

How to Get Paid: Vouchers for CJA Attorneys, Experts and Transcripts

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Introduction

Panel attorneys are the only members of the Federal Curt criminal system who are not on salary. Prosecutors, judges, probation agents, case agents, all get a weekly paycheck rain or shine. Direct deposit no less. And health insurance. And a retirement plan. And federal benefits. They all have staff, also on salary. They have unlimited Westlaw usage paid for by someone else. They have government cars, government computers and government phones. They have badges, id cards and special parking spaces.

CJA attorneys have vouchers.

That's it. Oh, we have clients, ethical obligations and bills. But money – no; file a voucher. So, like it or not, unless you are independently wealthy and want to further subsidize the Federal Government's constitutional obligations, you must master the Art of the Voucher.

There are currently three primary vouchers you need to understand.

\$	CJA 20	Appointment and Payment of CJA Attorneys
\$	CJA 21	Authorization for Experts and Other Services
\$	CJA 24	Authorization for Transcripts

The new vouchers are printed by the computer system in the clerk's office and replace the older multi-part NCR forms. Find out who is the CJA clerk at your district court. Charm this person. They are your inside source. They can give you the inside scoop on how to satisfy the various judges and the individualized requirements of each judge. *Never alienate the voucher clerk.* These are your contact people. Some district courts have written handouts or memos on CJA billing. Some have areas on a web site which provide details and local requirements. Inhale this information.

Attorney Fees

¹*Editor's Note: David Bemenan is currently the Federal Public Defender for Maine.*

Payment for appointed counsel is authorized under 18 U.S.C. § 3006A, Adequate Representation of Defendants, also known as the Criminal Justice Act. The Act establishes both the hourly rates and the case maximums. Case maximums as of November 13, 2000 are²:

\$	Felonies	\$5,200
\$	Misdemeanors	\$1,500
\$	Appeals	\$3,700
\$	Other	\$1200

These maximums can be exceeded for “extended or complex representation” when the judge certifies that “the amount of the excess payment is necessary to provide fair compensation,” and the application is approved by the circuit court. 18 U.S.C. § 3006A(d)(3).

If you want to get paid you need to give the judge the tools he or she needs to pay you. Too many judges take the attitude published by the 5th circuit:

Philosophy of the Act. The hourly rates of compensation fixed by the Criminal Justice Act are designated and intended to be the maximum rates and should be so treated. The underlying philosophy of the Act that the Bar of the Nation owes a responsibility to represent persons financially unable to retain counsel and that the compensation provided is not intended to equate to private counsel fees.

Where did they come up with this foolishness? The true philosophy of the Act is to make the conviction and sentence constitutionally valid so the government does not have to try cases twice. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Judges seem to think we are part of this process for public service extra credit. Some people coach little league, I defend poor people, that sort of thing. I don't see it. Heck, it probably would not be enough to get you a downward departure. No, we defend because we are the true believers. We are not closet prosecutors. We are not FBI wanna be's. We are defense counsel, all that stands between freedom and life in a cage. This is hard work and serious stuff and we have not merely a desire to be paid, but a statutory right. So tell your judges not to be cheap. You can't put a price on justice, but you can fairly compensate CJA counsel who are in the trenches daily making the system work. Without us, everything stops. The government can always find more defendants, but there are a limited number of us, and if we go broke the Judge is in real trouble. So feed us. Treat us fairly. Give us a little room to breathe. In return, we will give the Courts the paperwork they need. Remember, beyond marble, paper is the foundation of federal practice. Fire up that computer and start printing.

The purpose of law school (ostensibly) was to teach us to think and act like lawyers, the “herd mentality”. We were taught to read the rules and play by the rules. Law is rules driven. So too with vouchers. I am giving you the needed rules. Next you need to make the argument. What you should know is that every argument must be tailored to its specific target audience. Here the audience is the

²Editor's Note: Current caps (as of April of 2006) are: \$7,000 for felonies, \$2,000 for misdemeanors, \$5,000 for appeals, and \$1,500 for “Other.”

voucher approver, first the clerk and second the judge. Tell them what they want to hear in the language of the rules. Pretty much the same strategy as a pleading.

Understanding the Voucher

Thoughtfully, each voucher comes with a full set of instructions attached. Remember the first rule of statutory construction; **read the whole thing first, then start.** Most of the entry blocks are very clear. If you have a question and can't figure out what goes in what block, ask the Clerk, or send me an e-mail. It really is not that hard. Keep a notebook with an example of a completed voucher and related forms so you can refer back to it the next time.

What is missing from the voucher forms is room to explain. A cover letter or supporting memo is the missing link. Stop whining and start typing. Remember, you have the burden of persuasion. The judge often describes himself (female judges don't do this as much) as the "father figure" in the courtroom. Recall how you got money out of your Dad. You gave him a good reason, one that he wanted to hear. Reversible error, 2255, change of counsel, ineffective assistance all are buzz-words which can gain a court's attention. Equally important is substance. What you really did to earn your fee.

Here's an example of an effective persuasive explanation:

This was a hard-fought case in which the defendant faced serious Career Offender penalties. The first two attorneys appointed to represent the defendant withdrew due to the difficult nature of representing this particular defendant. Upon taking over representation, counsel began a significant investigation which stretched from Maine to Texas with stops along the way. Witnesses were located and interviewed (by telephone) in Texas, South Carolina and Maine. Counsel personally examined the physical evidence, went to the scene of the crime, took photographs used at trial, interviewed witnesses and developed the defense theory. Counsel prepared for and put on a three-day jury trial in which Defendant was acquitted of half the charges. At sentencing one of the two remaining charges was dismissed. Of four separate charges, in the end, Defendant was convicted of only possession of a single hand gun. In light of the multiple witnesses who testified to Defendant possessing the gun at the time of his arrest, conviction on that count was not surprising. Sentencing took on a life of it's own with the career offender issue and the viability of the disputed out of state predicate convictions. This required counsel to investigate and research the state law of Massachusetts and to obtain old records and interview lawyers "from away". Preparation, trial and sentencing required 135 hours of billable defense time. An unmeasurable amount of attorney thought time goes into such a case for which counsel receives no compensation.

Payments above the Statutory Cap

In dealing with voucher issues, the Administrative Office of the Courts puts out a book, *Guide to Judiciary Policies and Procedures, Vol. VII*, "Appointment of Counsel in Criminal Cases." This

is a useful reference source as you can cite to the Court its own guide. Shelly has a copy you can use.³ I have attached a copy of the Table of Contents. Paragraph 2.22 C(2) of the *Guidelines for the Administration of the Criminal Justice Act (CJA Guidelines)*, Volume VII, *Guide to Judiciary Policies and Procedures*, provides:

In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel shall submit with the voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation.

Paragraph 2.22 B(3) of the *CJA Guidelines* states that a case is **complex** if the "legal or factual issues are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case," and that a case is **extended** if "more time is reasonably required for total processing than the average case." Paragraph 2.22 B(3) lists the following criteria as useful in determining fair compensation in extended or complex cases:

- ➔ 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.

The following areas have been "suggested" as criteria for payments above the cap. All items will not apply in every case and the list is not exhaustive.

1. Length of appointment to case; total number of in-court hours, specifying pretrial hearings, trial, sentencing hearings, and other; and total number of out-of-court hours.
2. Offenses charged; number of counts charged; and other pending cases of defendant during the representation.
3. Number of co-defendants.
4. The Sentencing Guideline range found by the Court and whether a mandatory minimum was found or at issue at sentencing.
5. Discovery materials (nature and volume) and/or discovery practices.
6. Motions, legal memoranda, jury instructions, and sentencing documents, or legal research not resulting in such, which were drafted originally for this case (do not include standardized motions, etc., unless content was modified significantly).

³*Editor's Note: The Table of Contents mentioned is not attached. We have access to "the Guide" and Randy Murrell would be happy to provide copies of the applicable provisions.*

7. Investigation and case preparation (e.g., number and accessibility of witnesses interviewed, record collection, document organization). Use of investigative, expert, or other services (CJA 21 voucher).
8. The following client considerations: communication with client/family, language difference, accessibility of client, other.
9. Any other noteworthy circumstances regarding the case and the representation provided to support the compensation request. Include, if applicable: negotiations with the U.S. Attorney's office or law enforcement agency; complexity or novelty of legal issues and factual complexity; responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed and knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and hardship or injury resulting from the representation; any extraordinary pressure of time or other factors under which services were rendered.

Some judges love case citation. For the citers among us I have a few (not many, but a few) useful cases or at least positive language from losing cases.

- In order to obtain Government appointed services under the CJA., a defendant must first establish that he or she is “financially unable” to obtain the services without Government appointment and that the services are “necessary” for an adequate defense.(internal citations omitted). *U.S. v. Bissell*, 954 F.Supp. 903, 922 (D.N.J. 1997).
- Services are “necessary for an adequate defense” when “a reasonable attorney would engage such services were client having the independent financial means to pay for them.”(internal citations omitted). *U.S. v. Bissell*, 954 F.Supp. 903, 922 (D.N.J. 1997).

Bissell instructs you to argue that you (being a reasonable attorney) would engage such services (what ever you are seeking, be it your time, an expert, etc.) if you were retained. I have used affidavits or letters from other defense attorneys to bolster my position as needed. Generally the federal defender will give you a letter saying that if the client were represented by the federal defender’s office, they would do that which you are seeking.

- The court must be concerned with the protection of the rights of the accused. The public interest as well as the interest of the accused require prompt criminal proceedings. In complex multi-defendant cases, speedy trial rights are “stretched about as far as can be without making a mockery of that constitutional protection.” (internal citations omitted) *U.S. v. Mosquera*, 813 F.Supp. 962, 964 (E.D.N.Y. 1993).
- This court has long been mindful of enormous burdens posed on the courts and lawyers by complex criminal cases. Large multi-defendant cases such as the instant one creates severe disadvantages to defendants because many attorneys, particularly sole practitioners, can ill afford the substantial outlay of time and expense associated with the case. While attorneys sit for countless hours in a courtroom to hear their clients name mentioned only occasionally, their private practices stagnate.

Coordination of the work of defense counsel becomes almost impossible, to the disadvantage not only of defendants, but of the prosecutor and the court. Trial judges are faced with enormous problems of trial of *U.S. v. Mosquera*, 813 F.Supp. 962, 965 (E.D.N.Y. 1993). (Judge Weinstein ultimately rules that in this 18 defendant case under the CJA he can assign an overall coordinating lawyer to the case itself, in addition to each individual defendant's lawyer, *Id.* 966.)

Being the advocates we are, we now know both the applicable standard and who we need to convince. As is always the case in criminal work, the burden rests on us, if not beyond a reasonable doubt, then by a fair preponderance (whatever that means). In some instances just a paragraph like the one above along with the completed voucher and supporting time sheets will be enough. Other times a longer explanation is needed. With these materials is a copy of a full and detailed motion which was used and granted resulting in full payment.

Traps for the Unwary

1. Be sure to use the correct voucher category for tracking time.
2. Be sure to use the correct hourly rate
3. Time must be kept in tenth of an hour intervals, i.e., .1, .2, etc.
4. Many judges resent the legal research area. Counsel are presumed to have a strong working knowledge of general federal defense and many judges will not pay for what they see as “remedial studies.” One way to address this is to provide a detailed and active explanation of why the time was spent.

Here’s an example of a persuasive rationale regarding the need for legal research.

*Computer assisted legal research on issue of constructive possession using CD’s, the Internet and Westlaw. Starting with the Supreme Court cases of **Bass** and **Scarborough**, Counsel compared the facts as contained in the grand jury testimony of Smith and agent Jones to the requirements set forth in this circuit’s decision of **Gillies** and the second circuit case of **Buck**. With these cases as a guide, counsel worked on a proposed jury instruction consistent with the anticipated testimony on this crucial issue. By using the Westlaw keycite service, counsel located an unreported case, **Adams**, and was able to update the law in this area quickly, saving over two hours of what would have been tedious Shepardizing.*

Total time 4.5 hours.

This may seem like a lot of work, but if you make these kinds of time notations as you go, it really is not that much harder, and your time records serve as an outline of the work you did and proof that you were not ineffective.

5. Travel time must be kept separately from the actual meeting or reason for the travel.
6. You need receipts for all expenses. Some clerks/judges require receipts only for items exceeding \$50.
7. For Westlaw or Lexis you must explain how much time use of the service saved. Yes, it is subjective, but do the math. If it had been cheaper by hand then you did not save enough time to justify being online.
8. You must itemize your time according to the categories the vouchers set out. The “new” vouchers have arrived. While these have little change for attorneys, the underlying computer system in the clerk’s office has been totally revamped. For “statistical analysis,” the Administrative Office requires that all time fit into the categories they have chosen. If you use Time slips or a similar billing program, set up macro codes. Use the number of each area as an automatic code. Then you can print time bills which are chronological by category with full subtotals of your hours. Once you set this up and start using this system it will make your vouchers go much faster. Your voucher can not be paid if you do not separate time by categories.

Time Slips Federal Court CJA Billing Codes

Out of Court @ \$90 hr.

1. Interviews & Conferences
2. Obtaining & Reviewing Records
3. Legal Research & Brief Writing
4. Travel Time
5. Investigative & Other Work

In Court @ \$90 hr.

6. Arraignment and or Plea
7. Bail & Detention Hearings
8. Motions Hearings
9. Trial
10. Sentence Hearings
11. Revocation Hearings
12. Appeals Court
13. Other Court Proceedings

Costs

14. Mileage/Travel (36 cents per mile)⁴
15. Copies
16. Postage
17. Lexis/Westlaw
18. Toll Calls
19. Trial Exhibits
20. Medical Records
21. Other

On your worksheets or time entries, when indicating telephone calls or conferences, there needs to be some explanatory materials such as whom the call or conference was with, and the general subject discussed. Please note that in-Court waiting time can be billed at the in court rate. Chambers conferences are billable at the in court rate. The court will pay reasonable mileage at \$.36 per mile as long as the trip exceeds 5 miles. For trips under 5 miles, it is considered *de minimus*. Toll telephone charges are paid at the actual cost. You are not required to submit receipts for expenses which do not exceed \$50 per expense, with the exception of travel. For travel expenses, you are supposed to try to retain receipts for everything, including tolls and parking if possible.

Experts and Investigators

These requests are made using form CJA 21. The exact procedure varies with differing Magistrate Judges. Frequently this can be accomplished by letter request as opposed to a motion.

⁴*Editor's Note: As of April of 2006, the rate 44 ½ cents per mile.*

Note: if a request is captioned as a motion it tolls the speedy time clock. Generally the following information is essential.

- ➡ Expert's name and address
- ➡ Qualifications, (attaching a CV or resume is preferable)
- ➡ Hourly rate and estimated total cost
- ➡ The reason for the request, and
- ➡ Maximum amount available is \$1,000 without Circuit court approval.

Here is an example of a reason for the request:

1. *The Defendant is currently facing a nine count indictment, including four counts of mail fraud. Defendant has been found indigent and counsel appointed. Pursuant to a Grand Jury subpoena prior to indictment, the Postal Inspector's office took handwriting exemplars from the Defendant. The Government has informed counsel that they have submitted those handwriting exemplars to a government employed document examiner. Assistant United States Attorney Smith has represented to counsel that the results of that examination are "inconclusive." The government is of the opinion that the inconclusivity is the result of the deliberate efforts of deceptive acts by the defendant during his providing of the exemplars. The government intends to try and use this alleged "expert opinion" opinion against the defendant as evidence of deception, obstruction and guilt. AUSA Smith claims he will be requesting a jury instruction, similar to the flight instruction, suggesting that concealment or deception is evidence of guilt.*
2. *The defense believes that the exemplars provided were adequate, and that the inability of a government examiner to reach a conclusion between the provided exemplars and the question documents constitutes important exculpatory information in support of the defense. Specifically, the defendants handwriting on the exemplars, given to the postal inspector, do not match the handwriting on the checks and records obtained from the defendant's employer, the alleged victim of the claimed fraud.*
3. *Counsel has contacted Edwin F. Alford, Jr., a diplomat of the American Board of Forensic Document Examiners, whose curriculum vitae is attached. Counsel has utilized Mr. Alford's services in the past and found Mr. Alford to be professional and extremely helpful in dealing with document related issues including handwriting. Mr. Alford has indicated that he would be in a position to examine the questioned exemplars and documents, provide a written report if requested, consult with counsel by telephone, mail and e-mail, and assist counsel in the preparation of the defense. The initial cost would be in the area of \$950.00 based on 9.5 hours of work billed at \$100 per hour. Mr. Alford recognizes the budget constrains in an appointed case and is graciously offering this rate which is greatly reduced from his normal fee structure which requires a \$500 minimum retainer and an hourly rate of \$150.00 per hour. If trial testimony were needed there would be an additional cost which counsel would seek only if needed and at a later date.*

For these reasons, the Defendant requests authorization of funds up to the sum of \$950.00 for the retention of Edwin F. Alford, Jr.

An explanation such as this can be included in a cover letter or as part of a motion with incorporated memorandum. Some judges have a preference so check with the clerk.

Requests for funds under the CJA are *ex parte*. The First Circuit vacated a sentence and remanded the case when the District Court violated the *ex parte* provisions of the Act. *U.S. v. Abreu*, 202 F.3d 386 (1st Cir. Jan. 31, 2000)

Abreu pled to a cocaine charge. He is Dominican and required an interpreter. The case is out of Rhode Island, not a big Spanish speaking area. Abreu had some "mental health" issues which came to the attention of CJA counsel. Counsel felt a psychological evaluation was needed, possibly to support a diminished capacity downward departure under guideline section 5K2.13. Counsel applied to the court, *ex parte*, for \$550 to retain the psychologist. So far, the case seems normal to me. Then trouble starts. The judge holds an *ex-parte* hearing to decide if he can approve the \$550 *ex parte*. Somehow, the judge decides he can not do this without involving the government. Counsel is required to re-apply for the money noticing the prosecutor ! There is a second hearing and valiant counsel participates but refuses to disclose privileged and confidential information. The Court denies the funding. Abreu eventually is sentenced to 70 months and there is no departure.

On appeal, Abreu argues that the district court violated the plain terms of the statute -- which requires that applications for such funding by indigent defendants be handled *ex parte* -- and requests that the matter be remanded for reconsideration *ex parte*. The Court agrees, CJA expert request are to be heard *ex parte*. It is right there in the act,

"Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services. 18 U.S.C. § 3006A(e)(1)."

Somehow the trial judge found this language "very ambiguous." Thankfully, the parsimonious but scrupulous First Circuit rules that *ex parte* means *ex parte*. There is no ambiguity. The law applies to the entire period of representation, pre-trial, during trial and at sentencing.

"It was error for the district court to conclude that the "ex parte proceeding" language of subsection (e) did not apply to sentencing. Nor do we see any ambiguity at all in subsection (e)'s use of the term "ex parte." The statute says plainly that proceedings and applications should be *ex parte*. The text is not ambiguous in any sense and the meaning of "ex parte proceeding" is well established." *Abreu*.

The Court graciously added the following which might fit nicely into your next memo in support of funds;

"There is another principle at stake: fair treatment of indigents. Defendants who are able to fund their own defenses need not reveal to the government the grounds for

seeking a psychiatrist who might potentially testify at sentencing. To require indigent defendants to do so would penalize them for their poverty. The words of Judge Aldrich in an opinion of this court more than thirty years ago still hold true: [W]e would regard the purpose of the . . . rule as apparent on its face to be in recognition of the principle that defendants are not to be avoidably discriminated against because of their indigency. *Holden v. United States*, 393 F.2d 276, 278 (1st Cir. 1968)”. *Id.*

The Abreu case should go a long way to persuade those district court judges and magistrates who either require open hearings or who reject funds for sentencing experts. Indigent defendant shave a right to expert services. Further the court may not predicate availability of the funds on counsel's sharing the expert report with the court or the government. The defense consults with the expert and it is the defense's call whether or not to use the expert. Just because the client is poor does not mean the client must use the expert even if the report is unhelpful.

Be careful. In most courts you will still need to specify that your request is ex parte and ask that it be placed under seal. A word of caution – in this day of word processors, be sure you do not inadvertently include a certificate of service or have “CC: AUSA” on your letter as the clerk’s office will then assume it is not an *ex-parte* request. They may even set the matter for a chambers or telephone conference.

Remember, your time in searching for an expert is compensable so include it on your voucher. Give a narrative time entry which shows how tough and time consuming finding an expert is.

Compare:

Search for and locate potential blood stain expert, 5 hours

to

<i>Recognize potential need for bloodstain expert due to governments reliance on carpet stains. Search NACDL directory for experts.</i>	.5
<i>Internet computer search for experts.</i>	.5
<i>Go to forensics website and locate a number of potential experts.</i>	.3
<i>Attempt to find person in close geographical proximity to save time and costs. Follow up on three leads, Drs. X, Y, and Z. Check web sites of Drs. X and Y. Interview both doctors by telephone with follow up e-mails.</i>	2.5
<i>Send Dr. X copy of police report and letter outlining what I am seeking. Receive e-mail response along with CV, price structure and suggestions. Follow up telephone discussion on fees and time frame for Dr. X's work.</i>	1.3
<i>Prepare and file request for funds to retain Dr. X.</i>	.5
Total	5.6 hours.

For out of pocket costs over \$50, I like to get advanced approval so I don't ever get stuck with a bill personally. I have used this for rental equipment such as an overhead projector before the court had one, for a technical publication I needed to purchase, for copying costs when they were

going to be very large (several hundred dollars), and for the cost of trial exhibits like blow ups and enlarged photos.

For travel costs, you can get the government rate on travel by booking through **National Travel Services, 1-800-445-0668**.⁵ If you need to fly somewhere for investigation, get a price quote from NTS and then go on the Internet and print out a price off www.travelocity.com or other web travel pricer. Show the judge how much you saved the government because you knew CJA counsel could go through NTS. Show the number of hours to drive times \$90 an hour, the mileage cost and/or a bus ticket, . Call a PI in another state and get a price quote. We got quotes over \$100 an hour in California. Contrast that rate with the price of the plane fare we were able to find– \$380. It was not only better, but cheaper for the lawyer to go to California rather than hiring a PI to do interviews.(The lawyer did not bill for his travel time, but he also had some friends in CA and offered to “save” even more money by including a Saturday night stay.)

Sure it was a “high profile” case, but the opinion in *U.S. vs. McVeigh*, 954 F. Supp. 1441 (D.Colo. 1997)(Judge Matsch) is very helpful in obtaining needed funds. District Court approved a broad motion filed by court-appointed defense counsel requesting the appointment of additional counsel, investigators, consultants and forensic specialists "together with attendant costs and expenses." The scope of the ruling and phraseology used in the opinion are worth quoting here:

“[T]he court has made no effort to evaluate the credibility or determine the significance of these submissions, and has consistently relied on the experience and integrity of defense counsel, accepting their representations that such resources are reasonably necessary in preparing for the trial defense of Mr. McVeigh. There is no requirement that defense counsel show that admissible evidence will result from these investigatory efforts.” (Page 1445).

United States v. Kennedy

The case of *United States v. Kennedy*, 64 F.3d 1465 (10th Cir. 08/30/1995) provides some useful insight into how an appellate court, looking backwards addresses expert and funding issues.

Kennedy received appointed counsel in one year before his August, 1993 trial. During pretrial discovery, the government provided the defense access to 800 bankers’ boxes of documents it had amassed during its investigation, 539 of which contained WMC records. The boxes were placed in a repository in two rooms of a government building in Denver, Colorado, and were available for viewing as of August 14, 1992.

During this pretrial period, Kennedy's counsel made numerous requests for additional support services to supplement the services of his one paralegal assistant. The court granted Kennedy funds for an investigator, and funds to retain Philip Bolles ("Bolles"), who had served as WMC's chief financial officer from 1989 to 1992 and was an expert on the inner workings of WMC. The court

⁵*Editor’s Note: As of April 2006, Omega Travel provides the service. You can reach them at (866) 450-0401.*

additionally authorized funds for Kennedy to hire Ray Thomas ("Thomas") as an expert witness on the metal industry, and to hire Richard McCormack ("McCormack") as an expert witness on Ponzi schemes. On December 15, 1992, the court also appointed a co-counsel to work on Kennedy's case. [Not bad. Here is precedent from the notoriously cheap 10th circuit supporting funds for three experts and a paralegal].

However, the court denied Kennedy's request for additional paralegals to help review and index the 800 boxes of documents. The court also denied Kennedy's request for airfare to fly himself and Bolles from California to Denver to prepare for trial. And the court denied Kennedy's request to hire the accounting firm, Arthur Anderson, to audit WMC's financial records and to review the conclusions and analysis of one of the government's key expert witnesses.

I. Denial of Support Services

Kennedy first argues that the district court erred in denying his requests for paralegals, airfare for himself and Bolles to fly to Denver to prepare for trial, and the services of the Arthur Anderson accounting firm. Kennedy asserts that without these resources he was unable to defend himself at trial. Accordingly, he argues that the court violated his rights under the Criminal Justice Act ("CJA") and the Fifth Amendment Due Process Clause.

A. Criminal Justice Act, 18 U.S.C. Section(s) 3006A

The CJA creates a plan for furnishing representation to those who lack the financial ability to obtain it on their own. In relevant part, it provides that "[c]ounsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that **the services are necessary** and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services." 18 U.S.C. Section(s) 3006A(e)(1) (emphasis added). **In order to obtain services under this provision, the defendant must do more than allege that the services would be helpful. *United States v. Ready*, 574 F.2d 1009, 1015 (10th Cir. 1978). The defendant bears the burden of showing that the requested services are "necessary" to present an adequate defense. *United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986), cert. denied, 480 U.S. 908 (1987). The denial of such a request is reviewed only for an abuse of discretion. *United States v. Nichols*, 21 F.3d 1016, 1017 (10th Cir.), cert. denied, 115 S. Ct. 523 (1994).**

Kennedy challenges the district court's denial of resources on two grounds. First, he argues that the court abused its discretion generally by basing its CJA decisions at least in part on a lack of available funds, rather than on the necessity of the requested resources. See 18 U.S.C. Section(s) 3006A(e)(1) (providing that if the services are necessary, they "shall" be authorized). Second, he argues that the court abused its discretion in its specific findings of lack of necessity for each of the three requested resources at issue. We find it unnecessary to address the first question of whether or not the district court relied on financial concerns or the propriety of so doing, because we conclude that **Kennedy failed to meet his burden of showing the necessity of the three requested resources** (emphasis added, the court does not say such services are never available, rather counsel did not put on a good enough show to convince the trial judge to provide the funds) at issue, which we address in turn.

1. Additional Paralegals.

Kennedy first asserts that the court erred in denying his request for additional paralegals to help review and index the contents of the 800 boxes in the government's repository. He argues that without the assistance of paralegals, his counsel was unable to review all of the existing documents before trial, and, therefore, he may have been deprived of the opportunity to discover valuable evidence for his defense.

These general allegations, without any specific showing of what the additional paralegals might have found and how it would have affected his representation, fail to demonstrate that the court's denial of paralegals was an abuse of discretion. See *United States v. Mundt*, 508 F.2d 904, 908 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975) (requiring defendant "to show specifically the reasons why such services are necessary" and "to state what he expected specifically to find" through the use of such services). Kennedy's counsel and his counsel's one paralegal had access to the repository documents a full year before the August, 1993 trial. Kennedy also had the assistance of co-counsel who was appointed approximately eight months before trial, and an investigator for whom he was authorized to spend up to \$10,000. Kennedy also could rely on the assistance of Bolles, despite Bolles' failure to visit the repository in person, because Bolles had "intimate familiarity" with many of the repository documents from serving as WMC's former CFO.

In addition, as the district court noted, the government provided "extraordinary" assistance during discovery, "both in bulk, in summary form, in index form, [and] in work product," to enable the defense to review the repository materials efficiently. In conjunction with making the evidence accessible to the defense as of August, 1992, the government provided Kennedy with copies of some of the documents through a commercial copy service.*fn1 *Kennedy*, 819 F. Supp. at 1517. The government also gave Kennedy an inventory list and indices of the contents of the repository boxes.*fn2 *Id.* at 1517-18. In November, 1992, the government additionally provided Kennedy copies of all then-known documents that it intended to use at trial. *Id.* at 1518. And in April, 1993, the government specifically designated for Kennedy all of the evidence that it reserved the right to use at trial, and all of the evidence that it deemed to be material to the defendant's case, which involved only about 15 percent of the 539 boxes containing records from WMC. *Id.* at 1518-19. This designation included a date and general description of each item, along with its physical file location. *Kennedy*, 819 F. Supp. at 519.

Kennedy counters these facts by arguing that it is inappropriate to consider the resources provided by the government when judging the necessity of additional paralegals. Specifically, Kennedy argues that having to rely on his adversary's work product and assessments of what documents it anticipated would be material to his case is not an acceptable substitute for resources to personally review all of the potential evidence that existed.*fn3 We find this argument unpersuasive. The district court did not rely on the government's efforts as a substitute for providing adequate resources to Kennedy; it simply noted the extraordinary discovery materials that were provided to Kennedy when assessing the magnitude of Kennedy's task. Viewed against the backdrop of discovery, the assistance that the court did provide Kennedy to investigate the evidence, and Kennedy's failure to show how additional paralegals would have affected his representation, we find no abuse of discretion in the court's denial of paralegals.

2. Airfare for Trial Preparation.

Kennedy asserts, secondly, that the court erred in denying his request for funds to fly himself and Bolles from California to Denver to prepare for trial. Kennedy claims that without court-authorized airfare, neither he nor Bolles were able personally to review the documents in the repository and assist in preparing a defense. Kennedy also points out that Bolles' credibility was attacked during cross-examination because he had not visited the repository in person.

Again we find no abuse of discretion. The district court noted that 18 U.S.C. Section(s) 4285 authorized it to provide travel expenses for a defendant to attend court appearances, but not to prepare for trial. We agree, and also note that Kennedy did not demonstrate the necessity of his presence in Denver before trial. See R.O.A. Supp. Vol. 14 (ex parte motion of 5/10/93) (making only conclusory allegation that airfare was "essential . . . in order to prepare for trial"). With respect to Bolles, the court's order explained that although it was denying advance funding, Bolles was authorized to "travel to Denver and assist counsel and claim these fees and expenses on his CJA form," a choice that would have enabled him to avoid a credibility attack. R.O.A. Supp. Vol. 14 (order of 5/11/93). Thus, we find no impediment to Kennedy's defense.

3. Accounting Services.

Kennedy's final assertion is that the court abused its discretion by denying his request for funds to retain the services of the Arthur Anderson accounting firm. Kennedy requested the services primarily for two reasons. First, he wanted Arthur Anderson to conduct a complete audit of WMC's records to establish whether, to what extent, and by whom any losses had been suffered. Kennedy contends this was necessary to establish his defense that WMC failed to fulfill its obligations because of mismanagement, and not because of fraud. Second, Kennedy argued that he needed accounting expertise in order to counter the testimony of the government's expert witness, Campbell, who concluded that WMC had not purchased sufficient metal to cover its obligations to investors and had lost money trading in metals futures. Kennedy contends that an accounting firm was necessary adequately to review the data upon which Campbell relied, to help analyze Campbell's conclusions about the existence of a Ponzi scheme, to prepare for Campbell's cross-examination, and to present expert rebuttal testimony. Kennedy claims that authorizing funds to retain Bolles to perform these tasks was inadequate because Bolles had let his accounting license lapse, he was not an expert in the metals industry, he did not personally review the documents in the repository, and his credibility was open to attack due to his close relationship with Kennedy and WMC.

Once again, we conclude that the court did not abuse its discretion by denying the accounting services because Kennedy did not demonstrate their necessity to his representation. The court provided Kennedy with adequate tools both to present his mismanagement defense and to counter Campbell's testimony, without the assistance of Arthur Anderson to conduct a sweeping audit that was "undefined as to nature or scope." R.O.A. Supp. Vol. 14 (order of 5/4/93 at 4).

To the extent that Kennedy requested Arthur Anderson's services to assess WMC's losses, we agree with the district court that the services were unwarranted. As the district court explained, "Kennedy offer[ed] no basis for questioning either the amount of loss reported by the government data or which clients suffered the loss," but merely alleged that "true data" would show that he was not a criminal. R.O.A. Supp. Vol. 14 (order of 5/4/93 at 4-5). Moreover, the requested information on losses was already available to Kennedy in WMC's bankruptcy schedules. R.O.A. Supp. Vol. 14 (order of 5/4/93 at 5); see *United States v. Aldridge*, 484 F.2d 655, 660 (7th Cir. 1973) (affirming denial of

request for accountant to determine amount of money defendant received from a trust from which he was accused of self-dealing because the information was available through other documentary evidence), cert. denied, 415 U.S. 921, and 415 U.S. 922 (1974).

To the extent that Kennedy requested accounting expertise to help counter Campbell's testimony, we first note that Campbell himself does not appear to be a certified accountant.*fn4 Campbell's conclusions about WMC were based on a review of WMC corporate financial records, which were contained in the government repository, and his expertise in precious metals and commodities markets. The need for expert accounting was thus unclear. The defense had access to the financial records upon which Campbell relied, including summary charts of the underlying data. The defense also had the services of three individuals with knowledge in relevant fields of expertise. Although Bolles was a "financial and management professional," rather than an expert in precious metals or commodities markets, he was qualified to analyze WMC's inner-workings and financial condition, having served as WMC's chief financial officer from 1989 to 1992, and having spent some 400 hours analyzing data to prepare for trial. R.O.A. Supp. Vol. 14 (order of 5/4/93 at 3); Vol. 47 at 5181. Moreover, the defense was provided with \$5000 to retain Thomas, a qualified expert in the metals industry,*fn5 and \$200 per hour up to \$7,500 to retain McCormack, a qualified expert on Ponzi schemes.*fn6 Given these resources, there is no showing that the lack of additional accounting services prevented Kennedy from presenting his defense or countering Campbell's testimony at trial. Cf. *Ready*, 574 F.2d at 1015 (finding no abuse of discretion in denying defendant a tax expert in a tax fraud prosecution where there was no indication that expert could have benefitted the defense); *Aldridge*, 484 F.2d at 660 (holding that funds for an accountant were appropriately denied where defendant did not show that lack of an accountant prejudiced his case).

Thus, we conclude that the district court did not abuse its discretion under the CJA in denying Kennedy funds for additional paralegals, airfare, or the services of an accounting firm.

B. Due Process

Kennedy also argues that the district court's denial of these resources violated his Fifth Amendment due process rights. The Fifth Amendment's guarantee of fundamental fairness entitles indigent defendants to a fair opportunity to present their defense at trial. See *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). This requires that indigent defendants receive the "basic tools" and the "raw materials integral to" the presentation of an adequate defense. *Id.* at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). Kennedy argues that additional paralegals, airfare, and an accounting firm were among the "basic tools" necessary to defend himself in this complex fraud prosecution. For largely the same reasons noted above, we disagree.

An indigent defendant is not entitled to all the assistance that a wealthier counterpart might buy, but rather only to the basic and integral tools. *Id.* To determine what basic tools are required, we consider three factors: (1) the effect on Kennedy's private interest in the accuracy of the trial if the requested service is not provided; (2) the burden on the government's interest if the service is provided; and (3) the probable value of the additional service and the risk of error in the proceeding if such assistance is not offered. See *id.* at 78-79. In this case, the third factor is dispositive, because Kennedy has not shown the value of the requested services or how their denial caused him any substantial prejudice at trial. See *Coleman v. Brown*, 802 F.2d 1227, 1237 (10th Cir. 1986), cert.

denied, 482 U.S. 909 (1987); see also *Greschner*, 802 F.2d at 377 (requiring deprivation of a substantial benefit at trial).^{*fn7}

In *Coleman*, 802 F.2d at 1237, we held that a defendant's allegations "that his attorney was overworked, that many witnesses were involved in the case, and that the state's resources far surpassed those of the defense" were insufficient to show that the denial of an investigator violated the defendant's due process rights. Kennedy's conclusory allegations about the potential impact of additional paralegals, airfare, and accounting services are, as discussed above, similarly lacking. In particular, we note that although Bolles may not have been as effective as an independent accounting firm at presenting Kennedy's primary defense -- that WMC losses were due to mismanagement rather than fraud -- Bolles was able to articulate this defense to the jury, and it was corroborated by other defense witnesses at trial. Cf. *Greschner*, 802 F.2d at 377 (finding that denial of court-appointed penologist did not violate Fifth Amendment in part because defendants elicited the same testimony from other witnesses). When viewed in combination with the other witnesses that Kennedy was provided funds for, we cannot conclude that he was denied any of the basic tools for presenting an adequate defense.^{*fn8} Accordingly, we reject Kennedy's claim that the court's denial of resources violated his due process rights.

FOOTNOTES

Note 1. An overview of the documents and printouts provided to defense counsel includes; 2) work product generated by the government during its inventory of 539 boxes of WMC's corporate records; 3) work product generated by the government during its pre-indictment investigation, namely the same corporate records by key word; 4) alphabetical index of the documents obtained during the investigation which were not otherwise indexed; 5) a list of the 199 WMC clients identified as trial witnesses as of August, 1992; 6) a September 4, 1992 compilation of the grand jury exhibits, organized alphabetically according to the name of the witness through whom they were introduced or the corresponding victim; 7) an alphabetical list of grand jury transcripts; and 8) alphabetical list of investigative reports.

Note 2. *Kennedy*, 819 F. Supp. at 1517-18.

Note 3. Although Kennedy cites to the principles in *United States v. Agurs*, 427 U.S. 97 (1976), and *Brady v. Maryland*, 373 U.S. 83 (1963), to support his contention that the government is not competent to determine on its own what evidence may be exculpatory or relevant to the defendant's case, we note that he does not assert a Brady violation, nor does he assert a failure to comply with disclosure obligations under Fed. R. Crim. P. 16(a)(1)(c). Aplt's Br. at 20; Aplt's Rep. Br. at 9.

Note 4. Campbell testified only that he had a B.S. degree in business administration with a specialization in accounting.

Note 5. Although the court noted that Thomas would be important specifically to respond to testimony from former WMC employees about Kennedy's deviation from industry norms, rather than to respond to Campbell, Thomas was retained and qualified for his general expertise in the metals industry.

Note 6. We also note that one of Kennedy's witnesses, Lloyd Evan Qualls, had a master's degree in accounting and was employed as an auditor, although Kennedy did not call him to testify based on his accounting expertise.

Note 7. We also note that the burden on the government was not insignificant. Kennedy was seeking \$18,000 merely to enable Arthur Anderson to assess how much money it then would need to conduct the audit that Kennedy requested. R.O.A. Supp. Vol. 14 (order of 5/4/93 at 5).

Note 8. In this regard, we distinguish the cases in which the denial of an expert psychiatrist was deemed a due process violation. Those cases recognized that when the defendant's mental state is an important issue and is seriously in question, and when obtaining an accurate assessment of that mental state is uniquely dependant on psychological expertise, an expert psychiatrist indeed becomes a basic and integral tool to presenting an adequate defense. See, e.g., *Ake*, 470 U.S. at 74, 80-83 (holding that due process entitled indigent defendant to psychiatrist to present insanity defense and cross-examine state psychiatrists because of the tremendous reliance jurors place on psychiatric testimony where "there is often no single, accurate psychiatric conclusion on legal insanity"); *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985) (holding that due process entitled indigent defendant to psychiatrist to present defense of lack of capacity to form specific intent and to cross-examine government's psychiatrist on this point); see also *Dunn v. Roberts*, 963 F.2d 308, 314 (10th Cir. 1992) (finding due process violation where denying expert on battered women's syndrome prevented defendant from presenting information on specific intent, an essential element of the crime).

Witness Subpoenas

Do not pay to have witness subpoenas served because you will not be reimbursed. This is done at government expense by the U.S. Marshals. See F.R.Cr.P. 17(b). It is important to get the motions for witness subpoenas filed as early as possible so they can be delivered to the Marshals for service. You will not be reimbursed for the cost of having subpoenas served, since this can be done by the Marshals at no cost. If you are seeking a witness who is in custody, you must include with your witness subpoena, the witness's name, or location and a writ explaining why the witness is needed. Sample forms are attached.

Transcripts

The Court Reporters Act, 28 U.S.C. s 753(f), permits payment for transcripts in criminal proceedings for persons proceeding under the Criminal Justice Act. Transcripts are arranged with the court reporter using a CJA 24 along with a transcript order form. Most judges will allow you to get copies of anything the government gets. The original of all court transcripts go to the court so if the government orders a transcript the clerk will get a copy. Talk to your court reporter and ask that they let you know if the government orders any transcripts.

Judges seem mixed on transcripts from pre-trial hearings even when it is obvious the transcript will be helpful at trial for cross. If you suggest that the testimony be transcribed and then you provide the court with a post-hearing factual memo, some magistrates jump on that. If the magistrate refuses your early request for a hearing transcript, ask again as trial gets closer making it clear the case is

going to trial and you need the witnesses statements from the suppression hearing. If again denied, go to the trial judge and explain that not having the transcript is likely to slow down the trial if you go to sidebar saying you can impeach with what was said at the suppression hearing but need to adjourn until tomorrow as magistrate and judge did not let you get transcript in advance. Reversible error and 2255 are both terms judges do not like to hear. I try to hint at those obliquely, “if I were retained your honor I would certainly be buying that transcript, it is awfully important.”

Appeals

Appointed counsel is obligated to explain to the client his or her appellate rights and perfect an appeal if requested by the client. Once a notice of appeal is filed, jurisdiction on the case goes to the appellate court. Any motion to withdraw must be filed with the appeals court. Not every trial court abides by this rule, but the bulk will not entertain a motion to withdraw post-sentencing. This means you must have the necessary paperwork done to begin the appeal process, even if you hope to withdraw and have someone new handle the appeal. Circuits vary, but in the First Circuit the appeals court clerk keeps a separate list of attorneys who are willing to accept appointments on appeal. Trial counsel normally files the notice of appeal, puts in the transcript request, then moves to withdraw. I have been paid at the district court level for the notice of appeal, transcript request and explanatory letters to the client. I have never been paid for the withdraw process and related calls, letters and forwarding of the file. (I also have never put in a voucher with the appellate court for that work, so it might be possible to be paid for it). By having a set of appeal forms and explanatory letters, this process does not take very long. I send the client a letter explaining appellate rights and potential issues if any at least a week before sentencing so they can think about the matter. I have with me either at the last meeting before sentencing or the day of sentencing the necessary forms so the client can sign everything while they are still available. Once sentenced they may ship out that day, or it may be as long as six weeks, I never know in advance. If the judge allows self reporting it is usually 21 or 30 days from the date of sentencing. **You must be sure and have the client sign the form either agreeing they want you to continue on appeal, or indicating they want new counsel.** If you were retained in district court and wish to be appointed or have someone else appointed on appeal the process is more lengthy, see FRAP 24(a). Be sure to check any applicable local rule, in **both** the district and appellate court. In the First Circuit we have local rule 46.4 on withdraws.

If you handle an appeal, to be paid you must certify to the circuit that you have either explained the *certiorari* rights and the client does not want to pursue, that you have petitioned for *certiorari*, or certify to the circuit that you have explained the process to the client, they wish to file for *certiorari* and you feel such a petition would be frivolous. First Circuit Local Rule 46.5(c). If you file for *certiorari* the cost and time is included within the appeals court voucher and may for the basis for compensation above the statutory limit. Note, a copy of any petition for *certiorari* must be served on the Solicitor General of the United States, address Solicitor General of the United States, Department of Justice, Washington, DC 20530.

Final Thoughts

Judges worry that if they pay you fairly they may have to pay everyone the same way. This is not about everyone, it is about you getting paid. I had the clerk call me in after a lengthy insanity

defense trial. I was told my full voucher had been approved, but please keep the amount to myself. I did and so I can't tell you how much I was paid, but it was the amount I requested. Be humble. Document your time. Be polite to the clerks. File your vouchers promptly. My final test, read your request and time sheets. Would you pay the bill if someone sent it to you ?

David Beneman is a graduate of Bates College and the University of Maine School of Law. In 1994 he spent the month of August with Gerry Spence at the first Trial Lawyers College in Wyoming. He has been a partner/shareholder at Levenson, Vickerson & Beneman since 1986. Mr. Beneman's practice focuses on representing the rights of individuals in both state and federal court, primarily in the areas of criminal defense, personal injuries, employment disputes, and civil rights. He serves as CJA Resource Counsel and CJA panel representative for the District of Maine and is an active member of both the NACDL and the MACDL where he currently serves as President-elect as well as chairing the Federal Practice Section. David is on the Maine Federal District Court Local Rules Committee, the Maine State Rules of Evidence Committee and is the defense bar liaison to the federal court attending the quarterly federal court administrative meetings. David is a frequent speaker and writer on criminal defense and the rights of individuals. To receive copies of his sporadic e-mails on CJA and criminal defense issues send him a request to be added to the CJA E-news list at beneman@maine.rr.com (*Editor's Note: As of April of 2006, David Beneman is the Federal Public Defender for Maine*)