THE CRIMINAL JUSTICE ACT PANEL
CENTRAL DISTRICT OF CALIFORNIA
Los Angeles, California

March 28, 2014

Honorable Dale S. Fischer, Chair
Honorable David O. Carter, Vice-Chair
Honorable Manuel L. Real
Honorable Michael W. Fitzgerald
Honorable Jesus G. Bernal
Honorable Victor Kenton
Honorable Alka Sagar
Honorable Chief Judge George H. King, Ex Officio
Honorable Suzanne Segal, Ex Officio

Dear Your Honors:

We write with the support of the vast majority of the CJA Panel membership, respectfully seeking clarification from the judges on this Committee of a matter of substantial professional importance.

As a group we were recently advised that one or more members from the CJA panel have been referred by the Court to the Department of Justice for possible prosecution. We have been informed that the basis for the referral was the billing records, as well as potentially the results of a reasonableness review of those records that was performed by the Federal Public Defender. Of particular importance, we have been informed that the reasonableness review and billing documentation may have been provided to the Department of Justice by the Court or its staff.

As each of you may be aware, the Panel has recently been subjected to constantly evolving and ever increasing demands regarding the level of detail our billing materials must disclose.[1] To date, the Panel has endeavored to comply with

[1] For example, the Court has been requiring counsel to explain the purpose of client meetings (e.g., potential debriefing for cooperation), explain the

the Court's requests, as all counsel fully appreciate and respect the Court's need to ensure the expenditure of CJA funds is appropriately monitored. However, if we are correctly informed and billing records or other work product have indeed been disclosed, thereby vitiating their confidentiality, we are now in a potentially conflicted position. We respectfully seek any clarification Your Honors may be able to provide.

Rule 1.8 of the American Bar Association's Rules of Professional Conduct mandates as follows:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless: . . .
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.6 in turn provides for safeguards surrounding the information a lawyer obtains or generates during the representation, and specifically Rule 1.6(c) provides:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

This correlates with the California state laws and rules that govern our professional behavior as well.[2]

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strategy that justifies the funds requested for experts and investigators, and to identify by name the witnesses or individuals interviewed as well as the purpose of the interview. The potential adverse consequences from any disclosure of such highly sensitive information will no doubt be clear to this Committee.

[2] The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy." See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees, 46 Cal.App.3d 614 (1975). See also Rule 3-100 of

These rules appear to be in tension with the information we have received about disclosures of such information to the Department of Justice. Perhaps we have been misinformed, and if so, we would welcome clarification from this Committee.

If we have not been misinformed and it is in fact correct that the Court or its staff provided the materials to the DOJ, it is our hope to bring to each of Your Honors' attention the gravity of the problems we now face in seeking to comply with our professional obligations and duties as well as to satisfy the Court's increasingly detailed requirements surrounding compensation. In case it may assist, we have attached a work-flow chart outlining the current billing practices the Court asks us to follow, reflecting the increasingly detailed amount of confidential information we must disclose therein. Until this latest development we had understood, and trusted, that this information was being treated and maintained as confidential by the Court.

This understanding seemed justified, both by the heretofore long-standing practices of the Court as well as based upon regulatory and statutory parameters, and case law. Further, various members of the Panel have been given express assurances by members of the Court's staff that all billing materials were indeed handled in a confidential manner. This most recent development, however, has left us with a grave concern this may no longer be true.

More specifically, the clarification we seek is what documents beyond the vouchers are kept confidential, that is secret "seen only by the CJA office". Are the CJA 20 worksheets for daily work truly confidential as we have been told or are they available to the DOJ? We have the same question with respect to the underlying "contemporaneous records" we are required to keep that apparently can be requested by the court in a random audit, case audit, or reasonableness review of a submitted voucher.

In the past we have been told that these records are confidential and the CJA regulations re-sent to us recently and attached in the appendix, suggest that all of these records regarding billing, except for the first page, the voucher, are indeed

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the California Rules of Professional Conduct, and California Business and Professions Code § 6068.

confidential. Given the information we recently received, however, of the CJA member's billing records being sent to DOJ, perhaps we have a different meaning of confidential than the Court. When the Court states that the records are confidential, does it bear the ordinary meaning that it will be kept private/secret away from prying eyes, or does it merely mean restricted: not publically available. A primary question we would like answered is whether the CJA office will provide billing records if requested by DOJ? If such records will be produced, must DOJ make some preliminary showing to obtain the documentation below the voucher level (worksheets and/or contemporaneous time records and/or contemporaneous notes made during the actual work performed). We also have similar questions regarding the confidentiality or lack thereof of the declarations/statements submitted in support of ancillary services on the CJA 29 or on the CJA 26 (the form required to be submitted with the final voucher in the case.

If Your Honors could provide clarification of these points so that we can continue to act professionally and responsibly, as well as serve the best interests of our clients and discharge our duties as officers of this Honorable Court, we would be most appreciative. The Panel is currently experiencing extensive disquiet, concern, frustration and confusion about several recent changes in the requirements to be a Panel member, with the most important concern being the issue raised herein. Thus we respectfully seek clarification from this Committee so that we may continue to effectively represent our clients under the Sixth Amendment and the rules of professional responsibility but still provide the information required by this Court in support of our bills for our services.

Respectfully submitted,

/s/ Yolanda Barrera

/s/ Kate Corrigan

/s/ Marilyn E. Bednarski

/s/ Phillip A. Treviño

/s/ Mark Windsor

cc: The Honorable Milan Smith
cc: Cynthia V. Dixon, Supervising CJA Attorney

CURRENT PROCEDURAL AND SUBSTANTIVE REQUIREMENTS TO OBTAIN COMPENSATION IN THIS DISTRICT UNDER THE CRIMINAL JUSTICE ACT

At the conclusion of the case, counsel are permitted to seek compensation for professional services provided under the Criminal Justice Act. In certain instances, interim billing may be authorized by the Court. To obtain services during the litigation of the matter, detailed applications (including strategic justifications for the requested service) must be submitted (CJA 29) for experts, investigative, paralegal, or other ancillary services that counsel may believe to be professionally necessary for the proper defense of the client.

To submit a request for compensation, counsel fill out an electronic voucher (CJA 20). In this voucher, counsel must state the nature of the work done and the amount of time taken to complete the task (in tenths of an hour).

Counsel have been advised by Court officials at various training workshops that it is necessary to provide sufficient information for an individual reviewing the voucher to make a reasonableness review.

- Stated differently, it is insufficient to state that counsel met with the client but rather, the entry must indicate the purpose of such meeting.
- Similarly, it is insufficient for counsel to state a prospective witness was interviewed, counsel must disclose who the witness was and what the prospective witness would add in terms of a defense.

If the bill for services is greater than the statutory maximum, counsel must also complete an additional form (CJA 26) wherein additional information must be disclosed such as the amount of discovery materials, the nature of any negotiations undertaken, any characteristics of the client which caused an increase in the cost of the representation, and further such unique information.

Most recently, counsel have been advised by Circuit Judge Milan Smith, the Ninth Circuit judge who currently has final review over all vouchers, that in addition to the foregoing, it would be helpful for us to provide a detailed overview of the litigation, once again with enhanced detail with respect to the nature of the case, in multi-defendant matters how the client fits into the overall case, and discussing and explaining the reason for the actions taken in representing the client, with particular emphasis on the reasonableness of the work undertaken.

Yolanda Barrera

From: Cynthia_Dixon@cacd.uscourts.gov
Sent: Tuesday, March 25, 2014 5:40 PM
To: CACDml__zCJA_All_Trial_Panel@uscmail.uscourts.gov
Cc: Milan_Smith_Jr@ca9.uscourts.gov; Dale_Fischer@cacd.uscourts.gov; Sean_Kennedy@fd.org; Hilary_Potashner@fd.org; Gail_Ivens@fd.org
Subject: Brown Bag follow-up re: Disclosure
Attachments: pic14343.gif

Dear Panel Members:

Attached is Chapter 5 of the Guide pertaining to disclosure of CJA-Related Activities. The sections most pertinent to your questions from the brown bag today are: §520.10 and §520.20. These guidelines apply in the normal course of the general administrative process for payment of CJA vouchers.

Guide to Judiciary Policy Vol 7: Defender Services Pt A: Guidelines for Administering the CJA and Related Statutes

Ch 5: Disclosure of Information on CJA-Related Activities

§ 510 General Principles
- § 510.10 Overview
- § 510.20 Freedom of Information Act Inapplicable
- § 510.30 Limitations on Disclosure
- § 510.40 CJA Information Placed Under Seal
- § 510.50 Information in the Custody of the Administrative Office

§ 520 Disclosure of Information on Payments to Attorneys
- § 520.10 Timing
- § 520.20 Documents
- § 520.30 Notice
- § 520.40 Attorney Payments Approved Before or During Trial
- § 520.50 Attorney Payments Approved After Trial Where Appellate Review is Not Being Pursued or Has Concluded
- § 520.60 Attorney Payments Approved After Trial Where Appellate Review is Being Pursued
- § 520.70 Attorney Payments Approved After the Appeal is Completed

§ 530 Disclosure of Information on Payments to Service Providers

§ 540 History of Disclosure Policy

§ 510 General Principles

§ 510.10 Overview

This chapter sets forth the policy on the public disclosure of information pertaining to activities under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, and related statutes. Because of amendments to the CJA and related statutes, different procedures may apply depending on the type and date of the information.
Last substantive revision (Transm ittal G R -17) January 20, 2010 Last revised (m inor technical changes) M ay 18, 2011

§ 510.20 Freedom of Information Act Inapplicable

Neither the Freedom of Information Act (5 U.S.C. § 552) nor the Privacy Act (5 U.S.C. § 552a) applies to the judiciary and neither is applicable to requests for release to the public of records and information pertaining to activities under the CJA and related statutes.

§ 510.30 Limitations on Disclosure

Generally, such information which is not otherwise routinely available to the public should be made available unless it:

(a) is judicially placed under seal;
(b) could reasonably be expected to unduly intrude upon the privacy of attorneys or defendants;
(c) could reasonably be expected to compromise defense strategies, investigative procedures, attorney work product, the attorney-client relationship or privileged information provided by the defendant or other sources; or
(d) otherwise adversely affect the defendant's right to the effective assistance of counsel, a fair trial, or an impartial adjudication.

See: 5 U.S.C. § 552(b).

§ 510.40 CJA Information Placed Under Seal

Upon request, or upon the court's own motion, documents pertaining to activities under the CJA and related statutes maintained in the clerk's open files, which are generally available to the public, may be judicially placed under seal or otherwise safeguarded until after all judicial proceedings, including appeals, in the case are completed and for such time thereafter as the court deems appropriate. Interested parties should be notified of any modification of such order.

§ 510.50 Information in the Custody of the Administrative Office

Requests for release of information pertaining to activities under the CJA and related statutes in the custody of the Administrative Office (AO) will be disposed of in accordance with internal directives of that office.

§ 520 Disclosure of Information on Payments to Attorneys

§ 520.10 Timing

The CJA, as amended in 1998, mandates disclosure of amounts paid to court appointed attorneys upon the court's approval of the payment.

§ 520.20 Documents

(a) To satisfy the requirements of the CJA, courts may release copies of the payment vouchers (the top sheets of completed forms CJA 20 or CJA 30), redacted or unredacted, depending on the stage of the particular case and the statutory considerations involved.

(b) Documentation submitted in support of, or attached

to, payment claims is notcovered by the CJA and need not be disclosed at any time.

§ 520.30 Notice

(a) Before approving payments, courts are required to provide reasonable notice of disclosure to counsel to allow the counsel to request the redaction of specific information based on the considerations set forth in 18 U.S.C. § 3006A(d)(4)(D) and Guide, Vol 7A, § 520.50.

(b) To comply with this notice requirement, it is recommended that, contemporaneously with the issuance to counsel of the forms CJA 20 or CJA 30, courts give appointed counsel a copy of Form CJA 19 (Notice to Court Appointed Counsel of Public Disclosure of Attorney Fee Information).

§ 520.40 Attorney Payments Approved Before or During Trial

(a) After redacting any detailed information provided to justify the expenses, the court will make available to the public a copy of the voucher showing only the amounts approved for payment.

(b) On the completion of trial, an unredacted copy of the voucher may be released, depending on whether an appeal is being pursued and whether the court determines that one or more of the interests listed in Guide, Vol 7A, § 520.50 require the redaction of information.

§ 520.50 Attorney Payments Approved After Trial Where Appellate Review is Not Being Pursued or Has Concluded

The court will make an unredacted copy of the payment voucher available to the public unless it determines that one or more of the interests set forth in 18 U.S.C. § 3006A(d)(4)(D) and listed below justify limiting disclosure to the amounts approved for payment.

(a) the protection of any person's Fifth Amendment right against self-incrimination;
(b) the protection of the defendant's Sixth Amendment right to effective assistance of counsel;
(c) the defendant's attorney-client privilege;
(d) the work product privilege of the defendant's counsel;
(e) the safety of any person; or
(f) any other interest that justice may require (with the exception that for death penalty cases where the underlying alleged criminal conduct took place on or after April 19, 1995, the amount of the fees shall not be considered a reason to limit disclosure).

§ 520.60 Attorney Payments Approved After Trial Where Appellate Review is Being Pursued

The court will make available to the public only the amounts approved for payment unless it finds that none of the interests listed above in § 520.50 will be compromised.

§ 520.70 Attorney Payments Approved After the Appeal is Completed

The court will make an unredacted copy of the payment voucher available to the public unless it determines that one or more of the interests listed above in § 520.50 justify limiting disclosure to only the amounts approved for payment.

§ 530 Disclosure of Information on Payments to Service Providers

(a) The CJA and related statutes expressly provide for disclosure to the public of the amounts paid for representation with respect to cases commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996. The timing of the disclosure must be consistent with the principles set forth in § 510.

(b) For capital cases, disclosure must be after the disposition of the petition.

§ 540 History of the Disclosure Policy

(a) The Fiscal Year 1998 Judiciary Appropriations Act amended 18 U.S.C. § 3006A(d)(4) to require amounts paid to attorneys under the CJA be made publicly available pursuant to a specific process. The amendment applied to cases filed on or after January 25, 1998 and included a two- year sunset provision. Public Law No. 105-119, Nov. 26, 1997. To conform to the amendment, the Judicial Conference approved in March 1999 revisions to paragraph 5.01B of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume VII, Guide to Judiciary Policies and Procedures (Legacy Guide). See: JCUS-MAR 99, pp. 15-16.

Note: These amendments are now incorporated into Guide, Vol 7A, § 520 and § 530.

(b) In March 2000, the Judicial Conference agreed to retain the revised guideline after the scheduled sunset, with the following minor revisions: (a) to show that for cases filed on or after January 25, 2000, the guideline will no longer be statutorily based; and (b) to reflect a further amendment to 18 U.S.C. § 3006A(d)(4), enacted as part of the Fiscal Year 2000 Judiciary Appropriations Act (Public Law No. 106-113, 113 Stat. 1501), which states that in death penalty cases where the underlying alleged criminal conduct took place on or after April 19, 1995, the amount of the fees shall not be considered a reason justifying limited disclosure of payments to attorneys. JCUS-MAR 00, pp. 16-17.

(c) For Payments to Providers of Services other than Counsel in Cases Commenced on or after April 24, 1996, and for Payments to Attorneys in Cases Commenced on or after April 24, 1996 but before January 25, 1998:

(1) The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amended the CJA (18 U.S.C.§ 3006A), and the Anti-Drug Abuse Act of 1988 (ADAA) (codified in part at 21 U.S.C. § 848(q), recodified in 2005 as 18 U.S.C. § 3599), expressly to provide for disclosure to the public of the amounts paid

for representation with respect to cases commenced, and appellate proceedings in which an appeal is perfected, on or after April 24,1996.

(2) With respect to noncapital cases, the CJA, as amended, 18 U.S.C.§ 3006A(d)(4) and (e)(4), provided that the amounts paid under those subsections in any case "shall be made available to the public."

(3) With respect to capital cases, the ADAA, as amended, 21 U.S.C.§ 848(q)(10)(C) (now 18 U.S.C. § 3599(g)(3)), provided that the amounts paid under that paragraph in any case "shall be disclosed to the public, after the disposition of the petition."

(4) Judicial Conference policy required that the timing of disclosure be consistent with the principles stated in Guide, Vol 7A, § 510.

(d) For All Payments in Cases Commenced Before April 24, 1996:

The general principles regarding the release of information stated in § 510 governed.

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