating_CJA_Privileges.pdf https://www.pacer.gov/ecfcbt/cso/PACER_Job_Aids/CJA_instructions.pdf	NO

XIII. CONCLUSION

Attorneys can make the job of those who review vouchers much easier if they follow the simple rule of explaining why anything out of the ordinary was necessary to the representation. This can almost always be done without compromising the confidentiality of the representation. If you run into problems, please consult your local CJA experts at the courthouse or in your panel community.

FOURTH CIRCUIT CJA UNIT

CJA Resources: <https://www.ca4.uscourts.gov/information-for-cja-circuit-wide>

CJA-20 Billing Tips

- Record time daily and enter it into eVoucher at least weekly, if not daily.
- Describe services in sufficient detail to allow reviewers to gauge the reasonableness of the time expended without revealing privileged information.
- Do not block bill a group of different tasks in one billing entry. Separate in-court time/out-of-court time. To ensure that total time billed in a day does not exceed the actual time expended, each task should be billed separately except those that take less than six minutes (e.g., reviewing ECFs)(aggregate into one billing entry). For similar tasks on the same date, either aggregate into one billing entry or describe the services in a way that shows the entries are distinct (e.g., continued PSR review; follow-up call to client; additional emails to co-counsel).

16a. Interviews and Conferences

Includes witness interviews, meetings, and communications. Specify with whom (e.g., client, AUSA, service provider), type of communication (e.g., email, telephone call, in-person meeting, Zoom conference), and topic (if not privileged).

a. Interviews and Conferences	Meet with client and interpreter	1.6
a. Interviews and Conferences	Emails with AUSA re discovery issues in Vol 3	0.3

16b. Obtaining and Reviewing Records*

Includes discovery review and docket review. Specify type of discovery (transcripts, reports, medical records, photos, audio recordings, etc.) and, if applicable, Bates range, approximate number of pages, text searches run, number of relevant hits reviewed, and length of audio/video recordings. Specify ECF numbers for docket review.

b. Obtaining and Reviewing Records	Review GOV000-GOV800 (bank records), indictment, and investigative memos (5 pp)	4.9
b. Obtaining and Reviewing Records	Run approx. 5 text searches for client's name (including monikers) in 2TB of discovery; review approx. 175 pp of hits	2.8

*See *Discovery-Related Billing Tips* sheet for further examples.

16c. Legal Research and Brief Writing

Specify issue researched or type of motion. Include docket number if filed or note that document ultimately was not filed. Includes researching jury instructions, drafting research memos, and preparing sentencing memoranda and charts.

c. Legal Research and Brief Writing	Research and draft suppression motion	2.9
c. Legal Research and Brief Writing	Review PSR and draft objections	3.2

16d. Travel Time

Include origin/destination, whether round trip/one way, and method if not driving. When prorating travel among cases, provide the other case number(s).

d. Travel Time	Walk round trip office to US District Court	0.2
d. Travel Time	Office to/from Detention Center (split w/CASE #)	1.7

16e. Investigative or Other Work

Includes researching witnesses; inspecting evidence or crime scene; retrieving case-related evidence or property; preparing for hearing or trial, including witness examinations, opening statement, and closing argument; drafting requests for service providers; reviewing service provider bills to certify work was undertaken; budgeting the representation; and reviewing defense-generated materials, including documents, charts, and memos.

e. Investigative or Other Work	Draft funding application and prepare budget	0.7
e. Investigative or Other Work	Inspect crime scene with investigator	2.9

FOURTH CIRCUIT CJA UNIT

CJA Resources: <https://www.ca4.uscourts.gov/information-for/cja-circuit-wide>

CJA-21/CJA-31 Billing Tips

- Service providers such as investigators, paralegals, interpreters, and experts bill in eVoucher on CJA-21 (non-capital cases) or CJA-31 (capital cases). **NOTE:** Associate attorneys performing legal services bill on CJA-20 or CJA-30.
- Absent authorization for a different billing arrangement (e.g., hosting fees per GB), providers must bill time in tenths of an hour (six-minute increments) and describe work in sufficient detail to allow reviewers to gauge the reasonableness of the time expended without revealing privileged information.
- Providers should not block bill a group of different tasks in one billing entry. Rather, each task should be itemized separately except those that take less than six minutes (e.g., multiple emails), which should be aggregated into one billing entry. This ensures that total time billed in a day does not exceed the actual time expended.
- For similar tasks on the same date, providers should either aggregate the work into one billing entry or describe the services in a way that shows the entries are distinct (e.g., continued review of medical records; follow-up call with counsel).
- Where permitted, CJA counsel and providers should work with a court's CJA administrator to arrange for providers to enter their own time directly into eVoucher after CJA counsel has created the CJA-21 or CJA-31. If provider direct entry is permitted, CJA counsel may assign the voucher to either the provider or counsel to complete; entries entered by a provider still must be reviewed and submitted by counsel. If provider direct entry is not permitted, only the "attorney assignment" option will be available and counsel must enter the provider's billable time and expenses into the CJA-21 or CJA-31. **NOTE:** Time spent creating a CJA-21 or CJA-31 is a non-compensable administrative task. However, time spent by counsel reviewing a service provider's bill to ensure the work was undertaken is compensable.
- While documents such as W-9s containing a service provider's personal identifying information (e.g., social security number or date of birth) are needed for the creation of an eVoucher account, they should not be attached to authorizations or vouchers. The better practice is to coordinate with the CJA department.

Reviewing Discovery, Conducting Research, and Drafting Documents*

Specify type of discovery reviewed (transcripts, reports, medical records, photos, audio recordings, etc.) and, if applicable, Bates range, approximate number of pages, text searches run, number of relevant hits reviewed, and number of audio/video recordings. Specify the type of document created (report, memo, index, etc.) and any research or additional factors involved in its creation.

01/22/2020	Review GOV000-GOV800 (bank records), indictment, and investigative memos (5 pp)	4.9
02/05/2020	Listen to witness interview in Spanish and draft summary in English (15-min recording)	0.9
03/31/2020	Review notes from client evaluation and draft initial report	3.5
04/20/2020	Draft report after interview with witness AB, update case chronology	1.6
05/08/2020	Retrieve and review client criminal history records from superior court (approx. 100 pp)	2.8
05/26/2020	Research social media and other online sources for information on witness JS. Update case cast of characters	2.3
06/01/2020	Redact discovery for client review (per protective order)	0.8
06/14/2020	Research and review chapter in DSM-5 specific to client's mental health issues. Take detailed notes and update client chronology	1.5
06/27/2020	Review client medical records (230pp); update and revise evaluation report	3.1

*See *Discovery-Related Billing Tips* sheet for further examples.

Interviews and Conferences

Includes meetings and communications, e.g., reviewing and responding to emails, meetings and calls with client and counsel, interviews with witnesses, etc. Specify with whom (e.g., client, counsel, witness initials), type of communication (e.g., email, telephone call, Zoom conference) or meeting location, and topic (if not privileged).

02/13/2020	Meet with client; conduct examination	3.0
03/01/2020	Interview with witness AB	1.2
04/10/2020	Meet with counsel and client; translate for counsel	1.0
04/28/2020	Emails with attorney re new discovery	0.1
05/18/2020	Phone call with counsel re case strategy and next steps	0.4
05/30/2020	Locate and interview witnesses 1, 2, 3, and 4	4.5
06/12/2020	Translate for Spanish speaking client at detention hearing	0.9

Travel Time

Include origin/destination, whether round trip/one way, and method if not driving. When prorating travel among cases, provide the other case number(s).

02/13/2020	Walk from office to attorney's office	0.2
02/16/2020	To/from office to the jail for client examination	1.7
03/01/2020	Round trip to witness AB in Richmond (Split with Roberts/19-cr-526; 1.2 total)	0.6
03/18/2020	RT to crime scene review	0.8
04/04/2020	Round trip to courthouse for hearings (split with [CASE #])	0.5
05/30/2020	Travel from office to four different witness locations within Charleston	2.7
06/01/2020	Pick up new discovery from government	0.8

Expenses

Out-of-pocket expenses reasonably incurred may be claimed on a CJA-21/CJA-31. They must be listed on the "Expenses" tab and reasonably documented. Itemized receipts are required for any airfare, lodging, or meals when travel is authorized and for any expense over \$50. Common reimbursable expenses include photocopying, postage, fees for public records, mileage, and external hard drives for storing case-specific discovery. **NOTE:** While the cost of items such as hard drives may be reimbursed as an expense, the time and travel associated with procuring the items are generally not compensable (e.g., driving to Office Depot or the Post Office).

02/29/2020	Travel for client meeting (76 miles; 38 miles each way)	\$43.70
02/29/2020	Bridge toll	\$6.45
04/10/2020	Hard drive for discovery (receipt attached)	\$65.00
05/15/2020	Copies of transcripts (400 pp)	\$40.00
05/20/2020	Client medical records from Kaiser	\$52.75
05/20/2020	Postage to mail copies of discovery to client at the jail	\$4.60

FOURTH CIRCUIT CJA UNIT

CJA Resources: <https://www.ca4.uscourts.gov/information-for/cja-circuit-wide>

Discovery-Related Billing Tips

Adequately articulating and explaining discovery-related billable time can be challenging, especially where page counts are difficult to ascertain (e.g., conducting a keyword search in a database). For this reason, billers should provide sufficient detail to enable voucher reviewers to understand the context of the work and its relevance to the case, without revealing privileged information. This tip sheet provides numerous examples of good discovery-related billing entries.

Discovery Review:

- Note type and substance of discovery reviewed
- Note approximate number of pages or Bates ranges
- Note number or length of audio/video files
- Note if review is continuation of same materials on same day (and thus not a mistaken duplicate entry)
- Note any unique issues in reviewing discovery

Review SFPD reports, 302s, defendant's criminal histories (225 pp)	3.5
Continue reviewing SFPD reports, 302s, defendant's criminal histories. (130 pp)	2.0
Listen to client's jail calls, take notes (10 calls, approx. 75 mins)	1.5
Review reports of proffers with cooperating defendant (114 pp)	1.6
Review RICO allegations involving defendant and co-defendants, reviewed LAPD intervention, CDC incidents (291 pp)	2.0
Memo to attorney re client involvement with intercepted kites, defense strategy; draft memo with attached discovery as provided	1.8
Review audio intercepts involving Co-D and CI/CW meeting from 2013 (23 phone calls)	2.7
Code date, description, type, and author in CaseMap for Bates ROI000250-ROI000404 (50 documents/154 pp)	2.4
Review crime scene surveillance video; mark time stamps with activity of white Honda per counsel's request (4-hour video)	2.5
Emails with investigator re new witness reports; add reports to master case index	0.2
Review recordings of meetings involving RR (ES-44, 77, 78, 79, 131) and make notes of potential issues, problems with transcripts, arguments re MJ	5.7
Read/index 7/2019 discovery materials re ES recordings	1.8
Review IRS spreadsheets, reports of work absences by client and co-defendants, patient's student files (337 pp)	2.6
Review reports of defendant and co-d daughter's post-arrest interviews and reports related to fraud scheme involving defendant (52 pp)	0.8
Run searches for client's name and monikers in 90,000 pages of discovery using dtSearch (approx. 100 hits/40 docs)	3.1
Meet with client at jail re 03/20/2020 discovery review	1.0
Review CaseMap reports for 10 witness searches (approx. 200 docs/500 pp)	6.5

Discovery Processing:

- Time it takes to set up discovery files to download or upload is compensable, but wait time is not.
- Time spent loading, assessing, and organizing documents to OCR is compensable, but OCR run time is not.

Load, process, organize, OCR new discovery (3 discs)	1.2
Convert tiffs to pdf, OCR, and rename files (25 docs)	0.8
Convert surveillance videos from proprietary format to mp4s; open each video in provided player to convert (18 videos)	1.1
Load and organize discovery on SD card for client tablet pursuant to protective order	0.7
Update master discovery index with new government production	0.2
Set up OCR to run on pdfs received in government production (Bates TW000850-TW0004390)	0.5
Emails with government re new discovery; download discovery from Box; OCR, organize, and transfer to hard drive	0.6
Organize, convert to pdf, bates stamp, OCR defense-collected discovery (65 docs/1700 pp)	1.4
Convert client jail calls to mp3; conversion done individually on each call (125 calls)	1.1
Review contents of hard drive and load drive for investigator	0.5
Create dtSearch index of pdfs in discovery (approx. 90,000 pp/10 folders)	0.7

Discovery Dissemination:

- Counsel and providers should work to ensure that discovery is disseminated in an efficient manner.
- Check with CJA administrators about the availability of tablets or other electronic devices for discovery review by clients or others.

Phone call with AUSA re issues with discovery production	0.2
Emails with co-counsel and investigator re discovery updates	0.1
Multiple emails with counsel re missing discovery; locate missing documents and respond	0.3
Email with government re 03/20/2020 discovery production	0.1
Update client tablet with new discovery	0.5
Meet with paralegal and investigator re discovery review and case strategy	1.5
Update hyperlinked discovery chart with discovery production 4 and upload to box.com for all counsel	0.6
Draft discovery letter to AUSA	0.5
Emails with jail re problems with client tablet	0.1
Update attorney hard drive with new processed discovery	0.4

SERVICE PROVIDER HOURLY RATES

SERVICE PROVIDER HOURLY RATES

The high end of a listed range is not the presumptive rate. Rather, rates vary based on locality, education, specialization, certification, licensing, and experience. Depending on the circumstances in an individual case, a provider's rate may exceed the high end of a range upon a showing of good cause.

Courts may adopt their own service provider rate schedule based on local needs. However, court-specific rates may not exceed the high end of a below-listed range without approval of the Chief Circuit Judge. When a "special skills" rate is authorized based on case-needed foreign language fluency, only those tasks requiring use of the foreign language should be billed at the higher rate.

Counsel are expected to negotiate lower travel rates for high-cost service providers, preferably at 50 percent of the provider's services rate. Because some courts within the Fourth Circuit may have travel limitations such as reduced rates or billable time maximums, counsel should consult with local CJA staff regarding applicable travel policies. Time spent performing case-related work while traveling is not "travel time" and should be compensated at the full hourly rate.

Investigators, Mitigation Specialists, and Paralegals			
Court-specific rates vary based on unique locality needs. Thus, the high end of a range is not the presumptive rate. For providers who work in multiple courts, the approved rate will be based on the applicable court's presumptive rate, not prior authorizations in other courts.			
	Standard Rate	Special Skills Rate	
Investigator – Capital Cases	\$90 – \$100	\$100 – \$115	Special skills rate is for case-needed foreign language fluency or other specialization, such as mastery of one or more relevant areas of forensic science (e.g., forensic psychology or digital forensics) or a high level of experience in the type of alleged offense. The rate may be reduced to a non-capital rate if the Government opts against seeking the death penalty.
Investigator – Non-capital Cases	\$75 – \$90	\$90 – \$115	Special skills rate is for case-needed foreign language fluency or other specialization, such as mastery of one or more relevant areas of forensic science (e.g., forensic psychology or digital forensics) or a high level of experience in the type of alleged offense.

SERVICE PROVIDER HOURLY RATES

	Standard Rate	Special Skills Rate	
Mitigation Specialist – Capital Cases	\$100 – \$125	\$125 – \$150	Special skills rate is for case-needed foreign language fluency, specialized mental health expertise, or mastery of the <i>Atkins</i> intellectual disability standard. The rate may be reduced to a non-capital rate if the Government opts against seeking the death penalty.
Mitigation Specialist – Non-capital Cases	\$75 – \$100	\$95 – \$125	Special skills rate is for case-needed foreign language fluency or specialized mental health expertise.
Paralegal (non-J.D.)	\$55 – \$65	\$65 – \$85	Special skills rate is for those with the technology skills necessary to perform complex litigation support or discovery database management (including subjective coding), case-needed foreign language fluency, or capital case expertise.
Paralegal (J.D.)	\$65 – \$75	\$75 – \$90	Special skills rate is for those with the technology skills necessary to perform complex litigation support or discovery database management (including subjective coding), case-needed foreign language fluency, or capital case expertise.

Other Service Provider Categories		
Accident Reconstruction	\$150 – \$200	
Accountant	\$125 – \$275	
Accounting Staff (non-CPA)	\$65	E.g., reviewing/summarizing/preparing financial records
Attorney Expert – Capital	CJA Hourly Rate	
Attorney Expert – Non-Capital	CJA Hourly Rate	E.g., immigration law expert
Audio, Video, Photo Forensic Analyst	\$125 – \$200	
Audio, Video, Photo Technician	\$25 – \$100	E.g., creating video exhibits, taking or enlarging photos, enhancing audio or video recordings, etc.
Ballistics/Firearms Expert	\$150 – \$300	
Canine Expert	\$125 – \$200	
Chemist/Toxicologist (B.S. or Ph.D.)	\$150 – \$275	
Chemist/Toxicologist (M.D.)	\$275 – \$400	

SERVICE PROVIDER HOURLY RATES

Computer/Cellphone/Cellular Tower Forensic Analyst	\$150 – \$300	
Crime Scene/Police Practices/Use-of-Force Expert	\$150 – \$250	
DNA Expert (B.S. or Ph.D.)	\$150 – \$250	
Fingerprint Analyst	\$150 – \$250	
Gang Expert	\$150 – \$200	
Handwriting Analyst	\$100 – \$250	
Interpreter/Translator for in-person meetings	\$44 – \$80	Range accommodates both certified and non-certified providers. Half-day rate is \$320 for certified and \$190 for non-certified.
Jury Consultant	\$150 – \$225	
Law Student	\$20 – \$30	
Legal Analyst/Consultant (Non-Attorney)	\$75 – \$90	E.g., Sentencing Guidelines consultant.
Medical – Other (M.D. or D.O.)	\$275 – \$400	
Neurologist or Neuropsychiatrist (M.D.)	\$275 – \$400	
Neuropsychologist (Ph.D.)	\$225 – \$375	
Nurse (L.P.N. or R.N.)	\$100 – \$125	
Nurse (M.S.N. or D.N.P.)	\$150 – \$250	Including S.A.N.E. certified.
Pathologist/Medical Examiner	\$275 – \$400	
Ph.D – Other	\$150 – \$300	
Polygraph	\$100 – \$250	Polygraph testing typically billed at a flat rate between \$350 and \$1,000.
Psychiatrist (M.D.)	\$275 – \$400	
Psychologist (Ph.D.)	\$150 – \$350	
Translation – Foreign Language Document	Up to 20 cents per word	
Transcription – English Audio	\$3.65 per page	<u>Contract court reporter rate</u> (without foreign translation) for non-automated transcription services. NOTE: Reimbursement for transcripts of federal court proceedings must be submitted on Form CJA-24 in eVoucher and requested in District Court, whether for use in District Court or the Court of Appeals.
Transcription and Translation Combined – Foreign Audio	\$35 – \$85	Combined translation and transcription of foreign audio recordings are typically billed by the hour, not per word or page, for non-automated services. Rates vary based on language, interpreter certification, and recording quality.

Revised: June 15, 2023

Sample Engagement Letter: Contents of Financial Arrangements

Case name: _____

Case number: _____

The engagement of your services for this case is subject to the following:

- (1) You will be compensated at a rate of \$ _____ per hour [or specify other fee arrangement], and [\$ _____ per hour for long-distance travel-related time that will be explained in correspondence to you]. The maximum payment amount authorized by the court as of this date for your services in \$ _____, which includes any expenses incurred by you.
- (2) You will submit your voucher(s) (CJA Form 21 in a non-capital representation and CJA Form 31 in a capital representation) to me, and it is my responsibility as counsel to certify to the court that the services were rendered. Payment for your services is subject to approval by the presiding judge and, in certain circumstances, the chief judge of the court of appeals. Approved payments are made by the Department of the Treasury out of the federal judiciary's Defender Services account, not by me or my law firm.
- (3) The presiding judge (and the circuit chief judge, if applicable) has discretion to reduce a voucher. Specific reasons include: (a) a mathematical error; (b) non-compliance with the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), *Guide to Judiciary Policy*, Volume 7, Part A, or court policies; and (c) a determination that the services claimed are reasonable either in terms of the work performed or the amount of time and expenses submitted. Accordingly, this Engagement Letter is not a guarantee of payment for all services rendered or expenses incurred.
- (4) **Do not perform services or incur expenses that would result in an invoice in excess of the maximum payment amount authorized by the court** (as set forth in paragraph (1)). Doing so creates a risk that the court will not authorize the payment for the work done or expenses incurred in excess of the maximum authorized amount, even if the services performed or expenses incurred are necessary. You must advise me **before** you exceed the court's maximum authorized payment amount, and if I determine such additional work and/or expenses are necessary for the representation, I will seek approval from the court for a new maximum authorization level, before such work is performed or expenses incurred.
- (5) Travel expenses will be reimbursed on the basis of actual expenses incurred. Please consult with me regarding the maximum reimbursement amounts for travel expenses. Airline travel must be authorized by the court by my application. If airline travel is authorized, I will provide guidance to you regarding the purchase of a ticket.

- (6) Record Keeping – Consistent with Guidelines § 320.90, you are required to maintain contemporaneous time and attendance records for all work/services billed, including work performed by associates, partners, and support staff, as well as expense records. These records should be submitted with your CJA voucher for payment and must be retained for three years after approval of the appointed counsel's or the service provider's final voucher, whichever is later.
- (7) Unless otherwise authorized by the court, a voucher for services performed and expenses incurred for the representation will be submitted at the conclusion of your services. While the court attempts to process invoices as quickly as possible, there may be delays in payment due to workload and other factors.
- (8) Scope of Work – You are authorized to do the following work:

Accepted by: _____

Date: _____

UNITED STATES DISTRICT COURT
***EX PARTE* REQUEST FORM SEEKING ADVANCE AUTHORIZATION**
FOR INVESTIGATIVE, EXPERT, OR OTHER SERVICES

Name of Attorney:

Case Name:

Case No.:

Name of Service Provider:

Hourly Rate Requested:

Number of Hours Requested:

Total Amount Requested:

Justification for Requesting Service:

Provider's Relevant Experience and Qualifications (attach a CV if appropriate):

Fee Arrangement, if Applicable:

Brief Explanation of Services and Expenses to Be Included:

Whether You Anticipate Requesting Additional Services/Funding from/for This Provider (if so, please provide details):

Attorney's Electronic Signature:

Date: