

CAPITAL HABEAS CASE MANAGEMENT AND BUDGET OVERVIEW
SOUTHERN DISTRICT OF CALIFORNIA

I. INTRODUCTION

This guide provides an overview of the case management and budgeting process for capital habeas corpus cases in the Southern District of California in the Ninth Circuit. The application of the guidelines to a particular case will be determined by the District Judge assigned to the case. The information provided herein should assist attorneys unfamiliar with case management and budgeting aspects of the federal capital habeas corpus process.

The case management and budgeting process is intended to ensure continuing court supervision of capital habeas cases and to control costs by:

1. Dividing cases into four logical phases for which budgets can be developed;
2. Requiring counsel to submit to the Court a case management plan and budget for each phase in advance of commencing work on that phase;
3. Using an automated budget preparation program, which serves as a planning and monitoring tool for lawyers and a management tool for the Court;
4. Conducting case management conferences when appropriate, to manage the proceedings and resolve budget issues; and
5. Establishing firm deadlines, governing completion of the activities contemplated for each phase.

The process described in this guide is for the first federal capital habeas corpus petition filed in the case. The process requires early and continuous judicial case management, based on realistic yet firm deadlines, which it is believed will conserve judicial resources by creating realistic expectations on the part of counsel and by reducing time spent on contentious procedural issues.

The automated “Case Management Plan and Budget Forms” created by the Judicial Council of the Ninth Circuit are to be used by counsel in preparing for each phase of the case. The phases are:

Phase I Appointment, Record Review and Preliminary Investigation
Phase II Petition Preparation, Answer and Exhaustion
Phase III Motion for Evidentiary Hearing and Briefing of Claims
Phase IV Discovery, Evidentiary Hearing and Final Briefing

The automated forms provide categories of activities designed to assist counsel in planning their work and developing a budget, keeping track of expended hours and hours left to use, and completing the vouchers. The tasks outlined in the automated budget forms are typical tasks required for each phase and are listed as a guide for counsel. Some tasks may not be applicable in a particular phase and other unlisted tasks may be appropriate. Counsel should complete the forms as appropriate to the case. The program will also assist the Court in evaluating budgets and vouchers submitted.

The CJA Department will transmit, via electronic mail, the necessary budget forms for the appropriate phase to counsel, along with a guideline which explains how the automated forms should be prepared. A representative from the CJA Department will contact counsel to obtain the electronic mail address so the forms can be transmitted.

During each budget phase, petitioner's counsel should provide the Court with supporting declarations discussing the time proposed in each category itemized on the budget forms, generally indicating how counsel developed time estimates. Declarations should include an explanation of issues only as they specifically relate to budgeting needs; argument of legal issues in the case is not permissible and counsel will not be compensated for time expended for such argument. The budget should reflect the total attorney time required, as well as time for paralegals, investigators and experts, if applicable. In addition, the identities and qualifications of proposed investigators and experts should be set forth in the supporting declarations. The categories on the automated budgeting forms are designed to facilitate realistic contemplation of the tasks required in most cases. As the case progresses through each case management phase, counsel is responsible for ensuring that the case is litigated within the established budget. Budgets declarations should be submitted under seal and should be viewed only by the Court, the assigned court staff attorney, and counsel for the petitioner; none of the budgeting documents are served on the Attorney General.

Each phase will be closed out when the work for that phase is completed. Hours and expenditures will not be carried over to the next phase; rather, a new budget for the appropriate phase will be prepared by counsel and approved by the Court. In addition, counsel will not be allowed to exceed the established budget during any phase without first submitting a motion to amend the budget.

The budgeting forms for each of the four phases can be viewed and downloaded from the district court's web site. A copy of the Ninth Circuit Judicial Council's Amended CJA Capital Habeas Costs Policy, along with a sample order outlining procedures for litigation of capital habeas cases, is also on the district court's website.

For assistance with the substantive law governing federal habeas corpus proceedings counsel should refer to the Capital Punishment Handbook, which is published by the Ninth Circuit. It was written, compiled, and updated by the staff from the Office of the Circuit Executive of the Ninth Circuit, and is provided free of charge to all attorneys involved in capital cases in the circuit. The most recent edition of the Ninth Circuit Capital Punishment Handbook is available at www.circ9.dcn/dph. It is also available on the Ninth Circuit's Office of the Circuit Executive's website at www.ce9.uscourts.gov. It is located in the documents library, under capital punishment. The handbook should serve to expedite legal research by counsel.

In addition, counsel is encouraged to consult with the Habeas Corpus Resource Center in San Francisco. The center has an extensive brief bank and one of its mandates is to share research with attorneys assigned to capital habeas cases. Counsel is cautioned however that if a substantial amount of consultation is sought, at least a portion of it will be considered work that is inherently necessary to practice and remain current in the areas of federal habeas law. Such work is analogous to that of reading new case law, which is not directly attributable to a particular case, but rather should be considered part of overhead.

II. COMMENCEMENT OF THE CASE

The federal capital habeas corpus process typically is initiated by a request for stay of execution, a request for leave to proceed *in forma pauperis*, and a request for appointment of counsel. The case is assigned to a district judge and the initial review is completed by a capital case staff attorney.

Following review of the initial pleadings, the Court will issue an order staying execution (if necessary) and evaluate the petitioner's request to proceed *in forma pauperis*. Designation of counsel within 10 days is preferable, although the actual time may depend on the availability of attorneys. It is expected that lead counsel will be appointed from an established list of attorneys who are experienced in federal capital habeas practice and who meet specified criteria. Use of co-counsel is not presumed. If the Court finds second counsel is necessary it may request justification of such counsel's hourly rate (*see* **Optional Rate Justification Worksheet for Co-Counsel in Appendix ___**). While

appointing co-counsel may result in more efficient litigation of the case (in terms of development of federal claims and supporting evidence), care must be taken to ensure that counsel do not duplicate efforts and that billing for conference time is prudently limited.

Appointed counsel is expected to utilize all means to minimize costs, and should utilize associate counsel at lower rates, as well as paralegals and law clerks for tasks in which attorney expertise is not required. Reimbursement for such staff may not exceed the actual cost to appointed counsel, and is limited by the presumptive rate of \$65.00-\$80.00 per hour for associate counsel, and \$35.00 per hour for paralegals and law clerks (\$45.00 per hour for those with special skills). These rates have been adopted by the Ninth Circuit Judicial Council. Use of associates, paralegals, law clerks, summer associates and law students must be pre-approved in connection with the budget, and with specification of the hourly rate.

The Court expects that counsel will develop a reasonable division of labor between counsel and other staff, to avoid duplication of efforts and excessive staff conferencing. Only one counsel will be compensated for attendance at court hearings and case management conferences unless permission is granted by the Court. Compensation will not be approved for attendance at court hearings by additional support staff, including law clerks, paralegals, and investigators, without prior permission from the Court.

The Court will issue an order that may, if deemed necessary, schedule a Case Management Conference (“CMC”) with the assigned judge on a date within 20 days of counsel’s appointment. If a CMC is not scheduled, the order will advise counsel of applicable court policies, the hourly rates for counsel, and voucher requirements. It may also serve to advise prior counsel, if any, of the need to provide petitioner’s case files (or copies thereof) within 30 days. The Court may at this time authorize necessary travel expenses for an initial interview with petitioner.

Counsel should complete a Confidential Case Evaluation Form as fully as possible prior to the initial CMC; the Court may request subsequent updates to the form as more information becomes available. Counsel should be advised to arrive at the CMC prepared to discuss the time needed to assemble the record and files, as well as the date by which the petition must be filed, as required by the applicable statute of limitations.

III. BUDGET AND MANAGEMENT PHASES

Phase I- Appointment, Record Review and Preliminary Investigation

Phase I may begin with a CMC, at which counsel for the petitioner and the Attorney General should be present. All CMCs should be conducted on the record. Any ex parte proceeding, communication, or request made after a showing of the need for confidentiality must be transcribed and made a part of the record available for appellate review. 21 U.S.C. § 848(q)(9).

The conference provides an opportunity for a preliminary evaluation of case complexity. During this CMC, the Court and attorneys representing both sides will discuss a potential timetable and determine how much time will be needed to assemble the case record. Counsel should estimate the time needed for assembling the record based on information provided by prior counsel, and may want to enlist the assistance of the Attorney General in gathering the record. The use of paralegals whenever appropriate is encouraged, especially in the record gathering stage.

To ensure that the case proceeds in a timely manner, the Court will set appropriate deadlines, keeping in mind that the size of the record and difficulties in obtaining the record will influence these deadlines. The Court may order that:

The Attorney General deliver the full state court record, or whatever portions are missing, to counsel within 30 days, or other reasonable time following the CMC;

Prior counsel supply the case files within 30 days; and

Counsel complete the assembly and preliminary assessment of the record within 30 days, or other reasonable time following the receipt of files and records.

Once the case management issues are resolved, the Court will excuse the Attorney General from the CMC so that the Court can focus on budgeting with petitioner's counsel. Because it involves matters of strategy and witness development, the creation of a budget should be a confidential proceeding involving only the judge, court staff, and counsel for the petitioner. This information is essential to the Court's assessment of an appropriate budget, and as such, disclosure to the Attorney General would be improper. The confidentiality surrounding the creation of a budget does not differ from how courts treated funding applications for investigators and expert services in the past. Under 21 U.S.C. § 848(q)(9), as amended by the AEDPA, applications for funding may be considered on an *ex parte* basis only in cases where petitioners have made a proper showing of the need for confidentiality. The need for confidentiality is generally established in the budgeting process because such applications disclose matters protected by the attorney-client or work-product privileges. *See, e.g.*, Federal Rules of Civil Procedure 26(b)(3); United States v. Sanders, 459 F.2d 1001, 1002 (9th Cir. 1972) (funding statutes designed to put indigent defendants in same position as those who can afford counsel).

Applications for investigative, expert, or other services, if filed under seal, must contain "a proper showing . . . concerning the need for confidentiality." 21 U.S.C. § 848(q)(9). Because the information required by the Court from counsel to develop a budget is likely to be protected by the attorney-client privilege or the attorney work product doctrine, all documents relating to case budgeting may be filed *ex parte* and under seal, without service on the opposing party.

The showing of the need for confidentiality must be included within the budget request itself; counsel should not file a separate application to have a budget request filed under seal. Instead counsel should attach a copy of the initial order outlining procedures for litigation of capital habeas case to the budget documents to justify having them filed under seal. However, whenever petitioner files a budget request under seal, counsel shall notify respondent and provide a brief summary of the reasons why confidentiality is necessary. In addition, when necessary to protect confidentiality, and with notice to the opposing party, certain portions of case management conferences related to budgeting will be conducted *ex parte* and *in camera*.

During the budget portion of the CMC, the Court may authorize interim expenditures for investigators and paralegals and advise counsel of the approved hourly rates for those individuals. All expenditures will require court approval. Counsel shall tier staff responsibilities to lower-rate personnel whenever practical. Attorneys will be compensated for budget preparation because it is considered to be a component of case management.

The Court will schedule a due date for a Case Management Plan and Budget for Phase I, if one has not already been submitted. The Phase I budget should be submitted as soon as counsel has assembled the files and record and can estimate the time needed for review (within 30-60 days of counsel's appointment). The presumptive guideline for reading the record and taking notes from the record is 60 pages per hour, which will assist counsel in developing a time estimate for this task. Counsel should make every attempt to subtract the duplicative materials from the total number of pages that compose the state court record. Generally it has been found that there are duplicative materials contained in trial counsel's files and the official state court record.

It is the Ninth Circuit Judicial Council's general policy to avoid duplication of work with respect to reading the state court record. Thus, if two attorneys are appointed to work on a case, it is believed that the record, where possible, should be divided up, and each attorney should summarize their portion of the record. This would allow the other attorney to pinpoint areas of the record that he or she might need to review for information on the claims that he or she is working on. Generally, it is the practice not to compensate both attorneys for reading the same portions of the record. However, where appropriate, a district judge may authorize both counsel to read the core materials: the trial transcript from opening statement to verdict, substantial motions, state appellate and habeas briefs, and the decision in state appellate and habeas proceedings.

After this CMC, the Court will issue two case management orders, one filed under seal and addressed only to petitioner's counsel, and one filed publicly, addressed to all parties. The publicly filed order should contain significant dates upon which the parties agree, including the expiration of the statute of limitations, when the Attorney General can (or is directed to) lodge the state record with the Court (if applicable), the date for the

culmination of Phase I, and the date set for the next CMC, if any, as well as any other matters or decisions made at the conference. Counsel should be directed to notify the Court of delays in receiving the files; if prior counsel fails to cooperate, a *subpoena duces tecum* may be issued.

The order filed under seal should record the deadlines set for the presentation of the budget for Phase I, if it has not already been presented, and the billing rates for investigators and paralegals to be retained by petitioner's counsel, if not already conveyed in a prior order. If a Phase I budget has already been submitted, an explanation of the approved budget should be included in this order.

Court approval of the budget will serve as authorization for all expenditures. However, counsel is advised that the budget must also be reviewed by the Judicial Council of the Ninth Circuit. Counsel are authorized to proceed based upon the initial budget approved by the Court, and will be contacted should any further clarification, information, or action be requested by the Judicial Council.

Counsel is cautioned not to exceed the authorized budget. Accordingly, counsel should request permission to file any substantive pleading not anticipated in the case management and budgeting plan. In view of the period of time covered by the budget, it is possible that unanticipated events will require some adjustments to the authorized expenditures. In that event, counsel must not exceed the budgeted amounts approved herein without first seeking amendment of the budget, explaining why additional funds are required, and receiving the Court's permission to incur any additional costs. In planning for the litigation of this case, counsel must file any proposed amendments to the budget far enough in advance to give the Court an adequate opportunity to consider the request and issue a ruling thereon, without impeding the progress of the litigation. Amendments to the budget, once approved by the Court, must be submitted to the Judicial Council for its approval if the amount of the amendment exceeds \$15,000 or is greater than 10% of the original budget.

All funds are approved only to the extent that the tasks outlined in the budget request are ultimately required. Attorney hours may not be transferred from one task to another, or from lead counsel to co-counsel, except if authorized by the Court.

Generally expenses are approved by the Court "subject to the CJA guidelines" because it is a more pragmatic approach for the Court. The CJA Department will simply review ordinary expenses, like copy charges and telephone expenses, for reasonableness when the voucher is submitted.

The Court may exclude certain requests from the current budget and require further support (by declaration of counsel) for possible future approval, especially related to experts.

Each month, or longer upon order of the Judge in the case, appointed counsel shall submit an interim CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Appointed Counsel" to the CJA Supervising Attorney's Office, care of the Clerk's Office, together with an updated copy of the budget showing actual fees earned and expenditures to date, and an original and one copy of all supporting documents. Failure to timely submit a monthly CJA interim voucher may be considered a basis for denying the requested compensation.

All submissions for paralegals and law clerks must be made on a CJA Form 31, and not listed as expenses on a CJA Form 30. All CJA Form 31 submissions must include a copy of the order authorizing employment of the person whose services are being billed. Documentation of the services actually performed and the rate paid must be attached to the voucher, signed by the individual who performed such services.

As Phase I concludes, counsel should have completed the initial review of all available records and may have conducted a preliminary investigation of petitioner's competence to proceed with federal litigation. Based on client contact and family interviews, counsel should update the Case Evaluation Form, if appropriate. Counsel should prepare the Phase II Budget and submit the budget and supporting declarations prior to the next CMC, if one is scheduled, or by the due date set by the Court.

Counsel should note that the Case Management and Budgeting Forms for Phase II include entries for time and expenses of investigators and experts and counsel may need to consult with those individuals to provide the Court with enough information to evaluate the need for such resources. If a case was not budgeted from the very beginning, any requests for experts and/or investigators should include a complete recap of what has already been expended on such services in the case. A simple summary of the decisions on prior funding applications should suffice.

Requests for investigative and/or expert assistance should be detailed and present the factual and legal basis to support the request. The Court must find that any requested expert or investigative assistance is “reasonably necessary for the representation of the defendant,” 21 U.S.C. § 848(q)(9). In general, information which would assist the Court includes, but is not limited to a specification of: (1) the factual issues requiring expert or other assistance; (2) facts suggesting that such investigation, expert, or other assistance is warranted; (3) whether the evidence existed at the time of the state trial; (4) the purpose of the evidence on federal habeas; and (5) an estimated budget for each task, specifying the proposed billing rate, reasonableness of the rate and the total amount of the funds requested.

Counsel should submit the Court with the curriculum vitae demonstrating the work experience and education of the investigator/expert that counsel proposes be retained. Every effort should be made to retain experts who work in the geographic area in which the work is to be done. For instance, if the task is interviewing members of Petitioner’s family regarding mitigating evidence, an investigator who works in the city or region in which the majority of Petitioner’s family resides should be retained. Any investigators retained for the interview of witnesses shall avoid unnecessary expense by taking reasonable steps short of travel to locate the interviewees before initiating any travel.

Counsel should also be aware that expert assistance and/or investigative assistance should not be sought prematurely. In other words, such assistance may not be necessary to afford Petitioner the opportunity to adequately present his federal constitutional claims of error in a federal habeas petition. The right to file a petition under 28 U.S.C. § 2254 exists to allow a petitioner the opportunity to seek review of alleged constitutional errors in his conviction or sentence; such proceedings are not meant to function as a new trial. Rule 2(c) of the Rules Governing Section 2254 Cases requires only that petitioners “set forth in summary form the facts supporting each of the grounds” of his petition. “Thus the facts in a habeas petition need not be so detailed as to establish prima facie entitlement to habeas relief; they are sufficient if they suggest the real possibility that constitutional error has been committed.” Calderon v. United States District Court (Nicolaus), 98 F.3d 1102, 1109 (9th Cir. 1996) (Schroeder, J., concurring).

Thus, during phases I and II, which culminate with the preparation of the petition, the Court may not find expert and/or investigative assistance to be reasonably necessary. See 21 U.S.C. § 848(q)(9). If, after reviewing the petition and related pleadings, the Court determines such expert and/or investigative assistance is reasonably necessary, the Court will authorize such expenditures at that time, or prior to any evidentiary hearing that may be required.

Counsel should be aware of the fine-line distinction between experts and fact witnesses when the witness is an expert who testified at the state court trial. Often counsel seeks to have the expert retained and paid as an expert, when in actuality the expert will primarily perform the function of a fact witness in federal court. This occurs when the expert is asked whether some new evidence would change the opinion that he furnished at the state trial, or is asked about information that he was given before the trial which formed the basis for his opinion.

With respect to a request for a Strickland expert, the prevailing view is that expert testimony regarding the standards of practice for criminal defense attorneys in capital cases does not necessarily aid the district courts in resolving claims of ineffective assistance of counsel. District Courts are fully qualified to understand and apply the legal analysis required by Strickland v. Washington, 466 U.S. 668, 687 (1984), to the facts as developed during the litigation of the federal habeas corpus petition. Cf. LaGrand v. Stewart, 133 F.3d 1253, 1270 n. 8 (9th Cir. 1998) (“Although the determination of whether counsel has performed deficiently is a mixed question of law and fact . . . there is no requirement that expert testimony of outside attorneys be used to determine the appropriate standard of care.”). If the Court finds that a Strickland expert would assist in the resolution of an ineffective assistance of counsel claim, it is not necessary for the expert to undertake a comprehensive review of the trial proceedings. Rather the expert may be consulted about the standard of care at the time of the trial proceedings, in the context of the venue in which the case was tried. In other words, it is not necessary to utilize a Strickland expert to tell the attorneys what

the issues are. Rather, if used at all, such an expert should only be used to educate the court and the parties about the relevant standard of care for an attorney trying a death penalty case.

If the assistance of mental health experts is requested, Petitioner must disclose and summarize the findings of all previous mental health experts utilized in any type of capacity in the case, whether at the state level or the federal proceedings. If the assistance of more than one mental health professional is sought, Petitioner should make clear the tasks each expert is to complete, and how his or her work is distinguishable from that of the other requested experts. Petitioner is reminded that an assertion that his mental evaluations were incompetent is foreclosed by Harris v. Vasquez, 949 F.2d 1497, 1517-18 (9th Cir. 1990), which refused to expand Ake v. Oklahoma, 470 U.S. 68, 83 (1985), to encompass a “battle of experts.” Id. (citing Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990)). Counsel is also cautioned that mental health experts will not be paid at their professional hourly rate for time spent obtaining records. Arrangements should be made for an investigator or a paralegal to obtain records that might be necessary for a mental health evaluation.

If petitioner is seeking an investigation into mitigating evidence, care should be taken to ensure that any expert assistance requested for such an investigation be sought for clearly delineated tasks without any overlap. For instance, often times petitioners request the assistance of both a mitigation specialist and a social historian. However, if both experts are employed in a case, there is a possibility that their work will overlap to a large degree. A mitigation specialist is an investigator who specializes in capital work, developing facts in support of mental health-related claims. The mitigation specialist is trained through education or experience in understanding childhood and adolescent development, as well as mental health issues and their relevance to capital cases. The mitigation specialist collects documents, and locates and interviews lay witnesses. The mitigation specialist is competent in handling trauma interviews of both lay witnesses and the client. However, if the bulk of the work to be completed by the mitigation specialist is the collection of records, the specialist should be paid at a lower hourly rate as such tasks are considered purely investigative work. a social historian is a mental health expert who can testify on the genetic, biologic or environmental factors that influence a petitioner’s life. A social historian is an expert witness who diagnoses and treats mental illness. A social historian testifies regarding the genetic, biologic or environmental facts that influence or shape the client’s life. These factors include, but are not limited to, trauma, drug addiction, developmental problems and cultural issues. Although most social historians are psychologists, some carry M.S.Ws. The social historian does not diagnose brain damage or medical disease. Because of the overlap in type of work done by these experts, it may not be necessary to employ both experts in a case. However, if both experts are shown to be necessary, care should be taken to carefully delineate the responsibilities of each expert.

Although petitioners sometimes propose broad investigations of jurors, there is no automatic entitlement to conduct such an inquiry absent a preliminary showing of juror misconduct. See Smith v. Cupp, 457 F.2d 1098, 1100 (9th Cir. 1972). If the Court does permit juror interviews, only a limited amount will initially be granted. This will permit an investigator to locate some of the jurors, and contact them by telephone, in order to determine whether a more extensive investigation is warranted. No more than 40 hours will be granted for a preliminary investigation. When interviewing jurors, attorneys and investigators must keep Federal Rule of Evidence 606(b) in mind. See, e.g., Tanner v. United States, 483 U.S. 107, 117-27 (1987) (Rule 606(b) “is grounded in the common law rule against admission of jury testimony to impeach a verdict . . .”).

Phase II- Preparation of the Petition, Answer and Exhaustion

If a Case Management Conference is held at the beginning of Phase II, the Court will create a timetable for the litigation, determine the scope of necessary legal research to be undertaken by counsel, and approve a budget that will help control expenditures. Counsel should submit the Phase II budget and supporting declarations upon the completion of record review, when counsel can estimate the time needed to prepare the substantive habeas petition, or, if another CMC is scheduled, at least one week before the date set for the Phase II CMC. To assist the Court in continuing to evaluate the complexity of the case, the Court may request that counsel provide an updated Case Evaluation Form.

Counsel for both parties should be present for the discussion of the litigation timetable and setting of deadlines for filing the petition and responsive pleading. The petition must be filed within the time limits required by the statute of limitations. Considering this limitation, the Court will discuss with counsel for both parties how much time will be

required to prepare the petition and responsive pleading, and will tightly control continuances and deadline extensions. The Court will explore with both parties the tasks required, how such activities will be accomplished, and any other relevant issues.

Respondent should carefully consider what type of responsive pleading should be filed in the case. If Respondent seeks to challenge any of the claims on grounds of exhaustion or procedural bar, a motion to dismiss should be filed in lieu of an answer. If Respondent is not asserting such affirmative defenses, then an answer should be filed. The answer should comport with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.

A traverse is not mandated in § 2254 cases. Accordingly, the Court will examine whether, in each particular case, a traverse appears to be necessary. Ordinarily, a traverse will not be required.

The Court will also discuss with counsel whether experts are needed, the number of investigator hours needed, and any travel requirements for experts and/or investigators, as well as for counsel. The maximum hourly rates for experts contained in the policy adopted by the Ninth Circuit Judicial Council will apply to all experts and investigators authorized to work on the case. In the rare case, in which extraordinary circumstances are present such that the Court provisionally grants an increase in the hourly rate, it is counsel's responsibility to make sure the expert understands that they could be held to the presumptive maximum by the Judicial Council. Fees and expenses established for experts and investigators may not be exceeded without prior approval of the Court and are also subject to Judicial Council approval.

A request for funds to hire an expert witness shall separately identify each type of expert witness counsel seeks to hire, the number of hours requested and each expert's hourly rate. The request shall identify the subject matter to be covered by the expert, briefly explain why an expert is needed, and include an estimate of the amount of time the expert anticipates spending on each portion of the investigation or analysis. In explaining why an expert is necessary, counsel should address both the facts indicating that further analysis is warranted, and the reason why an expert witness is needed to interpret those facts. Counsel shall contact the proposed expert witness before submitting a request so that the proposed budget will include the actual billing rate being requested and a description of the proposed expert's credentials and experience.

The Court will explore with counsel what mental health and other examinations were conducted at the state court level, if relevant to the case. If additional examinations are requested, counsel should provide justification in the supporting Phase II declaration, and be prepared to discuss this justification at the CMC for Phase II, if any. Counsel should be prepared to state what further investigation will be needed in connection with each issue.

The results of this CMC are entered into case management orders, one under seal served only on petitioner's counsel, and one publicly filed served on all parties. The publicly filed order will contain the due date for the petition, answer or other responsive pleading, the date for the next CMC, if any, and any other decision made at the conference. The order filed under seal will discuss the approved Phase II budget, as well as set the due date for submission of the Phase III case management plan and budget.

Although rare, some cases may be suitable for settlement at this stage so the Court may explore this possibility with counsel.

Phase II typically proceeds with research and briefing of exhaustion and procedural default, if raised. If the case is directed back to state court for exhaustion, the federal court process is usually held in abeyance until the case returns. Counsel must apply to the state courts for attorneys, investigative, and experts fees for handling the state proceedings.

If the Court intends to follow the practice of holding the case in abeyance while the petitioner returns to state court to litigate the unexhausted claims, then a formal motion to hold the case in abeyance may not be necessary. The Court could eliminate the expenditure of funds for such briefing by holding a status conference on the issue. Alternatively the Court could indicate its view regarding abeyance at the hearing on the original motion to dismiss on exhaustion grounds. The United States Supreme Court set forth standards for granting a stay to exhaust in Rhines v. Weber, 125 S.Ct. 1528 (2005). Counsel should not include unexhausted claims in the petition.

In order to get a completely exhausted petition on file so that it may be held in abeyance, counsel may file a notice of unexhausted claims or withdrawal of unexhausted claims actually in the petition. If this is done, it will avoid the need to file an amended petition which does not include the unexhausted claims, when it is very likely that after the state court exhaustion proceedings are completed, counsel will have to amend the petition again to include the newly exhausted claims.

If held in abeyance, counsel shall provide brief status reports on the progress of the case as it proceeds through state court. These status reports should be filed quarterly and counsel will be paid for the small amount of time this task should take. The Court expects that no other fees or expenses will be incurred while the case is being held in abeyance. Counsel is advised to seek funds from the state court for fees and expenses incurred during this period.

As Phase II progresses, the Court will monitor counsel adherence to the budget and established deadlines. The CJA Department will compare actual expenses to budgeted amounts. Attorneys must not exceed the amounts established in the budget. It is counsel's responsibility to seek a modification of the budget before incurring any unauthorized fees or expenses. The Court also may require periodic conferences or status reports. Counsel are cautioned that all funds are approved in the budget only to the extent that the tasks outlined in the budget request are ultimately required.

Phase III- Exhaustion, Motion for Evidentiary Hearing, Briefing of Claims

Counsel should file the proposed Phase III budget within 20 days of the filing of the Attorney General's answer or other responsive pleading, or, if another CMC is scheduled, at least one week before the date set for the Phase III CMC. At the Phase III CMC, the Court will address:

Researching and briefing procedural default, if appropriate;

Briefing the claims;

Preparing and arguing a motion for evidentiary hearing;

Preparing motions for discovery or joint discovery stipulations for approval by the Court; and

Discovery, if granted.

The Court expects that the vast majority of discovery disputes can be resolved by the parties, and the discovery agreed upon by the parties should be submitted to the Court by way of a joint stipulation. The discovery for which no agreement can be reached should be delineated in the joint stipulation, with each party setting forth their position on the proposed discovery.

Counsel are reminded that for fact witnesses, the deposition costs (including transcripts, recording, etc.) and trial costs and expenses are paid by the U.S. Marshal's Service. 28 U.S.C. § 1825(b); Guide to Judiciary Policies and Procedures, Vol. VII, § 3.13©).

If Respondent seeks to depose any of Petitioner's witnesses the cost of Petitioner's counsel's attendance at the depositions shall be paid for by the Attorney General's Office, pursuant to Rule 6(c) of the Rules Governing Section 2254 Cases. Rule 6(c) states:

If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

See also Guide to Judiciary Policies and Procedures, Vol. VII, § 3.13(C). The cost of the depositions shall include Petitioner's counsel's hourly fees, travel costs, and the cost of the deposition transcripts. Whether the Attorney

General should have to pay for more than one attorney to attend will be dependent upon whether good cause is shown to the Court. The Court may require that upon calendaring the deposition Respondent inform Petitioner's counsel how many attorneys from his office will be attending, so that Petitioner seek approval for counsel to attend.

The final tasks to be accomplished at this CMC are establishing deadlines for all approved activities and approving the Phase III budget. The results of this CMC are entered into case management orders, one under seal served only on petitioner's counsel, and one publicly filed served on all parties.

Upon return from exhaustion, or if exhaustion has been waived, an amended petition will be filed (or deemed filed upon denial of the state petition, if petitioner already has lodged his/her proposed amended petition), discovery may be conducted and, if necessary, cross motions for summary judgment on claims and/or a motion for evidentiary hearing researched, briefed, filed and argued. The hours requested for the amendment of a federal habeas petition are closely scrutinized. The amendment of a petition should be very straightforward, as it just requires incorporating the claims that were filed in state court into the federal habeas petition.

During Phase III, the Court monitors counsel's adherence to established deadlines and the approved budget. As noted previously, vouchers should be regularly submitted in accordance with the Court's orders. Counsel is reminded not to exceed the authorized budget without first seeking an amendment to the budget.

Phase IV- Discovery, Evidentiary Hearing, Final Briefing

In Phase IV several CMCs may be necessary to serve as both budgeting and management tools. Phase IV CMCs are used to determine the time and resources needed to prepare for and conduct an evidentiary hearing and/or discovery, if granted. These CMCs are an opportunity for the Court to fully explore remaining areas of dispute and ascertain what items the Attorney General may be willing to admit.

The Court will determine how evidence will be received. To reduce costs, courts may consider handling appropriate issues on the papers, scheduling oral presentations only as needed. The Court also may consider allowing direct testimony by introduction of a witness's declaration and conduct depositions in lieu of testimony. Any residual discovery disputes should be resolved at this point.

The Court will consider apportionment of discovery costs between petitioner (which would be included in the budget) and respondent. Pursuant to Rule 6 of the Rules Governing Section 2254 Cases, respondent may be ordered to pay travel and subsistence expenses and fees for petitioner's counsel to attend depositions requested by respondent. In addition, in accordance with Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure, respondent may be ordered to pay the petitioner's retained expert a reasonable fee for time spent in responding to discovery. These hours should not be included in the budget. Because the budget order is a confidential document served on petitioner's counsel only, the Court will issue a companion order that is served on both parties indicating any resolutions as to the apportionment of costs.

The Court will also determine whether any witnesses should be considered fact witnesses and, if so, order that travel and other expenses shall be paid by the U.S. Marshal's office pursuant to 18 U.S.C. § 1825(b), and not included in petitioner's budget.

Strickland experts are often requested in Phase IV. Before authorization of a Strickland expert is granted the request will be carefully evaluated to determine the subject matter of the expert's proposed testimony, and whether the testimony is necessary. The Court will limit record review by the Strickland expert to that necessary for the formulation of his or her opinion on the subject area authorized by the Court. For example, a Strickland expert would normally need to do little, if any, record review in order to assist the Court in determining the prevailing professional norms that should govern the performance of competent trial counsel.

During Phase IV, the Court will determine the amount of time and resources needed for post-hearing briefing, and set deadlines accordingly. This determination, however, generally follows the presentation of evidence (by live

testimony and/or deposition and/or declaration testimony). The results of all CMCs are entered into the case management orders.

Phase IV continues with preparation for the evidentiary hearing. The Court will apply the concepts outlined in Rule 16 of the Rules of Civil Procedure and encourage the use of informal discovery devices, such as meet and confer conferences between the parties. The evidentiary hearing is conducted followed by post-hearing briefing, and if deemed necessary, and any post-hearing motions. The Court will assess viable issues and request counsel to limit briefing to these issues.

After careful review of the pleadings, the state record, all properly admitted evidence, and the argument of counsel for the parties, the Court will issue a memorandum order and decision on the merits of the petition.

Traditional practice is that once the final merits ruling is entered, a notice of appeal and request for a Certificate of Appealability (COA) are prepared and filed. However, it is generally believed that a better practice is for the COA to be addressed at the time of the decision on the merits, with notice to counsel before briefing. This approach is recommended because at that juncture the Court is most knowledgeable about the issues in the case, so it would be more efficient to examine what issues are appropriate for a COA at that time.

Accordingly, the Court is likely to grant or deny the COA in the final order. Therefore, large budget requests for the preparation of requests for COAs will be denied because there is no need for briefing of any significant size on the issue.

Motions for reconsideration of the final judgment should only be filed in rare circumstances. If one is filed and the Court issued a COA at the time of final judgment, a timing problem may result, as the application for an expanded COA would be due before the notice of appeal is due. Pursuant to Ninth Circuit Rule 22(d), if the petitioner wishes to seek an expanded certificate of appealability, the petitioner has to file a motion with the Ninth Circuit within 35 days of the district court's entry of its order denying a certificate of appealability. But if the petitioner files a motion for reconsideration of the denial of his petition, the petitioner would not be required to file a notice of appeal until 30 days from the date of the denial of the motion to reconsider. Thus, the notice of appeal would not be due until after the application for an expanded certificate of appealability is due, which creates the problem. The issue could be resolved if the petitioner files a request for an extension of Rule 22(d) time deadline with the Ninth Circuit.

IV. CONCLUSION

This case management guide should serve to assist attorneys in managing capital habeas cases while allowing them to control associated case costs. Within the basic framework of the budgeting process, creative and individual approaches to case management are encouraged. Ideas for effective case management are welcomed and should be communicated to the Court.